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 SC S063870

PETITIONER'S REPLY BRIEF ON THE MERITS

On the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Washington County
Honorable THOMAS KOHL, Judge

Opinion Filed: September 23, 2015
Author of Opinion: Lagesen, J.
Before: Duncan, Presiding Judge, Lagesen, Judge, and Edmonds, Senior Judge

Continued….

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PETITIONER'S REPLY BRIEF ON THE MERITS

Petitioner-Appellant (petitioner hereafter) replies to three arguments raised by the defendant (the state hereafter) in the state's Brief on the Merits (State's BOM). First, the state argued that petitioner's burden-shifting argument under ORCP 47 C as applied to ORS 138.550(3) and ORS 138.510(3) is not properly before this court. State's BOM at 20, 22. Second, although the state correctly acknowledged that ORS 138.550(3) and ORS 138.510(3) respectively codify the affirmative defenses of *res judicata* and statute of limitations, it argued that the state had met its burden of proving that those affirmative defenses preclude petitioner from seeking post-conviction relief in this case. State's BOM at 14, 21. Third, the state argued that petitioner had an affirmative obligation to prove that she was reasonably diligent in seeking out and finding the *Brady* evidence at issue in this case during her criminal trial and her first post-conviction proceedings. State's BOM at 30-44. Petitioner writes to respond to those arguments.

Summary of Argument

1. This court has previously held that an issue can be addressed by this court on its merits even if it was raised for the first time *sua sponte* by the Court of Appeals. That is true even if the Court of Appeals declined to reach the merits of the issue because it concluded that the issue was unpreserved.

In this case, the Court of Appeals decision and its order on reconsideration are based almost entirely on its understanding of ORCP 47 C as applied to ORS 138.550(3) and ORS 138.510(3). Petitioner briefed the issue in her petition for reconsideration and the Court of Appeals reached the merits of petitioner's argument in its order denying reconsideration. Petitioner petitioned this court for review on the question, acknowledging that the issue had not been briefed by the parties before the Court of Appeals issued its initial decision. This court granted review on the question and petitioner fully briefed the issue before this court. As such, the issue is properly before this court.

2. Although this court has never expressly so held, the state correctly concedes that ORS 138.550(3) and ORS 138.510(3) respectfully codify the affirmative defenses of *res judicata* and statute of limitations. If this court accepts those concessions, then its prior precedent requires that a defendant moving for summary judgment, pursuant to ORCP 47 C, present *evidence* proving that the affirmative defenses preclude the non-moving party from prevailing on the ground for relief.

In this case, to meet its obligation as the defendant moving for summary judgment the state had to submit evidence that it had previously disclosed the *Brady* evidence at issue to petitioner either during her criminal trial or during her

first post-conviction proceedings. Because the state presented no such evidence, the state was not entitled to summary judgment.

3. The state argued that petitioner could have obtained the *Brady* evidence at issue through due diligence by requesting her co-defendant Tiner's file from the prosecution or Tiner's criminal defense attorneys, or by cross-examining Tiner's brother at petitioner's trial.

One problem with the state's argument is that it impermissibly places the burden of seeking out and finding *Brady* evidence on petitioner, in violation of the Due Process Clause as interpreted in *Brady* and its progeny. Second, assuming for the sake of argument that the state is correct that ORS 138.550(3) and ORS 138.510(3) place a due diligence burden on a petitioner, ORCP 47 C still places the initial burden of production on the party moving for summary judgment.

In this case, that ORCP 47 C burden required the state to submit evidence with its motion for summary judgment, which no reasonable juror would dispute, showing that the *Brady* evidence at issue was available to petitioner if she had been reasonably diligent. The state did not produce any evidence with its motion, and the record is silent with regard to whether the evidence was available to petitioner if she had been reasonably diligent, as the state argues.

Further, the case register from Tiner's criminal trial shows that he had not even been indicted when petitioner's trial commenced. Therefore, the state's

suggestion that petitioner could have obtained the *Brady* evidence at issue by requesting Tiner's prosecution file from the district attorney or from his criminal defense attorneys appears to be in conflict with the historical facts.

Argument

I. Petitioner's ORCP 47 C burden-shifting argument is properly before this court, because it was raised before the Court of Appeals, which expressly relied upon its understanding of ORCP 47 C when it decided this case.

This court can decide an issue even when it is introduced for the first time before the Court of Appeals. *State v. Kuznetsov*, 345 Or 479, 486-87, 199 P3d 311 (2008). In *Kuznetsov*, a criminal direct appeal, the defendant made an alternative argument – that a "misdemeanor information" could not be substantively amended – for the first time at oral argument in response to a question asked by the Court of Appeals. *Id.* at 486. The Court of Appeals rejected the defendant's alternative argument as unpreserved. *Id.* (citing *State v. Kuznetsov*, 215 Or App 533, 543, 543 n 4, 170 P3d 1130 (2007)). This court allowed review and the state argued that the issue was unpreserved. 345 Or at 486. This court concluded that the argument was properly before it, even though it was raised for the first time at oral argument before the Court of Appeals. *Id.* This court explained,

> "Although defendant could, and perhaps should, have stated his complete argument in his opening brief or at least have sought leave to file a reply brief [after oral argument], the issue was introduced at

> the Court of Appeals and fully briefed in our court. We therefore address defendant's argument for the benefit of bench and bar."

Id. at 486-87.

In the present case, as the state correctly points out, neither party litigated the burden-shifting rule contained in ORCP 47 C or the interrelated[1] issue of how that rule applies to ORS 138.550(3) and ORS 138.510(3) before the trial court or in the initial briefing before the Court of Appeals. State's BOM at 20, 22. Rather, as in *Kuznetsov*, those issues were raised for the first time by the Court of Appeals. However, unlike *Kuznetsov*, instead of raising the issues at oral argument, the Court of Appeals in this case raised those interrelated issues for the first time in its written opinion. *Eklof v. Steward*, 273 Or App 789, 793-98, 359 P3d 570, 573 (2015). Further, the issue was briefed before the Court of Appeals before it reached it reached its ultimate conclusion in its order denying reconsideration. The Court of Appeals reached the merits of petitioner's arguments when it denied reconsideration.

The initial Court of Appeals decision relied upon two issues that were not briefed by the parties. First, in stating the burden-shifting rule contained in ORCP 47 C, the court described how "to withstand a motion for summary judgment, the

[1] The issues are interrelated because in order to determine who has the burden on a motion for summary judgment under ORCP 47 C a court must determine who has the ultimate burden on the issue at trial. *Eklof*, 273 Or App at 794-95; *Keller v. Armstrong World Industries, Inc, 342 Or 23, 38 n 12, 147 P3d 1154 (2006),*

party with the burden of proof must come forward with evidence that would permit a reasonable factfinder to find in that party's favor." *Id.* at 794 (paraphrasing the Court of Appeals holding in *Chapman v. Mayfield*, 263 Or App 528, 530-31, 329 P3d 12 (2014) *aff'd*, 358 Or 196, 361 P3d 566 (2015))[2]. Second, in order to apply that rule, the Court of Appeals relied upon its understanding of this court's decision in *Verduzco v. State of Oregon*, 357 Or 553, 565, 355 P3d 902 (2015), when it concluded that petitioner bore the burden at trial of proving that her *Brady* ground for relief fell within the escape clause contained in ORS 138.550(3). *Eklof*, 273 Or App at 794.

The court's written opinion and its order denying reconsideration were both based almost entirely on its understanding of those interrelated issues. *Id*. at 794-95. This court granted review on the question presented and petitioner fully briefed the issue before this court. Accordingly, this court should reach the merits of petitioner's burden-shifting arguments under ORCP 47 C, just as it reached the merits of the petitioner's arguments in *Kuznetsov*. If anything, the issue in this case is better preserved[3] than the issue in *Kuznetsov*, because unlike *Kuznetsov* the

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[2] Neither party cited *Chapman* before the Court of Appeals issued its decision.

[3] It is unclear to petitioner whether *Kuznetsov* is addressing preservation or whether an argument is properly before the court. In its brief, the state uses both the word "preserve" (State's BOM at 20) and the phrase "properly before this court" (State's BOM at 22) when arguing that this court should not reach the

Court of Appeals actually addressed the merits of the arguments in reaching its decision in this case.

II. This court has consistently held that when a defendant moves for summary judgment based on an affirmative defense, it carries the burden of producing evidence in support of its motion.

The state correctly concedes that both of the procedural bars contained in ORS 138.550(3) and ORS 138.510(3) are affirmative defenses. State's BOM at 14, 21. To petitioner's knowledge, this court has never expressly recognized that both the *res judicata* and statute of limitations bars contained in those statutes are affirmative defenses. In *Verduzco* this court implied – but did not hold – that a petitioner has the burden of disproving the state's affirmative defenses. 357 Or 553, 565 (writing that ORS 138.550(3) "places the burden on the petitioner to show that an omitted ground for relief comes within the escape clause"). However, that statement is inconsistent with this courts longstanding prior precedent that the burden of proving an affirmative defense is on the defendant. *See e.g. Keller v. Armstrong World Industries, Inc*, 342 Or 23, 38 n 12, 147 P3d 1154 (2006) (so stating with regard to the affirmative defense of statute of limitations); *Petock v.*

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merits of petitioner's burden-shifting argument. Regardless of the correct terminology, petitioner argues that the issue of whether the state was entitled to summary judgment was preserved before the trial court and that petitioner's burden-shifting argument is properly before this court.

Asante Heath Sys, 351 Or 408, 423, 268 P3d 579 (2011) (same holding with regard to the affirmative defense of *res judicata*).

After conceding that the procedural bars contained in ORS 138.550(3) and ORS 138.510(3) are affirmative defenses, the state's only argument is that petitioner had the burden of disproving a negative, *i.e.*, that she could not reasonably have discovered the *Brady* evidence at issue at an earlier time. State's BOM at 14-23. In the state's view, it met its burden because it asserted the affirmative defenses in its answer and because petitioner acknowledged that her petition was both untimely and successive. State's BOM at 22-23. The state argues that petitioner cited "no authority for the proposition that when a statute defines a general affirmative defense that includes a narrow exception—such as ORS 138.510(3) and ORS 138.550(3) do—the defendant has the burden to prove *both* the application of the affirmative defense *and* the negative of the exception." State's BOM at 23. The problem with the state's argument is that it is directly contradicted by this court's decisions in *Keller* and *Petock*.

In *Keller*, the "[d]efendant moved for summary judgment, claiming that a two-year statute of limitations barred the plaintiff's claim." 342 Or at 26. In October of 2000, the plaintiff had filed a products liability action alleging that the defendant's asbestos products had damaged his lungs. *Id.* Unlike the defendant in this case, the defendant in *Keller* submitted evidence in support of its motion for

summary judgment. *Id.* That evidence showed that the "plaintiff had referred to his 'asbestos lungs' when seeking social security disability and workers' compensation benefits in 1994 and 1995." *Id.*

To decide the issue this court interpreted both ORCP 47 C and the statute of limitations contained in ORS 30.907(1), which provides for a two-year statute of limitations for asbestos-related product liability cases that commences "after the date on which the plaintiff first discovered, or in the exercise of reasonable care should have discovered, the disease and the cause thereof." *Id.* at 31. This court concluded that the escape clause for two-year statute of limitations contained in ORS 30.907(1) reduced to two separate questions. *Id.* First, whether the plaintiff actually discovered that he had an asbestos-related disease during the two-year statute of limitations period. *Id.* at 31-32. Second, whether the "plaintiff 'in exercise of reasonable care should have discovered' that he had an asbestos-related disease and the cause thereof more than two years before he filed this action." *Id.* at 34.

This court explained that the second question "states a familiar standard; it provides that the statute of limitations begins to run when a plaintiff 'in the exercise of reasonable care should have discovered' the disease and the cause thereof." *Id.* at 35. In construing ORS 30.907(1) this court relied on its prior interpretations of a similarly worded statute of limitations contained in ORS

12.110(4), which also requires a showing that a claim could not reasonably have been discovered in the exercise of reasonable diligence. *Id.* at 35. This court concluded that both statutes contained essentially the same escape clause, whether "in the exercise of reasonable care" the plaintiff "should have discovered" the injury at issue within the two-year statute of limitations period. *Id.* at 35 n 10.

Applying that standard, this court reviewed the record to determine whether the defendant was entitled to summary judgment under this court's construction of the escape clause from the two-year statute of limitations contained in ORS 30.907(1). *Id.* at 35-38. This court found that the record "does not disclose that plaintiff suffered any change in his symptoms during that period, and a reasonable juror could find on this record that nothing occurred during that period to cause plaintiff to seek additional medical advice." Further, this court found that "even if a reasonable person would have continued to inquire after 1995, the record does not disclose what a further inquiry would have revealed." *Id.* Finally, this court held that because the defendant had not submitted any evidence affirmatively establishing that the escape clause to the statute of limitations defense did not apply, summary judgment could not be granted:

> "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. at 38 n 12. This court reached the same conclusion in *Petock* with regard to the affirmative defense of *res judicata*. *Petock*, 351 Or at 423 ("If defendant wanted to rely on issue preclusion as a basis for seeking summary judgment, it had the burden of producing evidence to establish that defense.").

To be sure, the statute of limitations and corresponding escape clause that this court construed in *Keller* is not identical to the statute of limitations and corresponding escape clause contained in ORS 138.510(3). For example, ORS 30.907(1) asks whether a person "should" have discovered the injury "in the exercise of reasonable care," while ORS 138.510(3) asks whether a petitioner "could" have discovered evidence based on "reasonable diligence." *Compare Keller*, 342 Or at 35 n 10 *with Verduzco*, 357 Or at 566. Regardless, as relevant here, those distinctions do not make a difference, because in both cases the burden is still on the defendant to offer evidence to support its affirmative defense.

Keller and *Petock* make clear that in order for a defendant to be granted a motion for summary judgment based on an affirmative defense, the defendant as the moving party has the burden of submitting evidence that no reasonable juror could dispute in order to affirmatively establish that the affirmative defenses apply. *Keller*, 342 Or at 38 n 12; *Petock*, 351 Or at 423. In *Keller*, that standard required the defendant to submit evidence proving that the injury either was or should have

been discovered within the two-year statute of limitations period. In the absence of any evidence in the record, the defendant was not entitled to summary judgment. In this case, under that standard, the state was required to produce evidence proving that it had previously disclosed the *Brady* evidence at issue to petitioner, either at trial or during the first post-conviction proceedings. Because the state submitted no evidence on that issue, it was not entitled to summary judgment under ORCP 47 C.

III. The state's argument that the *Brady* evidence at issue in this case was reasonably available to petitioner at trial or during her first post-conviction proceedings is not supported by the historical facts and is inconsistent with recent case law.

In its brief, the state argued that petitioner had failed to disprove the state's affirmative statute of limitations and *res judicata* defenses because she reasonably could have discovered the *Brady* evidence at issue if she had been more diligent. State's BOM at 30-37, 42. For example the state argued:

> "[P]etitioner reasonably could have discovered the allegedly undisclosed records by examining the district attorney's *Tiner* file, by coordinating with Tiner's counsel, or through normal discovery in the previous post-conviction proceeding. * * * The *most* that petitioner's evidence would show—if accepted as true—is that the records at issue were in the district attorney's file in the companion *Tiner* case * * *. With respect to the records of the criminal convictions David Tiner may have had at the time of the trial in *State v. Eklof*, petitioner submitted no evidence to show that her trial counsel would have been precluded from having made such an inquiry during his cross-examination of David Tiner."

State's BOM at 36.

There are several problems with the state's argument. First, as petitioner and *Amicus Curiae* argued, in their respective briefs on the merits, if ORS 138.550(3) and ORS 138.510(3) are interpreted to require a petitioner raising a *Brady* ground for relief to prove that she was reasonably diligent to meet those escape clauses, then those statutes violate the Due Process Clause as interpreted in *Brady* and its progeny. Petitioner's BOM at 28; *Amicus Curiae* BOM at 21-25.

A recent Third Circuit decision adds further support to petitioner and *Amicus Curiae's* arguments. *Dennis v. Sec'y, Pa. Dep't of Corr.*, __ F3d __ (3rd Cir Aug 23, 2016) (Slip Op at 61). In *Dennis* the state of Pennsylvania, like the state of Oregon in this case, argued that there was a due diligence requirement on the part of a criminal defendant to seek out and find *Brady* evidence. *Id.* The Third Circuit expressly rejected the state's argument, explaining that "the United States Supreme Court has never recognized an affirmative due diligence duty of defense counsel as part of *Brady* * * *." *Id.* The court held "the concept of 'due diligence' plays no role in the *Brady* analysis." *Id.* at 66. To be sure, the court in *Dennis* was deciding whether *Brady* and its progeny include a due diligence requirement, not whether ORS 138.550(3) and ORS 138.510(3) contain a due diligence requirement. Regardless, this court should apply the reasoning from *Dennis* when interpreting those statutes as applied to a *Brady* ground for relief. Petitioner argues that placing

any due diligence requirement on her with regard to a *Brady* claim would violate the Due Process Clause.

Second, assuming *arguendo* that ORS 138.550(3) and ORS 138.510(3) place a due diligence requirement on petitioner, ORCP 47 C still places the initial burden of production on the party moving for summary judgment. In this case, that ORCP 47 C burden required the state to submit evidence, which no reasonable juror would dispute, with its motion for summary judgment proving that the *Brady* evidence at issue was available to petitioner if she had been reasonably diligent. The state did not produce any evidence with its motion, and the record is silent with regard to whether the evidence was available to petitioner if she had been reasonably diligent, as the state argues.

Further, the case register from Tiner's criminal trial shows that he had not even been indicted when petitioner's trial commenced. ATT-1; ATT-2[4]. As such, the state's suggestion that petitioner could have obtained the *Brady* evidence at issue by requesting Tiner's prosecution file from the district attorney or from Tiner's criminal defense attorneys appears to be in conflict with the historical facts. Put another way, contrary to the state's suggestion in its briefing before this court,

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[4] Petitioner's trial commenced on September 6, 1995. ATT-1 at 5. The grand jury did not return an indictment against Tiner until December 13, 1995. ATT-2 at 3. On that same day, a warrant issued for Tiner's arrest. *Id.* Tiner was not arraigned until August 19, 1996. *Id.*

there is no evidence in this record that suggests that the *Brady* evidence at issue in this case was available to petitioner at the time of her trial.

CONCLUSION

Petitioner requests that this court reverse the judgment of the Court of Appeals and the post-conviction trial court and remand for further proceedings.

DATED September 2, 2016

Respectfully Submitted,

/s/ Jason Weber

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Attachment Index

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 3,626 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).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Reply Brief on the Merits 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 Reply Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Timothy Sylwester, #813914, attorney for Defendant-Respondent; Erik Lannet and Erik M. Blumenthal, and Janice C. Puracal,and Steven T. Wax, attorneys for Oregon Innocence Project, Amicus Curiae; and upon Mathew W. Dos Santos, attorney for American Civil Liberties Union Foundation of Oregon Incorporated, Amicus Curiae, by using the court's electronic filing system.

DATED September 2, 2016

/s/ Jason Weber

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