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IN THE SUPREME COURT OF THE STATE OF OREGON

JASON VAN BRUMWELL, Petitioner-Relator, v. JEFF PREMO, Superintendent, Oregon State Penitentiary Defendant-Adverse Party.	Marion County Circuit Court Case No. 12C11135 Supreme Court Case No. S060980
CHRISTIAN M. LONGO, Petitioner-Relator, v. JEFF PREMO, Superintendent, Oregon State Penitentiary Defendant-Adverse Party.	Marion County Circuit Court Case No. 07C21285 Supreme Court Case No. S061072

BRIEF OF *AMICUS CURIAE* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS-RELATORS

Mandamus Proceedings Regarding Circuit Court's Failure to Perform the Acts Required by This Court's Writs Both Dated June 20, 2013
Honorable Thomas Hart, Judge

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BRIEF OF *AMICUS CURIAE* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS-RELATORS

INTRODUCTION

The need for trust between a criminal defense lawyer and her client is a truism in the practice of criminal defense. In pursuit of such trust, criminal defense counsel regularly must have the following difficult but crucial conversation with new clients who often are both skeptical and suspicious of their attorney:

> "[HYPOTHETICAL DEFENSE COUNSEL:] Hello. I am your attorney. Thanks for hiring me. [{*OR*} It is nice to meet you.] You are being charged by the State of Oregon with committing some crimes. I know we don't really know each other, but, rest assured, I am working on your behalf and will work to get you the best possible result from this admittedly unfortunate situation.
>
> "Now, to do a good job representing you, you **have** to trust me. You are going to **have** to feel okay sharing secrets and embarrassing information with me. You **need** to tell me about crimes you have committed [or, at least, crimes that a prosecutor or police officer hypothetically would think you may have committed].
>
> "Don't worry. You can trust me for the following reasons. First, anything you privately tell me or my staff — or anything we discover through our defense investigation — will be strictly confidential unless **you** choose to disclose those secrets. Unlike other people that you talk to about your case, no one can force me to be a witness against you. And second, I am a professional. It is my job to represent you. In fact, if I do a bad job representing you or indeed you believe that I am actually

> working against your interests[1], you can file a court case (often for free or at little cost) that says I committed malpractice and/or was constitutionally ineffective or inadequate. Those are two ways you can hold me accountable and to make sure that you get to enjoy your right to counsel."

That difficult but important conversation is inherent to the practice of criminal defense. Neither a criminal defendant nor defense counsel can — nor should they — avoid that conversation. However, depending on the outcome of these above-captioned cases, that conversation could become much more problematic.

Amicus Curiae Oregon Criminal Defense Lawyers Association (OCDLA) writes to urge the Court not to adopt a rule of law that will force defense counsel to add the following less-than-inspiring caveats to the above already-difficult conversation:

> "Now, I have to warn you though, because of some case law, if you do file a court case that says I committed malpractice or was constitutionally ineffective or inadequate, you will be deemed by the courts and by the State of Oregon to have chosen to disclose **all** of the secrets or information that you told me or I have learned. And, no, you cannot limit the waiver not to certain secrets or certain information. They can even force me and my staff to be witnesses against you. But, don't worry about that. You should still trust me to do a good job **and** to safeguard your secrets and confidential information; that is, unless you file a suit challenging my representation, of course.
>
> "Well, ok, after I answer any questions you may have about the above issues, let's finally talk about what the State says you did * * *."

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[1] Many indigent clients unfortunately believe that court-appointed attorneys are in fact working on behalf of the state and law enforcement and are not working for the client.

Simply put, the addition of the above caveat would result in a great weakening of trust between a criminal defense lawyer and her clients.

Amicus ODCLA writes to advocate for a rule of law that does not undermine the criminal defense lawyer-client relationship. To do so, this Court should require circuit courts to recognize only a limited waiver of an attorney-client privilege in post-conviction relief proceedings where any waiver is limited to facts relevant and probative of the post-conviction relief claims as raised by the petitioner (and, of course, any permissible defenses to those claims). Furthermore, this Court should require circuit courts to take adequate steps — *e.g.*, issuing a suitable protective order — upon the request of the parties to protect and restrict the scope of use of any disclosed but otherwise privileged and confidential lawyer-client information. To that end, this Court should exercise its mandamus powers to direct the circuit court to comply with this Court's June 20, 2013, writs in both the above-captioned cases.

STATEMENT OF THE CASE

OCDLA accepts the petitioners-relators' statements of the cases.

ARGUMENT IN SUPPORT OF PETITIONERS-RELATORS

Amicus OCDLA writes to illustrate some of the practical difficulties that would arise for criminal defendants and defense counsel if the circuit court's rulings are allowed to stand. Part I explains how the circuit court's rulings undermine traditional and legally mandated criminal defense lawyer-defendant

confidentiality. Part II explains how the circuit court's rulings discourage the use of the post-conviction relief process to ensure that defense counsel (and through them the State) are providing constitutionally adequate and effective representation. And, part III explains why the above two considerations are particularly problematic in the context of death penalty cases (of which type the present two cases are).

I. The circuit court's rulings undermine the traditional, statutorily, and constitutionally mandated criminal defense lawyer-defendant privilege to protect the defendant's confidences and information.

The protection of lawyer-client secrets is a privilege that is found within and protected by many traditional sources of law and legal custom, including common law, statute, legal professional rules of conduct, and constitutional provision. The protection of lawyer-client confidences is an ancient privilege found in old English common law as well as in the traditions of the continental "civil code" jurisdictions. *In re Illidge*, 162 Or 393, 403-05, 91 P2d 1100 (1939) (so explaining); *see also Upjohn Co. v. United States*, 449 US 383, 101 S Ct 677, 66 L Ed 2d 584 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law").

Currently, the privilege to protect lawyer-client secrets is protected in Oregon by statute and by professional rule. ORS 9.460(3) ("An attorney shall * * * [m]aintain the confidences and secrets of the attorney's clients consistent with the rules of professional conduct * * *"); ORS 40.225 (OEC Rule 503).

See Oregon Rule of Professional Responsibility 1.6 (mandating a lawyer's protection of her client's confidentiality).

Indeed, the protection of **criminal defense** lawyer-client secrets is mandated by the state constitution. *State v. Durbin*, 335 Or 183, 190, 63 P3d 576 (2003) (explaining that Article I, section 11, of the Oregon Constitution provides that a "defendant's right to counsel include[s] the right to confer privately with counsel and that [an] invocation of the right to counsel [is] sufficient to request an opportunity to confer privately").[2]

That privilege can be found in so many sources of law, because it is crucial to our society's overall administration of justice. As this court explained in 1939:

> "* * * [The lawyer-client privilege]'s object was to secure the orderly administration of justice by insuring frank revelation by the client to the attorney without fear of a forced disclosure; in other words, to promote freedom of consultation. To be sure the exercise of the privilege may at times result in concealing the truth and in allowing the guilty to escape. That is an evil, however, which is considered to be outweighed by the benefit which results to the administration of justice generally."

In Re Illidge, 162 Or at 404-05. This court (somewhat more recently in 2003) reiterated a similar *pro-bono-publica* rationale for the privilege:

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[2] As well, while admittedly it is not a settled question, some jurisdictions have held that the privilege also is grounded in the Sixth Amendment of the United States Constitution. *See Bittaker v. Woodford,* 331 F3d 715, 724 n 7 (2003) (declining to squarely address the question but noting that "doing away with the privilege in all criminal cases would raise a nontrivial question whether defendants would still be getting effective assistance" and collecting cases from various jurisdictions that so hold or otherwise).

> "When one seeks legal advice, the protections of the lawyer-client privilege are implicated, because appropriate legal advice requires frank communication between the client and the lawyer. As this court has recognized, 'The purpose of the * * * privilege '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.'" *State ex rel OHSU* v. *Haas*, 325 Or 492, 500, 942 P 2d 261 (1997) (*quoting Upjohn Co. v. United States*, 449 US 383, 389, 101 S Ct 677, 66 L Ed 2d 584 (1981)).

Durbin, 335 Or at 190. Of course, it is axiomatic that the privilege is also of great benefit to individual clients and, indeed, is regarded as absolutely necessary to allow a criminal defense lawyer to adequately represent *any* citizen who is being accused of a crime. *See generally, e.g., State v. Jancsek*, 302 Or 270, 274, 730 P2d 14 (1986) ("Lawyers can act effectively **only** when fully advised of the facts by the parties whom they represent" (emphasis added)); *also Durbin*, 335 Or at 190 (noting that "appropriate legal advice **requires** frank communication between the client and the lawyer").

Here, as a practical matter, the circuit court's rulings threaten those underlying rationales for the criminal defense lawyer-client privilege. As laid out in the introduction to this brief, if this Court adopts the circuit court's rulings, a criminal defense attorney will be forced to explain to all her clients (prior to having any attorney-client conversations) that **any** client confidences **will not be protected** if the client ever chooses to file a legal claim that questions whether the lawyer provided negligent or constitutionally ineffective/inadequate representation. That is, with one breath, defense counsel

will urge an often skeptical and suspicious client[3] to trustingly tell the lawyer — a person who is almost certainly a stranger — the client's embarrassing, difficult, and perhaps inculpatory confidences. With the next breath, the lawyer ethically will then have to explain that those secrets may be disclosed to the prosecution if the client ever attempts to hold the lawyer accountable for negligent or constitutionally insufficient representation. Indeed, the lawyer should warn the client that the lawyer and her staff may, in such a situation, have to become a witness against the client. Such a situation simply does not inspire a client's trust nor does it sustain the common law, statutory, and constitutional rationale of a privilege meant "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." *Haas*, 325 Or at 500 (*quoting Upjohn Co.*, 449 US at 389).

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[3] Indigent clients who cannot choose their court-appointed attorneys can be exceptionally skeptical and suspicious. For many such clients, their appointed attorney is simply another "professional" who is more often than not from a very different socio-economic background and is a person of whom the client is unsure and of whom the client has little to no personal reason to trust. As well, because of the rapid pace at which criminal cases must advance, and the "efficient" manner in which an indigent court-appointed attorney is required to perform, it is often simply impossible for a newly appointed attorney to timely **earn** a new client's trust as opposed to demanding or at least requesting it.

II. The circuit court's rulings discourage the use of the post-conviction relief process to ensure that defense counsel (and through them the State) are providing constitutionally adequate and effective representation.

In addition to undermining the lawyer-client relationship, the circuit court's rulings have the practical effect of discouraging criminal defendants from using post-conviction relief proceedings to vindicate their state and federal rights to effective and adequate counsel.

In Oregon, post-conviction relief proceedings allow criminal defendants to challenge an underlying criminal conviction or sentence by proving, *inter alia*, a legal claim that there was

> "[a] substantial denial in the proceedings resulting in petitioners conviction, or in the appellate review thereof, of petitioners 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."

ORS 138.530(1)(a). Most commonly, such claims refer to a constitutional lack of adequate or effective trial and appellate counsel.

As discussed above, to be adequate and effective, criminal defense lawyers **must** seek to foster frank and open communication with a criminal defense client. As this Court has noted, "[w]hen one seeks legal advice, the protections of the lawyer-client privilege are implicated, because appropriate legal advice **requires** frank communication between the client and the lawyer." *Durbin*, 335 Or at 190 (emphasis added); *Jancsek*, 302 Or at 274 ("Lawyers can act effectively **only** when fully advised of the facts by the parties whom they

represent" (emphasis added)). As such, it is a truism that almost any criminal defense lawyer-client relationship will involve the disclosure (and expected safeguarding) of a client's secrets.

If this Court adopts the circuit court's rulings as the law, all potential post-conviction relief petitioners will have to come to terms with the fact that the filing of a post-conviction relief action will necessarily involve the disclosure to the State of Oregon of **all** the confidences that the client shared with, or gathered by, trial and appellate counsel. That is because discovery of the full defense file and a full debriefing or deposition of former defense counsel would almost certainly become a matter of course in any Department of Justice post-conviction relief defense. If the law allowed (and required former defense counsel to submit to) such wide discovery, any Department of Justice attorney defending a post-conviction relief action would be remiss in not fully exploiting the full scope of previously-confidential disclosures between a criminal defendant and his lawyers.

The overall practical outcome of adopting the circuit court's rulings will certainly be that some potential post-conviction relief petitioners (including potentially successful ones) will choose to not file for post-conviction relief, and, subsequently, some defense counsel (and through them the State of Oregon) will not be held accountable for the provision of negligent, inadequate, or ineffective assistance of counsel. That outcome does no service to the

parties, the community, the judiciary, or the criminal defense bar. As this Court recognized, the general "administration of justice" societal benefit of the criminal defense lawyer-client privilege in all cases outweighs the incidental costs of the privilege in specific singular cases. *In Re Illidge*, 162 Or at 404-05 (so noting).

This Court should not adopt the circuit court's rulings as the law. A strong criminal-defense lawyer privilege and the post-conviction relief process are some of the checks and balances built into our legal system that guarantee its overall effectiveness, credibility, and legitimacy to the people. The circuit court's rulings in the above-captioned cases sharply depart from that ideal.

III. The practical effects of the circuit court's rulings — *i.e.*, (1) to undermine the trust necessary for lawyer-client relationships; and (2) to discourage the pursuit of post-conviction relief to vindicate constitutional rights of counsel — are of particular concern in death penalty cases.

The two cases presently before this Court arise on mandamus from post-conviction relief proceedings in which Petitioners are challenging their death penalty convictions and/or sentences. Given the fact that the present cases are death penalty cases, the circuit court's rulings are particularly problematic.

Undermining the protection of lawyer-client confidences is particularly problematic in death penalty cases. A capital defense lawyer has a uniquely extensive duty to develop, inquire, and master intimate secrets and information

about a defendant in a death penalty case. *Ellis Declaration*, APP 1-2, at ¶ 7.[4] Indeed, capital defense counsel must extensively develop **all** client confidences and information that are relevant not only to whether or not the defendant is guilty of the crimes charged but also **all** such confidences and information relevant to sentencing mitigation. *Ellis Declaration*, APP 1-2, at ¶¶ 8,9. The scope of confidential and personal information potentially relevant for sentencing mitigation, in particular, is vast because such mitigation evidence includes any information or client confidences regarding defendant and what has been called the "diverse frailties of humankind." *Woodson v. North Carolina,* 428 US 280, 96 S Ct 2978, 49 L Ed 2d 944 (1976). *See Ellis Declaration*, APP 1-2, at ¶ 9.

A capital defense attorney's ability to do the above-described extensive investigation is largely dependent on the participation and trust of a defendant. *Ellis Declaration*, APP 1-2, at ¶¶ 8,9. Such participation and trust is, in turn, largely dependent on a defendant being assured that his confidences and personal information will be protected unless the decision is made to use the information in his defense. *Ellis Declaration*, APP 3, at ¶ 13 (explaining that "[t]he attorney-client privilege plays a vital role in obtaining the information

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[4] Accompanying this *amicus* briefing is a signed declaration under penalty of perjury by death penalty attorney Jeffrey Erwin Ellis, director of the Oregon Capital Resources Counsel. As a mandamus from a civil proceeding, the signed declaration under the penalty of perjury has the force of a notarized affidavit. ORCP 1 E.

required for competent representation in a capital case * * *Capital attorneys routinely explain that information communicated by clients is confidential and protected * * * In addition, capital defense attorneys also routinely explain the defense team and client will make joint decisions whether or not to reveal this confidential and often highly sensitive information").

Indeed, capital defense attorneys who currently represent defendants on post-conviction relief "explain to the client the scope of a waiver that results from the filing of a claim of ineffectiveness * * * Once again, the current practice mandates that capital post-conviction attorneys closely consult with their clients about what claims to bring and how to frame those claims in light of the waiver of the privilege." *Ellis Declaration*, APP 3, at ¶ 14. The circuit court's rulings make such advice erroneous, superfluous, and naive.

Adoption of the circuit court's rulings would cripple death penalty defense efforts to adequately represent defendants in capital cases. *Ellis Declaration*, APP 3, at ¶ 16. Simply put, great harm would be done to a death penalty defense team's ability to gather and develop lawyer-client confidences and information. The lawyer-client relationship would only be chilled (if it is not broken) by defense counsel's admonishment to a client that the defense counsel (or her staff) actually could be required to become a witness against the defendant, and that the entire defense file would have to be turned over in discovery to the State of Oregon, if the client ever filed a claim that the lawyer

was negligent or constitutionally inadequate/ineffective. Similarly, such an admonishment could dissuade defendants from even filing a post-conviction relief action. Adoption of the circuit court's rulings can only weaken the traditional, statutory, and constitutionally mandated protection of criminal defense lawyer-client confidences. The circuit court's rulings sharply stray from the societal and individual rationales and purposes behind the privilege.

CONCLUSION

For the above reasons, *Amicus* OCDLA respectfully requests that this Court direct the circuit court to comply with this Court's June 20, 2013, writs in both of the above-captioned cases.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

Brief length: I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief is 2,935 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).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I filed by electronic filing the Amicus Brief of OCDLA with the Appellate Court Administrator, Appellate Records Section on September 10, 2013.

I further certify that I directed by electronic filing on September 10, 2013 that a copy of Amicus Brief of OCDLA be served to the following person(s):

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