

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

**JASON VAN BRUMWELL,**

**Petitioner-Relator,**

**v.**

**JEFF PREMO, Superintendent,  
Oregon State Penitentiary**

**Defendant-Adverse Party.**

**No. S060980**

**Marion County Circuit  
Court No. 12C11135**

**RELATOR'S REPLY BRIEF**

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

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## STATEMENT OF THE CASE

Petitioner<sup>1</sup> disagrees with Defendant's Statement of the Case (*Answering Brief*, p. 1):

The single, common issue before this court is whether the post-conviction court in [Brumwell's and Longo's] cases erred when it denied the petitioners' requests for a protective order over information that may be obtained by defendant Superintendent during discovery and at trial that relates to past communications between petitioners and their trial and appellate counsel.

As Petitioner stated in both his *Petition*, his *Memorandum* supporting his *Petition* and his *Opening Brief*, this proceeding arose from the ruling of the court below on three motions:

- *Petitioner's Motion for Protective Order Regarding Information Protected by OEC Rule 503* filed on October 16, 2012;
- *Petitioner's Motion to Quash Subpoena Duces Tecum Issued to Lorrie Railey, for In Camera Inspection, and for Protective Order* filed on November 14, 2012; and
- *Petitioner's Motion to Quash Subpoena Duces Tecum Issued to Paul Lipscomb* also filed on November 14, 2012.

See *Petition for Peremptory Writ of Mandamus, or, in the Alternative, for an Alternative Writ of Mandamus*, pp 1-3 (paragraphs 3 and 4); *Memorandum*

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<sup>1</sup> For clarity, Petitioner-Relator will be referred to throughout this brief as "Petitioner," while Defendant-Adverse Party will be referred to as "Defendant."

Supporting Petition for Alternative Writ of Mandamus, pp 2-4; and *Relator's Opening Brief*, pp 2-4.

Petitioner is unaware of the content of the record in *Longo v. Premo*, case no. 07C-2128. However, Petitioner Brumwell does adopt the arguments by Petitioner Longo advanced in the current proceeding.

### **SUMMARY OF ARGUMENTS**

In his *Answering Brief* Defendant conflates the concept “relevance” for purposes of OEC Rule 503(4)(c) with the concept “relevance” for purposes of ORCP Rule 36B(1).

Defendant is simply wrong in arguing that Petitioner did not raise the concept of relevance in the post-conviction court.

Defendant mischaracterizes the questions argued below, and, therefore, the issues decided by post-conviction court.

### **ARGUMENT**

Defendant attempts to persuade this Court to decide the issues presented in this proceeding in terms of ORCP 36B(1) rather than in terms of OEC 503(4)(c). Thus Defendant claims:

there is no dispute before this court that the information that defendant seeks is relevant to the claims that petitioners have alleged, or may lead to the discovery of evidence that is relevant to those claims.

*Adverse Party's Answering Brief*, pp 12-3. Petitioner, recognizing that Defendant was entitled to discovery in the post-conviction proceeding, but also recognizing that the release of discovery without appropriate protective orders would vitiate his lawyer-client privilege, requested *in camera* inspection and orders protecting his lawyer-client privilege. Defendant replied that because there is no privilege, *in camera* review is not warranted. This is most clearly stated in heading B at page 3 of *Defendant's Response to Petitioner's Motion to Quash Subpoena for Billing Records (Lorrie Railey)* and in heading B at page 3 of *Defendant's Response to Petitioner's Motion to Quash Subpoena for Billing Records (Paul Lipscomb)*, both of which state: "Because there is no privilege, *in camera* review is not warranted and petitioner is not entitled to the protective order he seeks."

Contrary to Defendant's assertions, petitioner did raise the concept of relevance, as it applies to a proper interpretation of OEC 503(4)(c) in the post-conviction court. He stated:

It is, therefore, our position that this Court lacks discretion to enforce OEC 503(4)(c) as the Defendant interprets it. In order to avoid the unconstitutional reading advocated by defendant, the Court should read the provision for what exactly it says:

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.

In other words, whether or not the privilege survives Rule 503(4)(c) is conditioned on relevance, which is equivalent to saying that “the privilege under this section survives as to all communications not relevant to an issue of breach of duty.”

Because the privilege survives, in the circumstances of this case this Court must protect it. There are two procedural tools necessary to achieve this: *in camera* inspection, and protective orders limiting republication of information received by the Defendant.

See *Memorandum Supporting Petition for Alternative Writ of Mandamus*, p.

6. The post-conviction court, at Defendant’s urging, declined the request that it make an *in camera* inspection of material potentially protected by Rule 503(4)(c) for lawyer-client privilege relevance.

It is important to note that ORCP Rule 36B(1) permits discovery both of material that is relevant, but also material that “appears reasonably calculated to lead to the discovery of admissible evidence.” However, a proper reading of Rule 503(4)(c) will only vitiate the lawyer-client privilege as to materials that are relevant to the claims made in a post-conviction proceeding. Thus, as to materials that are merely calculated to lead to the discovery of admissible evidence, the lawyer-client privilege survives, even in post-conviction relief proceedings.

Defendant makes the nonsensical claim that “Neither petitioners nor *amici* contend that any statute or rule other than ORCP 36C is applicable



here.” *Answering Brief*, p. 14. At the very least, Rule 503(4)(c) applies. And while they are not statutory in nature, both this Petitioner and *amici* raise serious due process concerns. As Petitioner stated to the post-conviction court:

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 14<sup>th</sup> Amendment* and the right to counsel clause of *Article I, section 11, of the Oregon Constitution*.

As Justice Rehnquist noted in 1981 in *Upjohn Co v. US*, 449 U.S. 383:

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

OEC 503(4)(c), at least as [Adverse Party] would have the Court read it, contains a blanket destruction of the lawyer-client privilege. Therefore, it violates the *Due Process Clause of the 14<sup>th</sup> Amendment* and the right to counsel clause of *Article I, section 11, of the Oregon Constitution*.

It is worth noting that the U.S. Supreme Court has struck down the use of a state evidentiary rule when that rule is used in such a manner that it violated due process. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

See *Memorandum Supporting Petition for Alternative Writ of Mandamus*, pp. 5-6.

Defendant cites four reasons that it claims support the post-conviction court's failure to issue protective orders. What Defendant does not explain are:

- How could the post-conviction court exercise its discretion by not issuing protective orders when it has declined to review the materials that would be subject to such orders? In other words, what factors informed the purported exercise of discretion?
- Recognizing that the named parties are different, but nonetheless, why is it appropriate for his Court to issue a mandamus ruling requiring the issuance of a protective order when the Department of Justice seeks it (*State ex rel. Oregon Health Sciences University v. Haas*, 325 Or. 492 @ 497, 942 P.2d 261 (1997)), but to deny it when the Department of Justice opposes it?
- Recognizing that should these parties face similar issues during federal *habeas corpus* proceedings, *Bittaker v. Woodford*, 331 F 3d 715, 718 (9<sup>th</sup> Cir. 2003), would require the use of protective orders should Defendant seek discovery similar to that sought here, why should a different rule apply here?

- Is there any reason that the Ninth Circuit's *en banc* exhaustive analysis of the competing interests of the parties, and analysis that found in favor of the use of protective orders, not apply here?  
(*Bittaker v. Woodford*)

### 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,

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**CERTIFICATE OF SERVICE AND FILING**

I hereby certify that I eFiled and simultaneously served the foregoing

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October 22, 2013.

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**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 1,832 words.

**Type size**

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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