IN THE SUPREME COURT OF THE STATE OF OREGON

JASON VAN BRUMWELL,	)	
	)	
Petitioner-Relator,	)	
	)	
	)	**No. S060980**
v.	)	
	)	
	)	**Marion County Circuit**
JEFF PREMO, Superintendent, Oregon State Penitentiary	)	**Court No. 12C11135**
	)	
	)	
Defendant-Adverse Party.	)	

RELATOR'S OPENING BRIEF AND EXCERPT OF RECORD (AMENDED)

ALTERNATIVE WRIT OF MANDAMUS ISSUED TO THE HONORABLE THOMAS M. HART

Michael D. Curtis, OSB No. 77149
Attorney at Law
1631 NE Broadway, No. 142
Portland, OR 97232
503.804.6594
curtismichael@qwestoffice.net
Kathleen Correll, OSB No. 871989
Attorney at Law
kmc@kmcorrellattny.com
4300 NE Fremont St, Ste 230
Portland OR 97213
503.284.0763
Jesse Merrithew, OSB No. 074564
Levi Merrithew Horst LLP
jesse@lmhlegal.com
610 SW Alder St, Ste 415
Portland OR 97205
971.229.1241
Attorneys for Petitioner-Relator, Jason Van Brumwell

FILED SEPTEMBER 2013

Kathleen Cegla, OSB No. 892090
Assistant Attorney General
kathleen.cegla@doj.state.or.us
Timothy A. Sylwester,
OSB No. 813914
timothy.sylwester@doj.state.or.us
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
503.378.4402
Attorneys for Defendant-Adverse Party

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Constitutional Provisions

STATEMENT OF THE CASE

NATURE OF THE PROCEEDINGS

This is an original mandamus proceeding commenced under this Court's original jurisdiction. ORS 34.250.

Relator is the Petitioner[1] in the case of *Brumwell v. Premo*, Marion County Circuit Court No. 12C11135. That post-conviction relief proceeding was filed on January 27, 2012. It is from that proceeding, Marion County Circuit Court No. 12C11135, that the instant mandamus proceeding arose.

In Marion County Circuit Court No. 12C11135, petitioner sought relief from the convictions and sentences imposed in *State v. Jason Brumwell*, Marion County Circuit Court No. 04C46225 and in *State v. Jason Van Brumwell*, Lane County Circuit Court No. 10-94-08858. (In its current procedural setting the post-conviction relief proceeding deals only with convictions and sentences arising in *State v. Jason Brumwell*, Marion County Circuit Court No. 04C46225.) In Marion County Circuit Court No. 04C46225, petitioner was convicted of two counts of aggravated murder and was sentenced to death.

---

[1] For clarity, Petitioner–Relator will be referred to throughout this brief as "petitioner," while Defendant–Adverse Party will be referred to as "defendant."

NATURE OF THE PROCEEDINGS BELOW

On October 16, 2012, in Marion County Circuit Court No. 12C11135 Petitioner filed his *Petitioner's Motion for Protective Order Regarding Information Protected by OEC Rule 503*. By that *Motion* Petitioner sought an order granting him a protective order regarding evidence he would provide when deposed by Defendant, and that his former trial level attorneys and those working with them would provide upon deposition. Specifically, Petitioner requested a protective order precluding use of materials subject to OEC Rule 503 (lawyer-client privilege) for any purpose other than litigating the post-conviction proceeding, Marion County Circuit Court No. 12C11135, and barring Defendant from turning them over to any other persons or offices, including, in particular, law enforcement or prosecutorial agencies involved in the prosecution of *State v. Brumwell*, Marion County Circuit Court No. 04C46225.

Then on November 14, 2012, in Marion County Circuit Court No. 12C11135 Petitioner filed his *Petitioner's Motion to Quash Subpoena Duces Tecum Issued to Lorrie Railey, for In Camera Inspection, and for Protective Order*, and his *Petitioner's Motion to Quash Subpoena Duces Tecum Issued to Paul Lipscomb, for In Camera Inspection, and for Protective Order*. Lorrie Railey was an employee of the Office of Public Defense Services, the

agency responsible for overseeing funding of indigent criminal cases. (Petitioner is indigent.) See, generally, ORS 151.211 to 151.225. Paul Lipscomb is the executive director of Marion County Association of Defenders, the agency that assessed funding requests and authorized payments for services relative to Marion County Circuit Court No. 04C46225. The Defendant had issued *Subpoenas* to Ms. Railey and Mr. Lipscomb that directed them to deliver to the Defendant:

> Any and all billing records in your possession, or in the possession of any agent acting on your behalf, of trial counsel, investigators, or any other parties who performed services for the defense of State of Oregon v. Jason Van Brumwell, Marion County Case No. 04C46225.

By his *Motions*, Petitioner sought orders:

- Quashing Defendant's *Subpoenas* directing Lorrie Railey and Paul Lipscomb to deliver to Defendant's counsel the materials subject to the *Subpoenas*. However, Petitioner sought orders quashing those *Subpoena* only to the extent that the materials in question be delivered under seal directly to the Court, rather than that they be delivered to counsel for the Defendant.
- Ordering that the Court conduct an *in camera* review of those materials to determine which, if any, of them should be disclosed to the Defendant.

- Granting a protective order regarding any of those materials disclosed to the Defendant precluding use of those materials for any purpose other than litigating the post-conviction proceeding, Marion County Circuit Court No. 12C11135, and barring the Defendant from turning them over to any other persons or offices, including, in particular, law enforcement or prosecutorial agencies involved in the prosecution of *State v. Brumwell*, Marion County Circuit Court No. 04C46225.

On December 5, 2012, and again on December 12, 2012, the Hon. Thomas M. Hart, Circuit Court Judge, heard argument relative to the *Motions* referred to above. Because those *Motions* involved substantially similar issues, Judge Hart heard argument on them together. (Similarly, petitioner joined all three *Motions* in a single mandamus *Petition*.) In summary, Petitioner argued to Judge Hart that the lawyer-client privilege is such an integral part of our justice system that the government may not abrogate it without violating the Due Process Clause of the 14th Amendment to the United State Constitution and the right to counsel clause of Article I, section 11, of the Oregon Constitution.

By an *Order Denying Petitioner's Motion for a Protective Order* of December 12, 2012, Judge Hart denied *Petitioner's Motion for Protective Order Regarding Information Protected by OEC Rule 503*. (A copy of that

Order appears at ER-35.) By an *Order Denying Petitioner's Motions to Quash, for In Camera Inspection and for a Protective Order* of December 12, 2012, Judge Hart denied both *Petitioner's Motion to Quash Subpoena Duces Tecum Issued to Lorrie Railey, for In Camera Inspection, and for Protective Order*, and his *Petitioner's Motion to Quash Subpoena Duces Tecum Issued to Paul Lipscomb, for In Camera Inspection, and for Protective Order*. (A copy of that *Order* appears at ER-36.)

BASIS OF THIS COURT'S JURISDICTION

On June 20, 2013, this Court issued its *Order Allowing Petition for Alternative Writ of Mandamus; Alternative Writ of Mandamus; Order Consolidating Cases for Oral Argument*[2]. By its terms the *Alternative Writ of Mandamus* directed Judge Hart:

> 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 on December 12, 2012, and the order denying relator's motions to quash, for in camera inspection, and for a protective order, entered on December 12, 2012, and to enter an order allowing the motions, or in the alternative to show cause for not doing so, within 14 days from the date of this order.

[2] The case with which the instant proceeding was consolidated for oral argument in *Longo v. Premo*, S061072.

Judge Hart having failed to comply with this Court's *Alternative Writ of Mandamus*, this Court is called upon to determine whether good cause exists for that failure.

QUESTIONS PRESENTED

This proceeding presents the question whether the trial court correctly determined that Oregon legislature had destroyed and whether it may constitutionally destroy the lawyer-client privilege. As used here Petitioner refers to the lawyer-client privilege between himself and his trial level attorneys in Marion County Circuit Court No. 04C46225. It is his contention that the lawyer-client privilege survives into (and beyond) post-conviction relief proceedings.

As a secondary question, this proceeding presents the issue whether, assuming the lawyer-client privilege survives as Petitioner contends, it is appropriate for the trial court to enter protective orders to assure its vitality.

SUMMARY OF ARGUMENTS

The trial court below, at Defendant's urging, found that the mere filing of a petition for post-conviction relief acted to destroy the lawyer-client privilege in total. After finding that the privilege no longer existed, the court then concluded that there was no need to protect it in any way—either by insuring that the information Defendant sought is actually relevant to

Petitioner's claims, or by limiting its use. Therefore, Defendant would be free to use all of the tools of civil discovery to gather information and communications formerly protected by the privilege, and use them in any way he sees fit.

This ruling is based upon a flawed interpretation of OEC 503(4)(c) (referred to throughout this brief as the "self-defense exception"). That provision merely creates a limited exception to the general privilege rule, allowing for the fair adjudication of claims when privileged information is relevant to the claims. The exception only applies to specific communications that are relevant to the claims, and only applies in the particular proceeding where the claims are brought. For all other purposes, the information and communications continue to be privileged and trial courts have a responsibility to protect them.

A contrary holding would undermine the entire purpose of the privilege, thereby violating the right to counsel under Article I, section 11, of the Oregon Constitution, and the right to Due Process under the 14th Amendment to the United States Constitution.

ARGUMENT

I. OEC 503(4)(C) CREATES AN EXCEPTION TO THE PRIVILEGE LIMITED IN SCOPE TO THE PARTICULAR ISSUES RAISED IN THE PETITION AND TO THAT PARTICULAR PROCEEDING

OEC 503 codifies the lawyer-client privilege, bringing it into the Oregon Evidence Code. The privilege itself has existed since the Roman age and throughout the common law. When the legislature drafted the current version of the privilege, it also attempted to codify the various "exceptions" to the privilege that had developed under the common law. In so doing, it codified the "self-defense exception" to the privilege in OEC 503(4)(c), a relatively new addition to the overall doctrine of the privilege. At the time, no Oregon cases had addressed that particular exception, but the committee adopted it, noting that it was "required by considerations of fairness and policy." OEC 503 Commentary (1981).[3]

In doing so, the legislature did not intend to create a blanket exception akin to the crime-fraud exception, OEC 503(4)(a), but rather sought to avoid the injustice that would result if lawyers could not reveal privileged

---

[3] This Court looks to the 1981 Conference Committee Commentary as the "principal source of legislative history" for the Oregon Evidence Code. *State v. Serrano*, 346 Or 311, 324, 210 P3d 892 (2009).

information in order to defend themselves against claims by former clients. Adopting the blanket exception urged by Defendant and endorsed by the trial court is inconsistent with the historical foundations of the rule, inconsistent with the text and context of the statute, would undermine the very purpose of the privilege itself, and raise serious constitutional questions.

For those reasons, this Court should find the exception created by OEC 503(4)(c) is limited in scope to the issues raised in the petition and to that particular proceeding. Because the privilege itself continues to exist before, during, and after the litigation, trial courts have an obligation to protect it, by preventing disclosure of information not subject to the exception and prohibiting any information subject to the exception from being used in any way outside of the litigation.

A. Historical Foundation Of The Privilege And Exception

The lawyer-client privilege is not the creation of any legislative body. It is the creation of the courts, first seeking to protect the "oath and honor" of lawyers, and later seeking to encourage "full and frank" discussions between a lawyer and his client, allowing our modern adversarial system to function. *In re Illidge*, 162 Or 393, 404, 91 P 2d 1100 (1939); Jennifer Cunningham, Note, *Eliminating "Backdoor" Access To Client Confidences:*

Restricting The Self-Defense Exception To The Attorney-Client Privilege, 65 NYU L Rev 992, 998-999 (1990). Beginning in the 1800s, courts began to recognize an exception to this general rule and allowing lawyers to testify about privileged information when necessary to defend themselves against suits by former clients. *See Bittaker v. Woodford*, 331 F 3d 715, 718 (2003) (citing early cases). At the time the exception was adopted by the Oregon legislature, no Oregon decisions had yet addressed it in any way, and the courts elsewhere had only been presented with its straightforward application to collateral attack cases. *See* OEC 503 Commentary (1981) (noting lack of Oregon cases); *and, e.g., Tasby v. United States*, 504 F 2d 332, 336 (8th Cir 1974) (applying the exception to allow testimony of former attorney in motion to withdraw plea based on claimed lack of advice); *Laughner v. United States*, 373 F 2d 326 (5th Cir 1967) (same holding in the context of a federal attack on conviction (petition pursuant to 26 USC § 2255)).[4] The state and federal courts only began confronting the complicated questions presented in this case during the past several decades.

The lawyer-client privilege developed at common law based upon the idea that it was a rule of necessity—that lawyers could not do their jobs if the client could not be secure in disclosing to the lawyer all of the facts and

---

[4] *Petersen v. Palmateer*, 172 Or App 537, 19 P 3d 364 (2001), discussed below, also represents a straightforward case of this type.

circumstances surrounding the dispute. *Hunt v. Blackburn*, 128 US 464, 470 (1888); *Illidge*, 162 Or at 404. In other words, the courts developed the privilege in order to free clients from the fear that disclosures to their attorney might be disclosed to others. *Illidge*, at 403 (*citing* Wigmore on Evidence, § 2290). It was only in this way, the theory went, that people would be able to truly take advantage of the services a lawyer offered.

Just as the courts developed the privilege itself, they also defined its contours, limitations, and exceptions. *See, e.g., Clark v. United States*, 289 US 1, 15 (1933) (recognizing crime-fraud exception); *Illidge*, 162 Or at 405 (finding that privilege does not extend to the fact of retainer); *Hunt*, 128 US at 470-1 (recognizing the self-defense exception, without citation to authority). The courts simply looked to the rationale behind the privilege in order to define its outer limits.

Even where the privilege was codified by statute, such as Oregon, the courts still felt free to craft exceptions and limitations in order to fulfill the policy goals of the privilege itself. *See Illidge*, 162 Or at 403 (citing Section 353 of the Civil Practice Act).

OEC 503, including the self-defense exception, was adopted by the Oregon legislature in 1981. It is based upon proposed Rule 503 of the Federal Rules of Evidence, which was not adopted by Congress. OEC 503

Commentary (1981). The legislative committee made very few changes to the rule, even adopting the Advisory Committee Notes from the 1973 rules largely verbatim. *See* HR Rep No 650, 93rd Cong, 1st Sess (1973), *available at* http://www.michaelariens.com/evidence/acn.htm. [5] The Advisory Committee Notes relative to the self-defense exception and the Oregon legislative commentary are identical. It reads simply: "The exception is required by considerations of fairness and policy when questions arise out of dealings between attorney and client as in cases of controversy over attorney's fees, claims of inadequacy of representation, or charges of professional misconduct." *Id*.

The first Oregon case to address the self-defense exception actually arose contemporaneously with the new evidence code. In *In re Robeson*, 293 Or 610, 652 P 2d 336 (1982), this Court was called upon to decide whether a lawyer may reveal confidential information in order to defend himself in a disciplinary action where the client neither initiated the action or agreed to waive the privilege. The case was tried to the disciplinary panel before the adoption of OEC 503. *Id*. at 627-8. Nevertheless, this Court concluded that Robeson could testify regarding his communications with his former client,

---

[5] For a thorough discussion of the differences between the proposed rules and the adopted rules along with the various reasons for changes, *see* Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence,* 62 Geo L J 125 (1973).

relying on the self-defense exception within the ethics rules. *Id*. at 626 ("We hold the Trial Board's order in the context of this case was correct in allowing Robeson to testify as to the attorney-client communications to defend himself."). Therefore, this Court managed to posthumously create a self-defense exception to the traditional privilege after that privilege had been repealed and replaced with OEC 503. This decision demonstrates the continued willingness of this Court to define the outer limits of the privilege.

The only other case in Oregon to address the exception is *Petersen*. In *Petersen*, the Court of Appeals was faced with the straightforward application of the exception to a post-conviction case. Travis Petersen petitioned to have his conviction set aside after he pled guilty to aggravated murder. 172 Or App at 539. He alleged that he received ineffective assistance of counsel leading up to the plea. *Id*. When the defendant called his former attorney at trial to rebut the claims, Petersen objected, seeking to prevent that testimony entirely. *Id*. In essence, Petersen wanted to be able to claim that his lawyer failed to do something essential, but prevent the state from asking his lawyer whether or not he did it. Not surprisingly, the trial court overruled the objection, ordered the former attorney to answer the questions, and ultimately denied the petition. *Id*. at 540. On appeal, the issue was whether OEC 503(4)(c) applied at all. *Id*. at 541. The court concluded

that it did, and that because all of the evidence offered through counsel was relevant to the claims, there was no error in admitting the evidence. *Id*. at 543-544.

The holding in *Petersen* merely adopted an interpretation of OEC 503(4)(c) that was consistent with every court to consider the self-defense exception's application to collateral attacks had already adopted. *See, e.g.*, *Laughner*, 373 F 2d at 327. No Oregon court has been called upon to answer the more nuanced question presented in this case, and indeed, very few published decisions exist. The lead case on this subject comes from the Ninth Circuit, where Judge Kozinski, writing for an *en banc* panel, exhaustively discussed the competing interests of the parties and found in favor of the petitioner. *Bittaker*, 331 F 3d at 722-723. *Bittaker*'s holding that the implied waiver is limited to those communications directly relevant to the proceeding now enjoys wide acceptance. *See, e.g.*, *In re Lott*, 424 F 3d 446, 453 (6th Cir 2005); *United States v. Pinson*, 584 F 3d 972, 978 (10th Cir 2009); *Terry v. Bacon*, 2011 UT 432, 269 P 3d 188, 194 (2011). Its companion holding, that the implied waiver only allows the use of the information in that proceeding, has only been squarely addressed a handful of times, with each court to consider the issue agreeing with the rationale save one. *See, United States v. Nicholson*, 611 F 3d 191, 217 (4th Cir 2010)

(adopting the holding); *People v. Ledesma*, 39 Cal 4th 641, 692, 140 P 3d 657 (2006) (same); *Fears v. Warden*, 2003 WL 23770605 (SD Ohio, Aug 9, 2003) (contrary holding).

B. Context Of The Exception

Courts have struggled to label the self-defense exception, at times referring to it as a "waiver" or "implied waiver" and at other times referring to it as an "exception." In the evidence code, it appears under the "exceptions" heading. However, in truth, it does not function either as a traditional exception or a waiver. Traditional exceptions to the lawyer-client privilege define certain communications as outside the protections of the privilege from the moment they are made. The crime-fraud exception, OEC 503(4)(a), is an example—communications between clients and lawyers, despite meeting all the other qualifications, are not privileged if the client's purpose in engaging in the communication was to assist in an ongoing or planned fraud or crime. Waiver, on the other hand, is defined under OEC 511 and requires a voluntary action by the holder of the privilege. Once waived, the privilege is gone forever. *In re Lackey*, 333 Or 215, 226, 37 P3d 172, 178 (2002).

While some courts have analyzed the exception in terms of an "implied waiver," *see Bittaker*, 331 F 3d at 722, it is more consistent with

the statutory context to view it as an exception, one that applies only within the current proceeding.

i. Compared To Waiver Under OEC 511

Waiver is the intentional relinquishment of a known right. *Alderman v. Davidson*, 326 Or 508, 513, 954 P 2d 779 (1998). The legislature has specifically provided for the waiver of privileges in OEC 511 which attempts to lay out specific ways in which an individual can relinquish this right. OEC 511 applies to all of the statutory privileges, not just the lawyer-client privilege. As with other rights, once waived, privileges are gone forever. *Lackey*, 333 Or at 226-227. A communication, once privilege is waived, is no longer privileged and cannot be treated as such. *Id*.

The fact that waiver is permanent is consistent with the underlying purpose of privileges generally. Privileges protect communications that are made with the confidence that they will not be disclosed in contexts that we are prepared to protect for public policy reasons. However, once disclosed, the confidence is gone. The idea that one can reverse that is simply nonsensical.

In *Petersen*, petitioner argued that, because OEC 503(4)(c) was inapplicable to post-conviction proceedings, the appropriate analysis was whether the privilege had been waived under OEC 511. 172 Or App at 542.

The Court of Appeals disagreed. It found that, because the specific provision of OEC 503(4)(c) applies to post-conviction cases, the more general provisions of OEC 511 do not. *Id*. at 542-543. Because OEC 503(4)(c) is an exception and not a waiver, "[i]t is beside the point that petitioner may not have intended to relinquish the attorney-client privilege when he filed his petition." *Id*. at 544.

As discussed above, the holding in *Petersen* is consistent with every other court that addressed the issue.

ii. Compared To The Crime-Fraud Exception

The crime-fraud exception is the oldest exception to the privilege and has existed since long before any legislature thought to define it statutorily. *See* Cunningham, 65 NYU L Rev at 1006-7. Importantly, it exists despite the fact that the communications meet all of the other hallmarks of a privileged communication. The exception is not conditioned on any later event—any communication from a client to a lawyer which the client makes with the intention of perpetuating a fraud or planning a crime is simply not privileged from the moment it is uttered.

The self-defense exception does not function in this way. The communications are privileged when they are made. No one disputes that. The exception is simply meant to avoid the miscarriage of justice that could

result if clients were able to hide behind it and bring claims involving their former lawyers that cannot be defended.

Properly understood, the self-defense exception functions neither as a waiver or a traditional, absolute exception. It is, like all other aspects of privilege, bound by its purpose to create a limited exception and allow for the fair adjudication of claims.

C. Text Of The Exception

The text of the exception makes clear that it is a limited exception. "There is no privilege under this section … [a]s to a communication 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 Defendant and trial court below entirely changed the meaning of the statute from being applicable only to "relevant" communications to being applicable to all communications during the course of representation. If this were the intended interpretation, the legislature could have used much clearer language. For example, "There is no privilege under this section between a lawyer and client when the client raises an issue of breach of duty."

Defendant cited *Petersen* in support of their position, but *Petersen* said nothing of the sort. The Court of Appeals wrote in *Petersen* that "OEC 503(4)(c) provides a limited exception to the attorney-client privilege

conferred by OEC 503(2). The exception applies to a specific type of communication: one that is relevant to an issue of breach of duty between attorney and client." 172 Or App at 542-543. Because all of the communications at issue in *Petersen* were directly relevant to one of the petitioner's claims, they were all subject to the exception. *Id*.

D. Policy Considerations

While policy considerations are generally afforded little weight in interpreting the meaning of a statute, *PGE v. BOLI*, 317 Or 606, 612, 859 P 2d 1143 (1993), they are of the utmost importance when it comes to privilege. Privilege, as noted above, is a judicially-created doctrine founded on policy considerations. Its exceptions and contours, now codified in statute, are also judicially-created doctrines based on still more policy considerations. Because the interpretation urged by defendant ignores those policy considerations, it would eviscerate the privilege for practical purposes and put trial counsel in the unenviable position of having ethical duties inconsistent with what the statute protects. It is no answer to say that privilege can be adequately protected downstream, after the disclosure has been made. Once lost, the privilege is gone, and unraveling all the myriad ways in which the disclosure may effect the petitioner-cum-defendant in the future is impossible.

As noted in *Illidge*, the purpose of the lawyer-client privilege is to protect the client from the fear that what he discloses to his lawyer may be disclosed to others. 162 Or at 403. Should this Court adopt the interpretation urged by defendant and adopted by the trial court, that purpose cannot be achieved. Lawyers have a duty of competence under RPC 1.1 and duty to communicate with their clients under RPC 1.4(b). These twin duties would require the criminal trial attorney to explain to every client in serious cases, where the attorney can reasonably foresee a future post-conviction proceeding, the limits of the privilege. Therefore, the lawyer would be starting his relationship with his new client by warning him that there are circumstances in which anything the client says to him might be used against him. In other words, rather than being able to allay his fears and encourage the "frank and full disclosure" the rule was designed to facilitate, the lawyer himself will be implanting the fear of future disclosure.

Furthermore, for the trial lawyer who is accused of being ineffective, the ethical duty of confidentiality remains the same, creating an obligation on the part of the attorney to resist disclosure absent a court order. *See* Oregon Formal Ethics Op 2005-104 (explaining that the self-defense exception under the ethical rules is strictly limited to relevant communications); American Bar Association, *Formal Opinion 10-456:*

Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim, July 14, 2010 (explaining the obligations of counsel accused of ineffectiveness). This lack of consistency between the ethical rules and the privilege is something the courts and legislature have avoided to date.

Finally, once lost, the privilege cannot be effectively protected. As noted, under Oregon law, a privilege, once waived, is waived entirely. *Lackey*, 333 Or at 226-227. The communication is simply no longer privileged and therefore can be used in any way. Even if this were not the case, and the specific communications disclosed during the course of the post-conviction proceeding could not be directly introduced into evidence by the state in a re-trial, it would be impossible to sort out all the myriad ways those communications could be used. For example, may a witness who the state only learned of through the post-conviction proceeding be called in the re-trial? If not, what proof would be necessary to show that the state learned of the witness through other sources? Whose burden would it be to present that proof? How might the very knowledge of other evidence of the defendant's guilt effect plea negotiations while the case is pending re-trial? What about evidence of other crimes?

The litany of new questions that would be raised is difficult to predict. However, given that the petitioner is only entitled to have his conviction reversed if it was obtained in violation of the constitution, ORS 138.530, and that the goal in remedying constitutional violations is to place the person in the same position they would have been in absent the violation, *State v. Davis*, 295 Or 227, 234, 666 P 2d 802 (1983), it is necessary to protect the information from unnecessary disclosure from the start of the post-conviction proceeding. *See also Oregon Health Sciences University v. Haas*, 325 Or 492, 497, 942 P 2d 261 (1997) (so holding in circumstances remarkably similar to this case).

E. Doctrine Of Constitutional Avoidance

The doctrine of constitutional avoidance, or "avoidance doctrine," is a rule of statutory construction. Its requirement is that, where two interpretations of a statute or rule are possible, courts should adopt the one that avoids serious constitutional questions. *See INS v. St Cyr*, 533 US 289, 299-300, 121 S Ct 2271, 150 L Ed 2d 347 (2001); *Ainsworth v. SAIF Corp.*, 202 Or App 708, 712-13, 124 P 3d 616 (2005) (describing the extensive use of the doctrine in Oregon cases). For this additional reason, the construction adopted by the trial court is incorrect. *See infra* at Section II.

II. INTERPRETING THE PROVISION IN THE WAY URGED BY DEFENDANT WOULD VIOLATE PETITIONER'S RIGHT TO COUNSEL UNDER ARTICLE I, SECTION 11 OF THE OREGON CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The lawyer-client privilege is essential to the right to counsel because it is only through the privilege that lawyers can effectively advocate on behalf of their clients. Therefore, abrogating it to the extent the trial court has results in a violation of the right to counsel itself. Additionally, because the privilege is so ingrained in our system of justice, particularly in criminal cases, to remove it would violate the Due Process clause of the 14th Amendment.

A. Right To Counsel Under The Oregon Constitution

Article I, section 11, of the Oregon Constitution protects the right of a criminal defendant to counsel in the following terms: "In all criminal prosecutions, the accused shall have the right … to be heard by himself and counsel[.]" This Court has recognized that lawyer-client privilege is integral to this right. *State v. Durbin*, 335 Or 183, 190, 63 P 3d 576 (2003).

> The foregoing descriptions show why the 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.

Id. If the constitutional right to counsel includes the right to consult privately with counsel, it must also include the right to have those consultations shielded from disclosure. Otherwise, what purpose would the private consultation serve? Therefore, this Court has already recognized the constitutional requirement of the privilege.

As explained above, the ruling of the trial court, if adopted by this Court, would effectively destroy the privilege. This is true because lawyers have an obligation under the ethical rules to warn their clients of eventualities that are reasonably foreseeable. The chilling effect this requirement would have is obvious. Therefore, not only would the right to counsel be threatened by the direct threat of disclosure, but it would also be threatened by the resulting inability of lawyers to effectively represent their clients. Clients who feel that they cannot safely disclose information to their lawyers will have lawyers that cannot effectively represent their clients.

B. Right To Due Process Under The 14th Amendment

Where state evidentiary rules so offend the traditional notion of a fair trial, they may be struck down as violating the 14th Amendment. *Chambers v. Mississippi*, 410 US 284, 302, 93 S Ct 1038, 35 L Ed 2d 297 (1973). Because the lawyer-client privilege is essential to our justice system's functioning, and essential to the provision of fair trials for those accused of crimes, its destruction violates the Due Process Clause.

III. PROPOSED REMEDY

Should the Court conclude that Petitioner's view of the lawyer-client privilege is correct, either as a matter of statutory interpretation or of constitutional mandate, Petitioner believes it would be wise for the Court to explore the means of protecting that privilege in and after post-conviction relief proceedings. One commentator has noted that:

> Courts adjudicating an action in which an attorney seeks to abrogate the privilege in self-defense are largely bereft of guidance from case law. * * * [S]tate and federal courts recognizing the expanded exception have employed procedural and substantive restrictions in an ad hoc and often contradictory manner.

Cunningham, 65 NYU L Rev at 1026 (Footnotes omitted). That commentator made a number of proposals:

> The proposals are presented in the order in which a court would apply them if it were adjudicating a third party action against an attorney. They include: limiting the availability of the

> exception; increasing judicial supervision over its invocation; and, in the event that disclosure is warranted, requiring procedural protections to mitigate the harm to client confidences. The significant policy interests at stake argue in favor of invoking the maximum amount of restrictions on the use of the exception. However, although use of the full range of protections is preferable, it is not essential. Taken individually, or in any combination, each of these proposals would help restore a measure of protection to client confidentiality.

Id. at 1026-7. (Footnotes omitted.)

ORCP Rule 36 C provides a range of tools to protect an individual asserting the lawyer-client privilege:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or (9) that to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

This is a broad grant of discretion to the trial court:

> The issuance and vacation of protective orders are matters of a trial court's discretion. *See* ORCP 36 C (granting court discretion to make any discovery order "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense").

Jack Doe 1 v. Corporation of the Presiding Bishop, 352 Or 77, 86, 280 P 3d 377 (2012). However, trial court discretion is not unbridled discretion.

In another setting this Court has used a nuanced analysis informed by the Oregon Rules of Civil Procedure in determining whether or not discretion was properly exercised. In *Bremner By and Through Bremner v. Charles*, 312 Or 274, 821 P 2d 1080 (1991), the issue was whether a trial court erred when it bifurcated a trial into a liability phase followed, if necessary, by a damages phase. This Court reviewed for an abuse of discretion. The Court relied on ORCP Rule 53B, which permitted bifurcation of issues under certain circumstances, to identify the necessary prerequisite to the exercise of discretion. *Id.* at 278-9.

In this case, the necessary prerequisite triggering the exercise of discretion to issue an ORCP Rule 36 C protective order is the risk of disclosure of lawyer-client confidences.

Petitioner anticipates that the Defendant may argue that any protective order issued should be limited in duration to the life of the post-conviction

relief proceeding, i.e., that the Defendant should be allowed to re-publish materials discovered in the course of post-conviction relief. Petitioner asserts that nothing in ORCP 36 C justifies such a limitation. That rule contemplates an "any order which justice requires[.]" Indeed, it appears that following trial the court in *Jack Doe 1 v. Corporation of the Presiding Bishop* was entering and modifying protective orders. "After trial, the trial court entered another protective order, continuing the restrictions of its previous protective order until further order of the court." 352 Or at 82.[6] Petitioner asserts that there is no *a priori* justification for a specific time limitation on the duration of a protective order. Rather, as in *Jack Doe 1 v. Corporation of the Presiding Bishop*, the court issuing the protective order should retain authority to modify or enforce a protective order based on the changing circumstances.

---

[6] And:

> "Following the verdict, plaintiffs moved to vacate the protective order so that they could release the ineligible volunteer files to the public. Six media entities had previously had moved to intervene and also asked the trial court to release the trial exhibits, including the 1,247 ineligible volunteer files, for immediate public access. The trial court heard those motions together.

352 Or at 82. (Footnote omitted.)

CONCLUSION

For the foregoing reasons, this Court should determine that the Hon. Thomas M. Hart does not have adequate cause to disregard this Court's *Alternative Writ of Mandamus*, and should order him to comply with it.

Respectfully submitted,

Michael Curtis, Attorney at Law
OSB No. 771499
Jesse Merrithew
OSB No. 074564
Levi Merrithew Horst LLP
Of Attorneys for Relator

CERTIFICATE OF SERVICE AND FILING

I hereby certify that I eFiled and simultaneously served the foregoing *Relator's Opening Brief (Amended)* on the following persons on this date by eFiling:

Kathleen Cegla, OSB No. 892090
Assistant Attorney General
kathleen.cegla@doj.state.or.us
Timothy A. Sylwester,
OSB No. 813914
timothy.sylwester@doj.state.or.us
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem OR 97301-4096
503.378.4402

Attorneys for Adverse Party.

I further certify that I have served the foregoing *Relator's Opening Brief (Amended)* on the following person on this date by e-mail transmission to the e-mail addresses indicated and by US mail at the addresses indicated:

Mark Larrañaga
Walsh & Larrañaga
705 Second Ave., Suite 501
Seattle WA 98104
mark@jamlegal.com

Michelle A Ryan
Attorney at Law
3050 SE Division St, Ste 225
Portland OR 97202
mryan97388@yahoo.com

Bert Dupré
Attorney at Law
5015 SE Hawthorne Blvd, Ste B
Portland OR 97215
bert.dupre@gmail.com

attorneys for Relator in *Longo v. Premo*, SC S061072.

September 4, 2013.

_____
Michael Curtis, OSB No. 771499
Of Attorneys for Relator

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that 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 6,674 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).

_____

Michael Curtis, OSB No. 771499
Of Attorneys for Relator