IN THE SUPREME COURT OF THE STATE OF OREGON

KARLYN EKLOF, Plaintiff-Appellant, Petitioner on Review, v. HEIDI STEWARD, Superintendent, Coffee Creek Correctional Facility Defendant-Respondent, Respondent on Review.	Washington Co. Cir. Ct. Case No. C120242CV CA A154212 S063870

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON INNOCENCE PROJECT, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON, AND OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER EKLOF

Appeal of the decision of the Court of Appeals on Appeal from Judgment of the Circuit Court for Washington County

The Honorable Thomas W. Kohl, Judge

Filed 07/2016

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TABLE OF CONTENTS

I. STATEMENT OF *AMICUS CURIAE* 1

II. SUMMARY AND PROPOSED RULE 2

III. ARGUMENT 4

A. The promise of *Brady* guarantees all criminal defendants a fair trial in the pursuit of truth and not simply a victory in the courtroom. 4

1. The guarantee is firmly rooted in Due Process. 4

2. The Oregon legislature intended to capture the Due Process guarantee of *Brady*. 5

B. Criminal defendants in Oregon need an effective avenue to challenge *Brady* violations. 8

1. *Brady* violations are rampant nationwide. 8

2. *Brady* violations were documented in testimony before the Oregon legislature. 13

C. The state cannot avoid its *Brady* obligations by forcing the accused to hunt for possible violations in post-conviction proceedings...............21

1. The burden of disclosure under *Brady* falls on the state and not the accused. 22

2. The United States Supreme Court has rejected the type of burden-shift proposed by the state here. 25

D. *Brady* violations must be remediable in post-conviction proceedings. 29

IV. CONCLUSION...30

TABLE OF AUTHORITIES

Page(s)

Cases

Banks v. Dretke,
540 US 668, 124 S Ct 1256, 157 L Ed 2d 1166 (2004) ....*passim*

Brady v. Maryland,
373 US 83, 83 S Ct 1194, 10 L Ed 2d 215 (1963).......................................*passim*

Douglas v. Workman,
560 F3d 1156 (10th Cir 2009) 27

Eklof v. Steward,
273 Or App 789, 359 P3d 570 (2015) 22

Giglio v. United States,
405 US 150, 92 S Ct 763, 31 L Ed 2d 104 (1972)..5

Jean v. Rice,
945 F2d 82 (4th Cir. 1991) 12

Kyles v. Whitley,
514 US 419, 115 S Ct 1555, 131 L Ed 2d 490 (1995) ....*passim*

Mazzan v. Warden, Ely State Prison,
993 P2d 25 (Nev. 2000)..28

State v. Armstrong,
71 Or App 467, 692 P2d 699 (1984) 19

State v. Deloretto,
221 Or App 309, 189 P3d 1243 (2009) 20

State v. Faunce,
251 Or App 58, 282 P3d 960 (2012) 19

State v. Koennecke,
274 Or 169, 545 P2d 127 (1976) 6

State v. Wixom,
275 Or App 824, 366 P3d 353 (2015) 19

Strickler v. Greene,
527 US 263, 119 S Ct 1936, 144 L Ed 2d 286 (1999) 22

United States v. Agurs,
427 US 97, 96 S Ct 2392, 49 L Ed 2d 342 (1976)...5, 7

United States v. Bagley,
473 US 667, 105 S Ct 3375, 87 L Ed 2d 481 (1985) 4, 7

United States v. Olsen,
737 F3d 625 (9th Cir 2013) (Kozinski, J., dissenting) 8, 9, 21

United States v. Price,
566 F3d 900 (9th Cir 2009) 8, 20, 23

US v. Lopez,
577 F3d 1053 (9th Cir 2009) 27, 28

Verduzco v. State of Oregon,
357 Or 553, 355 P3d 902 (2015) 21

Statutes

ORS 132.090 18

ORS 135.805, *et seq.*...5, 6, 7, 17

ORS 135.845 7

ORS 138.530 30

Other Authorities

Aaron Mesh, *Rat Tale*, WILLAMETTE WEEK, Sept 1, 2015.....................................18

Anna Arceneaux, *Because the Prosecutors Withheld Evidence, This Man Has Spent 30 Years on Death Row*, American Civil Liberties Union, June 30, 2016 11

Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S TEX L REV 685 (2006) 9

Bill Moushey, *Win at All Costs: Out of Control*, PITTSBURGH POST-GAZETTE, Nov 22, 1998..10

Editorial Board, *To Stop Bad Prosecutors, Call the Feds*, N.Y. TIMES, June 6, 2016 10

Emily M. West, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases* 1 (Aug 2010) 10, 11

James S. Liebman *et al.*, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX L REV 1839 (2000) 9

John Hollway, *Reining in Prosecutorial Misconduct*, THE WALL STREET JOURNAL, July 4, 2016 10

John Thompson, *It's Time to Do Something About Prosecutors Who Break the Rules*, THE HUFFINGTON POST, June 30, 2016 10

Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L REV 138 (2012) 22

Ken Armstrong and Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, CHICAGO TRIBUNE (1999) 10

Radley Balko, *Prosecutors Withhold Evidence, Innocents Go to Prison*, THE WASHINGTON POST, June 29, 2016 11

Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L REV 643 (2002) 4, 7

I. STATEMENT OF *AMICUS CURIAE*

Oregon Innocence Project (OIP) is a program of the Oregon Justice Resource Center (OJRC). The OJRC's mission is centered on the principle that fairness, accountability, and evidence-based practices should always be the foundation of our criminal justice system. OIP works to exonerate the innocent, train law students, and promote legal reforms aimed at preventing wrongful convictions. OIP is the only program in Oregon dedicated to securing the release of wrongfully convicted inmates.

The American Civil Liberties Union Foundation of Oregon, Inc. (ACLU) is a nonprofit, nonpartisan, corporation dedicated to maintaining the civil rights and liberties guaranteed or reserved to the people by the Oregon and United States constitutions; to that end, the ACLU has appeared in numerous cases in this and other Oregon courts as *amicus curiae* concerning civil liberties generally and specifically relating to criminal justice.

The Oregon Criminal Defense Lawyers Association (OCDLA) is a statewide organization of criminal defense attorneys and others engaged in criminal defense. OCDLA advocates for the vigorous defense of constitutional rights and the rights of those accused and convicted of crimes.

Amici has not investigated the merits of Ms. Eklof's assertions and takes no position on her innocence or guilt. *Amici* appears in this matter to urge the court to

enhance the truth-seeking functions of the criminal justice system by enforcing the state's constitutional duty to disclose evidence pretrial. *Amici* has an abiding interest in ensuring that courts recognize and enforce prosecutors' constitutional obligations to disclose exculpatory evidence. When courts do not enforce *Brady* obligations, they not only damage the integrity of the proceedings at issue, but also undermine public confidence in the legal system. The experience of OIP and innocence projects around the country has taught that new evidence—including exculpatory evidence withheld by the prosecution—has often left wrongfully convicted individuals in need of a remedy many years after their conviction.

II. SUMMARY AND PROPOSED RULE

Brady violations are pervasive in Oregon, yet remedies are scarce. Courts must intervene.

Ms. Eklof was tried and convicted of aggravated murder in 1995. Her appeals were unsuccessful, and her first attempt at post-conviction relief was denied. More than sixteen years after her trial, Ms. Eklof learned for the first time that the state had previously accused John Distabile, one of its trial witnesses, of having been involved in the murder and having lied about it. Ms. Eklof also learned that the state knew about, but failed to disclose, the criminal history of David Tiner, another trial witness for the state.

Ms. Eklof attempted to raise the state's violations of its duty to disclose under *Brady v. Maryland* as grounds for relief in a "late" and "successive" petition for post-conviction relief. The state, in response, did not deny that the withheld evidence should have been disclosed under *Brady* and did not deny that the state failed to disclose it. The state argued only that, despite its own suppression of evidence, Ms. Eklof was not entitled to a remedy because she failed to discover the violation sooner. The state suggests that its own due process violation is beyond judicial review.

Amici respectfully requests that this court hold that:

(1) *Brady* material suppressed by the state is not "reasonably available" to a petitioner for purposes of the "escape clause" permitting a late or successive petition under the Post-Conviction Hearing Act.

(2) To avoid a late or successive petition for post-conviction relief, the state—and not the petitioner—bears the burden to prove that it disclosed the material to the petitioner earlier, or that the petitioner otherwise discovered it.

(3) A proven *Brady* violation is a stand-alone claim for post-conviction relief under Oregon's Post-Conviction Hearing Act.

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III. ARGUMENT

A. The promise of *Brady* guarantees all criminal defendants a fair trial in the pursuit of truth and not simply a victory in the courtroom.

1. The guarantee is firmly rooted in Due Process.

Brady v. Maryland is often "heralded as the Supreme Court case that granted the criminally accused a constitutional right to discovery."[1] The *Brady* 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."[2] The Court explained that "[t]he principle * * * is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."[3] The *Brady* Court was unequivocal in its recognition that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[4]

Since *Brady*, the United States Supreme Court has expanded the doctrine to require the disclosure of impeachment evidence,[5] evidence that the defendant has

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[1] Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 McGeorge L Rev 643, 645 (2002).

[2] *Brady v. Maryland*, 373 US 83, 87, 83 S Ct 1194, 10 L Ed 2d 215 (1963).

[3] *Id.*

[4] *Id.*

[5] *United States v. Bagley*, 473 US 667, 676, 105 S Ct 3375, 87 L Ed 2d 481 (1985).

not specifically requested,[6] and evidence that is in the control of those acting on behalf of the government other than the prosecutor.[7] The prosecution cannot simply rest on what is in its possession; instead, under Supreme Court authority in *Giglio v. United States*[8] and *Kyles v. Whitley*,[9] the prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[10]

The "promise" of *Brady* is not only a guarantee that a criminal defendant will have access to all important exculpatory evidence before facing the state at trial, but also an assurance from our highest court that a prosecutor's "interest * * * in a criminal prosecution is not that it shall win a case, but that justice shall be done."[11]

2. The Oregon legislature intended to capture the Due Process guarantee of *Brady*.

Ten years after *Brady*, in 1973, the Oregon legislature enacted ORS 135.805 to 135.873, which required pretrial discovery in criminal cases. However, "the

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[6] *United States v. Agurs*, 427 US 97, 107, 96 S Ct 2392, 49 L Ed 2d 342 (1976).

[7] *Kyles v. Whitley*, 514 US 419, 437, 115 S Ct 1555, 131 L Ed 2d 490 (1995).

[8] 405 US 150, 154, 92 S Ct 763, 31 L Ed 2d 104 (1972).

[9] 514 US at 437.

[10] *Id.*

[11] *Id.* at 439 (citing *Berger v. United States*, 295 US 78, 88, 55 S Ct 629, 79 L Ed 1314 (1935)).

rules governing the rights of discovery in criminal cases under *Brady* and these rights arising under ORS 135.805 to 135.873 [were] 'not necessarily synonymous.'"[12] The pretrial disclosure statute, ORS 135.815, at that time required disclosure only under certain circumstances, such as "when 'the district attorney intend[ed] to offer the evidence at the trial'; or when [tangible objects] 'were obtained from or belong to the defendant.'"[13] By contrast, *Brady* requires that criminal defendants be afforded a constitutional right to disclosure of all evidence that is "favorable" to the defendant and "material" either to guilt or to punishment.[14]

In 2013, the Oregon legislature enacted Senate Bill (SB) 492.[15] SB 492 reflects the constitutional requirements of *Brady* and its progeny.[16] *Brady* rights in Oregon are now protected by the federal constitution and Oregon statutes.[17]

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[12] *State v. Koennecke*, 274 Or 169, 176, 545 P2d 127 (1976).

[13] *Id.* at 177 (citing ORS 135.815(4)).

[14] *Brady*, 373 US at 87.

[15] Or Laws 2013, ch 525, § 1.

[16] *See* ORS 135.815 to 135.873. The statutes incorporate much, but not necessarily all, of the constitutional standard. *Compare Kyles*, 514 US at 446 (discussing *Brady* evidence that impeached the state's theory of the case, rather than the credibility of a particular witness) *with* ORS 135.815(g) (requiring disclosure of "(g) Any material or information that tends to: (A) Exculpate the defendant; (B) Negate or mitigate the defendant's guilt or punishment; or (C) Impeach a person the district attorney intends to call as a witness at the trial.").

[17] The Rule of Professional Conduct 3.8(b) also compels disclosure consistent with the ideal that prosecutors are "to pursue 'justice' and not simply a victory in the

Oregon statutory and constitutional standards require that prosecutors disclose to criminal defendants all evidence that is favorable to the defendant and material to either guilt or to punishment, including (1) exculpatory evidence,[18] (2) evidence that negates or mitigates guilt or punishment,[19] (3) impeachment evidence,[20] and (4) evidence in the control of others acting on the government's behalf, including law enforcement.[21] The disclosure must be made:

1. as soon as practicable following the filing of an indictment or information in the circuit court or the filing of a complaint or information charging a misdemeanor or violation of a city ordinance[22];
2. without a specific request from the defendant[23]; and
3. promptly before or during trial if additional material becomes available.[24]

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courtroom." Sundby, 33 MCGEORGE L REV at 646.

[18] *Brady*, 373 US at 87; ORS 135.815(1)(g)(A).

[19] *Brady*, 373 US at 87; ORS 135.815(1)(g)(B).

[20] *Bagley*, 473 US at 676; *Kyles*, 514 US at 446; ORS 135.815(1)(g)(C).

[21] *Kyles*, 514 US at 437.

[22] ORS 135.845(1).

[23] *Agurs*, 427 US at 107.

[24] ORS 135.845(2).

It should be noted that, while *Brady* is backwards-facing to require consequences after a failure to disclose, the Oregon statute is forward-looking to require pretrial disclosure. The standard, therefore, under the statute is broad and requires that the prosecutor disclose any evidence that could be favorable to the defense, not just that which suits the defense theory at trial, which may be unknown to the prosecutor pretrial.[25]

B. Criminal defendants in Oregon need an effective avenue to challenge *Brady* violations.

1. *Brady* violations are rampant nationwide.

Despite the United States Supreme Court's directives over the last fifty years, *Brady* violations are pervasive. Just three years ago, Chief Judge Kozinski of the Ninth Circuit recognized that "[t]here is an epidemic of *Brady* violations abroad in the land."[26] Judge Kozinski cited state and federal court cases from around the country that "bear testament to this unsettling trend."[27] His sharply worded dissent in that case made clear: "Only judges can put a stop to it."[28]

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[25] *Cf. United States v. Price*, 566 F3d 900, 913 n 14 (9th Cir 2009) (explaining that a prosecutor should disclose all evidence relating to guilt or punishment that might reasonably be considered favorable to the defendant's case, even if the evidence does not meet the "materiality" standard of *Brady*).

[26] *United States v. Olsen*, 737 F3d 625, 626 (9th Cir 2013) (Kozinski, J., dissenting).

[27] *Id*. at 631-32.

[28] *Id.* at 626.

Judge Kozinski was right. "When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law. When such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition."[29]

Studies document repeated transgressions nationwide. One law professor remarked that "[t]housands of decisions by federal and state courts have reviewed instances of serious *Brady* violations, and hundreds of convictions have been reversed because of the prosecutor's suppression of exculpatory evidence."[30] One study found that between 1973 and 1995, 16% of all state post-conviction reversals of capital cases were based on improper prosecutorial suppression of evidence.[31] Another national study by the Center of Public Integrity found that, among all 11,452 documented appeals that alleged some type of prosecutorial misconduct between 1970 and 2002, approximately 2,012 appeals led to reversals or remanded

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[29] *Id.* at 632.

[30] Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S TEX L REV 685, 686 (2006) (citations omitted).

[31] James S. Liebman *et al.*, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX L REV 1839, 1850 (2000).

indictments—a harmful error rate of 17.6 percent.[32] News reports in New York,[33] Chicago,[34] and Pittsburgh[35] document the widespread problem.[36]

Official misconduct is one of the leading causes of wrongful convictions, contributing to 51 percent of the more than 1,842 exonerations nationwide.[37] An Innocence Project study in 2010 found that, of the first 255 DNA exonerations

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[32] Emily M. West, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases* 1 (Aug 2010), *available at* https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=21946 (last visited June 17, 2016).

[33] The Editorial Board, *To Stop Bad Prosecutors, Call the Feds*, N.Y. TIMES, June 6, 2016, at A22, *also available at* http://www.nytimes.com/2016/06/06/opinion/to-stop-bad-prosecutors-call-the-feds.html?_r=0 (last visited June 17, 2016).

[34] Ken Armstrong and Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win (Parts 1-5)*, CHICAGO TRIBUNE (1999), *available at* http://www.chicagotribune.com/chi-020103trial-gallery-storygallery.html (last visited June 17, 2016).

[35] Bill Moushey, *Win at All Costs: Out of Control*, PITTSBURGH POST-GAZETTE, Nov 22, 1998, at A-1, *available at* http://www.usa-the-republic.com/items%20of%20interest/Win_At_All_Cost/Win_at_all_costs.htm (last visited June 1, 2016).

[36] *See also* John Hollway, *Reining in Prosecutorial Misconduct*, THE WALL STREET JOURNAL, July 4, 2016, *available at* http://www.wsj.com/articles/reining-in-prosecutorial-misconduct-1467673202 (last visited July 7, 2016); John Thompson, *It's Time to Do Something About Prosecutors Who Break the Rules*, The Huffington Post, June 30, 2016, *available at* http://www.huffingtonpost.com/johnthompson/its-time-to-do-something-about-prosecutors-who-break-the-rules_b_10761092.html (July 7, 2016).

[37] National Registry of Exonerations, % Exonerations by Contributing Factor, *available at* http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last visited July 13, 2016).

nationwide, about 18 percent were overturned as a result of prosecutorial misconduct.[38]

For example, Kristine Bunch spent more than 17 years in prison after she was wrongfully convicted of setting a fire that took the life of her three-year-old son.[39] At trial, a forensic analyst from the U.S. Bureau of Alcohol, Tobacco, and Firearms ("ATF") testified that he had identified an accelerant in flooring samples taken from the living room where the fire was believed to have started and from the bedroom where the child died. Years later, in post-conviction proceedings, the defense team discovered previously undisclosed documents showing that, contrary to his trial testimony, the ATF analyst found no accelerant in the bedroom and only kerosene (likely from the heater) in the living room. The documents had been withheld in violation of *Brady*. The post-conviction court initially refused to grant relief, but the Indiana appellate courts reversed the conviction, and Bunch was released.

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[38] West, *supra*, n 32. *See* Radley Balko, *Prosecutors Withhold Evidence, Innocents Go to Prison*, THE WASHINGTON POST, June 29, 2016, *available at* https://www.washingtonpost.com/news/the-watch/wp/2016/06/29/prosecutors-withhold-evidence-innocents-go-to-prison/ (last visited July 7, 2016). *See also* Anna Arceneaux, *Because the Prosecutors Withheld Evidence, This Man Has Spent 30 Years on Death Row*, American Civil Liberties Union, June 30, 2016, *available at* https://www.aclu.org/blog/speak-freely/because-prosecutors-withheld-evidence-man-has-spent-30-years-death-row (last visited July 7, 2016).

[39] National Registry of Exonerations, Kristine Bunch, *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4085.

Although the types of evidence that prosecutors suppress may vary, the result for the defendant is often the same: years of wrongful incarceration in which the only hope for exoneration occurs in proceedings that occur long after the prisoner has exhausted his or her initial post-conviction remedies. Lesly Jean spent nine years in prison for a rape he did not commit after the prosecution withheld *Brady* evidence that would have impeached the eye-witness's identification at trial.[40] Ronald Williamson spent 11 years in prison for a murder he did not commit after the prosecution withheld a videotape of Williamson making exculpatory statements.[41] Michael Morton spent 25 years in prison for a murder he did not commit after the prosecution withheld *Brady* evidence that proved that the victim's credit card had been used by a woman after the murder.[42]

The number of wrongful convictions arising out of *Brady* violations continues to rise, and the full scope of the problem has yet to be determined.

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[40] National Registry of Exonerations, Lesly Jean, *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3324. *See also Jean v. Rice*, 945 F2d 82, 87 (4th Cir. 1991).

[41] National Registry of Exonerations, Ronald Keith Williamson, *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3752.

[42] National Registry of Exonerations, Michael Morton, *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3834. The "Michael Morton Act" was enacted in 2014 to change the way discovery is conducted in criminal cases in Texas.

2. *Brady* violations were documented in testimony before the Oregon legislature.

When the Oregon legislature enacted SB 492 in 2013 to codify *Brady*, it heard from numerous criminal defense attorneys, district attorneys, and representatives of law enforcement who testified to *Brady* practice in Oregon.[43] Their testimony calls attention to the lack of *Brady* compliance across the state.

(a) Testimony from criminal defense attorneys shows a pattern of *Brady* violations in Oregon.

Testimony from Oregon defense attorneys illustrates the ways in which police and prosecutorial practice makes it difficult for defendants and defense attorneys to uncover the truth. A criminal defense attorney from Multnomah County testified that a prosecutor had recently excused the failure to disclose information because the information appeared in email form.[44] A public defender from Marion County testified that a prosecutor had recently excused the failure to disclose materials because the defense did not ask for the materials in the right way.[45]

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[43] *See* Testimony, Senate Committee on Judiciary, SB 492, Mar 18 and Apr 11, 2013 [hereinafter "Senate Hearings"] and Testimony, House Committee on Judiciary, SB 492, May 16 and 20, 2013 [hereinafter "House Hearings"], *available at* https://olis.leg.state.or.us/liz/2013R1/Measures/Overview/SB492.

[44] Senate Hearings, Apr 11, 2013, at 30:15 (testimony of Bronson James, Attorney, Portland, Oregon), *supra*, n 43.

[45] Senate Hearings, May 16, 2013, at 29:28 (testimony of Tom Sermak, Attorney, Salem, Oregon), *supra*, n 43.

A public defender from Multnomah County testified that, in one case, she learned of recorded phone calls between law enforcement and the victim for the first time during her cross-examination of the investigating police officer at trial.[46] The defense attorney successfully moved for a mistrial and forced the disclosure of 20 recorded calls. In two of the calls, the officer stated that he had "scrubbed" the system of exculpatory evidence that showed prior unsubstantiated allegations against the defendant. On retrial, the accused was acquitted. He may not have been so lucky had his defense attorney failed to ask the right question during the officer's cross-examination.

One criminal defense attorney from Multnomah County testified that, in one case, he made multiple requests for emails between the investigating detective and the victim, and the prosecution denied the existence of any such emails.[47] The prosecution even moved for, and was granted, an order to suppress a subpoena to the detective requesting the emails. The defendant was convicted after a trial, and then went to trial on similar charges in another county. The day before trial in that second county, the defense attorney learned that the very emails he had earlier requested did, in fact, exist. With the trial court's help in the second county, the

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[46] House Hearings, May 16, 2013, at 20:20 (testimony of Kasia Rutledge, Public Defender, Multnomah County, Oregon), *supra*, n 43.

[47] House Hearings, May 16, 2013, at 7:29 (testimony of Bronson James, Attorney, Portland, Oregon), *supra*, n 43.

accused recovered 61 pages of previously withheld emails discussing, among other things, alternate suspects who may have been involved in the crime.

A criminal defense attorney from Baker City, testified that, in one case, he learned only after his client was convicted of attempted murder that a co-defendant had struck a deal with the prosecutor for a lighter sentence in exchange for testimony implicating the accused.[48] The co-defendant had earlier told the defense attorney that his client was not involved in the conspiracy to commit murder, but the story changed at trial without explanation. The accused was convicted and could only address the *Brady* violation in post-conviction proceedings.

There were many other examples in the testimony before the legislature.[49]

(b) Testimony from the state's representatives suggests a lack of understanding and compliance with *Brady*.

The breadth of the *Brady* problems described by defense attorneys was buttressed by testimony from the state's representatives.

The district attorney in Lane County admitted that there are *Brady* failures due to overburdened caseloads.[50] Two former district attorneys testified that they

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[48] Senate Hearings, Mar 18, 2013, at 36:16 (testimony of Bob Moon, Attorney, Baker City, Oregon), *supra*, n 43.

[49] *See*, *e.g.*, Senate Hearings, Mar 18, 2013, at 41:38 (testimony of Connor Huseby, Attorney, Multnomah County, Oregon), *supra*, n 43.

[50] Senate Hearings, Mar 18, 2013, at 55:33 (testimony of Alex Gardner, District Attorney, Lane County, Oregon), *supra*, n 43.

were trained *not* to take notes during interviews to avoid having anything to disclose.[51] The First Assistant to the District Attorney in Multnomah County testified that he was aware that some assistant district attorneys in his office and elsewhere had a practice of not writing things down during interviews, although he encourages the opposite.[52] One former district attorney who served in four different counties testified that some offices had training on *Brady* and exculpatory evidence, but some did not; some offices had manuals, but some did not.[53]

Representatives for the district attorneys, the Department of Justice, and the Attorney General went so far as to advocate for a version of the proposed statute that was inconsistent with well-settled United States Supreme Court directives. The state's representatives urged the Oregon legislature to enact a bill under which *Brady* obligations would apply only to materials already known to the prosecutor,[54] despite the fact that the United States Supreme Court has instructed prosecutors to

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[51] Senate Hearings, Mar 18, 2013, at 39:00 (testimony of Kara Davis, Public Defender, Umatilla County, Oregon), *supra*, n 43; Senate Hearings, Mar 18, 2013, at 46:26 (testimony of Mike Romano, Attorney, Bend and Portland, Oregon), *supra*, n 43.

[52] Senate Hearings, Mar 18, 2013, at 1:03:37 (testimony of Jeff Howes, First Assistant to District Attorney Rod Underhill, Multnomah County District Attorney's Office), *supra*, n 43.

[53] Senate Hearings, Mar 18, 2013, at 46:26 (testimony of Mike Romano, Attorney, Bend and Portland, Oregon), *supra*, n 43.

[54] Senate Hearings, Mar 18, 2013, at 1:11:40 (testimony of Alex Gardner, District Attorney, Lane County, Oregon), *supra*, n 43; Senate Hearings, Apr 11, 2013, at 7:16 (testimony of Jeff Howes, First Assistant to District Attorney Rod Underhill, Multnomah County District Attorney's Office), *supra*, n 43.

discover Brady information outside their possession, including information in the files of others acting on behalf of the government.[55]

Despite the hours of testimony highlighting *Brady* failures in Oregon, including failures that came to light only after conviction, the district attorney from Clatsop County suggested that there was no problem in Oregon because there were no Oregon appellate or Ninth Circuit cases instructing Oregon district attorneys to put an end to *Brady* violations.[56]

The legislature recognized a problem. Senator Dingfelder commented that "we do not have conformity in how or if *Brady* is enforced in this state[.]"[57]

(c) The structure of Oregon's criminal justice system make *Brady* violations more likely to happen and less likely to be discovered.

Structural components of Oregon's criminal procedure make it particularly likely for *Brady* violations to occur and more likely that *Brady* violations escape detection. Criminal defendants in Oregon have limited access to discovery, with no ability to take depositions,[58] serve interrogatories,[59] attend grand jury

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[55] Senate Hearings, Apr 11, 2013, at 24:55 (testimony of John Henry Hingson III, Attorney, Oregon City, Oregon), *supra*, n 43.

[56] Senate Hearings, May 16, 2013, at 1:13:55 (testimony of Josh Marquis, Oregon District Attorney's Association), *supra*, n 43.

[57] Senate Hearings, May 16, 2013, at 1:07:41 (Senator Dingfelder), *supra*, n 43.

[58] *See* ORS 135.805 to 135.873.

[59] *Id.*

proceedings,[60] or even require that those proceedings be recorded.[61] The lack of discovery ensures that defendants are overly dependent on the state's compliance with *Brady* disclosures and, simultaneously, unable to independently discover *Brady* violations.

(d) *Brady* violations are constitutional violations and should be treated accordingly.

Brady violations are rampant in Oregon due to lack of consequence. The passage of the 2013 statute reflecting *Brady* has done little to change practice in Oregon. According to some of the same attorneys who testified before the legislature, the state regularly discloses new evidence on the day of, or during, trial. Just last year, in 2015, news came out about cases in Multnomah County that were based on informant testimony where the prosecutors failed to disclose the criminal history (and ongoing criminality) of the informant.[62]

Oregon courts need to do more to diligently enforce *Brady*. When faced with a late disclosure, trial courts generally give defendants the untenable option of proceeding to trial or taking a short continuance at the risk of losing other defense

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[60] ORS 132.090.

[61] *Id.*

[62] Aaron Mesh, *Rat Tale*, WILLAMETTE WEEK, Sept 1, 2015, *available at* http://www.wweek.com/portland/article-25313-rat-tale.html (last visited June 19, 2016).

witnesses.[63] Even when prosecutors fail to make a pretrial disclosure, appellate courts refuse to punish the violation because the defendant cannot prove how the information would have changed the outcome at trial[64]—a standard that is wholly

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[63] *See*, *e.g.*, Senate Hearings, Mar 18, 2013, at 43:54 (testimony of Erik Deitrick, Public Defender, Portland, Oregon), *supra*, n 43 (Mr. Deitrick testified to a case in which the prosecution withheld thousands of financial records that were potentially exculpatory. The prosecution disclosed the documents for the first time on the first day of trial. The trial court gave Mr. Deitrick and his client the choice of proceeding to trial without reviewing the documents or taking a short, one-week continuance, which still would have left the defense without an opportunity to engage a financial expert to review and testify about the documents).

[64] *State v. Wixom*, 275 Or App 824, 837-39, 842, 366 P3d 353 (2015) ("Defendant's motion and the pretrial hearing transcript demonstrate that, although defendant articulated a belief and a suspicion that the DHS foster care records would contain helpful impeachment information for the defense, he did not point out exculpatory facts that the DHS records would show or lay a foundation for why there was reason to believe that the DHS records would contain any such facts, such as by articulating facts known by him or by others that led to his belief and suspicion. * * * Defendant acknowledges that, to establish a due process violation, he must demonstrate that the DHS records would have been material and favorable to his defense. Defendant's vague assertions in the trial court that there were 'things' in the DHS file that would lead to 'discussion about the complaining witness's character for truthfulness or the propensity for truthfulness or untruthfulness and possible false allegations' did not satisfy his burden."); *State v. Faunce*, 251 Or App 58, 68-69, 282 P3d 960 (2012) ("Defendant argues, however, that he could have conducted tests other than test-firing Green's gun, such as testing to determine whether there was trace evidence of the victim's blood on the gun, testing the black powder in Green's possession, and testing to determine whether Green's gun had wadding in the chamber or used a grease alternative. Again, it is highly speculative that any of these tests would have exculpatory evidentiary value to defendant's case. The state's forensic expert explained at trial that he rarely finds blood on a gun and that traces of blood dissipate over time. Because Green's weapon was seized seven months after Adams's murder, it is unlikely that the weapon would have had traces of blood that would reveal any potential forensic evidence."); *State v. Armstrong*, 71 Or App 467, 469-70, 692 P2d 699 (1984) ("Defendant contends additionally that the state's refusal to produce [police officer] notes [of witness interviews] deprived him of liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution. *Brady* * * * requires the state to disclose to a defendant exculpatory material in the prosecutor's possession. The burden is on a defendant to show a reasonable good faith belief that the evidence sought is favorable to him and material to his defense. Defendant made no showing that the notes contained exculpatory material, and the state's failure to produce them did not violate his

speculative and fails to account for the fact that, if disclosed earlier, the defense could have been prepared to address the information at trial[65] or could have used the information to develop further evidence of innocence or mitigation.[66] The lack of enforcement allows—and even incentivizes—future violations.

As it stands in Oregon, the practice of *Brady* does not fulfill the promise. Chief Judge Kozinski of the Ninth Circuit got it right when he explained that non-compliance with *Brady* is too often a low-risk, high-reward proposition for prosecutors:

> A robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence. Due to the nature of a *Brady* violation, it's highly unlikely wrongdoing will ever come to light in the first place. This creates a serious moral hazard for those prosecutors who are more interested in winning a conviction than serving justice. In the rare event that the suppressed evidence does surface, the consequences usually leave the prosecution no worse than had it complied with *Brady* from the outset. Professional discipline is rare, and violations seldom give

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rights under the federal Constitution.").

[65] *See, e.g., Kyles*, 514 US at 434 ("*Bagley's* touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'").

[66] *See United States v. Price*, 566 F3d 900, 911-12 (9th Cir 2009). *But cf. State v. Deloretto*, 221 Or App 309, 322, 189 P3d 1243 (2009).

> rise to liability for money damages. Criminal liability for causing an innocent man to lose decades of his life behind bars is practically unheard of. If the violation is found to be material (a standard that will almost never be met under the [majority] panel's construction), the prosecution gets a do-over, making it no worse off than if it had disclosed the evidence in the first place.[67]

Judge Kozinski's advice to courts is apt: "We must send prosecutors a clear message: Betray *Brady*, give short shrift to *Giglio*, and you will lose your ill-gotten conviction."[68]

C. The state cannot avoid its *Brady* obligations by forcing the accused to hunt for possible violations in post-conviction proceedings.

The state's position in this case would dilute *Brady* by shifting the burden from the state (to disclose evidence) to the accused (to hunt for evidence). The state has argued that the "escape clause" for a late or successive post-conviction petition requires Ms. Eklof to prove that she "used reasonable diligence" at trial and during her first post-conviction proceeding to discover *Brady* material withheld by the state.[69] The state also argues, and the Court of Appeals has agreed, that ORCP 47 requires Ms. Eklof to produce affirmative evidence to prove her

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[67] *Olsen*, 737 F3d at 630 (Kozinski, J., dissenting).

[68] *Id.* at 633.

[69] State's Court of Appeals Answering Brief at p. 8. *See Verduzco v. State of Oregon*, 357 Or 553, 566, 355 P3d 902 (2015) (The multiple "escape clauses" of Oregon's Post Conviction Hearing Act requires a petitioner to prove "that the facts on which her new grounds for relief depend could not reasonably have been discovered sooner.").

diligence.[70] The state suggests that it must have actively suppressed the evidence to qualify as a *Brady* violation when that violation is raised in post-conviction proceedings.[71] The state's arguments directly conflict with *Brady* and its progeny.[72]

1. The burden of disclosure under *Brady* falls on the state and not the accused.

The state's proposed interpretation of the "escape clause" is in direct conflict with due process. The United States Supreme Court has consistently held that due process places the burden to disclose squarely on the state.[73] The accused does not bear any burden to request *Brady* materials.[74] The United States Supreme Court has also consistently held that, when the state fails to make a required disclosure, a due process violation occurs "irrespective of the good faith or bad faith of the prosecution."[75] The defendant need not prove whether the state actively

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[70] State's Court of Appeals Answering Brief at p. 7. *See also Eklof v. Steward*, 273 Or App 789, 794, 359 P3d 570 (2015).

[71] State's Court of Appeals Answering Brief at p. 8.

[72] *See* Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L REV 138 (2012).

[73] *Kyles*, 514 US at 433-40.

[74] *Strickler v. Greene*, 527 US 263, 280, 119 S Ct 1936, 144 L Ed 2d 286 (1999) (citing *Agurs*, 427 US at 107 ("[T]he duty to disclose [*Brady*] evidence is applicable even though there has been no request by the accused.").

[75] *Brady*, 373 US at 87.

suppressed materials or mistakenly failed to produce them.[76] *Amici* are not suggesting that Oregon prosecutors routinely act with malicious intent when they suppress *Brady* evidence. A violation occurs because, regardless of the prosecutor's intent, the result is the same: an unfair trial to the accused.[77]

The state's position in this case unfairly circumvents the prosecutorial duty to disclose by creating a rule that would deny a petitioner relief from *Brady* violations if that petitioner failed to "ask the right question" to uncover the evidence that the state wrongly withheld.[78] The state does not deny that the evidence at issue in this case is *Brady* evidence and does not deny that the state failed to disclose that evidence to Ms. Eklof.[79] The state argues only that the evidence was "reasonably available" to Ms. Eklof had she "asked the right question" in her first post-conviction proceedings. The state's proposed rule reverses the burdens under *Brady*, strips it of its force, and frustrates its purpose.

The purpose of *Brady* is to ensure the defendant's right to a fair trial under the Fifth and Fourteenth Amendments' Due Process guarantees. The prosecutor's

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[76] *Id. See also Price*, 566 F3d at 907 ("The term 'suppression' does not describe merely overt or purposeful acts on the part of the prosecutor; sins of omission are equally within *Brady's* scope.").

[77] *Brady*, 373 US at 87.

[78] *See* State's Court of Appeals Answering Brief at pp. 9-10.

[79] *See* State's Court of Appeals Answering Brief.

role is to "search for truth in criminal trials,"[80] and the promise of *Brady* can be accomplished only when the burden of production is borne by the state without a specific request from the defendant. Only the state knows what evidence is in its possession. Only the state has at its disposal the police, the crime lab, and other investigate agencies. Only the state knows the investigation done to collect the evidence.

It is unfair and unrealistic to expect criminal defendants to "ask the right question" to uncover evidence that is within the state's possession and could prove innocence. If the prosecutorial mandate is to "search for truth,"[81] prosecutors must be required to disclose, and thereby confront, the evidence that could lead to the truth.

The state's proposed rule in this case would allow a prosecutor to withhold *Brady* material and wait for post-conviction proceedings to force the accused first, to allege a speculative *Brady* claim without support and, second, to guess what the prosecutor might hold. If the accused fails to ask the right question in discovery, that due process violation need never be addressed. If the evidence comes to light later, as it did in this case, the state can shield itself with the excuse that the

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[80] *Banks v. Dretke*, 540 US 668, 696, 124 S Ct 1256, 157 L Ed 2d 1166 (2004) (quoting *Strickler*, 527 US at 281)).

[81] *Id.*

accused never asked, despite the state's duty to disclose without an ask. The state is attempting to use the procedural rules of post-conviction to narrow the substance of due process under *Brady*. This court should reject the state's attempt and, instead, hold that *Brady* material suppressed by the state is not "reasonably available" to a petitioner for purposes of the "escape clause" to file a late or successive petition for post-conviction relief. The court should further hold that the state, not the petitioner, bears the burden to prove that *Brady* evidence was earlier disclosed to, or otherwise discovered by, the petitioner.

2. The United States Supreme Court has rejected the type of burden-shift proposed by the state here.

The rule that the state seeks here was soundly rejected by the United States Supreme Court. In *Banks v. Dretke*, the Court explained: "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."[82] The Court announced a rule of constitutional interpretation that is equally applicable in all phases of the criminal justice system, whether trial, post-conviction, or federal habeas. In *Banks*, the Court addressed a state's argument that a lack of "due diligence" in state post-conviction proceedings prevented

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[82] *Id.* at 695.

federal habeas review of *Brady* violations.[83] Banks had been convicted of capital murder and sentenced to death.[84] Banks filed for state post-conviction relief and alleged for the first time that the state failed to disclose exculpatory evidence that would have revealed that one state's witness (Robert Farr) was a paid police informant and another (Charles Cook) was an incentivized witness.[85] The state denied the allegations and the post-conviction court rejected the claims.[86] Banks later filed a federal habeas petition raising the same allegations.[87] There, the state, for the first time, revealed that it had withheld evidence related to Farr and Cook.[88] The district court granted habeas relief with respect to Banks' sentence based on the Farr evidence that was improperly withheld.[89] The Fifth Circuit reversed, finding that Banks did not act diligently to develop the facts in his state post-conviction proceedings.[90]

[83] *Id.* at 692.

[84] *Id.* at 674.

[85] *Id.* at 682.

[86] *Id.* at 683.

[87] *Id.*

[88] *Id.* at 685-87.

[89] *Id.* The district court did not disturb the guilt-phase of the trial because it found that Banks had not properly pled a *Brady* claim based on the materials related to Cook. The United States Supreme Court reversed that holding.

[90] *Id.* at 687-88.

According to the Fifth Circuit, during state post-conviction proceedings, Banks should have attempted to locate Farr and question him, or ask to interview the officers involved in the investigation.[91] The Fifth Circuit held that Banks' lack of diligence rendered the federal habeas proceeding procedurally barred.[92]

The United States Supreme Court disagreed.[93] The Court recognized that evidence suppressed by the state is "external to the defense" and, therefore, not reasonably available to the petitioner.[94] Any other rule would be untenable: "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."[95]

The Ninth Circuit faced a similar question in habeas proceedings in *US v. Lopez*.[96] Lopez filed a "second and successive" habeas petition under the AEDPA to request relief on the basis of a *Brady* violation.[97] The prosecution argued that Lopez should have discovered the violation sooner.[98] The Ninth Circuit disagreed,

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[91] *Id.* at 688.

[92] *Id.*

[93] *Id.* at 695.

[94] *Id.* at 696 (citing *Amadeo v. Zant*, 486 US 214, 222, 108 S Ct 1771, 100 L Ed 2d 249 (1988)).

[95] *Id.* *See also Douglas v. Workman*, 560 F3d 1156, 1180-81 (10th Cir 2009).

[96] 577 F3d 1053, 1055 (9th Cir 2009).

[97] *Id.* at 1059.

[98] *Id.* at 1068.

recognizing the "perverse result" of barring all second-in-time *Brady* claims: "[T]he broad rule the government advocates, under which *all* second-in-time *Brady* claims would be subject to [the procedural bar of AEDPA], would completely foreclose federal review of some meritorious claims and reward prosecutors for failing to meet their constitutional disclosure obligations under *Brady*."[99]

Significantly, the court acknowledged that "*Brady* claims, by their nature, necessarily rest on newly discovered evidence."[100] Thus, "[b]arring these claims would promote finality—one of AEDPA's purposes—but it would do so only at the expense of foreclosing all federal review of meritorious claims that petitioner could not have presented to a federal court any sooner—certainly not an AEDPA goal."[101]

Banks and *Lopez* each arose in federal habeas proceedings, but the courts' concerns are equally applicable in state post-conviction proceedings.[102] Procedural

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[99] *Id.* at 1064-65 (emphasis in original).

[100] *Id.* at 1065.

[101] *Id.* The Ninth Circuit ultimately denied the habeas petition because the evidence was not "material" under *Brady* and, therefore, not reviewable under the federal AEDPA standards for a permissible "second and successive" petition.

[102] *See, e.g., Mazzan v. Warden, Ely State Prison*, 993 P2d 25, 37 (Nev. 2000) ("Mazzan's instant petition for [state] habeas relief is a successive one; therefore, to avoid procedural default under NRS 34.810, Mazzan has the burden of pleading and proving specific facts that demonstrate both good cause for his failure to present his claim in earlier proceedings and actual prejudice. NRS 34.810(3). Cause and prejudice parallel two of the three *Brady* violation components. If Mazzan proves that the state withheld evidence, that will constitute cause for not presenting his claim earlier. If he proves that the withheld evidence was material

bars that promote finality should not be used to foreclose judicial review of meritorious claims that could not have been raised any sooner due to suppression by the state. By shifting the burden to Ms. Eklof, here, the state incentivizes *Brady* violations by creating a finish line whereby if the state suppresses evidence long enough, there will be no consequences for its wrongdoing. The state suggests that its constitutional violation is beyond judicial review.[103] This court should reject that suggestion and, instead, give *Brady* the force required to fulfill the promise.

D. *Brady* violations must be remediable in post-conviction proceedings.

Brady violations can, and do, result in wrongful convictions. *Brady* violations further offend our system of justice because they undermine the fairness of the entire proceeding. Courts must intervene. Without judicial enforcement, *Brady* is meaningless.

This court should recognize a stand-alone claim for post-conviction relief as a result of a *Brady* violation. Despite the statutory mandate requiring that constitutional violations be addressed in post-conviction proceedings, some post-

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under *Brady*, that will establish actual prejudice.")

[103] The state's ORCP 47 argument—that Ms. Eklof bore the burden to produce affirmative evidence in opposition to summary judgment to prove that she did not receive the evidence prior to her first post-conviction proceeding—is a further attempt to improperly shift the burden. The trial court and Court of Appeals accepted the state's argument and shifted the burden to Ms. Eklof to prove that she did not receive the evidence, rather than forcing the state to prove that it met its disclosure obligations pursuant to *Brady*.

conviction trial courts find that there is no stand-alone claim arising out of a *Brady* violation.[104] *Amici* adopts Ms. Eklof's argument related to the right to post-conviction relief as a result of a *Brady* violation.

The court's ruling in this case should demand pretrial compliance with *Brady* and ensure meaningful post-conviction relief for violations.

IV. CONCLUSION

Amici respectfully requests that this court hold that *Brady* material suppressed by the state is not "reasonably available" to a petitioner for purposes of the "escape clause" permitting a late or successive petition under the Post-Conviction Hearing Act. *Amici* further requests that this court hold that, to avoid a late or successive petition for post-conviction relief, the state—and not the petitioner—must bear the burden to prove that it disclosed the *Brady* material to the petitioner earlier, or that the petitioner had otherwise already discovered it.

Finally, *Amici* requests that the court hold that a proven *Brady* violation is a stand-alone claim for post-conviction relief under the Post-Conviction Hearing Act.

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[104] *See* ORS 138.530(1)(a) (requiring post-conviction relief be granted when the petitioner establishes "[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").

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Respectfully submitted,

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CERTIFICATE OF FILING

I certify that I electronically filed the foregoing BRIEF OF *AMICUS CURIAE* with the State Court Administrator for the Supreme Court of the State of Oregon by using the appellate electronic filing system on July 15, 2016.

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CERTIFICATE OF COMPLIANCE

I certify that (1) BRIEF OF *AMICUS CURIAE* OREGON INNOCENCE PROJECT, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON, AND OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION complies with the word-count limitation in ORAP 9.10(3) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 7,322 words.

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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