IN THE SUPREME COURT
OF THE STATE OF OREGON

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

BRIEF ON MERITS OF PETITIONER ON REVIEW

Appeal from the Judgment of the Circuit Court
for Washington County
Honorable Thomas W. Kohl, Circuit Court Judge

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BRIEF ON THE MERITS OF PETITIONER ON REVIEW

STATEMENT OF THE CASE

This is a post-conviction case that presents the issue of whether a petitioner may raise an untimely[1] and successive[2] ground for relief based on newly discovered *Brady*[3] evidence. The trial court granted the state's motion for summary judgment. ER-26-27 (Order Granting State's Motion for Summary Judgment) . The Court of Appeals affirmed in a written opinion, denied reconsideration, and this court allowed review. *Eklof v. Steward*, 273 Or App 789, 359 P3d 570 (2015), *rev allowed*, 359 Or 525 (2016); ER 28-29 (Court of Appeals Order Denying Reconsideration).

In this brief, petitioner provides argument on three of the four questions presented in the petition for review. Petitioner relies on her brief before the Court

[1] Petitioner uses the word "untimely" to refer to a ground for relief raised outside of the statute of limitations in ORS 138.510(3).

[2] Petitioner uses the word "successive" to refer to a ground for relief that was not raised in an initial post-conviction proceeding.

[3] Petitioner uses term "*Brady*" to refer to the United States Supreme Court's decision in *Brady v. Maryland*, 373 US 83, 83 S Ct 1194, 10 L Ed 2d 215 (1963), holding that a state violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it fails to disclose to a criminal defendant evidence that is material either to guilt or punishment.

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of Appeals for argument on the fourth question presented.[4] ORAP 9.20(4). Petitioner addresses the remaining issues in this brief. Those issues require this court to discern the meaning of (1) ORS 138.530(1)(a); (2) the identically worded escape clauses in ORS 138.550(3) and ORS 138.510(3); and (3) ORCP 47 C. Pursuant to ORAP 5.77, petitioner adopts the Oregon Innocence Project's *amicus curiae* brief in its entirety.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

Does ORS 138.530(1)(a) permit a post-conviction petitioner to raise as a ground for relief that her conviction was obtained in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution as interpreted in *Brady v. Maryland*?

First Proposed Rule of Law

Yes, in ORS 138.530(1)(a), the legislature intended to permit a petitioner to

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[4] The fourth question presented in the petition for review is

> "Does Oregon's PCHA permit a petitioner to raise an untimely and successive claim that trial counsel was inadequate and ineffective for failing to object to a natural and probable consequences jury instruction, if that claim allegedly could not reasonably have been raised until after this court decided *State v. Lopez-Minjarez*, 350 Or 576, 260 P3d 439 (2011)?"

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raise a ground for relief based on an allegation that a criminal conviction was obtained through a substantial violation of the petitioner's rights under the United States Constitution. A *Brady* claim alleges a substantial violation of the Fourteenth Amendment to the United States Constitution based on the state's failure to disclose material evidence.

Second Question Presented

When a ground for relief is based on *Brady* evidence discovered after the conclusion of a prior, timely post-conviction proceeding, does the ground for relief satisfy the escape clauses for the affirmative defenses of statute of limitations (ORS 138.510(3)) and *res judicata* (ORS 138.550(3)), which require a court to find that the ground for relief could not reasonably have been raised during the prior post-conviction proceeding?

Second Proposed Rule of Law

Yes, when a ground for relief is based on material evidence that was not disclosed by the state during the criminal trial and which the petitioner first discovered after prior, timely post-conviction proceedings have concluded, a court must find that the ground for relief could not reasonably have been raised in the prior, timely petition.

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Third Question Presented

In order to raise an issue in a motion for summary judgement, does ORCP 47 C require the party moving for summary judgment to produce evidence before the burden of production shifts to the adverse party?

Third Proposed Rule of Law

Yes, when the 1999 legislature amended ORCP 47 C it intended the words "raised in the motion" to codify the moving party's burden of producing evidence before the burden shifts to the adverse party to produce evidence on any issue "as to which the adverse party would have the burden of persuasion at trial." ORCP 47 C.

SUMMARY OF ARGUMENT

1. The legislature intended ORS 138.530(1)(a) to permit a petitioner to raise a ground for relief based on a substantial violation of any state or federal constitutional right. Under *Brady* and its progeny the Due Process Clause of the Fourteenth Amendment places an affirmative obligation on the state to disclose all evidence that is material to the guilt or punishment of a criminal defendant. The failure to disclose material evidence to a criminal defendant is a substantial violation of the Fourteenth Amendment. Accordingly, a petitioner may raise a

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ground for relief based on an alleged *Brady* violation pursuant to ORS 138.530(1)(a).

2. The legislature intended the escape clauses contained in ORS 138.550(3) and ORS 138.510(3) to codify the affirmative defenses of *res judicata* and statute of limitations that apply under the rules of civil procedure. A court should consider a ground for relief raised in an untimely or successive petition if it finds that the ground for relief could not reasonably have been raised at an earlier time. When a ground for relief is based on newly discovered evidence, a court must decide whether the petitioner was previously aware that the evidence existed and whether the petitioner could have obtained that evidence by ordinary means.

Here, petitioner's ground for relief is based on newly discovered *Brady* evidence. By definition *Brady* evidence is material information in the state's possession that was not disclosed to a criminal defendant. Accordingly, this court should find that petitioner could not reasonably have raised her ground for relief at an earlier time because she was not aware that the evidence existed until 2012 when she initiated this proceeding.

3. When the 1999 legislature amended ORCP 47 C it intended the words "any issue raised in the motion" to codify the burden of production shifting rule that applied under FRCP 56. That rule places the initial burden of production

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on the party moving for summary judgment. In order to shift the burden of production to the adverse party the moving party must either produce or cite to evidence in the record that affirmatively establishes that there is no genuine issue of material fact. That is true regardless of which party carries the ultimate burden of persuasion at trial. Once the moving party meets its burden of production, the burden shifts to the adverse party on any issue raised in the motion "as to which the adverse party would have the burden of persuasion at trial." ORCP 47 C. A party cannot raise an issue in a motion by merely asserting that it disagrees with the factual allegations in a petition. If the moving party fails to meet its burden of production then a court should deny the motion for summary judgment because the moving party has failed to meet its burden of persuasion that there is no dispute of material fact.

Here, the state filed a motion for summary judgment without producing or citing to any evidence in the record. Rather, the state's motion was based on mere assertions and its legal argument that petitioner could not meet the escape clauses contained in ORS 138.550(3) and ORS 138.510(3). The trial court should have denied the state's motion because the state failed to produce or cite to any evidence in the record establishing that there was no genuine dispute of material fact and because it was not entitled to judgment as a matter of law.

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Further, under the plain text of ORCP 47 C, the state could not shift the burden of disproving its affirmative defenses to petitioner because the burden of proving an affirmative defense at trial is on the defendant, here the state. Finally, because the state failed to meet its initial burden of production the burden never shifted to petitioner to produce any evidence. For all of those reasons this court should reverse and remand so that petitioner can have a hearing on the merits of her *Brady* claim as required by the Due Process Clause.

SUMMARY OF FACTUAL AND PROCEDURAL HISTORY

Petitioner was charged and convicted of aiding and abetting Jeffrey in the aggravated murder of ER-2. Two of the state's "key witnesses" at petitioner's trial were John and Jeffrey brother, David ER-5; *see also* ER-19-21 (Affidavit of trial counsel John Kolego); ER-22-23 (Affidavit of trial counsel Jeffrey Murdock). The state failed to disclose to petitioner's trial attorneys exculpatory impeachment evidence relating to both witnesses. ER-19-23.

Specifically, the state failed to disclose five police reports documenting multiple interviews and polygraph examinations during their investigation of

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TCF 109-123 (police reports).[5] The police reports describe telling different stories regarding what happened to The reports also relay that five detectives (Warthen, Lewis, Ackom, Walker, and Kennedy) had concluded that was either a liar or that he had told inconsistent stories. TCF 109-123. In addition, the police reports document several threats by officers to arrest in connection with the murder of TCF 116, 120, 121. The reports describe officers telling that the District Attorney was considering prosecuting him unless he cooperated with the investigation, by changing his story. TCF 121. The state also failed to disclose David criminal history. ER-6; ER-21, ER-23.

The undisclosed evidence about and David would have had impeachment value if it had been available to petitioner during her trial. ER-6; ER-19-23. The evidence was not disclosed to petitioner or any attorney working on her behalf until 2012[6], when Jeffrey post-conviction attorney provided it to petitioner. ER-16; ER-19-23. Petitioner filed an untimely and successive petition for post-conviction relief based on the discovery of that evidence. ER-1.

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[5] "TCF" refers to the trial court file. The TCF is an electronic document in Adobe PDF format. Petitioner cites to the page of the PDF document, which pursuant to ORAP 16.50 is available here.

[6] The petition itself contains a typographical error referencing "2013." The parties have consistently agreed that the discovery date was in 2012.

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As the Court of Appeals explained, "[t]he petition currently at issue is petitioner's second. She previously filed for post-conviction relief in 1999, after the completion of the direct appeal in her underlying criminal case. That petition for post-conviction relief was denied in 2001." *Eklof*, 273 Or App at 791. As relevant here, petitioner raised two grounds for relief in her current petition:

> "(1) that the prosecution withheld material exculpatory evidence in violation of its disclosure obligations under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as recognized by the Supreme Court in *Brady* * * * (2) that trial counsel was inadequate and ineffective under Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution for not objecting to the 'natural and probable consequences' jury instruction that the Oregon Supreme Court later invalidated in *State v. Lopez-Minjarez*, 350 Or 576, 260 P3d 439 (2011) * * *."

Id.

The Court of Appeals concluded that the allegations contained in the petition sufficiently alleged ultimate facts to state a ground for relief based on a *Brad*y violation in a successive and untimely petition. *Eklof*, 273 Or App at 794 n 5. Petitioner "adequately pleaded that the *Brady* ground for relief falls within the escape clause; it alleged that the facts underlying petitioner's claim were not disclosed to any lawyer representing petitioner until 2012." *Id*.

The state responded to the grounds for relief raised in the petition by filing an answer that asserted the affirmative defenses of *res judicata*, ORS 138.550(3),

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and statute of limitations, ORS 138.510(3). TCF 90-95. The state raised those same affirmative defenses in its motion for summary judgment. ER-11-14. The state did not challenge the truth of petitioner's allegations in her petition that the state had not previously disclosed the information at issue or that petitioner first discovered the evidence in 2012. *Id.* Instead, the state argued that even if those facts were true, she was not entitled to relief because her claims did not fall within the escape clauses contained in ORS 138.550(3) or ORS 138.510(3). ER-11-14.

The state's motion focused on alleged deficiencies in petitioner's Second Amended Petition. Specifically, that she had not sufficiently alleged ultimate facts to meet the escape clauses contained in ORS 138.510(3) and ORS 138.550(3). With regard to ORS 138.510(3), the statute of limitations, the state asserted that "petitioner has not alleged ultimate facts showing that she was reasonably unable, during her first post-conviction proceeding, to complain about * * * police reports or impeachment material which were allegedly not obtained by her underlying criminal defense counsel or withheld by a prosecutor." ER-12.

Similarly, with regard to ORS 138.550(3), the successive petition bar, the state asserted that petitioner had not "alleged any ultimate facts demonstrating that she was reasonably unable, during the pendency of her first post-conviction proceeding in 1999-2000, to discover that impeachment material was allegedly

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withheld by a prosecutor or not made available to petitioner's underlying defense counsel in 1995." ER-12. The state concluded that "[t]here are no genuine issues of material fact about any of these *pleading deficiencies*." ER-13 (emphasis added). The state did not produce or cite to any evidence in its motion supporting those assertions. ER-11-14.

Petitioner submitted a written response to the state's motion. ER-15-18. In that response, petitioner described evidence that she had recently obtained and explained why she had not obtained the evidence prior to 2012:

> "These materials first became known to the Petitioner through the cooperation of the post-conviction attorney for Jeffry Andy It turned out that there were two files in the Lane County DA office which were of concern. First, the Jeffry file and second, the Karlyn Eklof file. There were two different prosecutors, one for each file. The two defendants had separate jury trials. The information regarding John and David was not contained in the Eklof file, but was included in the file. It was not until about March 1, 2012, when Andy provided [it] to Petitioner's post-conviction attorney that this material became known."

ER-16.

Petitioner supported her assertions by producing evidence and by explaining the significance of that evidence to the court. TCF 101-123 (evidence submitted). She attached (1) affidavits from petitioner's criminal defense trial attorneys, John Kolego (ER-19-21) and Jeffrey Murdock (ER-22-23); (2) a declaration from

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Investigator Jose DeLeon (ER-24-25); and (3) the newly discovered *Brady* evidence. TCF 101-123. Petitioner explained that the affidavits and declaration showed that "the report was never received by the trial attorneys" and "the trial attorneys could not have discovered the criminal history of David ER-17. Both of petitioner's criminal defense trial attorneys averred that they had not received the alleged *Brady* evidence when they represented petitioner. ER-19-23. Investigator Deleon declared that it would not have been possible to obtain criminal history during petitioner's first post-conviction proceeding unless the state had disclosed it. ER-25.

At the hearing on the motion for summary judgement, the state confirmed that the only issues raised in its motion were solely "legal." Tr 5. Based on that representation, post-conviction trial counsel waived petitioner's personal appearance at the hearing. Tr 5-6. After the hearing the trial court granted the state's motion for summary judgment in a written order. ER-26-27. That order provides in part:

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

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> first post-conviction proceeding, was reasonably unable to raise the issues she is now attempting to raise in the current post-conviction proceeding[.]"

ER-27.

Petitioner appealed and assigned error to the trial court's grant of summary judgment. Appellant's Opening Brief (AOB) at 14. Petitioner argued that the escape clauses reduced to a single question and that she could not reasonably have raised her ground for relief at an earlier time because she did not have the evidence at issue until 2012 when she filed her current petition. AOB at 17-22. Alternatively, petitioner argued that if the procedural do not permit her to reach the merits of her *Brady* claim then they violate the Due Process Clause. AOB at 23-26.

In its answering brief the state assumed the truth of the allegations in the petition. Ans Br at 2-5. For example it wrote "[f]or the purposes of summary-judgment motion, defendant merely assumed *arguendo* that those records [the alleged newly discovered *Brady* evidence] were not properly disclosed to [petitioner] and that she suffered prejudice, as she had alleged." Ans Br at 2 n 1. The state argued that petitioner had not shown that she could not have obtained the evidence at trial or during her first post-conviction proceedings. Ans Br at 7-16. The state also responded to petitioner's due process argument. *Id.*

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The Court of Appeals affirmed the trial court's grant of summary judgment on an issue not briefed by the parties: its interpretation of ORCP 47 C, informed by *Verduzco v. State of Oregon*, 357 Or 553, 565-66, 355 P3d 902 (2015). *Eklof*, 273 Or App at 793. The court concluded that under *Verduzco* petitioner

> "had to show 'that the facts on which [her] new grounds for relief depend[ ] could not reasonably have been discovered sooner.' To make that showing, she had to demonstrate both that the facts on which the new grounds for relief depend were not known to her (or her post-conviction lawyer) at the time of her first post-conviction proceeding and that it was reasonable for her not to have discovered them at that time."

Id. (citing *Verduzco*, 357 Or at 566). The court concluded that "to withstand the state's motion for summary judgment, petitioner had the burden of coming forward with admissible evidence that would permit a reasonable factfinder to find that the escape clause applied to the *Brady* claim." *Id.* at 794. The court concluded that petitioner had not met her burden of submitting evidence and affirmed on that basis. *Id.* at 795.

Petitioner submitted a petition for reconsideration, arguing that the Court of Appeals had misconstrued ORCP 47 C and that petitioner did not have the burden of producing evidence. The Court of Appeals denied the petition because it

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concluded that a 1999 amendment to ORCP 47 C overruled this court's decision in in *Jones v. GMC*, 325 Or 404, 939 P2d 608 (1997) (*Jones II*[7]). ER-28-29.

ARGUMENT

In section I, petitioner shows that a petitioner may bring a *Brady* claim under ORS 138.530(1)(a) because a *Brady* violation is a substantial violation of the Fourteenth Amendment. In section II, petitioner shows that a *Brady* claim satisfies the escape clauses in ORS 138.510(3) and ORS 138.550(3) because a petitioner cannot reasonably raise a ground for relief based on evidence that she does not know exists. In section III, petitioner addresses the 1999 legislature's intent in amending ORCP 47 C to require the moving party to produce evidence in order to raise an issue in a motion before the burden of production shifts to the adverse party "as to which the adverse party would have the burden of persuasion at trial." ORCP 47 C.

In section IV, petitioner asserts alternative arguments, that even if she was required to produce evidence disproving the state's affirmative defenses and even if this court concludes that an issue can be raised in a motion by mere assertion, petitioner did in fact present evidence creating a genuine dispute of material fact.

[7] Because this brief discusses the Court of Appeal decision in *Jones v. GMC*, 139 Or App 244, 911 P2d 1243 (1996) (*Jones I*), petitioner refers to this court's subsequent decision in that case affirming on other grounds as *Jones II*.

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I. A petition alleging that a petitioner's convictions were obtained in violation of the Due Process Clause because the government failed to disclose evidence that is material to guilt or punishment states a ground for post-conviction relief pursuant to ORS 138.530(1)(a).

For the purposes of this appeal, the parties have not disputed that petitioner sufficiently alleged a valid claim for post-conviction relief pursuant to ORS 138.530(1)(a). The Court of Appeals correctly assumed in its opinion that petitioner adequately pleaded a ground for post-conviction relief. *Eklof*, 273 Or App at 794 n 5. The state has not sought review of that portion of the court's opinion. Nonetheless, petitioner sets out the following argument because this court has not previously decided the issue, and it is unclear to petitioner whether the state will argue that a *Brady* violation does not constitute a ground for post-conviction relief.

A. The text, context, and legislative history of ORS 138.530(1)(a) show that the legislature intended to permit a petitioner to obtain relief based on a violation of the Fourteenth Amendment as interpreted in *Brady*.

This court must interpret ORS 138.530(1)(a) to determine whether a petition that alleges the state failed to disclose evidence that is material to guilt or punishment states a valid claim for relief. This court interprets a statute to discern the legislature's intent. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). This court examines the text in context and gives the legislative history the weight that it deems appropriate. *Id*. at 171-72. "As a part of context, this court considers,

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among other things, other provisions of the same statute, other related statutes, prior versions of the statute, and this court's decisions interpreting the statute." *Jones II*, 325 Or at 411. This court resorts to maxims of statutory construction if it finds that the legislative intent is unclear after reviewing the text, context, and legislative history. *Gaines*, 346 Or at 172-73.

ORS 138.530(1)(a), which has not been amended since its enactment in 1959, provides in relevant part:

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

Or Laws 1959, ch 636, § 3. The text plainly requires a court to grant relief based on any substantial violation of a petitioner's state or federal constitutional rights. That includes a *Brady* violation.

To be sure, the most common grounds for relief raised under this statute are inadequate and ineffective assistance of counsel, in violation of the Sixth and Fourteenth Amendments. But this court has recognized that the text of ORS 138.530(1)(a) means what it says: a petitioner is entitled to relief based on a

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substantial denial of any state or federal constitutional right in the proceedings resulting in her conviction or in the appellate review of that conviction. *Stelts v. State*, 299 Or 253, 257-61, 701 P2d 1047 (1985) (conviction reversed because petitioner's guilty plea was void under the Fourteenth Amendment to the United States Constitution); *Lyons v. Pearce*, 298 Or 554, 556-59, 694 P2d 969 (1985) (addressing invalid guilty plea claim grounded in Fourteenth Amendment separately from claim of ineffective assistance of counsel).

B. The state violates the Due Process Clause of the Fourteenth Amendment when it fails to disclose impeachment evidence that is material to guilt or punishment.

In *Brady*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 US at 87. The government's obligation to disclose favorable evidence includes an obligation to disclose impeachment evidence. *United States v. Bagley*, 473 US 667, 676, 105 S Ct 3375, 87 L Ed 2d 481 (1985).

The Supreme Court has subsequently clarified that the government is obligated to produce exculpatory and impeachment evidence regardless of whether the criminal defendant *requests* that evidence. *United States* v. *Agurs*, 427 US 97, 107, 96 S Ct 2392, 49 L Ed 2d 342 (1976); *Strickler v. Greene,* 527 US 263, 280,

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119 S Ct 1936, 144 L Ed 2d 286 (1999); *see also Banks* v. *Dretke*, 540 US 668, 696, 124 S Ct 1256, 157 L Ed 2d 1166 (2004) (holding, in interpreting the federal habeas corpus statutes, that "[a] rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process").

Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 US at 682. That standard is the same as the standard for prejudice in an ineffective assistance of counsel claim under the Sixth Amendment. *Id*; *Strickland v. Washington*, 466 US 668, 694, 104 S Ct 2052, 80 L Ed 2d 674(1984). A prejudicial violation of a constitutional right is a substantial violation of that right under ORS 138.530(1)(a). *Moen v. Peterson*, 312 Or 503, 513, 824 P2d 404 (1991).

C. Here, petitioner adequately alleged that the evidence first discovered by petitioner in 2012 was "material" under *Brady* and thus she stated a ground for relief pursuant to ORS 138.530(1)(a).

The Court of Appeals properly concluded that petitioner alleged a substantial violation of her Fourteenth Amendment rights under ORS 138.530(1)(a). Petitioner alleged that she first discovered the and evidence in 2012. ER-5. She also alleged facts that if believed establish that the

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newly discovered evidence was material and prejudicial. ER-5-6. As explained above, those allegations state a ground for post-conviction relief.

The state has also recognized that petitioner adequately pleaded a *Brady* claim, at least thus far in this litigation. In its motion for summary judgment, the state did not dispute that the evidence first discovered by petitioner in 2012 was prejudicial. ER-11-14. Similarly, before the Court of Appeals the state acknowledged that under the standard of review, it must assume that the evidence was prejudicial. Ans Br at 4 n 2.

II. A petitioner meets the escape clauses contained in ORS 138.550(3) and ORS 138.510(3) if the ground for relief asserted is based on evidence that the petitioner did not know existed until she filed her untimely and successive petition.

A. The legislature intended the identically worded escape clauses contained in ORS 138.550(3) and ORS 138.510(3) to require a court to determine whether a ground for relief reasonably could have been raised at an earlier time.

In the present case, the newly discovered *Brady* evidence was discovered in 2012, after the two-year statute of limitations in ORS 138.510(3) had run and after petitioner's first post-conviction proceedings had concluded. Whether petitioner met the identically worded escape clauses in ORS 138.510(3) and ORS 138.550(3) based on newly discovered *Brady* evidence is the main contested issue in this appeal.

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i. The text of the escape clauses contained in ORS 138.550(3) and ORS 138.510(3) are identical.

Both ORS 138.510(3)[8] and 138.550(3)[9] contain "identically worded" escape clauses. *Verduzco,* 357 Or at 564-65. Those escape clauses provide that a court cannot grant relief on a successive or untimely ground for relief "unless the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or amended petition." ORS 138.510(3); ORS 138.550(3).

The text of ORS 138.510(3) and ORS 138.550(3) provide that the relevant time for deciding whether a ground for relief "could not reasonably have been raised" is the time when the "original or amended petition" was filed. ORS 138.510(3); ORS 138.550(3). That is true for both statutes. That is, the relevant

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[8] That statue provides in part: "A petition pursuant to ORS 138.510 to 138.680 must be filed within two years of the following, unless the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or amended petition: * * *."

[9] That statue provides in part:

> "All grounds for relief claimed by petitioner in a petition pursuant to ORS 138.510 to 138.680 must be asserted in the original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition. * * *"

inquiry for the statute of limitations defense, ORS 138.510(3), is not whether the petitioner could reasonably have raised the ground for relief during the statute of limitations period itself, but rather whether the ground for relief could reasonably have been raised when the "original or amended petition" was filed. ORS 138.510(3).

Thus, in *Verduzco* this court explained that when a trial court decides whether a petitioner met the escape clause to the successive petition bar in ORS 138.550(3) the question "is not whether a petitioner conceivably could have raised the grounds for relief in an earlier petition. Rather, the question is whether the petitioner reasonably could have raised those grounds for relief earlier, a question that calls for a judgment about what was 'reasonable' under the circumstances." *Verduzco*, 357 Or at 566. However, this court did not decide whether the inquiry would be the same under for the statute of limitations escape clause contained in ORS 138.510(3). That is because identically worded phrases "can have different meanings depending on differences in context and legislative history." *Id.* at 564-65. As explained below, nothing in the context or legislative history of the 1989 amendment now contained in ORS 138.510(3) suggests the legislature intended that escape clause to have a different meaning than the identically worded escape clause in ORS 138.550(3).

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ii. There is nothing in the context or legislative history suggesting that the legislature intended the escape clauses contained in ORS 138.550(3) and ORS 138.510(3) to be interpreted differently.

a. Both procedural bars codify affirmative defenses

When the Oregon legislature enacted Oregon's Post-Conviction Hearing Act (PCHA) in 1959, it included four[10] procedural bars, three of which contained identically worded escape clauses now contained in ORS 138.550(2), (3), and (4). Or Laws 1959, ch 636, §15. The legislature intended for all three of the identically worded procedural bars to codify the common law concept of *res judicata* that applied in civil cases at the time. *Johnson v Premo*, 355 Or 866, 874-76, 333 P3d 288 (2014); Jack G. Collins and Carl R. Neil, *The Oregon Postconviction-Hearing Act*, 39 Or L Rev 337, 356-59 (1960) (hereinafter "Collins and Neil") (citing *Barber v. Gladden*, 215 Or 129, 332 P2d 641 (1958)). This court has already held that the *res judicata* escape clauses contained in ORS 138.550(2) and (3) have the same meaning. *Verduzco*, 357 Or at 565.

[10] The fourth bar is contained in ORS 138.550(1). It is not identically worded but has been interpreted to codify a preservation rule like the rule that applies on direct appellate review. *North v. Cupp*, 254 Or 451, 455-56, 461 P2d 271, 273 (1969); *Verduzco*, 357 Or at 567 n 12 (*North* is "notable * * * for its conclusion that Oregon's post-conviction statutes do not permit a petitioner to raise an issue on post-conviction that the petitioner reasonably could have raised on direct appeal if he or she had made a contemporaneous objection below.").

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At the time of the 1959 enactment, the legislature would have understood, from this court's case law, that *res judicata* is an affirmative defense under the rules of civil procedure. *Wade v. Peters*, 89 Or 233, 173 P 567 (1918); *Wagner v. Savage*, 195 Or 128, 141, 244 P2d 161 (1952). An affirmative defense does not directly controvert the allegations of the claim to which it responds; instead, it alleges new facts that, if true, defeat the claim. *Buchtel v. Evans*, 21 Or 309, 312, 28 P 67 (1891); *Hubbard v. Olsen-Roe Transfer Co.*, 110 Or 618, 626–627, 224 P 636 (1924).

Similarly, in 1989, the legislature that enacted ORS 138.510(3) would have understood that a statute of limitations provides an affirmative defense. Or Laws 1989, ch 1053, § 18; ORCP 19 B (1989) (expressly listing "statute of limitations" as affirmative defense); *see also* Frederic R. Nerrill, Butterworth's *Oregon Rules of Civil Procedure Annotated* at 79-82 (1988) (same).

Accordingly, when the 1989 legislature used words identical to ORS 138.550(2) and (3) to provide the escape clause for the affirmative defense of the statute of limitations now contained in ORS 138.510(3), it would have understood that this court would interpret and apply those words in the same way that it has historically treated the affirmative defenses of *res judicata* and statute of limitations under the Oregon rules of civil procedure.

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b. The 1959 legislature and the 1989 legislature both intended to codify affirmative defenses to save money while balancing the due process requirement to provide a fundamentally fair process.

The 1959 legislature intended for all three of the *res judicata* procedural bars contained in ORS 138.550 to "provide a clear and workable basis for reducing the tide of post-conviction litigation to manageable proportions, while maintaining standards of fairness." Collins and Neil, 39 Or L Rev at 356; *see also Young v. Ragen*, 337 US 235, 239, 69 S Ct 1073, 93 L Ed 1333 (1949) (holding that the Illinois procedural process preventing post-conviction petitioners from obtaining a hearing on the merits of their claims was inconsistent with due process). By codifying the *res judicata* rule that applied in civil proceedings, the legislature intended to prevent "prison-lawyers" from raising "grounds" for relief that "reasonably could have been raised" earlier. 39 Or L Rev at 356.

As originally enacted, the PCHA had no statute of limitations. In 1989, the legislature enacted a 120-day statute of limitations contained in ORS 138.510(3) because it wanted "to reduce the costs of the state's indigent defense programs." *Bartz v. State*, 314 Or 353, 358, 839 P2d 217 (1992) (citing legislative history). However, "it was suggested" during hearings in the House Judiciary Subcommittee on Crime and Corrections "that, if a time limitation were adopted, it contain an exception or 'escape clause.'" *Id.* at 358-59. Thereafter, the legislature adopted the same words to codify an escape clause that it had previously used in ORS

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138.550 when codifying the affirmative defense of *res judicata*. Or Laws 1989, ch 1053, § 18.

The use of the same words continued the legislature's primary intent when enacting the PCHA to provide a "clearly defined" process for petitioners to raise claims that their convictions were obtained in violation of their federal constitutional rights. *Bartz*, 314 Or at 363 (quoting *Young*, 337 US at 239). This court should conclude that the text, context, and legislative history of ORS 138.510(3) and ORS 138.550(3) indicate that the legislature used the same words to enact affirmative defenses that mean the same thing. Specifically, the question "is not whether a petitioner conceivably could have raised the grounds for relief in an earlier petition. Rather, the question is whether the petitioner reasonably could have raised those grounds for relief earlier, a question that calls for a judgment about what was 'reasonable' under the circumstances." *Verduzco*, 357 Or at 566.

B. ORS 138.510(3) and ORS 138.550(3) codify affirmative defenses, and this court's contrary statement in *Verduzco* is erroneous.

In *Verduzco*, this court noted that ORS 138.550(3) placed the "burden on the petitioner to show that an omitted ground for relief comes within the escape clause." 357 Or at 565. That statement is inconsistent with the well-settled rules of civil procedure, which squarely place the burden of proving the affirmative defense of *res judicata* on the defendant. *Petock v. Asante Heath Sys.*, 351 Or 408,

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423, 268 P3d 579 (2011); ORCP 19 B. This court's statement in *Verduzco* was *dicta* because it was not necessary for the court's conclusion. The burden of proving whether the petitioner in *Verduzco* could reasonably have raised his claim at an earlier time was not at issue in the case. *Id.* Regardless, the statement is incorrect as a matter of law and this court should disavow it.

As explained above, at the time of enactment, the legislature would have understood that the statute of limitations contained in ORS 138.510(3), and the *res judicata* bar contained in ORS 138.550(3), would operate like affirmative defenses have historically operated under the common law and the now-codified rules of civil procedure. Under those well-settled rules, the burden of persuasion to prove an affirmative defense is on the defendant. *Keller v. Armstrong World Industries, Inc.*, 342 Or 23, 38 n 12, 147 P3d 1154 (2006) (so stating with regard to statute of limitations defense); *Petock*, 351 Or at 423 (stating same rule with regard to *res judicata*). The rules of civil procedure apply to Oregon's PCHA. *Ogle v. Nooth*, 355 Or 570, 586, 330 P 3d 572 (2014).

Indeed, in the present case, the state raised both affirmative defenses in its answer consistently with the Oregon rules of civil procedure. TCF 90-94; ORCP 19 B.

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Further, there are serious due process considerations at stake if this court continues to hold that a petitioner has the burden of disproving the state's affirmative defenses by producing evidence that she affirmatively sought out the *Brady* evidence. Such a rule is akin to a "'prosecutor may hide, defendant must seek,'" rule which was expressly found to be untenable under the Due Process Clause. *Banks*, 540 US at 696. Those due process concerns are addressed in detail in the Oregon Innocence Project's *amicus curiae* brief and in petitioner's opening brief in the Court of Appeals. AOB at 22-26. ORAP 9.20; 5.77

In addition, the *Verduzco* rule is directly contrary to the rationale for how the burdens of production and persuasion were understood to work at the time ORS 138.510(3) and ORS 138.550 were enacted. The reason defendants have historically been required to bear the burden of proof for an affirmative defenses is that they are the party with the best access to the evidence to establish the facts necessary to prove the defense. John Henry Wigmore, 9 *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 2486 (3d ed 1940) (explaining why burden of proof is placed on the party that has access to the facts); John Henry Wigmore, 9 *Evidence in Trials at Common Law* § 2486 (rev by James H Chadbourn 1981) (same); James Fleming Jr., *Burdens of Proof*, 47 Va L Rev 51, 60 (1961) (similar). For example, in this case the state has access to things like

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discovery logs and witnesses that could establish whether the *Brady* evidence at issue in this case was ever previously disclosed to petitioner.

In summary, there is nothing in the text, context, or legislative history of ORS 138.510(3) or ORS 138.550(3) that establishes that the legislature intended for these affirmative defenses to operate differently than the same affirmative defenses in other civil cases.

Alternatively, if this court concludes that its statement in *Verduzco* is a correct statement of the law, then this court should remand so that the parties can proceed under the new *Verduzco* rule, which was decided by this court during the pendency of this appeal. *See Green v. Franke*, 357 Or 301, 320, 350 P3d 188 (2015) (remanding because "[n]either the post-conviction court nor the Court of Appeals had the benefit of this court's decision" which was published during the pendency of the appeal.). In the trial court, the parties would not have understood that petitioner had to prove the affirmative defenses, as illustrated by the state's assertion of those defenses in its answer.

C. Information is not reasonably available to a petitioner if (1) the petitioner had no reason to know that the information existed, or (2) the petitioner had no reasonable ability to obtain the information at the time her original petition was filed.

When deciding whether a petitioner meets the escape clauses the question "is not whether a petitioner conceivably could have raised the grounds for relief in

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an earlier petition. Rather, the question is whether the petitioner reasonably could have raised those grounds for relief earlier, a question that calls for a judgment about what was 'reasonable' under the circumstances." *Verduzco*, 357 Or at 566. Depending on the circumstances of the case, a ground for relief could theoretically satisfy the escape clause in ORS 138.550(3) if it is based on new case law. *Verduzco*, 357 Or at 571 (adopting the test from *Long v. Armenakis*, 166 Or App 94, 101, 999 P2d 461 (2000), for ORS 138.510(3) and applying without modification to ORS 138.550(3)).

Similarly, when a ground for relief is based on the discovery of new evidence the question is whether the ground for relief involved "information that did not exist or was not reasonably available" to the petitioner when he filed his original petition. *Bartz*, 314 Or 359. In *Bartz*, the petitioner's claim was based on a criminal statute "the existence of which was reasonably available to the petitioner" when he was convicted at trial. *Id.* at 360. This court reasoned that "[i]t is a basic assumption of the legal system that the *ordinary means* by which the legislature publishes and makes available its enactments are sufficient to inform persons of statutes that are relevant to them." *Id.* at 360-61 (emphasis added).

Since *Bartz* was decided, this court has not addressed when new facts might satisfy the escape clauses. In the twenty-plus years since *Bartz* was decided, the

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Court of Appeals has found a single fact pattern that it concluded met the escape clause in ORS 138.510(3). *Keerins v. Schiedler*, 132 Or App 560, 562-64, 889 P2d 385 (1995).

In *Keerins*, the petitioner alleged that his untimely post-conviction petition should be allowed because "'he had directed his trial attorney * * * to file an appeal and he did not learn that his attorney had not done so until after the limitations period had run." 132 Or App at 562. At the time, the Court of Appeals concluded that "[i]nformation as to whether a case is pending before the Court of Appeals" is not readily available to the public by *ordinary means*. *Id.* at 564 (relying on *Brown v. Baldwin*, 131 Or App 356, 360, 885 P2d 707 (1994), emphasis added). Accordingly, viewing the record in the light most favorable to the petitioner the court concluded that his claim met the escape clause contained in ORS 138.510(3). *Id.*

In summary, this court's rule from *Verduzco* provides a framework for evaluating grounds for relief based on newly discovered evidence when those grounds are raised in a late and successive petition. "The question is whether the petitioner reasonably could have raised those grounds for relief earlier, a question that calls for a judgment about what was 'reasonable' under the circumstances." *Verduzco*, 357 Or at 566. Whether information was "reasonably available under

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the circumstances" must be decided on a case-by-case basis. Case law from this court and the Court of Appeals identify at least two factors relevant to the analysis. First, whether, as in *Bartz*, a petitioner could reasonably be expected to know where to look for the information. *Bartz* suggests that a petitioner cannot reasonably be expected to know where to look for information if she is unaware that the information "exist[s]." 315 Or at 359. Second, as in *Keerins*, even if the petitioner may have known where to find the information, whether the petitioner would have been able to obtain that information by ordinary means.

That understanding of ORS 138.510(3) and ORS 138.550(3) is consistent with the 1959 and 1989 legislatures' intents of balancing the policy interest of cutting back on the number of claims that may be raised in post-conviction relief based on newly discovered evidence, with providing a fundamentally fair process as required by *Young*. In operation, this rule imposes reasonable limits on late or successive grounds for relief. In the context of a *Brady* claim, for example, if newly discovered evidence is not "material," then it is not prejudicial or substantial under *Brady* and ORS 138.530(1)(a). As such, merely discovering additional evidence of a ground for relief that was previously raised on direct appeal would not entitle a petitioner to relief. *See Freeman v. Gladden*, 236 Or 137, 139, 387 P2d 360 (1963) (so holding).

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Similarly, if a petitioner knew where the information was located but chose not to obtain the information, even though she could have obtained it by ordinary means, the "new" evidence would not satisfy the escape clauses. For example, if a petitioner were to raise a ground for relief in a late and successive petition based on "newly discovered" *Brady* evidence, but the substance of that evidence was previously known to the petitioner at trial or during the first post-conviction proceedings, then that "newly" discovered evidence would not satisfy the escape clause. That is because the petitioner both knew that the evidence existed and because it was available by ordinary means; the ground reasonably could have been raised.

D. A rule that requires a petitioner to disprove the state's affirmative defense by producing evidence showing that the petitioner was "reasonably diligent" is untenable when applied to *Brady* evidence.

Petitioner anticipates that the state will rely on this court's statement in *Verduzco* to argue that petitioner had the burden of producing evidence to disprove the state's affirmative defenses. 357 Or at 565. Additionally, petitioner anticipates that the state will argue that petitioner could have obtained the *Brady* evidence at issue in this appeal during her first post-conviction proceedings through "reasonable diligence." *Verduzco*, 357 Or at 566 (quoting *OR-OSHA v. CBI Services, Inc.*, 356 Or 577, 591, 341 P3d 701 (2014); *see also Cunningham v. Premo*, 278 Or App 106, 122-23, __ P3d __ (2016) (relying on *Verduzco* and

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applying "due diligence" standard in context of *Brady* evidence). There are several reasons that argument is incorrect.

First, such a reasonable diligence rule turns the rule from *Brady* on its head. *Brady* evidence is unique in how it interacts with the escape clauses contained in ORS 138.550(3) and ORS 138.510(3). By definition, *Brady* evidence is information that is in the government's control *and* a criminal defendant is unaware of its existence. That is why the United States Supreme Court has held that "[a] rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 US at 696.

The Due Process Clause requires the government to disclose material information to a defendant. A *Brady* violation occurs when the government has material information in its possession and fails *to disclose* that information to the defendant regardless of whether the defendant requested the information. *Strickler*, 527 US at 280; *Agurs*, 427 US at 107. If the information had been disclosed there would be no *Brady* violation and therefore no viable claim under Oregon's PCHA.

Second, petitioner acknowledges that it is theoretically possible that she could have stumbled across the *Brady* evidence during her first post-conviction

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proceeding. It would have been unreasonable, however, for petitioner to presume that the state committed a *Brady* violation. Even if petitioner had made that presumption in her first post-conviction proceeding, she would have had to correctly guess where the undisclosed evidence was located. Because the state failed to comply with its affirmative obligation to disclose the evidence, petitioner could not reasonably have discovered it during her first post-conviction proceeding because she had no idea where to look for it.

Third, such an argument would be tantamount to the "hide and seek" rule that the United States Supreme Court has rejected in federal habeas corpus because such a rule is inconsistent with the Due Process Clause. *Banks*, 540 US at 696. A reasonable diligence rule imposed on a *Brady* claim violates the fundamental constitutional principles underlying *Brady* and its progeny.

Fourth, a rule that places the burden on the petitioner to prove a negative by submitting evidence establishing that she could not reasonably have discovered *Brady* evidence earlier ignores the fact that the state is in the best position to produce evidence regarding when or whether the state previously disclosed the information at issue. For example, the state would have access to its own discovery logs and employees who could provide evidence about whether the information at issue in this appeal was previously disclosed. Placing that burden

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on the state is reasonable. It is consistent with the reason for how the burdens of proof have historically been allocated and why the defendant has the burden of proving an affirmative defense under the rules of civil procedure.

E. Petitioner meets the escape clauses because there is no evidence in this record that petitioner was aware that the *Brady* evidence existed until she discovered it in 2012.

This court should conclude that petitioner adequately pleaded a claim for relief under *Brady* and that she meets the escape clauses contained in ORS 138.510(3) and ORS 138.550(3) because she had no reasonable way of knowing that a *Brady* violation occurred until 2012. The Court of Appeals reached a similar conclusion. *Eklof*, 273 Or App at 794 n 5 ("[P]etitioner adequately pleaded that the *Brady* ground for relief falls within the escape clause; it alleged that the facts underlying petitioner's claim were not disclosed to any lawyer representing petitioner until 2012.").

If this court agrees with that conclusion and petitioner's argument that ORS 138.510(3) and ORS 138.550(3) are affirmative defenses, then it is not necessary for this court to conduct any further analysis. Under *Keller* and *Petock*, the burden of proving an affirmative defense at trial is on the defendant. The state as the moving party had the burden of proving that there was no genuine dispute of material fact. Because the state did not produce any evidence, it cannot meet its

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burden of persuading the court that there is no genuine dispute of material fact. *Keller*, 342 Or at 38 n 12. In *Keller*, this court explained:

> "Because the statute of limitations is an affirmative defense, defendant has the burden of persuasion on that issue at trial. On summary judgment, a party has the burden to produce evidence on an issue as to which it has the burden of persuasion at trial. ORCP 47 C. It follows that, if no evidence exists on an issue of fact that is material to defendant's statute of limitations argument, that omission defeats that argument."

Id. (citation omitted).

There is no evidence in this record that petitioner knew that the state failed to disclose the *Brady* evidence at issue in this appeal until 2012, soon before she initiated this post-conviction proceeding. Under ORCP 47 C the state had the burden of producing such evidence. Accordingly, under *Keller* and petitioner's proposed rule, she meets the escape clauses contained in ORS 138.510(3) and ORS 138.550(3). This court can reverse for those reasons alone. If this court disagrees, then it is necessary for this court to interpret the 1999 amendment ORCP 47 C.

III. In 1999 the legislature amended ORCP 47 C with the intent of adding a burden of production shifting rule like the rule that applied under FRCP 56.

A. The text and context of the 1999 amendment to ORCP 47 C.

In 1999, the legislature added the following text to ORCP 47 C:

> "The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. The adverse party may satisfy the burden

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> of producing evidence with an affidavit or a declaration under section E of this rule."

Or Laws 1999, ch 815, § 1. The text of the amendment makes clear that the burden of producing evidence shifts to the adverse party on *any issue raised in the motion* for summary judgment on which the "adverse party would have the burden of persuasion at trial." ORCP 47 C. The text leaves unclear, however, how a party moving for summary judgment *raises an issue in a motion.*

As a starting point, this court has made clear that the word "motion" refers to the initial motion for summary judgment itself and not, for example, a reply memorandum. *Two Two v. Fujitec Am., Inc.,* 355 Or 319, 325, 325 P3d 707 (2014) ("defendant did not 'raise [the issue] in the motion' * * *[i]nstead, defendant first raised the [issue]* * * in its reply memorandum."). The only issues that a court should decide on a summary judgment motion are the issues that are expressly raised in the motion itself and not some other issue that may arise at a later time. *Id.* at 326; *see also Petock*, 351 Or at 425 (issue not raised in motion because it was raised for first time on appeal). What exactly a party moving for summary judgment must do to raise an issue in a motion under ORCP 47 C is an unresolved question.

B. The legislature intended the 1999 amendment to ORCP 47 C to codify a burden of production shifting rule like FRCP 56.

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The 1999 amendment to ORCP 47 C was introduced as HB 2721 by Representative Max Williams with the express intent of "federalizing" ORCP 47 C so that it mirrored the then extant burden shifting rule under FRCP 56. Tape Recording, House Committee on Judiciary, Civil Law Committee, HB 2721, Apr 21, 1999, Tape 119, Side B (statement of Rep Max Williams); Exhibit I, House Judiciary Committee, HB 2721, Apr 21, 1999 (hereinafter "Exhibit I") at 2; *see also* Exhibit A[11], Senate Judiciary Committee, HB 2721A, May 18, 1999 (hereinafter Exhibit A) at 2.[12]

Williams testified that he introduced the bill in response to the part of this court's decision in *Jones II* that concluded that the 1995 amendment to ORCP 47 C did not codify a burden of production shifting rule like the rule in FRCP 56. Exhibit I at 4-5; Exhibit A at 4-5. He made clear that he did not disagree with this court's conclusion in *Jones II* that the 1995 amendment codified this court's prior case law on summary judgment motions, including its holding in *Seeborg v. General Motors Corporation*, 284 Or 695, 588 P2d 1100 (1978). In his view,

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[11] The first five pages of Exhibit I, which was submitted to the House Judiciary Committee, and Exhibit A, which was submitted to the Senate Judiciary Committee, appear to be identical. Exhibit I, unlike Exhibit A, also included a copy of this court's decision in *Jones II* and a hand-annotated copy of the Court of Appeals decision in *Jones I*.

[12] Pursuant to ORAP 16.50 petitioner has provided all of the exhibits to HB 2721 here.

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however, that was not the only thing the 1995 amendment accomplished. *Id.* Williams agreed with the Court of Appeals majority in *Jones I*, that the 1995 amendment was also intended to codify a burden of production shifting rule like FRCP 56. Exhibit I at 3, Exhibit A at 3. Accordingly, he introduced HB 2721 to add a burden of production shifting rule to ORCP 47 C like the burden of production shifting rule that existed under FRCP 56:

> "To make it perfectly clear, my purpose in moving this bill forward is to accomplish what the majority of the Oregon Court of Appeals [in *Jones I*] believed was accomplished by the 1995 Legislature. With its recent record of not examining the 'legislative history', it may be doubtful that any Oregon court will actually look at this testimony. However, on the off chance that legislative history might someday again rise from the dust bin of the judicial interpretation – I wish to say 'federalize' in this case means 'burden shifting' within the meaning of *Matsushita*, *Celotex* and all their progeny."

Exhibit I at 4-5; Exhibit A at 4-5. Petitioner submits that the totality of the legislative history supports only one conclusion – that the legislature intended the words "raised in the motion" to refer to FRCP 56's burden of production shifting rule.

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C. In order to raise an issue in a motion the moving party must meet its burden of production by either producing evidence or citing to evidence already in the record before the court.

i. FRCP 56's burden shifting rule as interpreted in *Jones I, Celotex*, and *Matsushita*.

The legislature intended ORCP 47 C to be interpreted consistently with how FRCP 56's burden shifting rule was interpreted in Justice Brennan's dissenting opinion in *Celotex Corp. v. Catrett*, 477 US 317, 330, 106 S Ct 2548, 477 US 317 (1986), as quoted by the Court of Appeals in *Jones I*, 139 Or App at 254-55. That rule provides:

> "'The burden of establishing the nonexistence of a 'genuine issue' is on the party moving for summary judgment. This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion which always remains on the moving party. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion unless and until the court finds that the moving party has discharged its initial burden of production.
>
> "'The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment. * * * If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence--using any of the materials specified in Rule 56 (c)--that would entitle it to a directed verdict if not controverted at trial. Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a 'genuine issue' for trial or to submit an affidavit requesting additional time for discovery.

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> "'If the burden of persuasion at trial would be on the nonmoving party, the party moving for summary judgment may satisfy Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the *nonmoving* party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.' (Some citations omitted; emphasis in original)."

Jones I, 139 Or App at 254-55 (quoting Justice Brennan's dissenting opinion in *Celotex*, 477 US at 330-31); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US at 574, 586-87, 106 S Ct 1348, 89 L Ed 2d 538 (describing how the non-moving party meets its burden of production *after* the moving party shifts the burden of production by meeting its "initial" burden of production under FRCP 56).

In 1999, the legislature would have understood that *Celotex*, and specifically Justice Brennan's dissent, illustrated how the moving party meets its initial burden of production under FRCP 56. In his testimony to the legislature, Representative Williams cited Justice Brennan's dissent in *Celotex* in two exhibits that presumably circulated to the entire legislative body. Exhibit I at 2 n 5 (House Judiciary Committee); Exhibit A at 2 n 5 (Senate Judiciary Committee). Similarly, in *Jones I*, an annotated version of which was attached to Exhibit I, the Court of Appeals

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also quoted the same portion of Justice Brennan's dissent in *Celotex* that was relied upon by Representative Williams in his testimony to the legislature. *Compare Jones I*, 139 Or App at 254-55, *with* Exhibit I at 2 n 5 *and* Exhibit A at 2 n 5. That is most likely because, as the Court of Appeals correctly noted, "Justice Brennan did not take issue in his dissent with the allocation of the burden of proof" announced by the majority opinion. *Jones I*, 134 Or App at 254 n 5.

Further, in 1999, scholars generally agreed that out of the three summary judgment cases decided by the United States Supreme Court in 1986, *Celotex,* and specifically Justice Brennan's dissent, provides the best example of how FRCP 56's burden shifting rule should be applied in practice. *See* Wright, Miller & Kane, *Federal Practice and Procedure: Civil* § 2727 at 468, 471 (3d ed 1998) (explaining that out of the three cases *Celotex* and specifically Justice Brennan's dissent provides the best example of how the moving party meets its burden of production under FRCP 56); *see also* James William Moore and Daniel R. Coquillette, *Moore's Federal Practice 3D*, § 56.40-56.42 (hereinafter "Moore's Federal") (repeatedly citing Justice Brennan's dissent as primary authority for "Burdens of Production and Persuasion" under FRCP 56).

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ii. The burden of persuasion is always on the party moving for summary judgment, but the moving party can shift the burden of production to the adverse party by producing or citing to evidence in the record.

Under FRCP 56, the burden of production begins with the party moving for summary judgment. Moore's Federal at § 56.40[1][a]. As Justice Brennan explained:

> "'The burden of establishing the nonexistence of a 'genuine issue' is on the party moving for summary judgment. This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion which always remains on the moving party."

477 US at 330. The burden of production can shift from the party moving for summary judgment to the non-moving party when the moving party meets its initial burden of production. *Celotex*, 477 US at 323 (majority opinion); Moore's Federal §56.41.

Importantly, the burden of persuasion always remains on the party moving for summary judgment. Moore's Federal § 56.42[2] ("movant has ultimate burden of persuasion"). That is also true under this court's prior interpretations of ORCP 47 C and under FRCP 56. *Jones II*, 325 Or at 420 (the burden of persuasion always remains on the party moving for summary judgment "*even as to those issues upon which the opposing party would have the trial burden*") (emphasis in original); *Celotex*, 477 US at 330 (Under FRCP 56's burden shifting rule, the

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"ultimate burden of persuasion" "always remains on the party moving for summary judgment.").

D. The moving party meets its burden of production by producing or citing to evidence in the record.

Under FRCP 56, in 1999, there were two different rules for how the moving party could meet its burden of production and those rules depended on whether the moving party had the ultimate burden of persuasion at trial. When the moving party carries the burden of persuasion at trial it can only meet its burden of production by producing evidence. Moore's Federal §56.40[1][b]. When the moving party does not have the burden of persuasion at trial, it must either produce evidence or specifically cite to an absence of evidence "on an essential element" that the nonmoving party is required to prove at trial. *Id.* As Justice Brennan noted, the "mechanics" of the second rule are "trickier." *Celotex*, 477 US at 332. Because the state never produced any evidence in this case and because petitioner does not bear the burden of disproving an affirmative defense at trial, this court need not address how the mechanics of that rule works here. In this case, the important rule is that the moving party only raises an issue in a motion by producing or citing to evidence in the record.

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E. The state failed to raise any issue in its motion because it failed to meet its burden of production by citing to or producing evidence in its motion.

In the present case, the state failed to produce or cite to any evidence in its motion for summary judgment. ER-11-14. The state therefore failed to raise any issue in its motion, as required by ORCP 47 C, because it failed to meet its initial burden of production. As such, the burden never shifted to petitioner to produce any evidence. This court can reverse and remand for this reason alone.

F. ORCP 47 C and FRCP 56 differ in two unimportant ways.

At this point, it is important to note that because the text of ORCP 47 C differs from FRCP 56 and because the text is the best evidence of the legislature's intent, the rules do have two distinct but seemingly unimportant differences. First, under ORCP 47 C the moving party can only shift the burden of production for those issues "which the adverse party would have the burden of persuasion at trial." ORCP 47 C. In contrast, FRCP 56 permitted the moving party to shift the burden of production even on those issues which the moving party would have the burden of persuasion at trial. Moore's Federal § 56.40[1][c]; *Celotex*, 477 US at 330-31. However, to meet that burden, FRCP 56 required the moving party to produce evidence. Moore's Federal § 56.40[1][c]; *Celotex*, 477 US at 330-31.

In Oregon ORCP 47 B, which provides context, makes clear that a defendant may move for summary judgment "with or without supporting affidavits or

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declarations * * *." ORCP 47 B. That is the second way the rules differ. In Oregon, the moving party does not have to produce evidence when it moves for summary judgment. ORCP 47 B. Accordingly, under ORCP 47 C a party can meet its burden of production either by producing evidence or by citing to evidence in the record.

These distinctions are not significant because the ultimate outcome remains the same under either rule. First, there is no reason to require a party to produce evidence when it files its motion when the evidence it is relying on already exists in the record before the court. Accordingly, Oregon's rule makes the common-sense observation that it is redundant to require a party to produce evidence when the evidence already exists in the record.

Second, even though the text of ORCP 47 C does not permit a moving party to shift the burden of production on issues for which the moving party carries the burden of persuasion at trial, the ultimate outcome remains the same under ORCP 47 C and FRCP 56. For example, in this case if the state had produced evidence of its affirmative defense, like discovery logs or an affidavit from a prosecutor stating that the evidence was previously disclosed, then the burden of production would not have shifted to petitioner because the defendant always carries the burden of persuasion at trial for an affirmative defense. *Keller*, 342 Or at 38 n 12; *Petock*,

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351 Or at 423. However, unless petitioner produced contradictory evidence, the state in this hypothetical would have met its burden of persuading the court that there was no dispute of material fact. That is because the undisputed evidence in the record would persuade a reasonable juror that the state had complied with its discovery obligations and therefore no *Brady* violation occurred. Accordingly, although ORCP 47 C and FRCP 57 differ in two ways, those distinctions are not meaningful because the ultimate outcome under either rule remains the same.

G. If the moving party fails to meet its burden of production a court should dismiss the motion.

When the moving party fails to meet its burden of production by producing or citing to evidence in the record a court should deny the motion because the party has failed to establish that there is no genuine dispute of material fact. Moore's Federal 56.40[1][d]; *Celotex*, 477 US at 331 ("The court need not decide whether the moving party has satisfied its ultimate burden of persuasion unless and until the court finds that the moving party has discharged its initial burden of production.").

This rule illustrates the two-part burden that a party moving for summary judgment must always meet, "'[t]he moving party has the burden of showing [1] that there are no genuine issues of material fact and [2] that he or she is entitled to judgment as a matter of law.'" *Jones II*, 325 Or at 420 (quoting *Seeborg*, 284 Or at 699). If a party moving for summary judgment fails to meet its burden of

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production, then it is axiomatic that it has failed to meet its burden to show that there is no genuine dispute of material fact. Accordingly, in that circumstance a court can deny the motion without any further inquiry. Put another way, a court need not decide whether the evidence viewed in the light most favorable to the moving party entitles the moving party to judgment as a matter of law. That is because, in this example, the moving party has failed to meet its burden of production so there is no evidence in the record for a court to evaluate. This court appears to have reached the same conclusion in *Keller*. 342 Or at 38 n 12.

H. Because the state failed to meet its burden of production its motion should have been dismissed.

In the present case, the state failed to produce or cite to any evidence establishing that there was no genuine dispute of material fact. ER-11-14. Under *Keller* and *Celotex*, the state's motion should have been denied. This court can reverse for this reason alone.

I. Under ORCP 47 C a party moving for summary judgment cannot sustain his burden by merely making assertions in its motion.

At the time that the legislature enacted the 1999 amendment to ORCP 47 C it was undisputed that the moving party could not meet its burden of production under FRCP 56 by merely asserting in its motion that the adverse party could not prove an issue at trial. Moore's Federal § 56.40[1][b][iv]; *Celotex*, 477 US at 328, 332. As Justice Brennan explained in *Celotex*, "[p]lainly, a conclusory assertion

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that the nonmoving party has no evidence is insufficient * * *. Such a 'burden' of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment." *Id.* at 332.

J. The state's motion should have been denied because it was based on mere assertions unsupported by any evidence in the record.

The only issue raised in the state's motion was its assertion that petitioner could not meet the escape clauses contained in ORS 138.510(3) and ORS 138.550(3). ER-11-14. That is purely a legal argument unsupported by any evidence. In 1999, it was well settled that a motion based on mere assertions unsupported by any evidence should be denied. Alternatively, some jurisdictions treat a motion that is based on mere assertions like a motion to dismiss on the pleadings for failure to state a claim. *See* Wright, *Federal Practice* § 2713 (providing examples and circumstances when this procedure may be appropriate including providing notice to the parties of the court's intention); *see also* ORCP 21 A(8). However, as the Court of Appeals correctly found, the petition in this case adequately stated a claim for relief. *Eklof*, 273 Or App at 794 n 5. Accordingly, regardless of how this court treats a motion unsupported by any evidence the state's motion should have been dismissed because it was based on mere assertions.

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IV. Alternatively, even if this court concludes that petitioner had the burden of disproving the state's affirmative defenses, and even if this court concludes that the state raised a factual dispute in its motion through mere assertions, petitioner still produced sufficient evidence to create a genuine dispute of material fact.

Relying on *Verduzco*, the Court of Appeals concluded that "to withstand the state's motion for summary judgment, petitioner had the burden of coming forward with admissible evidence that would permit a reasonable factfinder to find that the escape clause applied to the *Brady* claim." *Eklof*, 273 Or App at 794. The court acknowledged that petitioner had submitted a declaration from investigator Deleon but concluded that the declaration was not sufficient for a reasonable factfinder to conclude that the *Brady* evidence at issue was not reasonably available to petitioner or her post-conviction attorney during her first post-conviction proceeding. *Id*. at 795.

That conclusion ignores the standard of review that applies under ORCP 47 C. When deciding whether to grant a motion for summary judgment a court must "view the evidence *and all reasonable inferences* that may be drawn from the evidence in the light most favorable to plaintiff, who is the party opposing the motion." *Jones II*, 325 Or at 408 (emphasis added). Viewed in the light most favorable to petitioner, the evidence on summary judgment establishes that criminal history was not provided to petitioner during her criminal trial and was not reasonably available to her during her first post-conviction proceedings.

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Petitioner's criminal defense trial attorneys, Kolego and Murdock, both averred that they received criminal history for the first time in 2012 and that the state had never disclosed this impeachment evidence during the course of petitioner's criminal trial. ER-19-23; *Eklof*, 273 Or App at 795. Investigator Deleon's declaration explained that California criminal history was not reasonably available to petitioner during her first post-conviction proceedings unless the state had disclosed it:

> "to obtain and perform a criminal history in California, an investigator had to travel to the county of which a criminal history was being requested. California did not have a system available to the public such as OJIN. Therefore, without the aid of a law enforcement agency or District Attorney's Office, a complete and through [*sic*] criminal history check on a witness from California could not be performed."

ER-25.

A reasonable inference from this evidence is that California criminal history was not in petitioner's possession until 2012 and was not reasonably available to her during her first post-conviction proceedings. In order to have obtained California criminal history during her first post-conviction proceedings petitioner would have had to have correctly guessed (1) that the state had violated its statutory and constitutional obligations to disclose criminal history; (2) that had impeachable convictions in California; and (3) the

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county in which he had been convicted. Viewing the evidence in this record in the light most favorable to petitioner, with all reasonable inferences in her favor, petitioner produced evidence that established a genuine dispute of material fact. For that reason alone, this court should reverse and remand.

To be sure, this evidence does not speak to when the police reports regarding were discovered by petitioner. Kolego and Murdock's affidavits make it clear that that evidence was not disclosed during the course of petitioner's criminal trial. ER-19-23. As the Court of Appeals noted, petitioner did not submit evidence on summary judgment about whether the police reports were reasonably available to her during her first post-conviction proceeding. However, that failure, if it is one, is easily explained.

The state did not raise any factual disputes in its motion for summary judgment. ER-11-14. Instead, the focus of the state's motion was on alleged deficiencies in petitioner's pleadings. *Id.* The state argued that petitioner's pleadings did not allege facts that met the escape clauses in ORS 138.510(1) and ORS 138.550(3). *Id.* Those are legal arguments. At the hearing on its motion, the state confirmed that the only issues raised in its motion were solely "legal." Tr 5. Petitioner's post-conviction trial attorney relied upon that representation when he agreed to proceed with the hearing without petitioner personally present. Tr 5-6.

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If petitioner had known that the state's motion involved anything other than "solely issues of law," then her appearance would have been mandated by ORS 138.620(1)[13]. Further, if petitioner had known that the state was disputing a material fact—when she discovered or reasonably could have discovered the *Brady* evidence at issue—then she could have testified consistently with the allegations in her petition or she could have submitted an affidavit, as the Court of Appeals suggested in its opinion. *Eklof*, 273 Or App at 794. Accordingly, this court should not affirm on this record, as it would have developed differently if petitioner had known that there was a factual dispute regarding when she discovered the *Brady* evidence at issue in this case. *Petock*, 351 Or at 425 (deciding not to affirm a grant of summary judgment for defendant because record may have developed

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[13] That statute provides:

> "After the response of the defendant to the petition, the court shall proceed to a hearing on the issues raised. If the defendant's response is by demurrer or *motion raising solely issues of law*, the circuit court need not order that petitioner be present at such hearing, as long as petitioner is represented at the hearing by counsel. At the hearing upon issues raised by any other response, the circuit court shall order that petitioner be present. Whenever the court orders that petitioner be present at the hearing, the court may order that petitioner appear by telephone or other communication device as provided in ORS 138.622 rather than in person."

(Emphasis added.)

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differently under *Outdoor Media Dimensions v. State*, 331 Or 634, 659-60, 20 P3d 180 (2001)).

CONCLUSION

This court should hold that a ground for relief that based on newly discovered *Brady* evidence meets the escape clauses contained in Oregon's PCHA. This court should reverse and remand so the parties can reach the merits of petitioner's *Brady* claim. That is what is required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

DATED July 1, 2016

Respectfully Submitted,

/s/ Jason Weber

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) that the word count of this brief (as described in ORAP 5.05(2)(b)) is 12,998 words.

Type Size

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

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Opening Brief to be filed with the Appellate Court Administrator, Appellate Courts Records section, 1163 State Street, Salem, OR 97301.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Appellant's Opening Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Timothy Sylwester, #813914, Solicitor General, attorney for Defendant-Respondent.

DATED July 1, 2016

Respectfully Submitted,

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