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IN THE SUPREME COURT OF THE STATE OF OREGON

CHRISTIAN M. LONGO,	)	
	)	
Petitioner-Relator,	)	**Marion County Circuit Court No. 07C21285**
	)	
v.	)	
	)	**No.** SC S061072
JEFF PREMO, Superintendent, Oregon State Penitentiary	)	
	)	
Defendant-Adverse Party.	)	

RELATOR'S REPLY BRIEF

Mandamus Proceeding Regarding Circuit Court's Failure to Perform the Act Required by This Court's Writ Dated June 20, 2013

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SUMMARY OF REPLY

The crux of the Adverse Party's answer to the issuance of a protective order is not grounded in legal authority, but rather claims that a protective order will be logistically and administratively difficult to follow. To "support" this argument, the Adverse Party conjures up hypothetical and speculative scenarios. None of the hypothetical scenarios create a situation that could not be easily remedied by the protective order itself since a party may seek court intervention and relief from the protective order. Moreover, the Adverse Party wholly fails to show – legally or factually – how any of the claimed hardships should trump the Petitioner's rights.

According to the Adverse Party, the only remedy available to a Petitioner, who seeks review of whether he was afforded constitutionally effective representation and thus is court-mandated to disclose confidential information, is to challenge the use and dissemination under the rules of evidence at a retrial. As discussed in detail below, such a draconian position creates logistical and constitutional problems – never addressed by the Adverse Party. First, the remedy lacks any protections against law enforcement and the prosecution from obtaining an unfair advantage by using privileged information to unjustifiably investigate potential defense witnesses, experts or strategies. Second, the Adverse Party's proposed remedy would result in prolonged pre-trial hearings to determine what

aspects of the investigation or testimony was the product of tainted and unlawfully disseminated privileged information. Third, it is unreasonable, and nearly impossible, for the Petitioner to have the burden to argue the exclusion of such tainted evidence since only the prosecution would be in a position to know. Finally, the Adverse Party does nothing to challenge the legal support for the conclusion that OEC 503(4)(c) is, effectively, an "implied waiver" that warrants necessary safeguards such as a protection order.

ARGUMENT

A. Procedural Corrections to Adverse Party's Answer

The Adverse Party suggests there is a single, common issue before this court in Longo *v. Premo*, 07C21285 and *Brumwell v. Premo*, 12C11135. As such, the Adverse Party filed a substantively identical answer brief in both matters. Answering, pg. 1, n. 1. By filing a single answer, the Adverse Party attributes facts and procedural history not applicable to *Longo v. Premo*. For instance, the Adverse Party writes that "given the numerous, varied, and extremely broad scope of the claims of inadequate assistance of counsel that *petitioners* have alleged in their petitions, it is unlikely that they will be able to successfully assert a relevance question to any of defendant's discovery requests." Answer, pg. 10, n. 8 (emphasis added). This broad assertion is inaccurate. At the time the protective order was sought in *Longo v. Premo*, and thus the subject of this mandamus proceeding, there

were only two specific issues regarding ineffective assistance of counsel: (1) ineffective assistance of direct appeal counsel for failing to raise challenge to trial court's denial of change of venue; and (2) trial counsel error concerning the use of a stun device during trial without a hearing. Nevertheless, the question of whether discovery is irrelevant to a specific claim is not an issue before this court in *Longo v. Premo*.

The issue presented here, and the subject of this reply, is whether, in a post-conviction proceeding, the post-conviction court erred when it denied a motion for a protective order that would allow for the discovery of privileged, confidential attorney-client communications and work product matters within the post-conviction proceeding, but limit the distribution and use of such material outside the confines of the post-conviction proceeding.

B. Legal Arguments in Reply to the Adverse Party's Answer

With scant legal support, the Adverse Party sets out five reasons a protective order is unwarranted: (1) a protective order may unfairly interfere with the defense's investigation of claims; (2) a protective order may be an onerous burden to comply with; (3) petitioner's concerns to warrant a protective order are speculative and contingent; (4) a protective warrant is unnecessary because the petitioner has a remedy to address their concerns at a later date; and (5) that cases

from other jurisdictions do not provide a basis for a protective order. As discussed below, each argument fails.

1. **The Adverse Party's Claim that a Protective Order may Interfere with the Defendant's Case is Based on Speculation, not the Law.**

The Adverse Party acknowledges, as it must, that the protective order does not thwart its ability to investigate a claim since the proposed protective order provides a mechanism for a party to make a request to the court if disclosure to anyone else is needed. The Adverse Party complains that the protective order may be too burdensome by requiring them to seek leave of the court, because there may be "dozens of claims and extensive discovery." Answer, pg. 19, n. 13. Not only is Adverse Party's fear that there will be "dozens of claims and extensive discovery" speculative, it is likely unrealistic. For instance, the Adverse Party writes there are "numerous" claims of ineffective assistance of counsel in the petitions, but seeks to support its position by relying exclusively on a hypothetical scenario based on a single claim allegedly set forth in Petitioner-Brumwell's petition. [1] Answer, pg. 16 – 18.

Of course, Petitioner-Longo cannot directly address the hypothetical since he is not privy to the legal and factual basis that supports the claim – except to note how the Adverse Party, who argues strenuously that the need for a protection order

[1] The Adverse Party fails completely to provide an example that may apply to Petitioner-Longo's petition.

is speculative, relies exclusively on speculation to argue against one. *See e.g.*, Answer, pg. 16 (it *may* become necessary to disclose the privileged information); (protection order *could* unfairly impede in investigation), pg. 17 (it *may* become necessary to confer); (it *may* become necessary); (post-conviction court *may* need to answer factual questions), pg. 18 (defendant *may* need to have discussions with prosecutor); (defendant *may* need to present evidence).

In the end, the Adverse Party fails to provide any legal support for its argument.

2. **Complying with a Protective Order is not Unduly Onerous**.

The Adverse Party complains that complying with a protective order would be unduly burdensome. The argument goes, apparently, that a protective order may be administratively workable in a non-capital post-conviction context because the materials are "relatively compact and easy to segregate", but unworkable in a capital post-conviction context because they may involve more evidence and remain active longer. Answer, pg. 19 – 23.

Again, to advance its argument, the Adverse Party relies exclusively on conjured up logistical nightmares. For instance, the Adverse Party fears it will be "obliged to go through boxes and boxes and volumes and volumes of discovery line by line, marking and segregating out the arguably privileged materials" or undertake undesirable need for redactions or burdensome record-keeping. Answer,

pg. 20. Even assuming they are accurate, none of these alleged burdens are unique. Parties often review voluminous materials to determine what is privileged, and provide a Uniform Trial Court Rules (UTCR) 2.100 Segregated Information Sheet. Additionally, parties are routinely obligated to review and redact names, addresses and other private information as necessary. *See e.g.* ORS 135.815(4).

The Adverse Party does not advance any case law, statute, or any legal authority to support its argument that protective orders should not be issued because of the type of post-conviction.[2] On the other hand, the Adverse Party's capital versus non-capital distinction supports the issuance of a protective order. It is a long-standing proposition that death is different in kind from all other sentences and requires heightened judicial scrutiny:

> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100–year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

[2] The Adverse Party suggests the court could, in determining whether to issue a protective order, "consider . . the nature and extent of the burden" that a protective order could impose. Answer, pg. 23. There record does not demonstrate that post-conviction court considered any such claimed burdens in denying the protective order. Neither did the Defendant make any such argument in its opposition to the Petitioner's motion for a protective order.

Woodson v. North Carolina, 428 US 280, 305, 96 SCt 2978, 49 LEd2d 944 (1976); *State v. Haugen,* 349 Or 174, 203, 243 P3d 31 (2010) ("To state the obvious, the penalty of death is different in kind from incarceration"); *State v. Haugen* 351 Or 325, 343-344, 266 P3d 68, 79 (2011)(death is different).

Because death is different, courts provide more, not less, protections. Justice Harlan wrote that capital cases "stand on quite a different footing than other offenses. * * * I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case," the distinction "being literally that between life and death." *Reid v. Covert,* 354 US 1, 77, 77 SCt. 1222, 1262, 1 LEd2d 1148 (1957) (Harlan, J., concurring). Moreover, "Oregon law also has long imposed stricter safeguards on potential capital cases than on other criminal proceedings." *State v. Wagner,* 305 Or 115, 189, 752 P2d 1136 (1988) (Linde, J., dissenting), *vac'd and rem'd sub nom Wagner v. Oregon,* 492 US 914, 109 S.Ct. 3235, 106 LEd2d 583 (1989).

The Adverse Party's argument that the protective order is unwarranted in the capital post-conviction context because they are different than non-capital proceedings, and thus too burdensome to follow, is unsupported by case law, statute, the language of the protective order, and the record.

In the end, the Adverse Party fails to provide any legal support for its argument.

3. **Adverse Party Fails to Demonstrate how the Petitioner's Concerns are Speculative and Contingent**.

The Adverse Party argues the basis for issuing a protective order is speculative and contingent. Answer, pg. 23 – 25. The Adverse Party argues that because certain events - such as retrial - must occur, a protective order is unnecessary. Additionally, the Adverse Party argues a protective order is unnecessary because, historically, retrials have not occurred following post-conviction relief in Oregon. *Id*. The Adverse Party does not advance any legal authority for its proposition that an issuance of a protective order is contingent on the likelihood of certain events occurring. Perhaps, due to the lack of any legal support, the defendant did not raise a similar argument in objecting to the Petitioner's motion for a protective order; and the court did not make any such finding.

4. **A Protective Order Is Necessary to Protect Petitioner's Interest**.

The Adverse Party suggests that a protective order is unnecessary because the Petitioner will have a complete remedy available upon retrial. Answer, pg. 25 – 30. The remedy, according to the Adverse Party, is to allow unfettered disclosure of privileged information to parties unrelated to the post-conviction

proceeding and then later simply let the Petitioner litigate its admissibility, or perhaps require the prosecutor purge his or her file of privileged information, or perhaps require another prosecutor prosecute the case. *Id*.

At the outset, the Adverse Party's position limits the privilege as only a rule of evidence for the trial court to consider its admissibility. By doing so, the Adverse Party ignores the constitutional and ethical dimensions of the attorney-client confidentiality that support a protective order. For instance, as set forth in detail in Petitioner's Opening Brief, both the federal courts and this Court have strongly suggested there is a constitutional dimension to the lawyer-client privilege under the Sixth Amendment. Petitioner's Opening Brief, pg. 14 – 16. Nor does the Adverse Party's argument address the ethical considerations. See e.g., *In re Conduct of Spencer*, 335 Or 71, 82, 58 P3d 228 (2012) (An attorney's obligation to preserve client's secrets, as codified by statute, is broader than evidentiary attorney-client privilege) and ABA Formal Opinion 10-456, pg. 4, n .23; citing to Rule 1.6, Cmt. 14 (Rules of Professional Conduct (RPC) cautions lawyers to "take steps to limit 'access to the information to the tribunal or other persons having a need to know it' and to seek '*appropriate protective orders* or other arrangements . . . to the fullest extent practicable.") (emphasis added).

The Adverse Party's proposed after-the-fact remedy provides no real remedy to protect against subsequent prosecutors or law enforcement using the

unrestricted, court-mandated disclosure of privileged material, to obtain an unfair advantage; for example using the privileged information for other purpose, such as investigating potential defense witnesses, experts or strategies. According to the Adverse Party, the court would be in a position to grant "appropriate relief" to protect against such a situation. Answer, pg. 32. This vague remedy presupposes that the burden is on the Petitioner to demonstrate what aspects of the investigation is the by-product of unlawfully obtained privileged information. To suggest the prosecution would self-monitor the harm of the unwarranted disclosure brings to mind the skepticism expressed in *State v. Soriano*, 68 OrApp 642, 684 P2d 1220 (1984), when the court, while discussing derivative use of incriminating statements from compelled psychiatric evaluation, acknowledged:

> The court's skepticism about relying on the prosecution to protect a defendant's rights was expressed most clearly in its rejection of a proposed prohibition of only the use and derivative use of incriminating statements made during a psychiatric interview:
>
> > "The state contends that pretrial discovery will permit a criminal defendant to spot and to stop any attempt by the prosecution to make such use of the statements. We are not convinced that this would be so. The temptation on the part of prosecutors to develop their cases would be almost irresistible. *It is unrealistic to give a dog a bone and to expect him not to chew on it.* . . " (Emphasis supplied.)

Soriano, 68 OrApp. At 661 (internal citations omitted).

Moreover, it would be impracticable, if not nearly impossible, for the trial court to determine the depth and degree that the proposed prosecution's evidence was not tainted from the unlawfully obtained privileged material. The process proposed by the Adverse Party would mirror the burdensome *Kastigar v. United States*[3]-type hearings, "which requires the prosecution to bear the burden of showing that its proposed evidence is without taint; the prosecution would also have to bear the burden of showing that its case is unaffected by prohibited non-evidentiary use. Yet carrying the latter burden would require the prosecution to open up its investigatory process to thorough examination and would permit the defense to question the prosecutor concerning proposed evidence and trial tactics and their sources in order to ferret out subtle non-evidentiary uses of which even the prosecutor might not be consciously aware." *Soriano*, 68 OrApp at 664, *Kastigar*, 406 US at 460-461.

The Adverse Party also suggests that exclusion, and not the "extraordinary remedy of a protective order", is the proper remedy for unlawfully obtained privileged information. Answer, pg. 26. The Adverse Party fails to explain how a protective order is an "extraordinary remedy." In fact, there is nothing extraordinary about a protective order. State and federal courts have a long-standing and well-accepted power to delimit how parties may use information

[3] *Kastigar v. United States,* 406 US 441, 92 SCt 1653, 32 LEd2d 212 (1972).

obtained through the court's power of compulsion. *See e.g*., ORCP 36; *Carlton v. Shisler*, 146 OrApp 513, 934 P.2d 448 (1997); *See, e.g., Degen v. United States,* 517 US 820, 826, 116 SCt 1777, 135 LEd 2d 102 (1996) (noting that protective orders may be used "to prevent parties from using civil discovery to evade restrictions on discovery in criminal cases"); *see also* 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2043, at 566 (2d ed.1994) (listing examples of protective orders "limiting the persons who are to have access to the information disclosed and the use to which these persons may put the information").

Finally, the Adverse Party suggests it is unfair for this Court to address this issue because the district attorneys for Marion and Lincoln County are not parties to this mandamus. Answer, pg. 27. This apparent procedural argument has never been advanced before even though the Adverse Party could have done so when it filed its response to the Petitioner's petition for writ in February, 2013. Moreover, the Adverse Party could have, but didn't seek to have the county district attorneys seek to intervene in the matter. And finally, the county district attorneys could have, at a minimum, sought leave to file an amicus curiae pleading. For whatever reason, none of these steps were taken, so the Adverse Party's argument that the matter should not be considered because the district attorneys are not parties to the mandamus proceeding is a red herring and falls short.

5. **Adverse Party's Claim that Cases From Other Jurisdictions do not Provide Basis for the Protective Order Fails**.

The Adverse Party's answer finishes with a claim that cases from other jurisdictions do not support a basis for a protective order. Answer, pg. 30 – 33. The Adverse Party does not offer any legal support for its position that a protective order is unnecessary, unwarranted or unduly burdensome. Instead, the Adverse Party's entire argument is an attempt to distinguish cases that support issuing a protective order. *Id*. Their attempts, however, fall short and provide no legal support for its position that a protective order is unwarranted.

The Adverse Party desperately tries to dispel the sound reasoning expressed in *Bittaker v. Woodford*, 331 F3d 715 (2003) by claiming the procedural posture of the case makes it inapposite to the case at hand. Answer, pg. 30. According to the Adverse Party, because *Bittaker* involved a federal habeas corpus and dealt with an implied waiver instead, it provides "no authority for this court to ignore the express *exclusion* in OEC 503(4)(c) and thus to impose a protective order in the absence of any privilege." Answer, pg. 30-31. (emphasis in original). This argument is inconsistent with previous concessions by the Adverse Party. On one hand, the Adverse Party appears to agree that OEC 503(4)(c) is limited in scope and is not forever abrogated. Answer, pg. 11 ("Defendant has not contended that the privilege is thereby abrogated forever, for any other purposes, and in any other

proceedings."); but then claims on the other hand, OEC 503(4)(c) is an "express exclusion" of the attorney-client privilege to which a protective order, prohibiting subsequent use in a wholly different proceeding, is unwarranted. Answer, pg. 30-31.

Regardless, what is apparent is that OEC 503(4)(c) has all the makings of an implied waiver.

> "[T]he doctrine of implied waiver allocates control of the privilege between the judicial system and the party holding the privilege." *Privileged Communications,* 98 Harv. L.Rev. at 1630. The court imposing the waiver does not order disclosure of the materials categorically; rather, the court directs the party holding the privilege to produce the privileged materials *if* it wishes to go forward with its claims implicating them. The court thus gives the holder of the privilege a choice: If you want to litigate this claim, then you must waive your privilege to the extent necessary to give your opponent a fair opportunity to defend against it.

Bittaker v. Woodford, 331 F3d at 720. Similarly, the privileged material is not categorically disclosed under OEC 503(4)(c), but rather court-mandated disclosure is made applicable only *if* a party seeks to litigate certain claims (e.g., ineffective assistance of counsel) that necessitate disclosure so the opposing party may defend against it.

Furthermore, the three implications that flow from an implied waiver exist here. First, the court must not require disclosure under OEC 503(4)(c) any broader

than to allow the opposing side to defend the specific claim.[4] *Bittaker*, 331 F3d at 720. Second, the Petitioner, as the holder of the privilege, may preserve the confidentiality of the privileged communication by choosing to abandon the claim that gives rise to the waiver. *Bittaker*, 331 F3d at 721. And finally, a party that is court-mandated to disclose privileged materials should be provided the contours of the disclosure (waiver) before any disclosure is made. *Id*. If OEC 503(4)(c) was defined any broader then it would force a petitioner into a painful choice of asserting his ineffective assistance of counsel claim and risking a trial where the prosecution can use against him every statement he made to his first lawyer or retain the privilege at the detriment of giving up his claim of ineffective assistance of counsel. Forcing such a situation would unconstitutionally require a petitioner to choose between two competing interests. *Bittaker*, 331 F3d at 723-724; *Simmons v. United States*, 390 US 377, 394 (1968).

Whether the language of OEC 503(4)(c) acts like an implied waiver was addressed in *People v. Ledesma*, 140 P3d 657 (Cal 2006). In *Ledesma,* the California Supreme Court concluded that California Evidence Rule section 958, which contains nearly identical language as OEC 503(4)(c), was, strictly speaking,

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[4] OEC 503(4)(c) is also limited, applying only to those communications relevant to a specific claim; and as such, must be "narrowly construed to avoid disclosing any more of the client's confidences than are necessary." *Peterson v. Palmateer*, 172 OrApp 537, 542-543, 19 P3d 364 (2001); Kirkpatrick, Oregon Evidence, §503.12[3].

an *exception* but was effectively a *waiver* to the attorney-client privilege similar to the type addressed in *Bittaker*. *Ledesma*, 140 P3d at 697 – 698. To conclude otherwise, the California Supreme Court reasoned, would raise serious questions as to whether section 958 conflicts with the defendant's Sixth Amendment right to counsel, a right that the privilege is intended to promote. *Id*. at 698.

The Adverse Party seeks to distinguish *Ledesma* by claiming that it supports the proposition that a protective order is unnecessary. Answer, pg. 31. The Adverse Party's leap of faith is misplaced. There is nothing in *Ledesma* to support the argument that a protective order is unwarranted – it was simply not addressed. However, the *Ledesma* court acknowledged the strength of other jurisdictions to restrict subsequent disclosure and use of privileged information. *Ledesma*, 140 P3d at 697-698; citing to *State v. Samuels*, 965 SW2d 913, 919 (Mo. App. 1998); *Commonwealth v. Chimiel*, 558 Pa 478, 511, 738 A.2d 406, 424 (1999).

CONCLUSION

The crux of the Adverse Party's answer is that a protective order is unduly burdensome because it is a capital case and is based on conjured up speculation of logistical and procedural problems. None of these alleged reasons are founded in legal support. Moreover, these claimed logistical and practical problems should

not trump the strong suggestion that there exists a constitutional, ethical and professional dimension to attorney-client privilege.

Finally, absent from the Adverse Party's claim is any support – either from Oregon or any other state or federal jurisdictions – that a protective order is unwarranted. On the contrary, courts have concluded that protective orders are necessary to fully protect one's constitutional rights. See e.g., *United States v. Nicholson*, 611 F3d 191, 216-217 (4th Cir 2010)(on remand for resentencing, petitioner should be entitled to a protective order); *Lambright v. Ryan*, 698 F3d 808, 818-819 (9th Cir 2012), quoting *Bittaker*, 331 F3d at 727-728 ("[d]istrict courts have the *obligation,* whenever they permit discovery of attorney-client materials as relevant to the defense of ineffective assistance of counsel claims in habeas cases, to ensure that the party given such access does not disclose these materials, except to the extent necessary in the habeas proceeding....")(emphasis added). Denying a protective order would effectively give "the prosecution the advantage of obtaining the defense case file – and possibly even forcing the first lawyer to testify against the client during the second trial – [and] would assuredly not put the parties back at the same starting gate." *Bittaker*, 331 F3d at 722.

Submitted this 22nd day of October, 2013.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the 4,000 word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3999 words.

Type size

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

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that I served the foregoing *Relator's Reply Brief* on the following person on this date by eFiling:

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