IN THE SUPREME COURT OF THE STATE OF OREGON

KARLYN EKLOF, Petitioner-Appellant, Petitioner on Review, v. HEIDI STEWARD, Superintendent, Coffee Creek Correctional Facility, Defendant-Respondent, Respondent on Review.	Washington County Circuit Court No. C120242CV CA A154212 SC S063870

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW SUPERINTENDENT STEWARD

Appeal from the Judgment of the Circuit Court
for Washington County
Honorable THOMAS KOHL, Judge

Opinion Filed: September 23, 2015
Author of Opinion: Lagesen, J..
Before: Duncan, Presiding Judge, and Lagesen, Judge,
and Edmonds, Senior Judge.

Continued…

JASON L. WEBER #054109
O'Connor Weber
522 SW 5th Avenue, Suite 1125
Portland, Oregon 97204
Telephone: (503) 226-0923
Email: jason@oconnerweber.com

Attorney for Petitioner on Review

ERNEST LANNET #013248
Chief Defender
Office of Public Defense Services
ERIK M. BLUMENTHAL #073240
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email:
erik.blumenthal@opds.state.or.us

Attorneys for Oregon Innocence Project, *Amicus Curiae*

JANIS C. PURACAL # 132288
Maloney Lauersdorf Reiner
1111 E. Burnside Street, Suite 300
Portland, Oregon 97214
Telephone: (503) 405-7804
Email: jcp@coveragelit.com

Attorneys for Oregon Innocence Project, *Amicus Curiae*

RANKIN JOHNSON IV #964903
Rankin Johnson IV, LLC
208 SW 1st Ave., Suite 220
Portland, Oregon 97204
Telephone: (503) 307-9560
Email: rankin@briefwright.com

Attorney for Oregon Criminal Defense Lawyer's Association, *Amicus Curiae*

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
TIMOTHY A. SYLWESTER #813914
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
timothy.sylwester@doj.state.or.us

Attorneys for Defendant-Respondent

MATHEW W. DOS SANTOS # 155766
ACLU of Oregon
P.O. Box 40585
Portland, Oregon 97240
Telephone: (503) 227-6928
Email: mdossantos@aclu-or.org

Attorney for American Civil Liberties Union Foundation of Oregon Incorporated, *Amicus Curiae*

STEVEN T. WAX #850120
Oregon Innocence Project
Box 5248
Portland, Oregon 97208
Telephone: (503) 830-7758
Email: stwax@outlook.com

Attorney for Oregon Innocence Project, *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Other Authorities

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW SUPERINTENDENT STEWARD

STATEMENT OF THE CASE

Petitioner, an inmate serving a life sentence for aggravated murder, filed an untimely and successive petition for post-conviction relief in which she alleged, *inter alia*, that the district attorney in the underlying criminal prosecution had committed a *Brady* violation by not disclosing certain information to her trial attorneys.[1] The post-conviction court concluded that petitioner's *Brady* claim is procedurally barred by ORS 138.510(3) and ORS 138.550(3) because she did not present evidence to show that, during her previous post-conviction proceeding, she and her counsel were not aware of the alleged *Brady* violation and thus were excused for not raising it in that proceeding. The Court of Appeals affirmed. *Eklof v. Steward*, 273 Or App 789, 359 P3d 570 (2015), *rev allowed*, 359 Or 225 (2016).

As framed by petitioner's brief on the merits, the question now before this court is narrow. Petitioner does not dispute that her petition is both untimely and successive, and she does not dispute that she did not present facts

---

[1] In this context, the term "*Brady*" refers to *Brady v. Maryland*, 373 US 83, 83 S Ct 1194, 10 L Ed 2d 215 (1963), and the holding in that case that a state violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it fails to disclose to a criminal defendant potentially exculpatory evidence in its possession that is material either to guilt or punishment. (*See* Pet BOM 18-20).

in response to the superintendent's motion for summary judgment to establish that she and her counsel in her previous post-conviction proceeding were not aware of the alleged *Brady* violation. But she contends that it was not her burden to establish that she could not reasonably have raised the *Brady* claim in her previous post-conviction proceeding. She contends that the superintendent, to be entitled to summary judgment, had the burden to establish that the district attorney did not commit a *Brady* violation.

As will be explained below, the post-conviction court and the Court of Appeals correctly ruled that: (1) The burden was on petitioner, in response to the superintendent's motion for summary judgment, to present sufficient facts to establish that she was entitled to relief under the "escape clause." (2) To carry her burden on that point, she had to present facts to show that her *Brady* claim could not reasonably have been raised in her previous post-conviction proceeding. (3) She failed to carry her burden because she did not present evidence to establish that she and her counsel in her previous post-conviction proceeding were not aware of the possible *Brady* claim during that proceeding.

STATEMENT OF FACTS

A. Summary of procedural history

The relevant procedural facts are undisputed and may be summarized as follows:

• Petitioner was charged in *State v. Eklof*, with numerous offenses, including aggravated murder, based on her participation in the murder of James which she and Jeffrey committed in 1994.

• After a jury trial, petitioner was found guilty of, *inter alia*, aggravated murder. In December 1995, she was sentenced to imprisonment for life without the possibility of release or parole.

• Petitioner appealed from her judgment of conviction in *State v. Eklof*, the Court of Appeals affirmed the judgment without opinion, and this court denied her petition for review in April 1999.[2]

• In July 1999, petitioner filed a petitioner for post-conviction relief in Umatilla County in which she challenged her conviction for aggravated murder in *State v. Eklof*. In May 2001, the post-conviction court denied all of her claims for relief and dismissed her petition. She appealed from that judgment, and the Court of Appeals summarily affirmed the judgment without opinion in December 2003.

• Meanwhile, Jeffrey case was separately tried to a jury, which found him guilty of, *inter alia*, aggravated murder and sentenced him to death.[3]

• In January 2012—*i.e.*, over 11 years after her original petition for post-conviction relief was dismissed—petitioner filed a second petition for post-conviction relief, which is this case. In her second amended petition, she alleged *inter alia* that the district attorney committed a *Brady* violation during the prosecution in *State v. Eklof*.

• Defendant Superintendent Steward filed an answer that

---

[2] *State v. Eklof*, 154 Or App 448, 960 P2d 397, *rev den*, 328 Or 331 (1999).

[3] *State v.* 340 Or 551, 135 P3d 305 (2006), *cert den*, 127 S Ct 1125 (2007).

admitted the procedural facts set forth above, otherwise denied the allegations of petitioner's petition, and asserted, as affirmative defenses, that her claims are procedurally barred both by the two-year statute of limitations in ORS 138.510(3) and by the successive-petition bar in ORS 138.550(3).

• The superintendent then moved for summary judgment on those affirmative defenses. (Pet BOM, ER 11). Petitioner opposed that motion. (Pet BOM, ER 15). The post-conviction court granted the motion and dismissed her petition as procedurally barred. (Pet BOM, ER 26).

B. Petitioner's claims for post-conviction relief

Petitioner alleged essentially two claims for relief in her petition:

• *First*, she alleged that John and David (Jeffrey brother) "were key witnesses against" her at trial, that the district attorney had certain police reports relating to and "records relating to David criminal history," that those records "would have been valuable in impeaching" those witnesses at trial, and that those records "were never disclosed to any attorney working for Petitioner." (Pet BOM, ER 5-7).

• *Second*, she alleged that the uniform jury instruction on "natural and probable consequences" was given to the jury in her trial and that this court later disapproved that instruction in *State v. Lopez-Minjarez*, 350 Or 576, 260 P3d 439 (2011). Petitioner further alleged that her trial counsel failed to provide constitutionally adequate assistance by not objecting to that instruction and that her previous post-conviction counsel failed to provide constitutionally adequate assistance by not raising such a claim in her previous post-conviction proceeding. (Pet BOM, ER 2, 4, 8)

Petitioner further alleged that she "had not previously sought post-conviction relief to challenge" her conviction for aggravated murder on the basis of those two claims. Finally, she alleged that neither of those claims is procedurally

barred by ORS 138.510(3) and ORS 138.550(3) because each claim "could not reasonably have been raised" by her in her previous post-conviction proceeding. (Pet BOM, ER 3, 7).

C. Summary-judgment process

As noted above, the superintendent moved for summary judgment on the affirmative defenses that both of petitioner's claims are procedurally barred by ORS 138.510(3) and ORS 138.550(3). In her response, petitioner submitted: (1) records relating to and David that she alleged that the district attorney had possessed at the time of trial in *State v. Eklof* but had not disclosed to her trial counsel; (2) affidavits from her trial counsel in *State v. Eklof,* who averred that they did not recall having obtained those records from the district attorney during discovery or at trial;[4] (3) evidence that petitioner obtained copies of those records in March 2012 when the lawyer who was representing Jeffrey in his post-conviction proceeding obtained them from the district attorney's file in the case and then provided her with copies; and (4) transcripts from the guilt phase of the trial in *State v. Eklof* showing that the

[4] The superintendent has not conceded: (1) that the district attorney did not disclose those records to petitioner during discovery, and (2) that even if those records were not disclosed to petitioner's trial counsel that she suffered any actual prejudice as a result. For purposes of the summary-judgment motion, the superintendent merely assumed *arguendo* that those records were not properly disclosed to petitioner and that she suffered prejudice, as she had alleged.

trial court gave the "natural and probable consequences" instruction to the jury. (Pet BOM, ER 19-25).

Based on that record, the post-conviction court granted the superintendent's motion for summary judgment, ruling in pertinent part:

> "(5) Petitioner's current post-conviction proceeding is untimely and barred under ORS 138.510(3)(b);
>
> "(6) Petitioner's current post-conviction proceeding is successive and barred under ORS 138.550(3); [and]
>
> "(7) Petitioner failed to show, by affidavit, declaration, or otherwise, that a genuine material fact exists regarding whether petitioner, in her first post-conviction proceeding, was reasonably unable to raise the issues she is now attempting to raise in the current post-conviction proceeding[.]"

(Pet BOM, ER 26-27).

D. Parties' arguments before the Court of Appeals

Before the Court of Appeals on appeal, petitioner argued that the evidence that she presented in response to the superintendent's motion for summary judgment was sufficient to provide a basis for relief under the escape clauses in ORS 138.510(3) and ORS 138.550(3) with respect to her *Brady* claim. She also relied on *Banks v. Dretke*, 540 US 668, 124 S Ct 1256, 157 L Ed 2d 1166 (2004), which she argued stands for the proposition that a *Brady* claim is cognizable in a collateral proceeding regardless of whether the petitioner previously had exercised diligence in attempting to discover that information.

In response, the superintendent argued, with respect to the *Brady* claim, that petitioner failed to present any evidence that she and her counsel in the previous post-conviction proceeding were not aware of the allegedly undisclosed records and could not reasonably have discovered those records during that proceeding.[5] (Resp Br 9-10). The superintendent also argued that *Banks* is inapposite because, unlike the record in that case, the record in this case does not show that the district attorney had actively hid evidence, had misled the defense counsel and the court, or had presented false testimony. (Resp Br 14-16).

E. Decision by the Court of Appeals

The Court of Appeals affirmed. The court relied on this court's recent decision in *Verduzco v. State of Oregon*, 357 Or 553, 355 P3d 902 (2015), and held that although petitioner's *Brady* claim did state a potential basis for post-conviction relief, she failed to present sufficient evidence to avoid summary judgment:

> Petitioner bore the burden of proving that her *Brady* ground for relief fell within the escape clause. *Verduzco*, 357 Or at 565 (the "phrasing [of ORS 138.550(3)] places the burden on the

[5] With respect to petitioner's claim based on *Lopez-Minjarez*, the superintendent noted that that claim has no merit in light of *Hale v. Belleque*, 258 Or App 587, 298 P3d 596, *reaff'd on recons*, 258 Or App 587, *rev den*, 354 Or 597 (2013), and that her related claim of inadequate assistance of previous post-conviction counsel is not a basis for post-conviction relief. (Resp Br 17-18).

> petitioner to show that an omitted ground for relief comes within the escape clause"). **Consequently, to withstand the state's motion for summary judgment, petitioner had the burden of coming forward with admissible evidence that would permit a reasonable factfinder to find that the escape clause applied to the *Brady* claim.**
>
> Petitioner did not meet that burden here. The summary judgment record contains a significant evidentiary gap: Petitioner submitted no evidence regarding what was known to petitioner and her post-conviction lawyer at the time of the 1999 post-conviction proceeding. Petitioner did not submit an affidavit from her 1999 post-conviction lawyer, or any other evidence about what facts that lawyer knew during the 1999 post-conviction case. Petitioner also did not submit her own affidavit, or any other evidence about what she herself knew during the 1999 post-conviction proceeding. Instead, petitioner submitted affidavits from the two lawyers who represented her in her criminal trial, Kolego and Murdock; an affidavit from an investigator, DeLeon, whose relationship to petitioner's case is not made clear in the affidavit; and a copy of the impeachment material. In their affidavits, the two lawyers state that the impeachment materials were not disclosed to them during petitioner's criminal trial. DeLeon states that, at the time of petitioner's first post-conviction case in 1999, "from personal experience," a complete criminal history check could not be performed without the assistance of a law enforcement agency or a district attorney. **None of that evidence speaks to what petitioner and her post-conviction lawyer knew or did not know at the time of the 1999 post-conviction proceeding, and none would permit a reasonable factfinder to find that petitioner and her post-conviction lawyer did not know at that time the facts on which her *Brady* claim depends.** For that reason, the trial court correctly granted summary judgment to the state on the *Brady* ground for relief.

273 Or App at 794-75 (footnotes and some citations omitted; boldface added).[6]

[6] After finding that petitioner failed to present sufficient evidence to avoid summary judgment on the *Brady* claim, the Court of Appeals noted that it

Footnote continued…

Petitioner then filed a petition for reconsideration in which she contended that the court's opinion misapplied ORCP 47 by placing the burden on her to produce evidence in support of her request for relief under the escape clause. The Court of Appeals denied that petition by an unpublished opinion in which it ruled that the current version of ORCP 47 does place that burden on petitioner. (Pet BOM, ER 28).

QUESTION PRESENTED AND PROPOSED RULE

Question Presented: Petitioner filed an untimely and successive petition for post-conviction relief that alleges a claim that the district attorney committed a *Brady* violation in the underlying criminal prosecution, the superintendent moved for summary judgment on the ground that the petition is procedurally barred by ORS 138.510(3) and ORS 138.550(3), and the petitioner responded by asking for relief under the escape clauses. Is the burden on the petitioner to present facts that are sufficient for the post-conviction court to find that she and her counsel in her previous post-conviction proceeding were not aware of the alleged *Brady* violation during that proceeding?

Proposed Rule: Yes. When a petitioner files and untimely and

(…continued)
was hence unnecessary to resolve whether and how the decision in *Banks* may apply to this case. 273 Or App at 795 n 7.

successive petition and asks for relief under the escape clause, she bears the burden to present facts that are sufficient for the post-conviction court to find that the new claim alleged in her petition could not reasonably have been raised in her previous post-conviction proceeding. When, as here, the petition includes a *Brady* claim, the burden is on her to present facts that are sufficient to establish, at a minimum, that she and her counsel in her previous post-conviction proceeding were not aware of the alleged *Brady* violation.

ARGUMENT

A. Introduction

Based on the arguments that petitioner sets forth in her brief on the merits, the ultimate issue that is before this court on review is whether her response to the superintendent's motion for summary judgment presented facts that were sufficient to avoid summary judgment on her request for relief under the escape clauses in ORS 138.510(3) and ORS 138.550(3). The superintendent's motion was based on petitioner's express concession that her petition was untimely and successive. But petitioner's response to that motion did not present any affirmative evidence to establish that she and her counsel in her previous post-conviction proceeding did not know of, and reasonably could have discovered, the information that provides a basis for her *Brady* claim.

The ultimate issue presented by this case may be divided into three

questions. First, the threshold question is whether the burden was on petitioner to establish facts that are sufficient for her to be entitled to relief under the escape clauses. If so, then the second question is whether she was relieved of that burden in this case with respect to her *Brady* claim—*i.e.*, whether a *Brady* claim is one that, by its inherent nature, may be asserted in an untimely, successive petition without any showing whether the petitioner and her counsel in the previous post-conviction proceeding knew or reasonably could have discovered the information that the state allegedly withheld. If the answer to that question is "no," then the final question becomes whether the evidence that petitioner presented in response to the superintendent's motion was sufficient to establish a basis for relief under the escape clauses, and thus to avoid summary judgment. As will be explained below, the post-conviction court and the Court of Appeals correctly ruled that the burden was on petitioner to present facts that were sufficient to establish a basis for relief under the escape clauses, that she failed to do so, and that, as a result, the superintendent was entitled to summary judgment.

In her brief on the merits, petitioner pursues only her claim that the district attorney committed a *Brady* violation.[7] She asserts that her *Brady* claim

[7] Petitioner does not present any argument on her claims based on *Lopez-Minjarez* or *Martinez v. Ryan*, 566 US 1, 132 S Ct 1309, 182 L Ed 2d 272 (2012). If this court nonetheless chooses to consider either of those claims,

Footnote continued…

states a viable claim for post-conviction relief. (BOM 15-20). She then asserts that she would be entitled to relief under the escape clauses in ORS 138.510(3) and ORS 138.550(3) if that claim is based on evidence that she reasonably was unaware existed at the time of trial and during her previous post-conviction proceeding. (BOM 20-29). She then asserts that she could not reasonably have known about the factual basis for that claim at the time of trial and her previous post-conviction proceeding. (BOM 29-37). She contends that, under ORCP 47, the burden was on the superintendent, as the party moving for summary judgment, to come forward with affirmative evidence to show that her *Brady* claim was procedurally barred and that the superintendent did not carry that burden. (BOM 37-50). Finally, she contends that, in any event, the evidence that she presented in response to the superintendent's motion was sufficient to establish a basis for relief under the escape clause and thus to avoid summary judgment. (BOM 51-55).

In light of petitioner's series of arguments, it is helpful at the outset to narrow the legal questions presented on review by identifying those issues that are not in dispute:

(…continued)
the superintendent relies on the arguments that are set forth in the respondent's brief.

First, the superintendent agrees that a *Brady* claim—*viz.*, a claim that the district attorney had in his possession potentially exculpatory evidence but did not disclose that evidence to the defendant during the underlying criminal prosecution—may state a viable claim for post-conviction relief under ORS 138.530(1)(a), depending on the nature of the claim as asserted.[8]

Second, the superintendent agrees that petitioner might be entitled to relief under the escape clauses if she had alleged and established that at the time of trial and during her previous post-conviction proceeding she did not know of, and reasonably could not have discovered, the potentially exculpatory evidence that she alleges the district attorney did not disclose in violation of *Brady*. Under those circumstances, the post-conviction court properly could determine, under the escape clauses, that the *Brady* claim could not reasonably have been raised previously.

---

[8] ORS 138.530(1)(a) provides:

> "(1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:
>
> "(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void."

Finally, the superintendent agrees that the procedural bars that are set forth in ORS 138.510(3) and ORS 138.550(3) are in the nature of affirmative defenses that the defendant in a post-conviction proceeding must specifically assert in a timely and proper manner and then bears the burden to prove.[9] In this case, the superintendent did timely and properly raise those affirmative defenses in the answer and then did specifically assert them in a timely motion for summary judgment. Moreover, the factual bases for those defenses were already expressly admitted by petitioner in her petition—*i.e.*, she expressly conceded in her petition that it was both untimely and successive.[10] (Pet BOM, ER 3).

B. Statutory procedural bars and escape clauses

There are a number of statutory limitations in the Post-Conviction Hearing Act, ORS 138.510 *et seq.* (PCHA), on the types of claims that can be raised in a post-conviction petition. Two are relevant here: First, a petition for post-conviction relief "must be filed within two years" after the date on which

---

[9] *See, e.g., Palmer v. State of Oregon*, 121 Or App 377, 380, 854 P2d 955 (1990), *aff'd on other grounds*, 318 Or 352 (1994) (noting that the "statute of limitations" bar in ORS 138.510(3) is "an affirmative defense" that the defendant must raise "in an answer or motion to dismiss" and hence cannot be raised for the first time on appeal).

[10] As will be explained below, the superintendent did not need to present any additional facts, in support of the motion for summary judgment, to prove either of those affirmative defenses.

the conviction being challenged become final. ORS 138.510(3). Second, "all grounds for relief claimed by a petitioner * * * must be asserted in the original or amended petition," unless the successive petition alleges grounds that "could not reasonably have been raised in the original or amended petition." ORS 138.550(3). The limitation in ORS 138.550(3) codifies the traditional *res judicata* principles as applied to petitions for post-conviction relief. *See Verduzco*, 357 Or at 565 (ORS 138.550(3) "express[es] the legislature's determination that, when a petitioner has appealed and also has filed a post-conviction petition, the petitioner must raise all grounds for relief that reasonably could be asserted."); *Johnson v. Premo*, 355 Or 866, 874-75, 333 P3d 288 (2014) (explaining that ORS 138.550(3) codifies claim-preclusion principles); *Freeman v. Gladden*, 236 Or 137, 139, 387 P2d 360 (1963) (ORS 138.550(2) is "intended to state the principle of *res judicata* in post-conviction appeals."); *Barber v. Gladden*, 215 Or 129, 133, 332 P2d 641 (1958) ("[T]he principle of res judicata is applicable to habeas corpus proceedings. That principle precludes the relitigation not only of matters actually determined in a prior proceeding but also matters which could properly have been determined in such earlier proceeding.").

There is an exception—a so-called "escape clause"—to each of these procedural limitations if the post-conviction court finds that the ground for relief that is alleged in the petition could not reasonably have been raised at an

earlier point in time—*i.e.*, on direct appeal or in a timely filed original petition for post-conviction relief. Specifically, ORS 138.510(3) and ORS 138.550(3) each provide that the procedural bar applies "unless the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or amended petition." Consequently, if the ground for relief alleged in the petition reasonably could have been raised at an earlier point in time, then the procedural default is not excused and the post-conviction court must grant judgment for defendant. This court has noted that the legislative history of the escape clauses shows that they are "meant to be construed narrowly" and apply only in "extraordinary circumstances," when the petitioner discovers "information that did not exist or was not reasonably available to a [criminal] defendant" previously. *Bartz v. State of Oregon*, 314 Or 353, 358-59, 839 P2d 217 (1992) (discussing the statute of limitations escape clause in ORS 138.510(2)).

Whether a claim "reasonably" could have raised earlier is a question of statutory construction. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (describing how the court looks to text, context, and legislative history when interpreting statutes). As used here, "reasonably" is an adverb meaning "in a reasonable manner." *Webster's Third New Int'l Dictionary* 1892 (unabridged ed. 2002). "Reasonable," in turn, has several relevant meanings:

> 1 a: being in agreement with right thinking or right judgment: not conflicting with reason : not absurd : not ridiculous <a *reasonable* conviction> <a *reasonable* theory> b: being or remaining within the bounds of reason : not extreme : not excessive <a *reasonable* request> <a *reasonable* hope of succeeding> <spent a *reasonable* amount of time in relaxation> <is of a *reasonable* size> * * * 2 a: having the faculty of reason : RATIONAL <a *reasonable* being> b: possessing good sound judgment : well balanced : SENSIBLE <can rely on the judgment of a *reasonable* man>

Id. In short, a ground for relief could not "reasonably have been raised" at an earlier time if raising the ground at the earlier time would have been absurd or ridiculous.

In summary, the general rule is that a petitioner must assert a claim for post-conviction relief in a timely filed original petition for post-conviction relief. Any claim that the petitioner attempts to assert later, in an untimely or successive petition for post-conviction relief, is procedurally barred unless the post-conviction court finds that it is one that could not reasonably have raised in a timely filed original petition.

C. Petitioner bore the burden to establish that her *Brady* claim "could not reasonably have been raised" in her previous post-conviction proceeding.

This court stated in *Verduzco* that the PCHA "places the burden on the petitioner to show that an omitted ground for relief comes within the escape clause." 357 Or at 565. In support of that statement, this court relied on *Cain v. Gladden*, 247 Or 462, 430 P2d 1015 (1967). In that case—which was in an

early decision under the PCHA—this court held that the post-conviction court properly sustained a demurrer to the petitioner's petition for post-conviction relief because he had "failed to allege," and also had failed to "make a sufficient showing," for purposes of the escape clause in ORS 138.550(2), that the grounds for relief he alleged in his petition could not reasonably have been raised by him in his previous appeal.[11] 247 Or at 464. In other words, this court in *Cain* necessarily construed the escape clause as imposing the affirmative burden on the petitioner both "to allege" in his petition and then to "make a sufficient showing," in response to the defendant's pretrial challenge to the sufficiency of the petition, that the claim he alleged in his petition was one that "could not reasonably" have raised earlier.

Before this court on review, petitioner offers two reasons why the burden should not be on her to establish a basis for relief under the escape clauses in ORS 138.510(3) and ORS 138.550(3). First, she contends that this court's statement in *Verduzco* was *dicta* and, in any event, "is incorrect as a matter of law and this court should disavow it." (Pet BOM 26-27). Second, she contends that the procedural rules governing the assertion and proof of affirmative

[11] The escape clause in ORS 138.550(2) bars a claim the petitioner could have raised in his previous appeal "unless such ground was not asserted and could not reasonably been asserted in the direct appellate review proceeding." The operative language in that escape clause—"unless such ground * * * could not reasonably have been asserted"—is the same as the escape clauses in ORS 138.510(3) and ORS 138.550(3).

defenses place that burden instead on the defendant in a post-conviction proceeding to allege and prove all the facts that are necessary to application of the procedural bar. (Pet BOM 20-33).

The threshold difficulty for petitioner is that she did not make either of those arguments before the post-conviction court or the Court of Appeals. She did not contend in response to the superintendent's motion for summary judgment that the burden of presenting evidence was on the superintendent—and not on her—with respect to the application of the escape clauses; rather, she argued before the post-conviction court only that the evidence that she had presented was sufficient to establish a basis relief under the escape clauses. (*See* Pet BOM, ER 15-17). Similarly, she did not argue before the Court of Appeals that the superintendent had the burden to prove that the escape clauses did not apply; rather, she argued only that she had presented sufficient evidence to provide a basis for relief under the escape clauses.[12] The first time that petitioner raised either of these issues was after the Court of Appeals had

---

[12] In her opening brief, petitioner cited *Walton v. Thompson*, 196 Or App 335, 342, 102 P3d 687 (2004), *rev den*, 338 Or 375 (2005), as stating the applicable standard of review. (App Br 16). In *Walton*, the Court of Appeals stated that when, as in that case, the claim alleged in the petition is procedurally barred by ORS 138.550(2), the petitioner "was obligated * * * to establish that such a challenge 'could not reasonably have been asserted in the direct appeal proceeding,'" and the court ultimately held that the post-conviction court correctly dismissed the petitioner's petition because he "failed to establish" a basis for relief under the escape clause. 196 Or App at 342, 351.

already issued its opinion, and she raised the arguments in her petition for reconsideration. (*See* Pet BOM, ER 28). That, of course, was too late for her to preserve such an argument for this court's review. Petitioner's default in raising this argument earlier has practical implications in this case: if she had raised that argument before the post-conviction court and that court had been persuaded on that point, the superintendent would have been in a position to obtain and present additional evidence in support of the motion.

In any event, petitioner is wrong when she asserts that this court's statement in *Verduzco* was mere *dicta*. (Pet BOM 27). In that case, the issue presented was whether the petitioner's petition for post-conviction relief was procedurally barred as successive and untimely or whether there was a basis for the petitioner to obtain relief from those procedural bars under the respective escape clauses. 357 Or at 561, 565. The post-conviction court dismissed the petition as procedurally barred. *Id.* at 560. This court affirmed, ruling that the record did not establish that the petitioner was entitled to relief under the escape clauses. *Id*. at 573. Consequently, this court's intermediate statement that the burden was on the petitioner to allege and establish a basis for relief under the escape clauses was an integral part of this court's analysis. Moreover, as noted above, this court in *Verduzco* expressly relied on its previous decision in *Cain* in support of its holding that the burden is on the petitioner. *Verduzco*, 357 Or

at 565. And it is clear, as was discussed above, that this court's decision in *Cain* squarely was a holding on that point.[13] 247 Or at 464.

Nonetheless, petitioner contends that this court's statement in *Verduzco* was wrong because it "is inconsistent with the well-settled rules of civil procedure, which squarely place the burden of proving an affirmative defense of *res judicata* on the defendant." (Pet BOM 26). Petitioner's argument misses the point. As noted above, the superintendent does not dispute here that the procedural bars in ORS 138.510(3) and ORS 138.550(3) are in the nature of affirmative defenses and that the defendant typically bears the burden of proof on such an affirmative defense. But the affirmative defenses that the superintendent properly asserted in the answer and then in the motion for summary judgment were that petitioner's petition is *in fact* both untimely and

---

[13] In her brief on the merits, petitioner requests that "if this court concludes that its statement in *Verduzco* is a correct statement of the law, then this court should remand so that the parties can proceed under the new *Verduzco* rule, which was decided by this court during the pendency of this appeal." (Pet BOM 29). But this court's statement in *Verduzco* did not announce a new rule; rather, it merely reiterated what the law already has been since *Cain*. Moreover, the Court of Appeals long has held that when the petition is untimely or successive the burden is on a petitioner to allege and establish a basis for relief under the escape clause. *See, e.g., Morrow v. Maass*, 109 Or App 694, 695, 820 P2d 1374 (1991), *rev den*, 312 Or 676 (1992) (affirming dismissal of petition: "An untimely petition must allege facts that, if supported by evidence, would establish that the grounds for relief could not reasonably have been raised timely."). Consequently, this case does not present a situation in which a change in the applicable law was announced while this case was the appeal.

successive. And both of those two facts were established by petitioner's own petition, in which she expressly conceded that her petition is both untimely and successive. (Pet BOM, ER 3, 11). In short, to the extent that the burden was on the superintendent to establish, as an affirmative defense, that the petition in fact is both untimely and successive, that burden was sufficiently carried by petitioner's express concession that her petition is both untimely and successive.

In her brief on the merits, petitioner makes an extended argument regarding the proper construction of ORCP 47 C, which provides the procedure for litigating and deciding a motion for summary judgment. (Pet BOM 37-50). That argument is not properly before this court, because she did not raise such an argument before the post-conviction court or in her briefing to the Court of Appeals. When she did raise that argument for the first time in her petition for reconsideration, the Court of Appeals correctly rejected it for the reasons that are sufficiently set forth in its order. (Pet BOM, ER 28). *See Two Two v. Fujitec America Inc.*, 355 Or 319, 324-26, 325 P3d 707 (2014) ("Thus, under ORCP 47 C, the party opposing summary judgment has the burden of producing evidence on any issue 'raised in the motion' as to which the adverse party would have the burden of persuasion at trial.").

In any event, petitioner's argument misses the point for the reasons that are discussed above: the superintendent's motion for summary judgment was

sufficiently supported by the admissions of fact that she conceded in her petition—*i.e.*, that her petition was both untimely and successive. The superintendent thus had no additional facts that needed to be presented in order to establish the affirmative defenses.

Petitioner's argument thus necessarily reduces to a claim that even though the superintendent sufficiently established, in support of the motion for summary judgment, that her petition is, in fact, untimely and successive, the superintendent had the additional burden to establish that she is *not* entitled to relief under the escape clauses. But she cites no authority for the proposition that when a statute defines a general affirmative defense that includes a narrow exception—such as ORS 138.510(3) and ORS 138.550(3) do—the defendant has the burden to prove *both* the application of the affirmative defense *and* the negative of the exception. Whatever may be the rule on that point in other contexts, it has been the consistent rule under the PCHA for the past 50 years—since this court's decision in *Cain*—that in this particular context it is the petitioner who has the burden to allege and then establish a factual basis for relief under the escape clause.

In asking for this court to adopt a different rule, petitioner contends:

> In addition, the *Verduzco* rule is directly contrary to the rationale for how the burdens of production and persuasion were understood to work at the time ORS 138.510(3) and ORS 138.550(3) were enacted. The reason defendants have historically been required to bear the burden of proof for an

> affirmative defense is that they are the party with the best access to the evidence to establish the facts necessary to prove the defense.

(Pet BOM 28). That presumption may be appropriate in this context with respect to whether the petition is in fact untimely and successive, because that is information that the superintendent would be able to discover and provide. But it not appropriate with respect to the further question whether the petitioner has some excuse that might entitle her to relief under the escape clauses. Whether the petitioner actually has such an excuse is typically only within the knowledge the petitioner, not the defendant, and whether facts are available to support such an excuse are typically only within the ability of the petitioner to discover and present.

Finally, petitioner contends at various points in her brief that the superintendent should have been required to present, in support of the motion for summary judgment, affirmative evidence that the district attorney actually had disclosed to her trial counsel the allegedly undisclosed information. (*See, e.g.*, Pet BOM 28-29, 35). That assertion confuses what would be the superintendent's response at trial to *the merits* of the claim—*i.e.*, that the district attorney in fact did not commit a *Brady* violation—with a pretrial motion for summary judgment based on the affirmative defense of a procedural bar. The superintendent did not move for summary judgment on the merits of petitioner's *Brady* claim; rather, the motion for summary judgment was based

only the superintendent's contention that the petition is procedurally barred. (Pet BOM, ER 11). In that context, the only contested issue was whether petitioner had a basis for relief under the escape clauses from the procedural bar. Because the merits of petitioner's *Brady* claim was not presented by the motion for summary judgment, the superintendent had no burden to present evidence to establish that the district attorney had complied with *Brady*.

In summary, the superintendent sufficiently established, in support of the motion for summary judgment, that petitioner's petition is in fact both untimely and successive. As this court recently reiterated in *Verduzco*, it has been the consistent rule under the PCHA for the past 50 years that when, as here, the petitioner files an untimely or successive petition for post-conviction relief she has the burden both to allege and to establish a basis for relief under the escape clause. Consequently, the post-conviction court and the Court of Appeals correctly reviewed the record to determine whether petitioner, in response to the superintendent's motion, had carried her burden to present facts that are sufficient to establish a basis for relief under the escape clauses.

D. To carry her burden, petitioner had to show, at a minimum, that she and her counsel in her previous post-conviction proceeding did not already know of the possible *Brady* claim.

The next question presented is whether petitioner had the burden to establish, as a basis for relief under the escape clauses, that she and her counsel in her previous post-conviction proceeding in fact did not know of the factual

basis for the possible *Brady* claim. Both the post-conviction court and the Court of Appeals correctly ruled that she had such a burden.

As discussed above, ORS 138.510(3) and ORS 138.550(3) provide that a petitioner must allege all grounds for relief in a timely filed original petition unless the untimely or successive petition alleges grounds for relief that the post-conviction court determines "could not reasonably have been raised in the original or amended petition." If petitioner or her counsel at her previous post-conviction proceeding actually knew about the information that now provides the basis for her *Brady* claim, but nonetheless chose, for whatever reason, not to assert that claim in that proceeding, then that claim "reasonably could have been raised" by her in that proceeding. Consequently, it is clear that if petitioner and her counsel at her previous post-conviction proceeding *actually knew* the information that now provides the basis for her current *Brady* claim, she is not now entitled to relief under the escape clause for her procedural default for not asserting it in that proceeding.

Petitioner concedes that point. (*See* Pet BOM 33). But she asserts that because she is raising a *Brady*-violation claim she has no obligation to establish, as a basis for relief under the escape clause, that she and her counsel could not reasonably been aware of the potential claim at the time of her previous post-conviction proceeding. (Pet BOM 33-37). *Amici curiae* assert essentially the

same argument. But that argument misses the essential point of the rulings below.

In analyzing the arguments presented by petitioner and *amici* on this point, it is important here to distinguish between what petitioner and her previous post-conviction counsel actually knew and what they reasonably could have discovered. Before the post-conviction court, the superintendent argued in support of the motion for summary judgment that petitioner had to prove that, at the time of her previous post-conviction proceeding, she did not know about the possible *Brady* claim and, in the alternative, "was reasonably unable, during the pendency of her first post-conviction proceeding in 1999-2000, to discover that impeachment material was allegedly withheld by a prosecutor or not made available to petitioner's underlying defense counsel in 1995." (Pet BOM 12). Although petitioner presented evidence, in response to the superintendent's motion, that was sufficient to establish that her *trial counsel* in the criminal prosecution were not aware of the allegedly withheld evidence, she did not present any evidence to show that *she and her post-conviction counsel* were not aware of that evidence at the time of her prior post-conviction proceeding. (Pet BOM 19-25). The post-conviction court granted summary judgment based on petitioner's lack of evidence on that point:

> Petitioner failed to show, by affidavit, declaration, or otherwise, that a genuine material fact exists regarding whether petitioner, in her first post-conviction proceeding, was reasonably

> unable to raise the issues she is now attempting to raise in the current post-conviction proceeding[.]

(Pet BOM 27).

On appeal from the post-conviction court's judgment, the superintendent argued that petitioner's evidence failed to establish a basis for relief under the escape clauses because she did not present evidence to show that, during her prior post-conviction proceeding, she could not reasonably have discovered the allegedly undisclosed information by a diligent investigation:

> The bottom line is that, as far as the record in this case shows, the records on which petitioner's newly asserted claims are based existed 15 years ago—before the trial in *State v. Eklof*—and always were included the district attorney's file in the case. As far as this record shows, petitioner's trial counsel could have and would have discovered those records (or the information in those records) upon diligent inquiry. And her counsel in her previous post-conviction proceeding certainly could have and would have discovered those records through a diligent discovery inquiry in that proceeding. Therefore, petitioner failed to show that she "could not reasonably have" discovered and asserted these claims in a timely manner in her first post-conviction proceeding.

(Resp Br 10).

But the Court of Appeals expressly did not resolve this appeal on the basis of the superintendent's alternative "reasonably could have discovered" argument. Instead, the court detailed the evidence that petitioner presented in opposition to the motion for summary judgment and expressly held that her evidence failed to establish a basis for the post-conviction court to find that she

and her counsel during the prior post-conviction proceeding did not already *know* of the allegedly withheld evidence:

> None of that evidence speaks to what petitioner and her post-conviction lawyer knew or did not know at the time of the 1999 post-conviction proceeding, and none would permit a reasonable factfinder to find that petitioner and her post-conviction lawyer did not know at that time the facts on which her *Brady* claim depends. For that reason, the trial court correctly granted summary judgment to the state on the *Brady* ground for relief.[7]
>
> ---
>
> [7] In the light of our conclusion that the summary judgment record would not permit a reasonable factfinder to find that petitioner and her post-conviction lawyer did not know the facts on which her *Brady* claim depends, we do not address the parties' competing arguments as to whether and what extent a post-conviction petitioner who does not discover the facts underlying a *Brady* claim until after a first post-conviction proceeding must demonstrate that she affirmatively investigated whether the prosecution might have violated its *Brady* obligations in order to demonstrate that the *Brady* claim could not reasonably have been raised in the original petition, or their competing arguments as to whether due process would permit a state to impose that type of investigatory obligation on a petitioner. We note that the Supreme Court has concluded in a similar context that a federal habeas petitioner's failure to raise a *Brady* claim in earlier state court proceedings was excused where the petitioner had secured the state's representations in both the direct criminal proceedings and in the post-conviction proceedings that the state had provided all *Brady* materials. *See* [*Banks v. Dretke*, 540 US 668, 698, 124 S Ct 1256, 157 L Ed 2d 1166 (2004)] (federal habeas petitioner's failure to litigate *Brady* claim in state court excused by "cause" where the state had represented in direct criminal proceedings and in post-conviction proceedings that it had complied with *Brady* obligations; the petitioner "was entitled to treat the prosecutor's submissions as truthful").

Eklof, 273 Or App at 795.

In their briefs in this court, petitioner and *amici* argue at length that a "reasonably could have discovered" standard should not be applied in the specific context of a procedurally barred *Brady* claim. Whatever may be the merits of that argument, it misses the point. The Court of Appeals affirmed based only on the ground that petitioner's claim is procedurally barred because she failed to establish that she and her counsel in the previous post-conviction proceeding did not already *know* of the information that provides the basis for her current *Brady* claim. For that reason, the Court of Appeals expressly declined to consider the superintendent's alternative argument that the claim also would be procedurally barred if they did not know of but reasonably could have discovered that information in that proceeding. Petitioner and *amici* do not argue that petitioner should be entitled to relief under the escape clauses even if she and her prior post-conviction counsel actually were aware of the allegedly withheld evidence but chose not to assert a *Brady* claim in that proceeding. Consequently, petitioner and *amici* do not provide a basis for reversing the limited ruling that was made by the Court of Appeals.

E. Petitioner's *Brady* claim also is procedurally barred because she failed to establish that she could not reasonably have discovered and asserted it in her pervious post-conviction proceeding.

But even if this court considers the "reasonably could have discovered" argument raised by petitioner and *amici*, petitioner is still not entitled to relief under the escape clauses, because she did not present evidence that would have

allowed the post-conviction court to find that the *Brady* claim could not reasonably have discovered and asserted during that proceeding.

Given the procedural posture of this case, the only issue that is presented here is whether petitioner has established a basis for relief under the escape clauses for her failure to raise her new *Brady* claim in her previous post-conviction proceeding. The applicable standard under ORS 138.510(3) and ORS 138.550(3) is whether that claim "could not reasonably have been raised in the original or amended petition." Therefore, if a potential claim *could have been discovered* and then asserted through the exercise of reasonable diligence, then it cannot be said that it "could not reasonably have been raised" by her in that proceeding, even if the petitioner failed to discover it.

The decision by the United States Supreme Court in *Banks v. Dredtke* illustrates that point by providing a contrasting example of a situation in which a petitioner's failure to discover and assert a *Brady* claim in a timely manner was excused by the circumstances. In *Banks*, the petitioner was convicted of capital murder in a state court, and he was sentenced to death. Despite the prosecutor's assurance to defense counsel that all discovery would be provided, the state "withheld evidence that would have allowed *Banks* to discredit two essential prosecution witnesses," including an informant named Farr; the prosecutor then allowed those witnesses to testify untruthfully at trial. 540 US at 675. Banks unsuccessfully pursued three post-conviction proceedings in

state court. In his third such action, he alleged "upon information and belief" that the state had withheld impeaching evidence. The state denied that claim, Banks failed to present evidence to substantiate it, and the post-conviction court ruled that he had failed to prove his claim. *Id.* at 682-83. Banks then filed a petition for *habeas corpus* relief under 28 USC § 2254 in federal district court in which he reasserted that claim, and he was able to obtain, through discovery and an evidentiary hearing, evidence to substantiate his allegations. 540 US at 683-84. The Fifth Circuit ruled that, even though the state had "suppressed" the potentially impeaching evidence, Banks's *Brady* claim was procedurally barred because he "was not appropriately diligent" in pursuing that claim in his state post-conviction proceeding. *Id.* at 688.

On review, the United States Supreme Court agreed that Banks's *Brady* claim was procedurally defaulted, because he had failed to develop a factual record in support of that claim in state court, but the Court then considered whether he had established "cause and prejudice" to excuse that default. *Id.* at 690-92. The Court concluded that he had established sufficient "cause" because the record showed that "the State persisted in hiding Farr's informant status and misleadingly represented that it had complied in full with its *Brady* disclosure obligations"—which meant that "Banks had cause for failing to investigate, in the postconviction proceedings" that claim. *Id.*, at 693. Moreover, the Court noted, the prosecutors during trial had allowed Farr to

testify untruthfully and "allowed his testimony to stand uncorrected," and it was "appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct" in order to obtain a conviction. *Id.* at 694.

The Court then rejected the state's argument that Banks had failed to show "appropriate diligence" in the post-conviction proceeding in investigating and pursuing his *Brady* claim. The Court noted: "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* materials when the prosecution represents that all such materials have been disclosed." *Id.* at 695. The Court also noted: "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process. * * * Prosecutors' dishonest conduct should attract no judicial approbation." *Id.* at 696. Finally, the Court rejected the state's argument that Banks, during his post-conviction proceeding, "failed to move for investigative assistance enabling him to" pursue his claims; the Court noted that under Texas law, "he had no clear entitlement" to such assistance.[14] *Id.* at 696-97.

The Court concluded:

---

[14] This consideration has no application to this case. A petitioner in a post-conviction proceeding in this state has a statutory right to appointment of suitable counsel, ORS 138.590(1), and the discovery rules in the Oregon Rules of Civil Procedure generally apply in such a proceeding and do not require court approval.

> In summary, Banks's prosecutors represented at trial and in state postconviction proceedings that the State had held nothing back. Moreover, in state postconviction court, the State's pleading denied that Farr was an informant. It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutors' submissions as truthful. Accordingly, Banks has shown cause for failing to present evidence in state court capable of substantiating his Farr *Brady* claim.

Id. at 698. The Court then concluded that Banks had established that the suppressed impeachment evidence caused him sufficient prejudice to excuse his procedural default. *Id.* at 698-703. On that basis, the Court remanded the case to the Fifth Circuit to consider his claim on the merits. *Id.* at 705-06.

To be sure, some language in the *Banks* opinion, taken out of context, may have some superficial applicability to this case. But the decision does not support petitioner's position here. First, the only issue before the Court in *Banks* was the procedural question whether Banks's admitted procedural default in failing to adequately investigate his *Brady* claim in the state post-conviction proceeding could be excused under § 2254 because he showed that the state had deliberately suppressed the evidence. That is, the Court in *Banks* considered only whether, under those circumstances, *federal law* allowed the *federal court* to consider the claim on the merits based on the newly discovered impeaching evidence. The Court did not purport to hold that the state post-conviction court had erred in its adjudication of Banks's claim, as he had presented it. Nor did the Court hold that some provision of federal law—either the Due Process

Clause or some federal statute—imposes an obligation on a state court to allow a petitioner to prosecute an untimely and successive post-conviction petition to assert a *Brady* claim based on newly discovered evidence. In short, the Court's ruling in *Banks* was based only on application of procedural-default rules that apply only in federal court in a *habeas corpus* proceeding and that have no application to a post-conviction proceeding in an Oregon court.

In any event, it was crucial to the Court's analysis in *Banks* that the prosecutors had *actively suppressed* the evidence at issue. The prosecutors did not turn over the evidence during discovery, they knowingly had allowed the witness to testify falsely at trial, and then the state in the post-conviction proceeding had falsely denied that the impeaching information existed. It was for that reason that the Court concluded that Banks's failure to be diligent in investigating the *Brady* claim that he had asserted in the post-conviction proceeding was sufficiently excusable *under those circumstances* to constitute "cause" to avoid his procedural default, for purpose of the *habeas corpus* case. In contrast to the situation presented in *Banks*, petitioner did not present evidence to show that the district attorney actually had *suppressed* the evidence at issue, that the district attorney knowingly presented false testimony at trial, or that the district attorney ever misled her by denying the existence of the records or the information contained in the records. As far as this record shows, the alleged non-disclosure by the district attorney—assuming it had occurred—was

nothing more than a clerical mistake and petitioner reasonably could have discovered the allegedly undisclosed records by examining the district attorney's file, by coordinating with counsel, or through normal discovery in the previous post-conviction proceeding.

To reiterate, the question here under the escape clause is whether petitioner's procedurally barred *Brady* claim is one that "could not reasonably have been raised" in her previous post-conviction proceeding. In a case such as *Banks*, in which the record shows that the prosecutors deliberately suppressed and hid the *Brady* material and then affirmatively misled the court and the petitioner's counsel during his post-conviction proceeding, a post-conviction court considering an untimely and successive petition properly might conclude that the petitioner would be entitled to relief under the escape clause because, in those particular circumstances, the claim was one that "could not reasonably have been raised" due to the prosecutor's affirmative misconduct. But that is not this case.

The *most* that petitioner's evidence would show—if accepted as true—is that the records at issue were in the district attorney's file in the companion case but that, for whatever reason, they were not properly disclosed to

petitioner's trial counsel during the discovery process.[15] Notably, her proffered evidence does not show that the district attorney ever lied to defense counsel or actively suppressed or hid any of the records from them such that even if her trial counsel had used reasonable diligence they would not have been able to discover those records.

With respect to the records of the criminal convictions David may have had at the time of the trial in *State v. Eklof*, petitioner submitted no evidence to show that her trial counsel would have been precluded from having made such an inquiry during his cross-examination of David Likewise, nothing would have precluded her trial counsel from having asked during his cross-examination at trial about the nature of his contacts with the police during the investigation. Of course, that is not to diminish the seriousness of a *Brady* violation, if it occurred. But this case involves an untimely and successive petition for post-conviction relief, and the burden is squarely on petitioner to show that the new claims that she asserts in her petition "could not reasonably have been" discovered and raised by her back in 1999 to 2001. For all this record shows, if petitioner, her trial counsel, or her

[15] Petitioner alleged that the records at issue were in "the prosecution file for the case against Jeffrey (Pet BOM, ER 6). She has argued that the district attorney "*chose* not to disclose [the records] to petitioner in violation of Oregon law and the Due Process Clause." (App Br 20-21; emphasis added). But nothing in this record suggests that the alleged non-disclosure was deliberate or anything more than a clerical mistake or inadvertence.

post-conviction counsel had asked the right questions of the right people and made an appropriate inquiry they reasonably could have discovered the records on which her newly asserted *Brady* claim is based.

Amici argue at length that *Brady* violations are a systemic problem, that criminal defendants should be entitled to assume that the prosecutors have complied with their obligations under the Due Process Clause, and that, as a result, a criminal defendant in a post-conviction proceeding should not be charged with the responsibility of affirmatively investigating to determine whether the prosecutor failed to disclose *Brady* material. Regardless of whether that is true, it has no bearing on whether petitioner provided a sufficient basis for relief under the escape clause.

The discovery process that is available in a post-conviction proceeding allows a petitioner broad latitude to subpoena and examine files and to question witnesses under oath. Again, petitioner does not appear to dispute that she *could* have discovered during her previous post-conviction proceeding, through that discovery process, all of the information that provides the basis for her *Brady* claim. Whether the evidence of the alleged *Brady* violation could "reasonably" have been discovered by her during that proceeding depends on whether that evidence was actively suppressed and hidden by the prosecutor or whether, on the other hand, the evidence was always available to her, sitting open in the prosecutor's file, and the failure to disclose was merely inadvertent.

In other words, whether a petitioner may be entitled to relief under the escape clauses with respect to a procedurally defaulted *Brady* claim necessarily depends on the particular facts relating to the nature of the violation, the reasons for the violation, whether the petitioner had any reason to know that the violation had occurred, and how difficult it was for petitioner to discover the violation. In short, it cannot be said, as a matter of law, that the escape clauses must be applied to excuse *any* procedural default with respect to a *Brady* claim. And *Banks* certainly does not support such a proposition.

When, as in this case, the petitioner asserts a *Brady* claim in an untimely and successive petition, it is not enough for her to assert, as a basis for relief from that default under the escape clause, that she just discovered the allegedly undisclosed information. Rather, the escape clauses require her to allege and establish that, under the particular factual circumstances of the alleged violation, the newly asserted claim is one that, for some case-specific reason, "could not reasonably have been asserted" earlier, in her previous post-conviction proceeding. In this case, petitioner failed to provide any evidence, in response to the superintendent's motion for summary judgment, that would have allowed the post-conviction court to find that the alleged violation was one that, in fact, "could not reasonably have been" discovered and asserted in her previous post-conviction proceeding. Therefore, the post-conviction court correctly granted the superintendent's motion for summary judgment.

F. Petitioner failed to carry her burden to show that her *Brady* claim "could not reasonably have been raised" in her previous post-conviction proceeding.

As was discussed above, the Court of Appeals affirmed the post-conviction court's dismissal of petitioner's *Brady* claim on the narrow ground that she failed to establish—at a minimum—that she and her counsel, during her previous post-conviction proceeding, did not know of the information that provides the basis for that claim. *Eklof*, 273 Or App at 795. In her brief in this court, petitioner contends that that ruling was error because when the evidence that she presented is viewed under the proper standard, it was sufficient to avoid summary judgment. (Pet BOM 51-52).

As petitioner correctly notes, when a party moves for summary judgment, that party "has the burden of showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law." *Jones v. General Motors Corp.*, 325 Or 404, 420, 939 P2d 608 (1997); *see* ORCP 47 C. Moreover, a trial court ruling on a motion for summary judgment must "view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to * * * the party opposing the motion." 325 Or at 408; *see also Two Two v. Fujitec America Inc.*, 355 Or 319, 331, 325 P3d 707 (2014). Consequently, the ultimate question is whether the evidence that petitioner presented in opposition to the superintendent's motion, when viewed in the light most favorable to her, was sufficient to create a genuine

issue of material fact regarding whether she was entitled to relief under the escape clauses. (*See* Pet BOM 51).

Petitioner contends that the evidence she presented was sufficient to allow the post-conviction court to find that the state had not disclosed to her trial counsel in *State v. Eklof* the information that provides the basis for her *Brady* claim. And she asserts that it reasonably can be inferred from the evidence that she presented that David criminal history was not reasonably available to her post-conviction counsel during that proceeding. (Pet BOM 52). But she concedes that she "did not submit evidence on summary judgment about whether the police reports were reasonably available to her during her first post-conviction proceeding." (Pet BOM 53).

To be sure, petitioner's evidence may have been sufficient to establish a basis to infer that the district attorney had not disclosed to her *trial* counsel the information that provides the basis for her *Brady* claim. But that alone is not a sufficient basis to avoid summary judgment. Rather, the relevant question here is whether that information was not actually known to her and her counsel during her previous *post-conviction proceeding*, such that she would be entitled to relief under the escape clauses for her procedural default. As the Court of Appeals correctly ruled, petitioner's evidence failed to create a genuine issue of

material fact on that point.[16] Petitioner now concedes that point with respect to the police reports. Her argument regarding David criminal history has no merit, because it is based only a declaration by an investigator in which he discusses, in general terms, how difficult it is to conduct a criminal-history investigation in California. (Pet BOM 52 & ER 25). Even when viewed in the light most favorable to petitioner, that declaration does not provide a basis to infer that she and her counsel did not know of David criminal history at the time of her *previous post-conviction proceeding* and could not reasonably have discovered it through a reasonably diligent discovery process in that proceeding.

Finally, petitioner complains that her failure of proof should be excused because the superintendent's motion was framed as a challenge to the sufficiency of the pleadings and, as a result, she was misled to her prejudice in preparing her response. (Pet BOM 53-54). That objection has no merit for several reasons. First, petitioner is making that objection for the first time before this court; she did not raise that objection either before the

[16] The Court of Appeals noted that petitioner's petition may have sufficiently *alleged* facts that, if proven, would provide a basis for inferring that she and her counsel during her previously post-conviction proceeding did not actually know of the information that provides the basis for her *Brady* claim. (*See* Pet BOM 36). But the problem for petitioner here is that she did not present any *evidence* in response to the superintendent's motion for summary judgment to provide a basis for the post-conviction court to find that those allegations are true.

post-conviction court at the hearing on the motion or on appeal before the Court of Appeals. Second, the argument in the superintendent's motion was directed at the sufficiency of allegations in her petition only because she had not yet presented any evidence, and the point was that those allegations *even if supported by evidence* would not be sufficient to provide a basis for her to obtain relief under the escape clause. (*See* Pet BOM 11-14). Finally, and in any event, it is obvious that petitioner understood that the superintendent's motion required her to present evidence in support of her request for relief under the escape clause, in order to avoid summary judgment, because she actually did present such evidence and she then argued that that evidence was sufficient to avoid summary judgment. (Pet BOM 15-18).

In summary, the post-conviction court and the Court of Appeals both correctly ruled that the evidence that petitioner presented in opposition to the superintendent's motion for summary judgment was not sufficient, even when viewed in the light most favorable to her, to create a genuine issue of material fact with respect to her request for relief under the escape clause for her admitted procedural default in not raising her *Brady* claim in her previous post-conviction proceeding. Those courts correctly ruled that, as a result of her failure of proof on that point, the superintendent is entitled, as a matter of law, to dismissal of her petition as procedurally barred.

CONCLUSION

For the reasons discussed above, this court should affirm the judgment of the circuit court.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Timothy A. Sylwester

TIMOTHY A. SYLWESTER #813914
Senior Assistant Attorney General
timothy.sylwester@doj.state.or.us

Attorneys for Defendant-Respondent
Heidi Steward, Superintendent
Coffee Creek Correctional Facility

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 19, 2016, I directed the original Brief on the Merits of Respondent on Review Superintendent Steward to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jason Weber, attorney for petitioner on review, Ernest Lannet and Erik M. Blumenthal, and Janice C. Puracal, attorneys for Oregon Innocence Project, *Amicus Curiae*; and upon Rankin Johnson, IV, attorney for Oregon Criminal Defense Lawyer's Association, *Amicus Curiae*; and upon Mathew W. Dos Santos, attorney for American Civil Liberties Union Foundation of Oregon Incorporated, *Amicus Curiae*, by using the court's electronic filing system.

I further certify that on August 19, 2016, I directed the Brief on the Merits of Respondent on Review Superintendent Steward to be served upon Steven T Wax, attorney for Oregon Innocence Project, *Amicus Curiae*, by mailing two copies, with postage prepaid, in an envelope addressed to:

Steven T. Wax
Oregon Innocence Project
Box 5248
Portland, OR 97208

Continued…

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 10,989 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).

/s/ Timothy A. Sylwester

TIMOTHY A. SYLWESTER #813914
Senior Assistant Attorney General
timothy.sylwester@doj.state.or.us

Attorney for Defendant-Respondent
Heidi Steward, Superintendent
Coffee Creek Correctional Facility

TAS:aft/7639608