IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF OREGON, INC.

Review of a decision of
the Marion County Circuit Court
by the Honorable Thomas M. Hart

Date of decision: December 12, 2012

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STATEMENT OF INTEREST

The ACLU of Oregon is a non-partisan organization dedicated to the preservation and enhancement of civil liberties and civil rights. It is a private, non-profit, membership organization with more than 10,000 members. Among the rights that the ACLU of Oregon seeks to protect are those of defendants in criminal proceedings. As discussed below, the ACLU of Oregon believes that the manner in which the state has interpreted OEC 503(4)(c) in this case infringes on defendants' constitutional rights and significantly weakens the attorney-client privilege as applied to such defendants. These issues are of importance to the members of the ACLU of Oregon.

INTRODUCTION

This case raises issues that have never been decided by this Court. When a convicted defendant files a petition for post-conviction relief asserting that his constitutional right to counsel was denied, the attorney client privilege is altered for purposes of the post-conviction proceeding. OEC 503(4)(c) states: "There is no [attorney-client] 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." This case raises two issues relating to the scope of the loss of the privilege in post-conviction proceedings.

The first issue is whether the otherwise privileged communications that lose their privileged status in the post-conviction proceeding remain privileged in all other proceedings -- including in a retrial. This Court should hold that the privilege exception applies only during the post-conviction proceeding. The purposes of the privilege exception are to allow an attorney accused of wrongdoing to defend his reputation, and to allow the state to effectively rebut the defendant's allegations of ineffective assistance of counsel. Extending the exception beyond the post-conviction proceeding does not serve either purpose. For that reason, the clear weight of authority limits the loss of privilege only to the post-conviction proceeding.

Additionally, allowing the prosecution to use the otherwise privileged material in a retrial would violate the defendant's constitutional rights to counsel and against compelled self-incrimination. It would violate the right to counsel because a defendant's ability to communicate freely with his trial attorney would be severely chilled: a defendant may be less forthcoming with his lawyer if his private communications with his trial attorney might be revealed to prosecutors and eventually be used against him in a retrial. It would also deprive the defendant of the right to privacy of communications with counsel if communications initially made in private were disclosed to the prosecutor or used at retrial.

Allowing the prosecutor to use the otherwise privileged material on retrial would also violate the right against compelled self-incrimination because a defendant contemplating whether to file a post-conviction relief petition would be forced to choose between two constitutional rights. If he sought to vindicate his right to effective assistance of counsel by filing the post-conviction relief petition, he would lose the protections of the Fifth Amendment because statements that he gave to his trial attorney could be used against him in a retrial. If he chose not to file the petition to avoid loss of the attorney-client privilege, he would forego his opportunity to vindicate his right to effective assistance of counsel. A defendant cannot be forced to choose between his constitutional rights in this manner. *Simmons v. U.S.*, 390 US 377, 391-94, 88 S Ct 967 (1968).

The second issue is whether, within the post-conviction proceeding, OEC 503(4)(c) excepts from the privilege all communications between the defendant and his trial attorney, or only those communications that are relevant to a specific issue of breach raised in the post-conviction petition. The plain text of the rule states that the exception narrowly applies only to "communication[s] relevant to an issue of breach." The rule does not say that the exception applies to all communications. Virtually every court that has addressed this issue has held that the privilege still applies in the post-conviction proceeding to all

communications not directly relevant to an issue of breach of duty. This Court should do the same.

ARGUMENT

A. OEC 503(4)(c) does not permit otherwise privileged communications revealed during a post-conviction proceeding to be used for other purposes

1. The interplay between OEC 503(2), 503(4)(c) and 511 demonstrate that OEC 503(4)(c) does not permit otherwise privileged communications to be used outside of post-conviction relief proceedings.

OEC 503(2)[1] provides: "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client" when the communication is between the client and the client's lawyer. A "confidential communication" is "a communication not intended to be disclosed to third persons[.]" OEC 503(1)(b). A defendant's private communications with his trial attorney are clearly "confidential communications." Thus, under OEC 503(2), the defendant has a "privilege" to prevent anyone from disclosing the communication.

If a defendant prevails in a post-conviction proceeding and is awarded a new trial, the defendant's communications with his original trial attorney are still "confidential communications" because they were not intended to be disclosed to third-parties when originally made. Thus, they still fall within the

[1] The full text of OEC 503 and 511, as well as the corresponding Conference Committee Commentary, is set out in the Appendix.

scope of OEC 503(2) and cannot be admitted into evidence over the defendant's objection, unless some other rule of evidence allows it. Two such rules are potentially applicable.

First, OEC 503(4)(c) provides: "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[.]" However, at the defendant's retrial, there is no "issue of breach of duty by the lawyer to the client." The issue at the retrial is whether the defendant is guilty of the crime charged, not whether the original trial attorney provided ineffective assistance of counsel. Accordingly, OEC 503(4)(c) does not apply at the retrial and the communications between the defendant and his original trial attorney remain privileged.

Second, OEC 511 provides:

> "A person upon whom [OEC 503 to 514] confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication."

This raises the issue of whether the defendant "waives the privilege" by disclosing documents relevant to an issue of breach during the post-conviction proceeding. Based on the plain text of OEC 503(4)(c), he does not. When a lawyer's breach of duty is at issue, "[t]here is no privilege" under OEC 503(2)

as to communications relevant to the breach. Accordingly, when the defendant discloses the documents to the state in the post-conviction proceeding, the defendant is not disclosing privileged communications. Because there is no privilege at that time, the defendant cannot have "waived the privilege" by disclosing the communications.

The Court of Appeals reached this same conclusion in *Petersen v. Palmateer*, 172 Or App 537, 19 P3d 364, *rev den* 332 Or 326, 28 P3d 1176 (2001). There, the defendant filed a petition for post-conviction relief and the state sought to introduce communications that would have otherwise been privileged. *Id*. at 539-40. The defendant asserted that he had not waived the privilege under OEC 511 merely by filing his petition for post-conviction relief. *Id*. at 541. The court agreed, noting that OEC 503(4)(c) carves out from the privilege communications relevant to an issue of breach. *Id*. at 542-43. The court then noted: "Because OEC 511 governs only the waiver of privileges that are *conferred* under OEC 503 to OEC 514, it does not apply to communications covered by OEC 503(4)(c)." *Id.* at 543 (emphasis supplied). Thus, the court held that filing a petition for post-conviction relief does not "waive" the attorney-client privilege. *Id.*

Additionally, disclosure of the communications in the post-conviction proceeding is not purely "voluntary," nor does a defendant "consent[] to disclosure" of the communications in the ordinary case. The only reason a

defendant discloses otherwise privileged communications is because he is required to do so as a prerequisite to seeking post-conviction relief and vindication of his constitutional right to effective assistance of counsel. If a defendant wants to vindicate his right to counsel, disclosure is *compelled* by the rules of evidence.

Because the communications between the original trial attorney and the defendant remain privileged at the defendant's retrial despite OEC 503(4)(c) or 511, the defendant "has a privilege * * *to prevent any other person from disclosing" the communications. Thus, if the DOJ (which legitimately obtained the communications during the post-conviction proceeding) provides them to the prosecutor and the prosecutor attempts to use them at the retrial, a defendant's objection to their introduction on privilege grounds must be granted. More broadly, outside of the context of the post-conviction proceeding, the communications remain privileged for all purposes, absent some other waiver by the defendant.

2. The comments to OEC 503(4)(c) and the proposed federal rule on which it was based demonstrate that OEC 503(4)(c) does not permit otherwise privileged communications to be used outside of post-conviction relief proceedings.

OEC 503(4)(c) "is based on proposed Rule 503 of the Federal Rules of Evidence, which was prescribed by the United State Supreme Court and submitted to Congress but not enacted." 1981 Conference Committee Commentary to the Oregon Evidence Code. In 1972, the U.S. Supreme Court

submitted proposed amendments to the Federal Rules of Evidence to Congress. 56 FRD 183. Among the amendments were proposed rules codifying many of the traditional privileges. *See* 56 FRD at 230-58. Proposed Federal Rule of Evidence 503(d)(3) contained an exception to the attorney-client privilege: "There is no privilege under this rule [providing for an attorney-client privilege] * * * [a]s to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer[.]" 56 FRD at 236.

Ultimately, Congress did not adopt the proposed privilege amendments when it adopted the Federal Rules of Evidence in 1975. Pub L 93-595, 88 Stat 1926.[2] Congress opted instead for a more general privilege rule, FRE 501, which provided that in civil cases, state privilege law applied, and in other cases, the common law of privileges applied unless modified by the U.S. Constitution, a federal statute, or a rule prescribed by the U.S. Supreme Court. *See* FRE 501. However, at least 27 states, including Oregon, have an evidentiary rule modeled after *proposed* FRE 503(d)(3). *See* App 1-2.

[2] For a discussion of why Congress rejected the specific privilege rules, see Note, *Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule Making Power*, 76 Mich L Rev 1177, 1177-78 (1977-78) (stating that primary issues were federalism concerns, debates over whether common law privileges should be codified at all, and special interest groups opposing particular privileges).

OEC 503(4)(c) is substantively identical to proposed FRE 503(d)(3).[3] It provides: "There is no privilege under this section [providing for an attorney-client privilege]: * * * (c) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer[.]" The text of that provision does not say whether a communication relevant to an alleged breach of duty is never privileged, from the time the communication was made going forward, or alternatively, whether the communication loses its status as privileged only for purposes of a legal dispute between the lawyer and the client. However, the commentaries to OEC 503(4)(c) and proposed Federal Rule 503(d)(3) answer that question.

The Conference Committee Commentary to OEC 503(4)(c) indicates that the Oregon legislature intended that provision to ensure fairness when a controversy arises between lawyer and client.[4] It states:

> "The breach of duty exception is required by considerations of fairness and policy. It will generally arise when there is a controversy over the attorney's

[3] The only differences are: (1) the federal rule states that there is no privilege "under this rule" while the Oregon rule states that there is no privilege "under this section;" (2) the Oregon rule does not have the header "Breach of duty by lawyer or client;" and (3) the federal rule refers to "his lawyer" while the Oregon rule refers to "the lawyer."

[4] The 1981 Conference Committee Commentary is the "principal source of legislative history for the 1981 Oregon Evidence Code." *State v. Serrano*, 346 Or 311, 324, 210 P3d 892 (2009). That commentary "provides highly useful background regarding each rule and guidance to courts and attorneys in interpreting these rules." *State v. McClure*, 298 Or 336, 344, 692 P2d 579 (1984).

> fees, a claim of inadequate representation, or charges of professional misconduct."

See also Leroy J. Tornquist, *Oregon Law and Practice*, Vol. 3 at 160 (2003) (OEC 503(4)(c) is necessary because "it would be unfair to render the client or the attorney defenseless" when he or she is accused of breaching a duty).

The commentary to the proposed *federal* rule provides additional context in interpreting OEC 503(4)(c). *State v. Stokes*, 350 Or 44, 51-52, 248 P3d 953 (2011) (where "Oregon originally adopted [a] statute as part of a criminal code that was based largely on New York law," the commentary to the New York law explaining its purpose is relevant "contextual source [ ]" in interpreting the Oregon law). Much like the Conference Committee Commentary to OEC 503(4)(c), the Advisory Committee's Note to proposed FRE 503(d)(3) states:

> "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."

56 FRD at 240.

Thus, considering the commentary to OEC 503(4)(c) and proposed FRE 503(d)(3), the breach of duty exception to the privilege rule applies only when considerations of fairness and policy arise -- in proceedings in which a client seeks legal redress against a lawyer for breach of duty.

Ironically, the state's proposed interpretation of OEC 503(4)(c) would transform a rule designed to foster fairness to attorneys accused by their clients of wrongdoing into a rule that would result in profound unfairness to criminal defendants. When a petition for post-conviction relief based on ineffective assistance of counsel is granted, it is established that the defendant's constitutional right to counsel has been violated. Yet, under the state's interpretation, the defendant is punished for vindicating the right to counsel by giving up the confidentiality of communications on retrial. If the legislature intended such a drastic and arguably draconian result, it would have stated that intent clearly.

3. Federal courts do not allow prosecutors to use communications discovered in habeas proceedings on retrial.

Absent a federal counterpart to OEC 503(4)(c), federal courts protect attorney-client privileged material not relevant to habeas proceeding by finding an implied waiver of the attorney-client privilege. *Bittaker v. Woodford*, 331 F3d 715, 718-20 (9th Cir 2003). The basis for the implied waiver is "the fairness principle" -- if a defendant alleges that his attorney was deficient in some manner, the attorney should be able to defend herself against the allegations, even if it means disclosing what would otherwise be privileged information. *Id.* at 719.

This fairness principle is sometimes described as preventing the client from using the privilege as both a sword and a shield. *See, e.g., Chevron Corp.*

v. Pennzoil Co., 974 F2d 1156, 1162 (9th Cir 1992) ("The privilege which protects attorney-client communications may not be used both as a sword and a shield. Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived.") (internal citations omitted). "In practical terms, this means that parties in litigation may not abuse the privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials." *Bittaker*, 331 F3d at 719. In other words, fairness demands that if a client accuses his lawyer of breaching a duty (*e.g.* in a malpractice claim, in an ineffective assistance of counsel petition), the lawyer must be able to reveal (to the extent necessary to defend herself) communications that would otherwise be privileged. *McCormick on Evidence* § 92 (7th Ed. 2013) ("Perhaps the whole doctrine, that in controversies between attorney and client the privilege is relaxed, may best be based upon the ground of practical necessity that if effective legal service is to be encouraged the privilege must not stand in the way of the lawyer's just enforcement of his rights to be paid a fee and to protect his reputation.").

Bittaker is the leading authority on this issue. There, the district court entered a protective order during the course of a *habeas* proceeding

> "precluding use of the privileged materials [provided to the State in conjunction with the limited waiver of the privilege discussed above] for any purpose other than litigating the federal habeas petition, and barring

> the Attorney General from turning them over to any other persons or offices, including, in particular, law enforcement or prosecutorial agencies."

Bittaker, 331 F3d at 717. The state appealed the order, contending that once the otherwise privileged materials were disclosed, the privilege was completely waived, and the communications could be used for any purpose. *Id.*

The *en banc* court resoundingly rejected the state's argument, holding that the waiver of the privilege was for purposes of the post-conviction proceeding only. *Id.* at 728. The court reasoned that broadening the waiver: would do nothing to serve the interests of the state in rebutting the allegations of the defendant in the habeas proceeding; would severely disadvantage the defendant in any retrial (because the prosecutor would potentially have access to significant amounts of evidence that it did not have in the original trial); and would create great difficulties for defendants' lawyers, who "would have to worry constantly about whether their casefiles and client conversations would someday fall into the hands of the prosecution" and account for "the very real possibility that they might be called to testify against their clients, not merely to defend their own professional conduct, but to help secure a conviction on retrial." *Id.* at 722-23. *See also* Prof Resp Crim Def Prac 3d § 10.69 ("When former defense counsel testifies at a post-conviction proceeding, the waiver of attorney-client privilege is limited to the post-conviction proceeding alone, and

the attorney-client privilege prevents that testimony from being used at any retrial").

There appear to be few other cases that directly address this issue. The *Bittaker* court itself noted that it appears to be a rare occurrence for a prosecutor to even attempt to use in a retrial documents that otherwise would have been privileged. *Id.* at 727; *see also People v. Ledesma*, 39 Cal 4th 641, 692, 140 P3d 657 (2006) (noting that "few courts have addressed the issue directly"). Even *Bittaker* itself has rarely been cited on this issue, either positively or negatively. Perhaps that is because, as one leading treatise puts it, "[i]t is hard to argue that the *Bittaker* opinion is not admirable in intent and effect." Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 5th Ed., Vol. 1 at 583 (2007). The Third Restatement of Law Governing Lawyers echoes that sentiment: "For obvious reasons of fairness, once a lawyer reveals confidential client information in response to a claim of ineffective assistance of counsel and obtains a new trial, the information may not be employed, over a proper privilege objection, at the retrial." Restatement (Third) of Law Governing Lawyers § 80 (2000), Reporter's Note, Comment c.

Those few other cases that have addressed the issue almost uniformly follow *Bittaker*.[5] The Fourth Circuit recently did so. *U.S. v. Nicholson*, 611

[5] *Fears v. Warden*, 2003 WL 23770605 at *2-3 (SD Ohio, August 9, 2003) is an exception, disagreeing with *Bittaker* and concluding that waiver is absolute and applies to all proceedings. It is worth noting that even in *Fears* the court agreed

F3d 191, 217-18 (4th Cir 2010). In *Nicholson*, the defendant challenged his sentence on the grounds that his attorney had an actual conflict of interest during the sentencing phase of his trial, resulting in the defendant receiving ineffective assistance of counsel. *Id*. at 195. The Fourth Circuit agreed and remanded the case for resentencing. *Id*. at 217-18. In doing so, the court held (citing *Bittaker*) that on remand, the defendant "is entitled to a protective order prohibiting the Government from using privileged information revealed by [the defense attorney] in litigating [the defendant's] actual conflict of interest claim." *Id*. at 217.

4. State courts do not allow prosecutors to use communications discovered in post-conviction relief proceedings on retrial.

The California Supreme Court has also followed *Bittaker*. *People v. Ledesma*, 39 Cal 4th 641, 693, 140 P3d 657 (2006). In cases that predate *Bittaker*, the Pennsylvania Supreme Court and the Missouri Court of Appeals held that otherwise privileged materials disclosed in a habeas-type proceeding

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with *Bittaker* that the waiver should be no broader than necessary at the habeas proceeding (*i.e.* that only communications directly relevant to the matters raised in the petition lose their privileged nature). *Id*. at *3. There are a number of cases that, in discussing whether an exception to (or waiver of) the privilege occurs in the post-conviction (or habeas) proceeding, use broad language that could be construed as suggesting that the loss of privilege is permanent, rather than expressly stating that the loss of privilege is confined only to the instant proceeding. However, the cases do not actually analyze the permanence of the exception (or waiver), so at best they offer ambiguous dicta. *See, e.g. Allen v. Lemaster*, 2012-NMSC-001, 12, 267 P3d 806 (2011) ("Any communications between [defendant] and his trial counsel that are relevant to [defendant's] specific ineffectiveness claims are excepted from the attorney-client privilege").

remain privileged for all other purposes. *Com. v. Chmiel*, 558 Pa 478, 508-12, 738 A2d 406 (1999); *State v. Samuels*, 965 SW2d 913, 919-20 (Mo App WD 1998). *Wigmore* also agrees with this application of the privilege exception: "Given the magnitude of the constitutional right at stake, the outcome of *Chmiel* is the right result." Edward J. Imwinkelried, *The New Wigmore: A Treatise on Evidence: Evidentiary Privileges*, § 6.13.2; *see also* Cynthia W. Rogowski, Note, *Attorney-Client Privilege: An Argument for an Exception to 'Absolute Waiver' in Criminal Proceedings Pursuant to* Commonwealth v. Chmiel, 47 Wayne L Rev 233, 248 (Spring 2001) (advocating other courts adopt the *Chmiel* holding).

Similarly, in *Waldrip v. Head*, 272 Ga 572, 580, 532 SE2d 380 (2000), the Georgia Supreme Court held that a post-conviction petitioner was entitled to a protective order limiting disclosure of otherwise privileged materials only to those people who needed to see the materials to assist the state in rebutting the petitioner's ineffectiveness of counsel claim. The court said that such a protective order was necessary to "protect the petitioner's constitutional right to effective assistance of counsel and against compelled self-incrimination." *Id.*[6]

If the state's position was the law, the entire purpose of the privilege -- encouraging "full and frank communication between attorneys and

[6] The court did not address whether the prosecutor could use such materials in a potential retrial, saying that issue was premature. *Id*. But given its basis for demanding entry of the protective order, it certainly seems likely that the court would follow the *Bittaker*/*Chmiel* line of cases.

their clients" and "encourag[ing] clients to make full disclosure to their attorneys" -- would be obliterated. *Frease v. Glazer*, 330 Or 364, 370, 4 P3d 56 (2000); *State v. Ogle*, 297 Or 84, 98, 682 P2d 267 (1984). Otherwise privileged information that is disclosed in a post-conviction proceeding should remain privileged in all other proceedings.

B. The state's position violates defendants' constitutional rights to counsel and against compelled self-incrimination.

Article I, section 11 of the Oregon Constitution provides that "[i]n all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel." This right to counsel applies broadly to all people "ensnared" in a criminal prosecution, whether the person has merely been taken into custody or is in the middle of a formal trial. *State v. Durbin*, 335 Or 183, 188-89, 63 P3d 576 (2003).[7]

The attorney-client privilege is directly related to the right to counsel. "When one seeks legal advice, the protections of the lawyer-client privilege are implicated, because appropriate legal advice requires frank communication between the client and the lawyer." *Id*. at 190. As the Ninth Circuit has noted, "the attorney-client privilege is, perhaps, the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system." *U.S. v. Bauer*, 132 F3d 504, 510 (9th Cir 1997).

[7] The federal counterpart is the Sixth Amendment to the U.S. Constitution. This court generally reads the provisions harmoniously. *See, e.g., Gorham v. Thompson*, 332 Or 560, 564, 34 P3d 161 n 3 (2001)

> "The purpose of the lawyer-client privilege, in general, 'is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.'"

State ex rel. Oregon Health Sciences University v. Haas, 325 Or 492, 500, 942 P2d 261 (1997) (quoting *Upjohn Co. v. United States*, 449 US 383, 389, 101 S Ct 677 (1981)).

The purpose of the privilege "cannot be fulfilled unless the communications between a client and a lawyer are confidential." *Durbin*, 335 Or at 190. Thus, "when an individual has a constitutional right to consult with counsel, that right includes the right to confer privately with counsel." *Id*. Because "the right to communicate confidentially is fundamental to the relationship between a lawyer and a client," that right is per se violated when a defendant has been denied the opportunity to confer in private with a lawyer, even if the defendant shows no actual harm caused by the denial. *Id*. at 192.

The Sixth Amendment to the U.S. Constitution also embodies a right to confer privately with an attorney. As one court noted, "utmost candor between an attorney and client is essential to effective assistance of counsel. 'The essence of the Sixth Amendment right is, indeed, privacy of communication with counsel.'" *Greater Newburyport Clamshell Alliance v. PSCNH*, 838 F2d

13, 21 (1st Cir 1988) (quoting *U.S. v. Rosner*, 485 F2d 1213, 1224 (2d Cir 1973)) (internal brackets omitted); *see also Mitchell v. Mason*, 257 F3d 554, 575 (6th Cir 2001) ("The Sixth Amendment assures confidential communication between a defendant and his lawyer").

The state's position would result in violation of the Sixth Amendment right to counsel. It would undoubtedly create a chilling effect on communications between defendants and their lawyers if the privilege was completely destroyed upon filing for post-conviction relief. S*ee Com. v. Chmiel*, 558 Pa 478, 510, 738 A2d 406 (1999) (noting potential "chilling effect" on defendants' open communication with counsel if privilege is completely destroyed when post-conviction relief petition is filed). Rather than advising the defendant that he should disclose all pertinent facts to the attorney in furtherance of his defense and that such disclosures will be kept strictly confidential, the attorney would need to disclose this dilemma: if the defendant discloses a secret to the lawyer, it will be privileged at trial; however, if the defendant loses at trial and successfully petitions the court for post-conviction relief, the secret may not be privileged on retrial.

Then, if the defendant is convicted at trial, he must choose between his constitutional right to effective assistance of counsel and his constitutional right to confer privately with his attorney. If he files for post-conviction relief, he can vindicate his right to effective assistance of counsel. But even if he files

and prevails, the prosecutor can use all previous communications between the defendant and his lawyer against the defendant at his subsequent retrial, making public communications that the defendant has a constitutional right to keep secret. And if the defendant declines to file for post-conviction relief in an effort to protect the privacy of his communications with his lawyer, he will be foregoing his right to effective assistance of counsel. Either way, a constitutional right is violated or the right to challenge such violation is lost.

The state may contend that, by filing for post-conviction relief, the defendant voluntarily waives the right to confer in confidence with his original trial attorney. But Article I, section 11 of the Oregon Constitution and the Sixth Amendment to the U.S. Constitution guarantee a defendant both the right to effective assistance of counsel at trial and the right to confer privately with an attorney. Both rights must be honored. If a defendant waives his right to confer privately with his attorney by attempting to vindicate his right to effective assistance of counsel, he is required to pick which right he wants to retain. Thus, when the petitioner's post-conviction relief action is successful, he is retried, and the prosecution attempts to use his original trial attorney's file against him, the defendant will have established that his right to counsel was already violated once.[8] And the defendant's "reward" will be a new trial in

[8] If the petition for post-conviction relief is denied, presumably the attorney-client communications with be of little use to the state, as they will not be trying the defendant again. However, it is still possible that the files could reveal that

which his right to counsel is violated again, just in a different way. This is a wholly inadequate manner of remedying constitutional violations.

Forcing a defendant to choose between exercising two constitutional rights is unconstitutional. *Simmons v. U.S.*, 390 US 377, 88 S Ct 967 (1968). In *Simmons*, the defendant was charged with robbing a bank. *Id*. at 381. One key piece of evidence against him was a collection of money wrappers from the robbery, found in a suitcase. *Id*. at 380, 391. The defendant challenged admission of the money wrappers on the grounds that the search of the suitcase violated his Fourth Amendment rights. *Id*. at 389.

Under federal law, a defendant must have "standing" to challenge the admission of evidence under the Fourth Amendment. *Id.* at 389-90. One way a defendant can establish standing is to prove that he is the owner of the item that was searched. *Id.* To establish standing, the defendant testified at the motion to suppress hearing that he owned the suitcase. *Id*. at 391. The prosecution later used this testimony against the defendant to show that he was the owner of a suitcase that contained money wrappers from a robbery. *Id*. The defendant was convicted. *Id*. at 381.

The Supreme Court reversed the conviction, holding that when a defendant testifies in a suppression of evidence hearing to establish that he has standing to pursue suppression of evidence under the Fourth Amendment, that

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the defendant committed other crimes, which could lead to additional prosecutions.

testimony cannot later be used against him at trial. *Id.* at 391-94. The Court concluded that allowing such testimony to be used would violate the defendant's rights under the Fifth Amendment. *Id.* The Court explained:

> "However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case [the defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, *we find it intolerable that one constitutional right should have to be surrendered in order to assert another*. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection."

Id. at 392-94 (emphasis added).

Forcing a defendant to give up the constitutional right to confer confidentially with his attorney in order to vindicate the constitutional right to effective assistance of counsel is unconstitutional. Defendants here cannot be required to give up one aspect of this Sixth Amendment right to protect the other. At least one court has applied *Simmons* to the situation presented here and held that a defendant cannot be forced to choose between asserting his right to post-conviction relief and protecting the privilege of his communications

with counsel. *State v. Samuels*, 965 SW2d 913, 919-20 (MoApp 1998); *see also* Cynthia W. Rogowski, Note, *Attorney-Client Privilege: An Argument for an Exception to 'Absolute Waiver' in Criminal Proceedings Pursuant to* Commonwealth v. Chmiel, 47 Wayne L Rev 233, 248 (Spring 2001) ("To not re-attach the attorney-client privilege after a client brings a meritorious ineffective-assistance-of-counsel challenge impermissibly forces the defendant to choose between essential constitutional protections").

The state's position would also violate Fifth Amendment rights. A defendant's trial attorney's file will almost certainly contain statements that the defendant made to the trial attorney. According to the state, once the defendant files for post-conviction relief, those statements are no longer protected by the attorney-client privilege, and if post-conviction relief is granted, the statements can be used in the defendant's retrial. In other words, the prosecution is free to use the defendant's own statements against him. Thus, in essence, by vindicating his Sixth Amendment right to effective assistance of counsel, the defendant must waive his Fifth Amendment rights under the Self-Incrimination Clause. Consistent with *Simmons*, it is "intolerable" and unconstitutional to require a defendant to surrender his Fifth Amendment right against self-incrimination to protect his Fourth Amendment rights. Requiring a defendant to surrender his Fifth Amendment rights to protect his Sixth Amendment rights

is equally intolerable and unconstitutional.[9] *See Samuels*, 965 SW2d at 917-20. The state's position should be rejected.[10]

C. In the post-conviction proceeding, the privilege still applies to all privileged communications not directly relevant to an issue of breach of duty by the lawyer

The state also takes the position that when a defendant petitions for post-conviction relief, the attorney-client privilege no longer applies to *any* communications between the defendant and his original trial attorney, regardless of whether the communications are relevant to an issue of breach raised in the petition. That argument is contrary to the plain text of OEC

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[9] This Court, citing *Simmons*, has previously noted that testimony given to establish standing to assert Sixth Amendment rights to confront witnesses cannot later be used in trial against the defendant in violation of his Fifth Amendment rights. *State v. Elliott*, 276 Or 99, 103, 553 P2d 1058 n 3 (1976).

[10] The U.S. Supreme Court has also held that it is a violation of the Fifth Amendment for a state to fire an employee, to bar an architect from obtaining government contracts, or to bar a political officer from serving in that capacity solely because the person refused to give grand jury testimony without a guarantee of immunity from later prosecution. *See Lefkowitz v. Cunningham*, 431 US 801, 805-09, 97 S Ct 2132 (1977) (discussing cases). The same principle has been applied by other courts to a wide variety of constitutional provisions. *See, e.g., U.S. v. Aguirre*, 605 F3d 351, 357-58 (6th Cir 2010) (truthful statements made in financial affidavit used to obtain appointed criminal defense counsel cannot be used against defendant in later prosecution; defendant cannot be forced "to choose between his Sixth Amendment right to counsel and his Fifth Amendment right against self incrimination"); *In re Grand Jury Investigation, etc.*, 587 F2d 589, 597 (3rd Cir 1978) (testimony given by Congressman in exercise of rights under Speech or Debate Clause cannot be used in later prosecution against Congressman; doing so would violate Congressman's Fifth Amendment rights); *U.S. v. Ragins*, 840 F2d 1184, 1193 (4th Cir 1988) (testimony of defendant at hearing to determine whether his Double Jeopardy rights were violated cannot be used against him in subsequent trial without violating Fifth Amendment); *United States v. Inmon*, 568 F2d 326, 332-33 (3rd Cir 1977) (same as *Ragins*).

503(4)(c). Moreover, nearly every court that has addressed the argument has rejected it.

1. Under the plain text of OEC 503(4)(c), only communications relevant to a specific issue of breach of duty are not privileged.

In the post-conviction relief proceeding, the exception to the privilege is limited to the communications relevant to the issues raised in that proceeding. OEC 503(4)(c) provides that "[t]here is no privilege * * * [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." Based on that unambiguous language, the exception to the privilege applies only to communications relevant to the issues directly raised in the post-conviction proceeding. The Court of Appeals has made this same point. *Petersen v. Palmateer*, 172 Or App 537, 543, 19 P3d 364, *rev den* 332 Or 326, 28 P3d 1176 (2001) (OEC 503(4)(c) excepts from the privilege communications "*if* the communications [are] relevant to petitioner's breach of duty claims") (emphasis supplied). When a defendant files for post-conviction relief based on ineffective assistance of counsel, he is asserting that his attorney breached the attorney's duty to provide effective assistance. Thus, OEC 503(4)(c) is clearly triggered. But that rule excepts from the privilege only communications "relevant to an issue of breach of duty by the lawyer to the client." Accordingly, under the plain text of the rule, if a particular communication between a lawyer and client is not relevant to a specific issue of breach raised by the defendant, the exception to the privilege set forth in OEC

503(4)(c) does not apply and the communication remains privileged. *See* Laird C. Kirkpatrick, *Oregon Evidence* at 322 (5th Ed 2007) (OEC 503(4)(c) exception "should be construed narrowly to avoid disclosing any more of the client's confidences than are necessary for the lawyer to defend against the client's claim").

Properly interpreted, the rule does require judicial determinations as to which communications are "relevant" to the specific issue of breach raised in the post-conviction proceeding. But trial judges deal with issues of relevance every day. There is no impediment to limiting the scope of the exception to the privilege to communications relevant to issue of breach raised in the post-conviction proceeding. OEC 503(4)(c) unambiguously requires that such determinations be made.

Limiting the exception only to communications relevant to an issue of breach of duty also makes sense in light of the rule's purpose. OEC 503(4)(c) was deemed necessary because of "considerations of fairness." 1981 Conference Committee Commentary to OEC 503(4)(c). Fairness does not require stripping communications of the protection of the attorney-client privilege when those communications are not relevant to the dispute between the defendant and the lawyer.

2. Courts routinely hold that communications not relevant to an issue of breach of duty by the lawyer to the client remain privileged in post-conviction proceedings.

To amicus' knowledge, every state court that has considered this issue has reached this conclusion. As one court recently noted, "research shows that the overwhelming majority of courts that have addressed this issue hold that the waiver of the attorney-client privilege should be narrowly applied" in post-conviction cases. *State v. Lewis*, 36 So 3d 72, 77 (Ala Crim App 2009).[11] That court went on to "join the majority of other jurisdictions that have addressed this issue and hold that when a petitioner raises a claim of ineffective assistance of counsel in a postconviction proceeding he waives the attorney-client privilege '*only* with respect to matters relevant to his allegations of ineffective assistance of counsel.'" *Id.* at 78 (quoting *State v. Taylor*, 327 NC 147, 152, 393 SE2d 801 (1990)); *see also* Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 5th Ed., Vol. 1 at 563 (2007) ("Courts repeatedly have tried to limit the scope of the waiver to only those communications relevant to the habeas claim, holding that communications in respect to other issues remain protected.")

Bittaker is also the leading case on this issue. 331 F3d 715 (9th Cir 2003). The court in *Bittaker* held that because the implied waiver of the privilege is based on giving the opposing side a fair opportunity to rebut

[11] The *Lewis* court did not cite any cases that held to the contrary.

allegations of ineffectiveness, the waiver must be limited only to those communications that are necessary to serve that purpose. *Id.* at 720. Thus, communications not relevant to an issue of breach of duty by the lawyer remain privileged even in the post-conviction proceeding. *Id.* at 720-21.

This aspect of the holding in *Bittaker* has been followed by the Sixth[12] and Tenth[13] Circuits, and many federal district courts.[14] It has also been followed routinely at the state level,[15] including by many states with evidentiary rules nearly identical to OEC 503(4)(c).[16] This Court should follow the rationale of the "overwhelming majority" of courts and hold that when a

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[12] *In re Lott*, 424 F3d 446, 453 (6th Cir 2005).
[13] *U.S. v. Pinson*, 584 F3d 972, 978 (10th Cir 2009).
[14] *See, e.g., U.S. v. Stone*, 824 F Supp 2d 176, 186-87 (D Me 2011); *Fears v. Warden*, 2003 WL 23770605 at *3 (SD Ohio, August 9, 2003).
[15] *See, e.g., Terry v. Bacon*, 2011 UT 432, 269 P3d 188, 194 (2011); *State v. Lewis*, 36 So 3d 72, 77 (Ala Crim App 2009); *Com. v. Chmiel*, 558 Pa 478, 511, 738 A2d 406 (1999).
[16] *See, e.g., Allen v. Lemaster*, 2012 NMSC 001, 11, 267 P3d 806 (2011) (only "those communications *specifically relevant* to the claim" of ineffective assistance of counsel are excepted from the privilege) (emphasis added); *Rodriguez v. Commonwealth*, 87 SW3d 8, 11 (Ky 2002) ("For example, if Appellant testified that he was coerced by counsel to plead guilty to this murder charge, he would not thereby waive his lawyer/client privilege with respect to communications with his attorney concerning his possible participation in other, unrelated criminal conduct"); *Hutchings v. State*, 53 P3d 1132, 1136 (Alaska App 2002) (stating, in interpreting Alaska's analog to OEC 503(4)(c), that privilege is waived only "to the extent necessary to resolve" the specific claim of breach at issue); *Volpe v. Conroy*, 720 So 2d 537, 538-39 (Fla App 4 Dist 1998) (exception to privilege "has been narrowly interpreted to apply only to the particular transaction which resulted in the malpractice action, and not to any other aspects of the relationship between the client and the attorney"); *State v. Flores*, 170 Wis 2d 272, 277-78 (Ct App 1992) (privilege waived only as to information "relevant to the charge of ineffective assistance").

defendant files a petition for post-conviction relief, only those communications that are directly relevant to the issues raised in the petition are excepted from the attorney-client privilege.

CONCLUSION

For the foregoing reasons, amicus curiae American Civil Liberties Union of Oregon, Inc. urges this Court to reverse the decision of the trial court and hold that Relator is entitled to entry of the requested protective order.

Dated this 10th day of September, 2013.

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