IN THE COURT OF APPEALS OF THE STATE OF OREGON

BENJIE ALLEN REEVES, Plaintiff-Appellant, v. MARK NOOTH, Superintendent, Snake River Correctional Institution, Defendant-Respondent.	Malheur County Circuit Court Case No. 1404798P CA A157444

BRIEF OF *AMICUS CURIAE* OREGON INNOCENCE PROJECT IN SUPPORT OF APPELLANT REEVES

Appeal from Judgment of the Circuit Court
for MALHEUR County

The Honorable Lung S. Hung, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. STATEMENT OF *AMICUS CURIAE*

Oregon Innocence Project (OIP) is an initiative of the Oregon Justice Resource Center. The mission of OIP is to (1) exonerate the innocent, (2) educate and train law students, and (3) promote legal reforms aimed at preventing wrongful convictions.

OIP is the only program in Oregon dedicated to securing the release of wrongfully convicted inmates. Additionally, OIP works with community partners to build support for comprehensive criminal justice reform to improve trial procedures, interrogation techniques, discovery practices, and other Oregon policies that do not serve to protect the innocent or punish the guilty.

Amicus OIP has not investigated the merits of Mr. Reeves' assertions and takes no position on his innocence or guilt. OIP, instead, appears as *amicus curiae* in this matter to urge the Court to enhance the truth-seeking functions of the criminal justice system by permitting broad access to the courts. In advocating for broad access, OIP relies on its experience, along with the experience of innocence projects around the country, representing the wrongfully convicted who often need a remedy many years after conviction in light of newly presented evidence. *Amicus* OIP respectfully requests the Court recognize a freestanding claim of "actual innocence" under the Oregon Constitution to permit compelling claims of innocence to be investigated through discovery and decided on their merits.

II. SUMMARY OF ARGUMENT

The trial court erred when it found that Oregon's Post-Conviction Hearing Act ("PCHA") does not recognize a freestanding claim for "actual innocence" under the state or federal constitution, and dismissed Appellant's claim of "actual innocence" on the pleadings.

This country has seen over 1,600 exonerations over the last 25 years, proving that our criminal justice system can—and does—make mistakes. The consequences are real. In recognition of that reality, courts in 16 states around the country have recognized freestanding claims of actual innocence arising out of their state constitution, the federal constitution, or by statute. In those 16 states, there is a clear right to relief for those wrongfully convicted. Under the trial court's interpretation of Oregon law, a wrongfully convicted person is not even entitled to a day in court.

The trial court's dismissal at the pleadings stage means the defendant is prevented from getting access to discovery to investigate and fully present a claim of innocence. That claim is cognizable under the PCHA and requires that those who can present a viable claim of innocence get their day in court.

The PCHA requires the post-conviction court grant relief when a petitioner proves a constitutional violation in his conviction or sentence. Convicting an innocent person violates Article I, section 10 of the Oregon Constitution requiring

complete justice. If a post-conviction petitioner can prove that he is innocent, it becomes apparent that justice in the original proceeding was not complete.

In addition, sentencing an innocent person violates Article I, section 16 of the Oregon Constitution prohibiting cruel and unusual punishment. If a post-conviction petitioner can prove that he is innocent, any sentence imposed on that person would be both disproportionate and barbaric.

Our system protects innocence. The importance of innocence requires this Court to recognize procedural mechanisms and remedies to protect the right. Dismissal on the pleadings fails the constitution's ultimate goal of establishing justice, maintaining order, and perpetuating liberty.[1]

III. ARGUMENT

The trial court erred when it refused to recognize a freestanding claim for "actual innocence" under the state or federal constitution, and dismissed Appellant's claim of "actual innocence" on the pleadings.

"'[A]ctual innocence' means factual innocence, not mere legal insufficiency."[2] Under a "freestanding" claim of actual innocence, a defendant

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[1] Or Const, Preamble.

[2] *Bousley v. United States*, 523 US 614, 623, 118 S Ct 1604, 140 L Ed 2d 828 (1998) (citing *Sawyer v. Whitley*, 505 US 333, 339, 112 S Ct 2514, 120 L Ed 2d 269 (1992)). "A prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime. 'Legal innocence,' in contrast, refers to a legal error in the trial that by itself requires reversal." *State v. Beach*, 370 Mont 163, 211, 302 P3d 47, 79 (2013) (McKinnon, J., concurring) (citations omitted).

must show that newly presented evidence proves his conviction is factually incorrect and his continued imprisonment would thus violate the constitution.

A. The nationwide "innocence movement" has forced courts to recognize the need for claims of actual innocence.

1. Without a freestanding claim of actual innocence, innocent individuals will not be able to fully investigate and present evidence to prove innocence.

The Oregon Constitution was written with the purpose that the law should always work "to the end that Justice be established, order maintained, and liberty perpetuated."[3]

It is for that reason that the Constitution protects innocence and, as discussed below, recognizes a right to a freestanding claim of actual innocence under Article I, sections 10 and 16.

The Oregon courts have never decided whether a freestanding claim of actual innocence is cognizable through the Post-Conviction Hearing Act. The Oregon Supreme Court, in *Anderson v. Gladden*, refused to decide whether such a claim exists and specifically left the issue for another day.[4] The *Anderson* court, however, strongly suggested the court's authority to correct a wrongful conviction: "The prospect of a court holding itself powerless to remedy a manifestly erroneous

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[3] Or Const, Preamble.

[4] 234 Or 614, 626, 383 P2d 986 (1963).

conviction obviously would not adorn the administration of justice."[5] That case, decided in 1963, was the last word on "actual innocence" by the appellate courts in Oregon.

Since then, over 1,600 men and women have been proved innocent around the country after wrongful conviction,[6] and the "innocence movement" has spread to all 50 states to investigate claims of actual innocence.[7] And to date, 16 states have found freestanding claims of actual innocence in the state's constitution, the federal constitution, or by statute.[8]

Courts in these other states have recognized that defendants can be proved innocent, often years later and often due to information or evidence that was not presented at the time of conviction. The wave of exonerations over the past two decades includes cases involving DNA evidence, false confessions, pleas that were contra-factual, recantations, mistaken identifications, and advances in forensic science.[9] Many of the cases involve a combination of these elements.

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[5] *Id.*

[6] National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited June 2, 2015).

[7] Innocence Network, http://innocencenetwork.org/members/ (last visited June 2, 2015).

[8] *See infra* section III(A)(2)(b).

[9] National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited June 2, 2015).

For example, DNA testing has come a long way over the last 25 years and can now be used to definitively exclude a person as the perpetrator with only a miniscule sample of testing material. It is the advance in science, despite the lack of any procedural flaw at trial, that can lead to exoneration. Advances in other areas of science (like arson investigation, blood serology, and memory science) as well as other forms of evidence (like victim recantations; newly presented police, prosecutor, or attorney misconduct; and newly presented evidence of improper interrogation or investigation) can lead to the same result. The more than 1,600 exonerations across the country have taught us a great deal about the ways in which wrongful convictions happen. When the justice system fails, it ought to correct itself.

But, without a procedural mechanism to get back into court, the correction cannot happen. The defendant is left with no alternative relief, despite his innocence. A freestanding claim of actual innocence recognizes that, when the criminal justice system makes a mistake, it is up to that system to fix itself. Moreover, in this man-made system, it is within the power of those who control the process to fix it.

The trial court in this case erred when it found that such a claim does not exist and dismissed Mr. Reeves' claim on the pleadings, denying him an opportunity to obtain discovery and present evidence that could prove his

innocence. Mr. Reeves was left in an untenable "catch 22"—he had uncovered some new evidence of innocence, but, because the claim was dismissed on the pleadings, he was left without the tools of discovery to get access to additional evidence, investigate fully, and present a proper claim of innocence to the court. *Amicus* OIP asks that this Court recognize a freestanding claim of actual innocence under the Oregon Constitution, as discussed below, to prevent dismissal on the pleadings.

2. Courts across the country are moving toward "actual innocence."

Before the 1980s, the once-dominant certainty was that the United States criminal justice system almost never convicts an innocent person. The "ghost of the innocent man convicted," according to Judge Learned Hand, was "an unreal dream."[10] Yet, since 1989, over 1,600 men and women have been exonerated around the country,[11] forcing state and federal courts, including the United States Supreme Court, to recognize the ongoing reality of wrongful convictions.

(a) The United States Supreme Court has indicated a shift toward claims of actual innocence.

In 1993, the United States Supreme Court, in *Herrera v. Collins*, assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual

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[10] *United States v. Garsson*, 291 F 646, 649 (SD NY 1923).

[11] National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited June 2, 2015).

innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."[12] The *Herrera* Court, however, left the question open.[13] As discussed below, other statements in that case suggest that a freestanding claim of innocence is constitutionally required.

In *Herrera*, the defendant was convicted of murder and sentenced to death.[14] He brought unsuccessful habeas petitions in state and federal court in Texas.[15] Ten years after his conviction, the defendant filed another federal habeas petition, asserting he was actually innocent of the murders.[16] The defendant relied on two affidavits indicating his brother had committed the murders.[17] He argued that, in light of this new evidence, his execution would violate the Due Process and Cruel and Unusual Punishment Clauses of the United States Constitution.[18]

The Supreme Court ultimately denied Herrera's appeal, but the majority opinion assumed that a persuasive claim for "actual innocence" would entitle a

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[12] 506 US 390, 417, 113 S Ct 853, 122 L Ed 2d 203 (1993).

[13] *See House v. Bell*, 547 US 518, 555, 126 S Ct 2064, 165 L Ed 2d 1 (2006); *McQuiggin v. Perkins*, 133 S Ct 1924, 1931, 185 L Ed 2d 1019 (2013).

[14] *Herrera*, 506 US at 393.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 398.

capital defendant to relief under the federal Constitution.[19] The concurring and dissenting opinions, too, indicate that the Constitution requires relief for an innocent person. Justice O'Connor wrote in her concurring opinion: "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."[20] Justice White wrote in his concurring opinion: "I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."[21] And Justice Blackmun, joined by Justices Stevens and Souter, wrote in a dissenting opinion: "We really are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence. Despite the State of Texas' astonishing protestation to the contrary, I do not see how the answer can be anything but 'yes.'"[22]

More recently, in *In re Davis,* the United States Supreme Court remanded without discussion a habeas petition to the district court for fact-finding on a

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[19] *Id.* at 417.

[20] *Id.* at 419 (O'Connor, J., concurring).

[21] *Id.* at 429 (White, J., concurring).

[22] *Id.* at 430-31 (Blackmun, J., dissenting).

freestanding claim of innocence.[23] And in *District Attorney's Office v. Osborne*, the Court again assumed without deciding that there is a "federal constitutional right to be released upon proof of 'actual innocence.'"[24] In that case, the defendant was denied further DNA testing of evidence used to convict, and he brought a claim under 42 USC § 1983 to compel the release of the evidence so that it could be tested.[25] The Supreme Court denied the petition.[26] In his dissent, Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, recognized that it is "far too late in the day to question the basic proposition that convicted persons such as [the defendant] retain a constitutionally protected measure of interest in liberty, including the fundamental liberty of freedom from physical restraint."[27]

The dissent, moreover, recognized that the State's interest in finality of judgment "is not a standalone value that trumps a State's overriding interest in ensuring that justice is done in its courts and secured to its citizens."[28] Instead, the Justices wrote, "when absolute proof of innocence is readily at hand, a State should

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[23] 557 US 952, 130 S Ct 1, 174 L Ed 2d 614 (2009).

[24] 557 US 52, 71-72, 129 S Ct 2308, 174 L Ed 2d 38 (2009).

[25] *Id.* at 55-56.

[26] *Id.* at 74-75.

[27] *Id.* at 94.

[28] *Id.* at 98.

not shrink from the possibility that error may have occurred."[29] Indeed, "our system of justice is strengthened by recognizing the need for, and imperative of, a safety valve in those rare instances where objective proof that the convicted actually did not commit the offense later becomes available through the progress of science."[30] For that reason, the dissent recognized "an individual's interest in his physical liberty is one of constitutional significance" and "if a wrongly convicted person were to produce proof of his actual innocence, no state interest would be sufficient to justify his continued punitive detention."[31]

(b) Lower state and federal courts have also recognized a claim for actual innocence.

At least 16 states have recognized the right to a freestanding claim of actual innocence. The states, listed in the chart below, find the right arises out of the state or federal constitution, or by statute:

State	***Source of the Right***	***Citation***
Arizona	Statute	Ariz R Crim P 32.1(h).
Arkansas	Statute	Ark Code Ann §§ 16-112-201-208.
California	Writ of Habeas Corpus	*In re Clark*, 5 Cal 4th 750, 766, 21 Cal Rptr 2d 509, 855 P2d 729 (1993).

[29] *Id.*

[30] *Id.*

[31] *Id*. at 99.

Connecticut	Writ of Habeas Corpus	*Summerville v. Warden,* 229 Conn 397, 422, 641 A2d 1356, 1369 (1994).
Delaware	Statute	DC Code § 22-4135.
Illinois	Illinois State Constitution, Article I, Section 2 (Due Process)	*People v. Washington*, 171 Ill2d 475, 489, 665 NE2d 1330, 1337 (1996).
Maryland	Statute	Md Code Crim Pro § 8-301.
Minnesota	Statute	Minn Stat § 590.01.
Missouri	Writ of Habeas Corpus	*State ex rel. Amrine v. Roper*, 102 SW3d 541, 547 (2003).
Montana	United States Constitution, 8th Amendment (Cruel and Unusual Punishment) and 14th Amendment (Due Process)	*State v. Beach*, 370 Mont 163, 168, 302 P3d 47, 53 (2013).
New Mexico	New Mexico Constitution, Article II, section 18 (Due Process) and section 13 (Cruel and Unusual Punishment)	*Montoya v. Ulibarri*, 142 NM 89, 97, 163 P3d 476, 484 (2007).
New York	New York Constitution, Article I, section 6 (Due Process) and section 5 (Cruel and Unusual Punishment)	*People v. Hamilton*, 979 NYS2d 97, 107-08, 155 AD3d 12, 26 (2014).

Ohio	Statute	Ohio Rev Code Ann § 2953.21.
Tennessee	Statute	Tenn Code Ann § 40-30-117.
Texas	United States Constitution, 14th Amendment (Due Process)	*State ex rel. Holmes v. Honorable Court of Appeals for Third District*, 885 SW2d 389, 397-98 (Tex Crim App 1994).
Utah	Statute	Utah Code Ann § 78B-9-301.

Several states find the right arises out of the "due process" requirement or the prohibition against "cruel and unusual punishment" in their state constitutions.[32] The "cruel and unusual punishment" provisions in the New Mexico and New York constitutions have been interpreted, similar to the provision in the Oregon Constitution discussed below, to prohibit punishment that is cruel and unusual, or disproportionate.[33]

At least two states (Montana and Texas) find the right arises out of the federal constitution. In *State ex rel. Holmes v. Honorable Court of Appeals for*

[32] The Ninth Circuit also recognizes a freestanding claim of actual innocence under the federal constitution and *Herrera*. *Carriger v. Stewart*, 132 F3d 463, 476-77 (9th Cir 1997).

[33] *Montoya*, 142 NM at 97, 163 P3d at 484; *Hamilton*, 979 NYS2d at 107-08, 155 AD3d at 26. None of these states have a "complete justice" requirement similar to Oregon's Constitution, also discussed below.

Third District, the Texas Criminal Court of Appeals held that executing an innocent person would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[34] And in *State v. Beach*, the Supreme Court of Montana recognized a substantive claim of actual innocence, following the United States Supreme Court's analysis in *Herrera*.[35]

The growing trend toward "actual innocence" is a recognition of the right to be free from punishment and the need for procedural mechanisms and remedies to protect that right.

B. Oregon's Post-Conviction Hearing Act recognizes "actual innocence" as a ground for relief if convicted as a result of a constitutional violation.

A petitioner who was convicted and can, later, prove his innocence is entitled to relief under the PCHA if he can establish a denial of his constitutional rights. The petitioner's innocence is protected under Article I, sections 10 and 16 of the Oregon Constitution. Each is discussed in turn.

1. Convicting an innocent person is a denial of "complete justice" in violation of Article I, section 10 of the Oregon Constitution.

The PCHA requires a court to grant a petitioner post-conviction relief if the petitioner establishes "[a] substantial denial in the proceedings resulting in petitioner's rights under the Constitution of the United States, or under the

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[34] 885 SW2d at 397-98.

[35] 370 Mont at 168, 302 P3d at 53. Mr. Reeves' right to a freestanding claim of "actual innocence" is, likewise, found in the Eighth and Fourteenth Amendments to the federal constitution, as discussed in the Appellant's Opening Brief.

Constitution of the State of Oregon, or both, and which denial rendered the conviction void."[36] The petitioner, then, is entitled to relief if he can prove he was denied a right that is constitutionally protected.

This Court, in analyzing the Oregon Constitution, must examine the wording of the particular constitutional provision, the historical circumstances that led to its creation, and case law surrounding it.[37] "The purpose of that inquiry is to understand the wording in the light of the way that wording would have been understood and used by those who created the provision, and to apply faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise."[38]

The Oregon Constitution requires the court to administer justice "completely."[39] Article I, section 10 of the Constitution provides:

> No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.

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[36] ORS 138.530.

[37] *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 91, 23 P3d 333 (2001) (citing *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992)).

[38] *Id.* (citations omitted).

[39] Or Const, Art I, § 10.

The Oregon Supreme Court construes section 10 as "one sentence that is made up of two independent clauses."[40] Each clause is "mandatory" and prescribes "how government ***must*** conduct its functions."[41] Oregon courts have construed the first clause of section 10 to protect individual defendants as well as the public interest by creating certain rights, including the right to a speedy trial and open courts.[42]

The plain language of the provision also creates the right to justice that is administered "completely."[43] Oregon courts have given little guidance as to the meaning of the phrase, although case law suggests the provision means what it says: that justice be administered completely.[44]

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[40] *Smothers*, 332 Or at 91.

[41] *Id.* (citing *Oregonian Publ'g Co. v. O'Leary*, 303 Or 297, 301-02, 73 P2d 173 (1987)) (emphasis added).

[42] *Application of Haynes*, 290 Or 75, 80, 619 P2d 632 (1980) ("As already stated, article I, section 10, addresses the administration of justice and protects interests of the public as well as the rights of defendants.").

[43] Or Const, Art I, § 10.

[44] *See, e.g., State v. MacBale*, 353 Or 789, 809, 305 P3d 107 (2013) ("[G]iven the sensitive and personal nature of the matters raised at an OEC 412 hearing, openness could potentially further victimize an already vulnerable witness or complainant and make the 'complete' administration of justice referred to in Article I, section 10, more difficult, if not impossible."); *State v. Reynolds*, 250 Or App 516, 526-27, 280 P3d 1046 (2012) ("Correction of the plain error on direct review, then, implements our mandate to administer justice 'completely and without delay' under Article I, section 10, of the Oregon Constitution.").

The provision traces back to the Magna Carta and was written to require that justice be done not "by halves."[45] Article 40 of the Magna Carta states: "To none will we sell, to none deny or defer, right and justice."[46] Lord Edward Coke added the idea of "complete justice" when he wrote his commentary on the Magna Carta in The Second Part of the Institutes of the Lawes of England (1642) ("Second Institutes").[47] Explaining Article 40, Coke wrote:

> And therefore every Subject of this Realm, for injury done to him in bonis, terris, vel persona [i.e., goods, lands, or person], by any other Subject, be he Ecclesiastical, or Temporal, Free or Bond, Man or Woman, Old or Young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the Law, and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay.
> Hereby it appeareth, that Justice must have three qualities, it must be Libera, quia nihil iniquius venali Justitia; Plena, quia Justitia non debit claudicare; & Celeris, quia dilatio est quaedam negatio; and then it is both Justice and Right.[48]

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[45] *Bryant v. Thompson*, 324 Or 141, 148, 922 P2d 1219 (1996).

[46] *Id.* at 147.

[47] *Id.* at 148.

[48] *Id.*

That is, justice must be "free, for nothing is more iniquitous than justice for sale; complete, for justice should not do things by halves; swift, for justice delayed is justice denied."[49]

At that time, Coke was fighting against royal interference with the common law courts, and he wrote the Second Institutes to justify the judiciary's independence from the Crown.[50] Over 100 years later, American colonists turned to Coke's writings as they created their own laws to prevent external interference in common law courts.[51] According to the Oregon Supreme Court, the first clause of Article I, section 10 "was intended to promote and protect an independent judiciary."[52]

Historians agree that the goal of the clause is to secure independence in the courts; the reason for independence is to ensure justice that is free, complete, and speedy.[53] These concepts were written into early constitutions, including the constitution of Indiana, from which the Oregon Constitution derives.[54] The

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[49] *Id.*

[50] *Id.*

[51] *Id.* At that time in colonial America, "the Crown actively hampered the administration of justice by the colonial courts" by "controlling the payment of judges and insisting on the right to remove colonial judges at will." *Id.*

[52] *Id.* at 149.

[53] Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or L Rev 1279, 1314 (1995).

[54] *Smothers*, 332 Or at 105 (citing Charles Henry Carey, ed., *The Oregon*

purpose of the provision, according to the Indiana Supreme Court, is "to promote justice, and as a means for the vindication of the innocent and oppressed."[55]

"Complete justice" does not simply require that the procedural steps be followed to their end. Rather, the language, the history, and the case law confirms that section 10 must be interpreted to address both the means and the ends of justice. For example, Oregon courts hold that the portion of section 10 that provides "justice shall be administered * * * without purchase" was "meant to prohibit (1) the procurement of legal redress through bribery and other forms of improper influence; and (2) the judicial imposition of fees and costs in amounts so onerous as to unreasonably limit access to the courts."[56] That is, not only must the procedure be "without purchase," the ends (i.e., justice) must also be "without purchase."

Similarly, the complete justice clause that follows the same structure—"justice shall be administered * * * completely"—must be interpreted to require not only that the procedure be followed to completion, but also that the ends of justice be complete. Indeed, the requirement of complete justice comes from

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Constitution and Proceedings and Debates of the Constitutional Convention of 1857, 28 (1926)).

[55] *McGuire v. Wallace*, 109 Ind 284, 10 NE 111, 112 (1887).

[56] *Allen v. Employment Dept.*, 184 Or App 681, 688, 57 P3d 903 (2002).

Coke's principle that justice be "full, for justice should not limp."[57] Moreover, the Oregon Court of Appeals, in *State v. Reynolds*, described the "complete justice" requirement as a constitutional mandate to accomplish the "ends of justice."[58]

If newly presented evidence proves that a post-conviction petitioner is innocent of the crime of which he has been convicted, justice in the original proceedings was not "complete." That is, when the case is reviewed in light of newly presented evidence, it becomes apparent that justice was not had. The court in the original proceeding did not complete the process of "justice," or "giving to everyone what is his due."[59]

This Court, sitting *en banc* in *Reynolds*, has already determined that the "complete justice" provision requires the court to correct "an unjust conviction" on direct appeal despite the defendant's failure to preserve the error in the lower court.[60] There, the defendant was convicted of two counts of assault in the third degree, but both the defendant and the state agreed there was no evidence to support one of the convictions.[61] The defendant failed to preserve the error in the

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[57] *Lawson v. Hoke*, 339 Or 253, 269, 119 P3d 210 (2005) (citing Edward Coke, *The Second Part of the Institutes of the Laws of England* 55 (1797)).

[58] *Reynolds*, 250 Or App at 527.

[59] *State v. Vasquez*, 336 Or 598, 604, 88 P3d 271 (2004).

[60] *Reynolds*, 250 Or App at 527.

[61] *Id.* at 518.

trial court, and the state argued the lack of preservation prevented the error from correction on appeal.[62] The appellate court held that "[c]orrection of the plain error on direct review * * * implements our mandate to administer justice 'completely and without delay' under Article I, section 10, of the Oregon Constitution."[63] The court recognized that "those constitutionally mandated 'ends of justice'" supported its authority to correct the wrongful conviction.[64]

The *Reynolds* court relied on section 10 to correct the wrongful conviction on direct appeal.[65] In the post-conviction context, section 10 applies in a slightly different manner. The court must follow the directives of the PCHA.[66] The petitioner must prove the denial of a constitutional right that resulted in his conviction.[67] The denial must not have been asserted and could not reasonably have been asserted on direct review.[68] At the post-conviction stage, under Article I, section 10, the petitioner must rely on newly presented evidence to prove that he is, in fact, innocent of the crime of which he was convicted. If he succeeds, it

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[62] *Id.*

[63] *Id.* at 526-27.

[64] *Id.* at 527.

[65] *Id.*

[66] ORS 138.510-138.680.

[67] ORS 138.530(1).

[68] ORS 138.550(2).

follows that his right (and the public's interest) in "complete justice" was denied in the original proceeding. The court has no legitimate interest in convicting an innocent person, and justice cannot be said to be "complete" when it is proved that the petitioner has been denied "his due."[69]

The Court should not confuse the question of whether the petition for post-conviction relief may be dismissed summarily with the question of whether the petitioner is entitled to relief on the merits. The only question before this Court is whether the petitioner can, in fact, bring a claim for relief under the PCHA. Because the claim in this case was dismissed on the pleadings under ORCP 21, the standard to succeed on the merits was not raised below and is not properly before this Court. That is, the trial court found that a person who has been convicted, but is, in fact, innocent, is not entitled to relief under the PCHA. The trial court, therefore, did not reach the merits of Mr. Reeves' claim of innocence, and the standard to prove innocence is not before this Court on appeal. *Amicus* OIP, however, notes that, once properly raised in post-conviction proceedings, the petitioner must still prove that "complete justice" was denied based on his innocence. The standard to prove "innocence" should be left for another day with the benefit of a properly developed record.

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[69] *Vasquez*, 336 Or at 604 (defining "justice" as "giving to everyone what is his due").

2. Imposing a sentence on an innocent person is "cruel and unusual punishment" in violation of Article I, section 16 of the Oregon Constitution.

The PCHA also requires a court to grant a petitioner relief if the petitioner establishes the unconstitutionality of his or her sentence.[70] The Oregon Constitution declares that cruel and unusual punishments are unconstitutional under Article I, section 16. That section provides, in relevant part:

> Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.[71]

Again, we analyze the wording, the historical circumstances, and the case law "to apply faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise."[72] The Oregon Supreme Court has confirmed that section 16 should be read to allow a defendant to bring claims challenging the length of a sentence (a "proportionality" challenge) as well as the manner of punishment (a "severity" challenge).[73]

The Supreme Court, in *State v. Wheeler*, examined the history of section 16 and found the "[c]oncerns about both proportionality and severity in criminal

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[70] ORS 138.530(1)(c).

[71] Or Const, Art I, § 16.

[72] *Smothers*, 332 Or at 91 (citations omitted).

[73] *State v. Wheeler,* 343 Or 652, 666, 175 P3d 438 (2007).

sentencing in English law may be found as early as Magna Carta 1215 and in the English Bill of Rights of 1689."[74] The "Magna Carta provided that fines should be set according to the 'magnitude' or 'degree' of the crime—a concept similar to proportionality—and according to the legal status of the offender."[75] The English Bill of Rights, then, "added the prohibition on 'excessive fines' and the different concept of 'cruel and unusual punishment.'"[76] That is, "forms of torture that were illegal or at least not customary."[77]

The concepts of "proportionality" and "severity" of punishments were later examined by Blackstone who "maintained that punishment should be proportional to the offense in question and to the social aims of criminal punishment generally."[78] Blackstone wrote that "[t]he method * * * of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means exceed it."[79]

Early commentators, including Blackstone, agreed that the purpose of punishment is to deter future offenses or correct a repeat offender's disposition to

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[74] *Id.* at 657.

[75] *Id.* at 657-58.

[76] *Id.* at 658.

[77] *Id.* (citations omitted).

[78] *Id.*

[79] *Id.* (quoting 4 William Blackstone, *Commentaries on the Laws of England*, 12 (1769)).

commit crime.[80] Commentators, however, agreed that "certainty of punishment is more important than severity in preventing future crimes."[81] History reflects a preference for accuracy (in proportionality) over severity: "Where the same undistinguishing severity is exerted against all offenses[,] the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye[.]"[82]

The concerns about proportionality and severity were reflected in section 16 when the framers wrote the Oregon Constitution.[83] It was those concerns that informed the *Wheeler* Court's ruling that section 16 requires punishments be proportional ***and*** not cruel and unusual.[84] Under either requirement, the punishment must be "so proportioned to the offense committed as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances."[85] The analysis for an as-applied challenge "necessarily involves the consideration of the particular conduct in which the defendant engaged and for

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[80] *Id.* at 659.

[81] *Id.* at 661 (citing Blackstone, *supra* n.79, at 17).

[82] *Id.* at 663 (quoting NH Const, Part I, Art XVIII (1784)).

[83] *Id.* at 665.

[84] *Id.* at 666.

[85] *State v. Baker*, 346 Or 1, 6, 202 P3d 174 (2009).

which he was convicted."[86] The court's rulings indicate that a punishment will violate section 16 if it is not designed to serve the aims of protecting the public, deterring future offenses, and punishing or reforming the individual.[87]

Punishing the innocent serves no one. It has been repeatedly recognized that "[t]he government has no legitimate interest in punishing those innocent of wrongdoing."[88] The United States Supreme Court was clear in *Calder v. Bull* that, although state legislatures "may * * * declare new crimes * * * they cannot change innocence into guilt; or punish innocence as a crime."[89] Neither can state judiciaries.

Several courts in other jurisdictions have held that punishing an innocent person would be cruel and unusual. The United States Supreme Court, in *Robinson*, recognized that "[e]ven one day in prison would be a cruel and unusual

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[86] *State v. Rodriguez*, 347 Or 46, 61, 217 P3d 659 (2009) (citing *Wheeler*, 343 Or at 677-80).

[87] *Wheeler*, 343 Or at 659 ("Blackstone thus advocated for penalties 'proportioned' to the purpose of the punishment, whether that be the 'amendment' of a particular defendant's disposition to commit crime or the deterrence of 'future offenses.' * * * Nothing in the records of the constitutional convention indicates that, when the framers of the Oregon Constitution adopted the proportionality requirement, they had any different concerns than those which had led Blackstone and later the framers of state constitutions from Pennsylvania to Indiana to emphasize the need for proportionality in sentencing. We therefore assume that those same concerns animated the Oregon framers. Those concerns, in turn, inform our interpretation of the Oregon provision.").

[88] *United States v. United States Coin and Currency*, 401 US 715, 726, 91 S Ct 1041, 28 L Ed 2d 434 (1971).

[89] *Calder v. Bull*, 3 US 386, 388 (1798).

punishment for the 'crime' of having a common cold."[90] The Supreme Court of New Mexico held that imprisonment of an innocent person violates the cruel and unusual punishment provision of its state constitution.[91] There, the court wrote, "[i]t cannot be said that the incarceration of an innocent person advances any goal of punishment, and if a prisoner is actually innocent of the crime for which he is incarcerated, the punishment is indeed grossly out of proportion to the severity of the crime."[92]

The Supreme Court in New York, likewise, held that "because punishing an actually innocent person is inherently disproportionate to the acts committed by that person, such punishment also violates the provision of the New York Constitution which prohibits cruel and unusual punishments."[93] As a result, the New York court permitted a freestanding claim of actual innocence under the state's post-conviction relief statute, which, like Oregon's, requires judgments be vacated if obtained in violation of a defendant's constitutional rights.[94]

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[90] *Robinson v. State of California*, 370 US 660, 667, 82 S Ct 1417, 8 L Ed 2d 758 (1962).

[91] *Montoya*, 142 NM at 97, 163 P3d at 484.

[92] *Id.*

[93] *Hamilton*, 979 NYS2d at 107-08, 115 AD3d at 26.

[94] *Id.*

Oregon's Post-Conviction Hearing Act requires the same result. A sentence imposed on any innocent person would "shock the moral sense" of any reasonable person as to what is right and proper, both in terms of duration and manner. If a petitioner can, in fact, prove he is actually innocent of the crime of which he was convicted, any punishment is disproportionate. The indiscriminate infliction of punishment does not serve the goals of deterrence and reformation, and, in fact, undermines those goals, for there is no distinction between guilt and innocence, the very concern the framers sought to avoid.[95]

Under the PCHA, if the petitioner proves he is innocent, and the sentence is, therefore, unconstitutional in violation of section 16, the trial court "shall" grant relief, which is broad and can include release or vacation of the conviction.[96]

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[95] *Cf. Wheeler*, 343 Or at 661 ("Blackstone agreed * * * with Montesquieu's view that the 'excessive severity of laws * * * hinders their execution,' particularly when jurors withhold conviction if they perceive that the likely punishment will be unjust. He concluded that 'punishments of ***unreasonable*** severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity.") (emphasis in original).

[96] ORS 138.530; ORS 138.520. In November 1995, Judge Lipscomb in the Marion County Circuit Court held the continued incarceration of Laverne Pavlinac would constitute "cruel and unusual punishment" under the Oregon Constitution in light of evidence that Pavlinac was, in fact, innocent. App 1. Judge Lipscomb held Pavlinac's sentence was unconstitutional and ordered her release, *id.*, but erred when he failed to understand his authority under ORS 138.520 to then vacate the conviction.

C. Individuals who can prove innocence are entitled to a meaningful opportunity to challenge stale convictions in the courts.

1. The plain language of the PCHA permits a timely, late, or successive petition based on newly presented evidence of innocence.

As discussed above, a claim for "actual innocence" is cognizable on two grounds: First, the claim may be raised under ORS 138.530(1)(a) on the ground that newly presented evidence of innocence proves the petitioner was denied "complete justice" in the original proceedings. Second, the claim may be raised under ORS 138.530(1)(c) on the ground that newly presented evidence of innocence proves that the sentence imposed is cruel and unusual, or disproportionate. At the post-conviction stage, both grounds require newly presented evidence of innocence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—to succeed. That is, it is the newly presented evidence that proves the constitutional error in the original proceedings.

Procedurally, such claims should be resolved as any other brought under the Act. First, the Act requires that "no ground for relief" be asserted "unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding."[97] The constitutional grounds for relief based on newly presented evidence cannot be asserted on direct appeal when that evidence

[97] ORS 138.550(2).

was, by definition, not previously presented. Second, if the petition is late or successive, the Act requires the post-conviction court find "grounds for relief asserted which could not reasonably have been raised in the original or amended petition."[98] Again, the constitutional grounds for relief based on newly presented evidence cannot be raised earlier when that evidence is, in fact, newly presented.

A petitioner claiming actual innocence based on newly presented evidence is subject to the same burdens under the PCHA as any other petitioner to weed out frivolous claims. In addition, a petitioner alleging a claim of actual innocence must, then, satisfy the burden of proving innocence. The Court should keep in mind that the mere recognition of a claim for actual innocence does not entitle the petitioner to relief—he or she must still prove actual innocence. The recognition of the claim here merely prevents dismissal on the pleadings for failure to state a claim upon which relief can be granted.

2. The Oregon Constitution requires the PCHA be construed to permit a late and successive petition based on newly presented evidence of innocence.

(a) The Remedy Clause

As discussed above, the plain language of the "escape clause" under the PCHA requires the court reach the merits of a post-conviction petition if the court finds "grounds for relief asserted which could not reasonably have been raised in

[98] ORS 138.510(3).

the original or amended petition."[99] Despite the plain language of the statute requiring a reasonableness determination, Oregon courts have construed the escape clause "narrowly" such that it should apply only in "extraordinary circumstances."[100] In cases of actual innocence, however, the "Remedy Clause" of the Oregon Constitution requires that the escape clause be construed under the reasonableness standard written into the statute.

The PCHA was enacted to subsume the common law writs, including the writ of coram nobis,[101] and the "Remedy Clause" requires that the Act provide a remedy as it existed through the common law writ.

Under the Remedy Clause, "[t]he legislature lacks authority to deny a remedy for injury to absolute rights that existed when the Oregon Constitution was adopted in 1857."[102] The Clause, found in Article I, section 10 of the Constitution, provides:

> [E]very man shall have remedy by due course of law for injury done him in his person, property, or reputation.

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[99] ORS 138.510(3).

[100] *Benitez-Chacon v. State*, 178 Or App 352, 356, 37 P3d 1035 (2001) (citing *Bartz v. State*, 314 Or 353, 358-59, 839 P2d 217 (1992)).

[101] ORS 138.540(1).

[102] *Smother*s, 332 Or at 119.

The Oregon Supreme Court, in *Smothers*, traced the history of the Remedy Clause and found that the drafters "identified absolute rights respecting person, property, and reputation as meriting constitutional protection under the remedy clause. As to those rights, the remedy clause provides, in mandatory terms, that remedy by due course of law shall be available to every person in the event of injury."[103]

As a result of the Remedy Clause, the legislature cannot abolish a remedy under the common law unless "it provides a substitute remedial process in the event of injury to the absolute rights that the remedy clause protects."[104] Under *Smothers*, this Court must follow a two-step analysis to determine whether the Remedy Clause is violated. "The first question is whether the plaintiff has alleged an injury to one of the absolute rights that Article I, section 10 protects."[105] That is, the Court must ask: "When the drafters wrote the Oregon Constitution in 1857, did the common law of Oregon recognize a cause of action for the alleged injury?"[106] Under *Smothers*, "[i]f the answer to that question is yes, and if the legislature has abolished the common law cause of action for injury to rights that are protected by the remedy clause, then the second question is whether it has

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[103] *Id.* at 124.

[104] *Id.*

[105] *Id.*

[106] *Id.*

provided a constitutionally adequate substitute remedy for the common-law cause of action for that injury."[107]

When the Oregon Constitution was written in 1857, the common law recognized a writ of coram nobis to redress errors of fact, which were unknown at the time of trial and of such a substantial nature that the result would have been different if the truth had been known at the time of trial.[108] The common law writ of coram nobis was available as a postconviction remedy in certain "rare instances" when the defendant's constitutional rights had been violated.[109]

The writ was based on the court's inherent authority "to correct its own record or to set aside an order or judgment which was induced by fraud upon the court or procured in violation of a constitutional right of a party."[110] Arising from the court's inherent authority, it has been said "that the right to bring coram nobis is 'without limitation of time.'"[111] That is, according to the Oregon Supreme Court, "the right is not limited by statutes of limitation prescribing the times within which motions for new trials or appeals must be taken."[112] The timeliness of a

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[107] *Id.*

[108] William G. Wheatley, *Coram Nobis in Oregon and the Need for Modern PostConviction-Procedure Legislation*, 38 Or L Rev 158 (1958).

[109] *State v. Huffman*, 207 Or 372, 405, 297 P2d 831 (1956).

[110] *Id.* at 420 (Latourette, J., concurring).

[111] *Id.* at 419.

[112] *Id.*

request for coram nobis was, instead, subject only to the court's authority "to consider the effect of negligent failure to ascertain the facts or to seek relief by the use of the usual statutory remedies or to proceed with due diligence when it is possible to so proceed."[113]

For the PCHA to provide an adequate "substitute remedial process" for the writ of coram nobis, as required by the Remedy Clause, it must be recognized that the courts possess the inherent authority to correct a constitutional wrong arising out of an error of fact, and that inherent authority exists independent of any statutory time limit. The "escape clause" under ORS 138.510(3) is the statutory recognition of the court's inherent authority to hear a late and successive post-conviction petition. The escape clause must be read consistent with the right of coram nobis to permit a court to reach the merits of a claim alleging a factual error resulting in a constitutional violation so long as the defendant did not negligently fail to ascertain the facts or seek relief and proceeded with due diligence when possible.[114] Indeed, the very purpose of coram nobis was to provide relief long after conviction "to protect the citizen in his constitutional prerogatives, and to prevent oppression or persecution."[115]

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[113] *Id.* (citations omitted).

[114] *See id.*

[115] *Id.* at 401 (quoting *People v. Gersewitz*, 294 NY 163, 167, 61 NE2d 427, 429 (1945)).

(b) The Complete Justice Clause

In addition to the requirement under the Remedy Clause that a late and successive claim of actual innocence based on newly presented evidence be heard, the Complete Justice Clause also requires the claim be considered to accomplish the ends of justice.

As discussed above, Article I, section 10 of the Oregon Constitution requires that justice be administered "completely," both in the procedure and the ends.[116] That constitutional mandate applies not only in the original proceeding (as discussed above), but also in post-conviction proceedings. In post-conviction proceedings, the mandate must require the court to adjudicate even a late and successive petition to accomplish the "ends of justice."

A similar "ends of justice" analysis in the federal system requires a habeas court to adjudicate even a successive habeas claim if the petitioner proves he is actually innocent of the crime of which he was convicted.[117] There, proof of actual innocence establishes "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[118] The Supreme Court, in *Schlup v. Delo*, recognized that "the individual interest in

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[116] *See supra.* section III(B)(1).

[117] *Schlup v. Delo*, 513 US 298, 319-21, 115 S Ct 851, 130 L Ed 2d 808 (1995).

[118] *Id.* at 315.

avoiding injustice is most compelling in the context of actual innocence."[119] Permitting a "gateway" claim of actual innocence to avoid procedural default, therefore, avoids a "fundamental miscarriage of justice."[120]

The same "ends of justice" analysis should follow under Oregon law. If a petitioner can prove actual innocence, "complete" justice requires the court excuse a procedural default to reach the merits of a constitutional claim of innocence under Article I, section 10 or 16, as discussed above.

3. Clemency is not a substitute remedy.

Post-conviction proceedings represent the last avenue of relief. Petitioners who are truly innocent have no other meaningful access to freedom in the state court system. Direct appeals are long over, and, contrary to the State's position in the proceedings below in this case,[121] clemency is not a substitute to redress constitutional rights. Although the majority in *Herrera* raised clemency as a viable alternative under Texas law,[122] Justice Blackmun's dissent, joined by Justices Stevens and Souter, properly recognizes that executive clemency is ***not*** a sufficient substitute.[123] A pardon is "an act of grace."[124] But "[t]he vindication of rights

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[119] *Id.* at 324.

[120] *Id.* at 321.

[121] TCF 286.

[122] *Herrera*, 506 US at 411.

[123] *Id.* at 439-40 (Blackmun, J., dissenting).

guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal."[125] The notion that clemency is an alternative to redress under the justice system was explicitly rejected in *Ford v. Wainwright*, where the United States Supreme Court addressed the right not to be executed if one is mentally ill.[126] The Oregon Supreme Court also found clemency is not a substitute for legal process in *Anderson v. Gladden*: "The prospect of a court holding itself powerless to remedy a manifestly erroneous conviction obviously would not adorn the administration of justice. We do not, therefore, say that executive clemency is the only remedy available when newly discovered evidence proves the innocence of a prisoner."[127]

Justice Blackmun, in his dissent in *Herrera*, explained the need for legal, as opposed to political, redress: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[128] If, then, "the exercise of a legal right turns on 'an act of

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[124] *Id.* at 440.

[125] *Id.*

[126] *Id.* (citing *Ford v. Wainwright*, 477 US 399, 416, 106 S Ct 2595, 91 L Ed 2d 335 (1986)).

[127] 234 Or at 626.

[128] *Herrera*, 506 US at 440 (citing *Marbury v. Madison*, 5 US (1 Cranch) 137, 163, 2 L Ed 60 (1803)).

grace,'" wrote Justice Blackmun, "then we no longer live under a government of laws."[129] Indeed, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[130]

In Oregon, the clemency process has proved insufficient and unpredictable. The process is entirely discretionary on the part of the Governor, except in cases of treason.[131] The Oregon Supreme Court finds "that, historically, governors and presidents have granted clemency for a wide range of reasons, including reasons that may be political, personal, or 'private,' and that many such decisions * * * may be animated by both public and private concerns."[132] The Governor's discretion "cannot be controlled by judicial decision."[133] Rather, "[t]he courts have no authority to inquire into the reasons or motives which actuate the Governor in exercising the power, nor can they decline to give effect to a pardon for an abuse of

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[129] *Id.*

[130] *Id.* (citing *West Virginia Bd. of Ed. v. Barnette*, 319 US 624, 638, 63 S Ct 1178, 1185, 87 L Ed 1628 (1943)).

[131] ORS 144.649; Or Const, Art V, § 14.

[132] *Haugen v. Kitzhaber*, 353 Or 715, 742-43, 306 P3d 592, 608 (2013), *cert. denied* 134 S Ct 1009, 187 L Ed 2d 856 (2014).

[133] *Eacret v. Holmes*, 215 Or 121, 127-28, 333 P2d 741, 744 (1958).

discretion. Concerning such matters, the courts 'are not authorized to express an opinion.'"[134]

Although the legislature can enact statutes to regulate the exercise of the clemency power, those on the books are procedural rather than substantive.[135] And the recent history of clemency power reflects the Governor's broad discretion. Under Governor Kulongoski's authority, from 2003 to 2011, over 735 clemency petitions were received, and more than 600 were denied.[136] As of the date of Governor Kitzhaber's report in 2012, 147 clemency petitions were received, and only one was granted.[137] Over the last ten years, clemency was granted to only 74 individuals, 44 of which were pursuant to HB 3508—permitting early release based on earned time—and an intergovernmental agreement.[138]

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[134] *Id.* (citing *In re Opinion of Justices*, 120 Mass 600 (1876)).

[135] ORS 144.649-670.

[136] Anna Canzano, *Oregon Governor Considering Over 60 Pardons*, KATU News, Dec. 3, 2010, http://www.kval.com/news/local/111273019.html (attached at App 6). From 2009-2011, Governor Kulongoski reported that, of the 319 clemency petitions he received, 304 petitions were denied or allowed to expire. Report from Governor Theodore R. Kulongoski to the Legislative Assembly (January 10, 2011). App 9.

[137] Report from Governor John A. Kitzhaber to the Legislative Assembly (March 1, 2012). App 17.

[138] Report from the Oregon Secretary of State on Clemency Petitions Granted in Last 10 Years. Due to the size of the Secretary's report, *Amicus* OIP has not included a copy in the Appendix and can, instead, provide a copy at the Court's request. Scholars have pointed out the "political calculations" that can factor into the decision to grant clemency as powerfully illustrated by former California Governor Edmund "Pat" Brown in his book *Public Justice, Private Mercy* (Weidenfeld & Nicolson 1989). Randall Coyne and Lyn Entzeroth, *Capital Punishment and the Judicial Process* at 645. Governor Brown was personally

Oregon's Constitution protects the right to "complete justice" and to be free from "cruel and unusual punishment."[139] When those rights are violated, Oregon citizens are entitled to a sure remedy that rests on legal rights, and not unfettered discretion. The PCHA recognizes that principle as a basic tenant of our justice system and requires relief. A petitioner, therefore, is entitled to bring a freestanding claim for "actual innocence" under the PCHA in post-conviction proceedings.

IV. CONCLUSION

Amicus OIP requests this Court hold that a freestanding claim of actual innocence exists under the Post-Conviction Hearing Act if the petitioner alleges a violation of his or her right to "complete justice" under Article I, section 10 of the

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opposed to the death penalty and was faced with a clemency petition on behalf of a man facing execution for the murder of a young girl. *Id.* The condemned man suffered an injury as a child leaving him mentally defective, and "the Governor viewed executing this man as an act of vengeance rather than justice." *Id.* According to Brown, however, one state legislator strongly supported the execution and held a key vote in a piece of migrant farm workers' legislation, which, if passed, would benefit the victim's parents who were farm laborers. *Id.* Brown wrote in his book:

> Rose Marie Riddle was dead, and nothing I could do would bring her back. By letting Richard Lindsey go to the gas chamber, I was giving her parents and people like them a chance at a living wage. The scales tipped. I picked up my pen and on the first page of the clemency file wrote these words: "I will take no action." Four days later, Lindsey was dead. That same week, the farm labor bill passed through committee and a few months later was signed into law.

Id. (quoting Edmund Pat Brown, *Public Justice, Private Mercy* at 84).

[139] Or Const, Art I, §§ 10, 16.

Oregon Constitution or a violation of his or her right to be free from "cruel and unusual punishment" under Article I, section 16 of the Oregon Constitution.

Amicus OIP further requests this Court permit a late and successive petition for post-conviction relief if based on newly presented evidence of innocence.

Dated: June 2, 2015

Respectfully submitted,

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APPENDIX

Pursuant to ORAP 5.52, *Amicus* OIP submits the following, as indexed below.

INDEX

CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
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SALEM, OREGON 97309-0869

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November 27, 1995

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#16

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Re: John Allen Sosnovske v. Maass, No. 9210450
Laverne Pavlinac v. Hoyt, No. 95C13341

Counsel:

I want to begin by thanking all the lawyers who have worked on these cases this past month; often, I am sure, on their own time. Your assistance has been a great help.

It is often said that "hard cases make bad law." We have all labored long and hard to ensure that this did not occur in this case, and so that justice could be found within the framework of the law.

There is no longer any doubt that these two individuals, though legally judged to be guilty, are, in fact, innocent of murder, rape, assault, and kidnapping. Anyone reviewing the various transcripts, police reports, photographs and depositions would reach the same conclusion. The evidence is compelling that Keith Jesperson committed the murder of Taunya Bennett and that Laverne Pavlinac and John Sosnovske did not.

It is now clear that Laverne Pavlinac enlisted the help of the police in terminating her relationship with Sosnovske by framing him for Ms. Bennett's murder. It was her hope and expectation that he would get arrested and be taken out of her life without her having to terminate the relationship herself.[1] She was persistent in her escalating efforts to secure his arrest for a capital crime she knew full well he had not committed. Eventually Pavlinac was caught up in her own web of deceit, but not before she had herself wired for sound at the request of the police and then attempted to coax incriminating statements from Sosnovske by convincing him that he did the crime during an alcoholic blackout.

In Sosnovske's case, the statutory relief provided by Oregon's Post Conviction Act is clearly available. His constitutional rights certainly were violated by Laverne Pavlinac, acting on behalf of the police, when she allowed herself to be wired for sound, and then attempted to get Sosnovske to incriminate himself. By preying on his known weakness and propensity for alcoholic blackouts, she attempted to convince him that he had killed Ms. Bennett in an alcoholic fog and that she had helped him ditch the body. His equivocal statements in response to her misrepresentations and insinuations were obtained fraudulently, without benefit of advice of counsel, and in disregard of his right to be free of self incrimination. Pavlinac did not disclose that she was a police agent, or that she was lying to him in an attempt to convince him he was guilty when she knew full well he was not.

Sosnovske's plea cannot be deemed to have been voluntary when it was obtained after such a pretext, and under threat of an impending conviction and death sentence for aggravated murder. Accordingly, Sosnovske's plea and conviction are hereby set aside, he is entitled to immediate release, and his case is remanded to Multnomah County for all further proceedings. It is my hope and expectation that the charges will be promptly dismissed by the trial court.

Sosnovske's case, while factually unusual almost to the point of the bizarre, is really fairly straightforward legally. Pavlinac's is considerably more complicated.

The Post Conviction Act is a statutory remedy which supplanted and displaced a number of overlapping common law remedies. Because of a strong social interest in ensuring the finality of criminal convictions once the appellate period has expired, the Post

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[1] Apparently she had tried a similar ploy years before. Records from Sosnovske's probation officer document that he was contacted by the FBI in response to a tip from Pavlinac that Sosnovske may have robbed a bank. However, his photo did not match that taken by the surveillance camera, and that lead was never pursued any further.

Conviction Act provides a very narrow window, and limited relief. (See Collins and Neil, "The Oregon Post Conviction Hearing Act," 39 Or L. Rev. 337, (1959).)

Absent a showing of a substantial Constitutional defect at trial, proof of actual innocence by means of newly discovered evidence is of no assistance under the Post Conviction Act. Id at 346-47: "Unless the conviction of an innocent man through fair procedure and on otherwise sufficient evidence is regarded as an abridgment of constitutional rights, there is presumably no judicial relief available to correct the wrong after the time for a motion for new trial has expired."

Our State and Federal Constitutions guarantee a fair trial, complete with a number of important procedural protections. Although these procedures are designed to make it extremely unlikely that an innocent defendant will be convicted, there is no Constitutional guarantee against an erroneous conviction. Courts and juries, like all other human institutions, remain fallible, and the Constitution does not go so far as to insist on perfect justice in every case. (See Herrera v. Collins, U.S. , 113 S. Ct. 853 (1993); Townsend v. Sain, 372 U.S. 293 (1963). See also Oregon Constitution, Article VII, § 3 (Amended).

Likewise, Habeas Corpus relief is also not available as a remedy for a convicted defendant seeking to prove through newly discovered evidence that the result at trial was factually incorrect. Although a potentially expansive remedy at common law, and in the federal courts, Habeas relief is strictly limited by statute in Oregon, and it does not encompass the relief sought here. See ORS 34.310 et seq. Moreover, all other potentially viable common law remedies, such as the writ of coram nobis, have been abolished by the legislature in Oregon. ORS 34.310, 138.540. In short, there is currently no statutory or common law remedy in Oregon which can relieve Ms. Pavlinac of the burden of her conviction and imprisonment.

On the other hand, once it has been clearly established to the satisfaction of the courts, as well as both the Attorney General and the prosecuting District Attorney, that Ms. Pavlinac is actually factually innocent, though legally convicted, further incarceration becomes merely pointless punishment, and ultimately unjust. It is noteworthy that all parties to this case seek her release at this time.

Article I, § 16 of the Oregon Constitution prohibits "cruel and unusual punishments" and commands that "all penalties shall be proportional to the offense." Under Oregon law, the test for determining whether punishment is cruel and unusual is whether the punishment is "so disproportionate to the offense committed as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances." State v. Rogers, 313 Or 356, 836 P2d 1308 (1992); State v. Thorton, 244 Or 104, 416 P2d 1 (1966).

Although the underlying conviction did not result from any constitutional violation, it would truly be both cruel and unusual to keep imprisoned any individual once they have been clearly proven to be factually innocent (albeit legally guilty) as a result of newly discovered evidence. Slavishly insisting that incarceration be continued under such circumstances would certainly "shock the moral sense" of all reasonable people "as to what is right and proper under the circumstances." Accordingly, I conclude that any further incarceration beyond the point that actual innocence is conclusively established in a court of competent jurisdiction to the complete satisfaction of all parties, including the prosecution, violates Article I, § 16 of the Oregon Constitution. (See also Article I, § 15: "Laws for the punishment of crimes shall be founded on the principles of reformation, and not on vindictive justice.")

Even in the absence of legislative authority or common law precedent, this Court has the inherent power to intervene and prevent an unconstitutional infringement of liberty from continuing. (See, e.g., State v. Huffman, 207 Or 372, 297 P2d 831 (1956). See also Anderson v. Gladden, 234 Or 614, 383 P2d 986 (1983).) The Circuit Courts of this State were created by the original Oregon Constitution which conferred on them "all judicial power, authority and jurisdiction not vested...exclusively in some other Court." (Art. VII, § 9) That power has never been curtailed. Whenever it is truly necessary for this Court to act to avoid an unconstitutional result, this Court has the inherent power to act; it need not wait for specific statutory authorization. (See also ORS 1.160: "When jurisdiction is, by the Constitution or by statute, conferred on a court or judicial officer, all the means to carry it into effect are also given....")

However, since inherent powers arise from necessity alone, they extend only so far as necessity really demands. This Court cannot extend relief beyond that actually required to terminate the unconstitutional situation which would otherwise continue. Accordingly, an order will be entered terminating Ms. Pavlinac's confinement today, but no more. Her conviction will stand for it was properly, legally, and constitutionally entered following a full jury trial and complete appellate review.

Ms. Pavlinac may not be completely satisfied with this result, but this is the legally correct result; and it achieves a just resolution of this matter. The natural consequences are sometimes the best and most fitting punishment for lies, particularly those designed and intended to injure other people. As is often said, "what a tangled web we weave when first we practice to deceive." Ms. Pavlinac has really no one to blame but herself for her current predicament. Distilled to its essence, her only real complaint is that her prosecutors were too gullible, too easily taken in by her lies, and that they inadvertently assisted her in polishing her "confession" until she finally got it to conform to the physical evidence.

Ms. Pavlinac's conduct in this case is an affront to our entire criminal justice system; a system she attempted to manipulate to serve her own selfish ends. The cost to the taxpayers of this state has been enormous. The costs to Mr. Sosnovske, nearly incalculable: she had him charged with aggravated murder and a potential death sentence, and he has now spent almost six years behind bars. The costs to other subsequent victims of Mr. Jesperson are ultimately unknowable, but if she had not deflected the early investigation of this case and channelled it to focus on her boyfriend, it may well be that the police authorities would have found Jesperson and stopped him at a much earlier date.

This letter opinion will serve as my findings of fact. Ms. Cegla may prepare the appropriate orders and judgments in each case, as outlined above.

Sincerely,

PAUL J. LIPSCOMB
Circuit Judge

PJL:ac

Oregon governor considering over 60 pardons

By Anna Canzano KATU News | Published: Dec 3, 2010 at 11:05 AM PDT (2010-12-3T18:05:40Z) | Last Updated: Oct 30, 2013 at 2:52 AM PDT (2013-10-30T9:52:29Z)

Gov. Ted Kulongoski

PORTLAND, Ore. - As Gov. Ted Kulongoski (http://search.kval.com/default.aspx?ct=r&q=%22Ted%20Kulongoski%22) finishes his time in office, he holds in his hands the fate of over 60 convicted criminals.

They've applied for clemency in the hope the governor will forgive their crimes.

NEWS/LOCAL/111273019.HTML?TAB=VIDEO&C=Y)

Wendy Maldonado wants Gov. Ted Kulongoski to pardon her after she hit her husband, Aaron, over the head with a hammer, killing him. The governor denied her request.

Video still courtesy of Tommy Davis, Quinto Malo Films

One of those who had hoped for a pardon was Wendy Maldonado.

She confessed to a 9-1-1 dispatcher in 2005 that she killed her husband, Aaron, by hitting him over the head with a hammer. She also told the dispatcher that her husband hurt her "every (deleted) day of my life."

Kulongoski, however, denied her request for clemency Thursday afternoon.

Her supporters said they will try again.

Maldonado's violent act and conviction, along with her then 16-year-old son, Randy - who was also denied clemency Thursday - were detailed in a documentary shown on HBO. The piece included comments from an Oregon judge who was bound by Measure 11 sentencing guidelines but was clearly aware of her claim she was a battered wife.

"I can't image a wife would kill her husband or a son would kill his father in cold blood unless this background existed," the judge said.

"He (the judge) feels she has a case to take to the Oregon Legislature to expand the definition of justifiable homicide," said Terrie Quinteros with the Oregon Coalition Against Domestic and Sexual Violence.

Quinteros was among those advocating for Wendy and Randy's release.

"It would be a gift of mercy from the governor if he allowed this family to be reunited so that they can focus together as a family unit to heal," she said.


Sung Koo Kim

Similar appeals are being made on behalf of other offenders, some of whom have made big news.

Panty thief Sung Koo Kim (http://search.kval.com/default.aspx?ct=r&q=%22Sung%20Koo%20Kim%22) is hoping to get his 11-year sentence reduced. He believes he was punished unfairly for his underwear thefts due to the mistaken connection investigators made between him and the disappearance of college student Brooke Wilberger (http://search.kval.com/default.aspx?ct=r&q=%22Brooke%20Wilberger%22).

Kim was eventually cleared in the Wilberger case with Joel Courtney pleading guilty to her murder last year.

Kim has already served six years behind bars.

Also on the list of clemency applications is Edward Morris. He shot and stabbed his pregnant wife and their three children then dumped their bodies in the Tillamook Forest.

"I calculate that it's going to cost taxpayers more than 40 million dollars if I live out my life in prison," he said after his November 2004 sentencing.

And then there is Bradley Price. He is one of the two notorious Seaside thrill killers of the 1990s. He and his best friend, Jesse McAllister, were convicted for murdering a couple watching the sunrise on the beach.

The governor hasn't pardoned or commuted any killers. In fact, he hasn't granted clemency to many offenders at all.

Of the 735 people who've sought his help, 66 have received clemency and nearly 600 have been denied.

Edward Morris

Of the 66 applications granted, 44 have had their sentences commuted by the governor under House Bill 3508. It means they were in the United States illegally when they committed nonviolent crimes and agreed to be deported and not return.

Fourteen people were pardoned, meaning their punishment had already been served; and the governor forgave their crimes. Also, eight people behind bars had their prison time reduced.

Worth noting is that of the 14 people pardoned, at least two serve in the military.

The governor forgave U.S. Army Lt. Col. Richard Gulley for a 2006 conviction in Washington County on interference with making a report, which is a misdemeanor.

Bradley Price

He also pardoned Pvt. Clinton Doyle on two counts of fourth degree assault. The pardon letter cited Doyle's service "in the Oregon Air National Guard since 1984" and that his "convictions are hampering...(his efforts)...to serve the Oregon National Guard overseas in his full capacity."

According to the governor's office, Kulongoski only grants clemencies in what he considers extraordinary circumstances like for someone who needs it to continue serving in the military, for someone who is going to lose a job or for someone who can't get a job because of an old conviction.

Kulongoski says he takes the responsibility very seriously and meets with the applicant because it is the only power he has that is not reviewed by the court.

January 10, 2011

The Honorable Peter Courtney
President of the Senate
S-201 State Capitol
Salem, OR 97310

The Honorable Bruce Hanna
Co-Speaker of the House
H-269 State Capitol
Salem, OR 97310

The Honorable Arnie Roblan
Co-Speaker of the House
H-295 State Capitol
Salem, OR 97310

Dear President Courtney, Co-Speaker Hanna, Co-Speaker Roblan:

Pursuant to ORS 144.660, I am reporting to the Legislative Assembly at its regular session each reprieve, commutation, pardon, remission of penalty or forfeiture granted since the beginning of the previous legislative session.

Since January 12, 2009, I have acted on 319 applications for executive clemency. I received 162 requests for pardon. I granted 13 pardons, and denied or allowed to expire 149 applications. I received 158 applications for commutation of sentence. I granted 2 sentence commutations and denied or allowed to expire 155. One application for commutation is currently pending.

I granted the following pardons:

(1) **Andrew Henry Adams.** Convicted of Possession of a Controlled Substance (2 counts) on January 30, 1997; and convicted of Possession of a Controlled Substance on May 19, 1997. Sentenced to 15 days jail and 18 months probation, which he successfully completed. I pardoned his convictions on May 21, 2009.

Mr. Adams was a heroin addict at age 19. His addiction continued until the time of these offenses when he was 23 years old, unemployed and homeless. After incarceration Mr. Adams sought help and co-founded the Oxford house a self-run, self-supported addiction recovery house. He attended Portland Community College and the University of Washington, obtaining a Masters in Engineering. His pardon request was supported by his employer, peers and friends. The district attorney had no objection to this request.

(2) **Amy Rae Moser.** Convicted of Delivery of a Controlled Substance on June 30, 2003. Sentenced to 24 months probation, which she successfully completed. I pardoned her conviction on June 30, 2009.

Ms. Moser has transformed from a young addict to successful business executive. She is a leader in her community involved with the Chamber of Commerce, PTA and volunteers with the Life Center and Meth Action Coalition. Her request was supported by her employers, friends and clients. The district attorney who prosecuted her case stated this is the first pardon application he ever has found to be "worthy." I determined there was substantial need to warrant this pardon as without it federal law enacted in 2007 would prohibit her from working in her career field.

(3) **Eros Baca.** Convicted of Trademark Counterfeiting in the Second Degree on December 14, 2007, for selling fake Rolex watches. Sentenced to two days in jail and fines. I pardoned his conviction on October 14, 2009.

Mr. Baca was brought to the United States illegally by his mother when he was four years old. He faces deportation and the possibility of being permanently barred from re-entering the United States. Mr. Baca has obtained an Associate's degree from PCC and hopes to pursue a Bachelors degree. For the last five years he worked as an emergency room translator. His application was supported by numerous emergency room physicians and medical personnel. I determined there are substantial humanitarian concerns to warrant this pardon.

(4) **Andrey Vladimirovich Kurochkin.** Convicted of two counts of Failure to Perform the Duties of a Driver on October 9, 2000. Sentenced to 180 days in custody and three years probation, which he successfully completed. I pardoned his convictions on December 3, 2009.

Mr. Kurochkin, while intoxicated, was involved in a race with two other cars on I-5. The result was a crash involving four vehicles in which the passengers were injured. Mr. Kurochkin took responsibility for his behavior and completed substance abuse treatment. He owns and operates a trucking business and is the sole breadwinner for his family.

Mr. Kurochkin is a legal permanent resident and has applied for citizenship but without forgiveness faces deportation to his native Ukraine. His wife's immigration status is dependent on his and she would most likely be deported to her native country. The children, United States citizens would likely follow their parents. One of the victims of this crime supported Mr. Kurochkin's request. The district attorney and one of the other victims took no position. I determined there were substantial humanitarian concerns to warrant this pardon.

(5) **Clinton Joseph Doyle.** Convicted of two counts of misdemeanor Assault IV, on August 21, 2001. Sentenced to five years probation, which he successfully completed. I pardoned his convictions on December 3, 2009.

Mr. Doyle assaulted one of his teenage children during an altercation. Mr. Doyle expressed sincere remorse for his actions and regrets this incident occurred. Mr. Doyle serves in the Oregon Air National Guard and if he were to deploy overseas he would be issued both body armor and weapons. These convictions bar him from carrying firearms.

Supporting this application were numerous friends, military superiors and the Multnomah County Department of Community Justice. The district attorney was neutral on this application. I determined there was substantial need to warrant this pardon.

(6) **Benjamin Barr Carleton.** Convicted of Criminal Mischief in the Second Degree and Theft in the Second Degree on January 12, 2005; Pointing a Firearm at Another on January 21, 2005 and Criminal Mischief in the Second Degree on April 24, 2005. He received a sentence that included 18 months of probation, restitution, 80 hours of community service and 10 days jail. Mr. Carleton met his financially obligations and was discharged from probation on July 25, 2005. I pardoned his convictions on August 5, 2010.

Mr. Carleton's criminal conduct occurred in a relatively short period of time during his late teens. Like many crimes, abuse of alcohol and drugs was a major contributing factor. In November 2005 he made the decision to turn his life around and joined the Marine Corps. He served honorably, earned numerous services medals, completed three combat deployments and was honorably discharged in November 2009. He is attending community college and seeks employment counseling juveniles.

Mr. Carleton's pardon request was supported by military superiors. The district attorney was neutral on the request.

(7) **Andrew DeForest Gilbert.** Convicted of Distribution of a Controlled Substance on January 5, 1989. Sentenced to five years probation and 100 hours community service which he successfully completed. I pardoned his conviction on September 23, 2010.

Mr. Gilbert just turned 18 years old at the time of this conviction. He purchased cocaine to share with friends. He is currently the program director of Sun Valley Snowboard Team. He is active in his community and works with youth. He shares with the youth he coaches his past conviction explaining to them how bad choices can haunt and limit their options for decades to come.

The district attorney opposed clemency but Mr. Gilbert's employer and a number of Ketchum city and county supervisors offered their support.

(8) **Mark Doran Campbell.** Convicted of Delivery of a Controlled Substance II on June 13, 1988. Sentenced to five years probation and ordered to pay fines which he successfully completed. I pardoned his conviction on December 17, 2010.

Mr. Campbell was 23 years old and attending the University of Oregon at the time of his conviction. Mr. Campbell graduated from college and went on to medical school. He has been a practicing physician for over 20 years; first in Washington State and currently as an orthopedic surgeon in Arizona.

Mr. Campbell wishes to return to Oregon to practice medicine but feels his conviction is preventing him from doing so. The district attorney supported Mr. Campbell's request.

(9) **Hector Chavez-Ruiz.** Convicted of Delivery of a Controlled Substance on March 6, 2001. Sentenced to three years probation which he successfully completed. I pardoned his conviction on January 3, 2011.

Mr. Ruiz has been married for almost 10 years to a U. S. citizen; together he and his wife have two young children. Mr. Ruiz does not have legal status in the United States and could be deported at any time. Normally he would have the ability to become a legal resident because of his marriage to a U.S. citizen. However, according to his lawyer, Mr. Ruiz is ineligible to adjust his status because of his felony conviction.

The district attorney did not support this request. I determined there are substantial humanitarian concerns to warrant this pardon.

(10) **DaLeesa Yvette Miller.** Convicted of Delivery of a Schedule II Controlled Substance on August 11, 1992. Sentenced to 24 months probation, 120 hours of community service and ordered to complete an alcohol/drug evaluation and treatment which was completed. I pardoned her conviction on January 3, 2011.

Since the conviction Ms. Miller has been steadily employed, currently works as a dental assistant in Oregon and is a single mother and sole financial provider of four children. She sought better paying work with autistic children but was disqualified because of her felony conviction. She has been advised that she cannot work in the State of Washington because of her conviction and worries that if Oregon adopts the same laws, she will be unable to continue working in a dental office. She has no prior or subsequent criminal record and has been a responsible law abiding member of society for over 18 years.

The district attorney opposed this request. I determined there was substantial need to warrant this pardon.

(11) **Antonio Kalandula Chimuku**. Convicted of Delivery of Marijuana on February 28, 2007. Sentenced to 36 months probation, ordered to perform community service and to participate in a drug evaluation treatment course which was successfully completed. I pardoned his conviction on January 3, 2011.

Mr. Chimuku along with his entire family came to the United States legally in the 1990s as political refugees from Angola. He was granted legal permanent resident status. Deportation proceedings commenced after this conviction but he was granted relief from deportation under the Convention Against Torture (CAT) because the Immigration Judge found that Mr. Chimuku would be tortured if deported to Angola. However, as a recipient of CAT relief from removal, Mr. Chimuku has no entitlement to legally work in the United States and may face deportation to a third party country. His application is supported by friends and family. The district attorney opposed this request. I determined there were substantial humanitarian concerns to warrant this pardon.

(12) **Michael Owen McQueen.** Convicted of Robbery in the First Degree on July 11, 1973. Sentenced to prison for an indeterminate 10 year term, he was, granted parole in 1976 and discharged early from parole in 1979. I pardoned his conviction on January 3, 2011.

At age 22, Mr. McQueen and a co-defendant robbed a gas station with a gun. Upon release from prison Mr. McQueen attended community college and trained as a welder. He married, raised six children and has been employed as a welder for the past 26 years working for the same employer.

Mr. McQueen and his wife have operated an adult foster care home business for the past 16 years. Under HB 2442(2009) Mr. McQueen is disqualified from continuing to live his residence of 22 years before of this conviction. Prior to the passage of HB 2442, waivers were obtained from DHS based on the full circumstances and age of the conviction.

Mr. McQueen's application is supported by friends and his supervisors. The district attorney took no position on this request. I determined there was substantial need to warrant this pardon.

(13) **Kristine Roseanne Hayes.** Convicted of Manufacture and Delivery of a Controlled Substance on October 14, 1991. Sentenced to 24 months probation, 80 hours of community service and ordered to complete alcohol/drug evaluation and treatment which was successfully completed. I pardoned her conviction on January 8, 2011.

Since completing her probation in 1992, Ms. Hayes has been a law abiding citizen of this State. She has volunteered in her community, received an Early Childhood Education Degree and continues to attend 12 steps meetings. The district attorney and sheriff of Tillamook County supported her request for clemency. I determined there was a need to warrant this pardon.

I granted the following commutations:

(1) **Andrew Joseph Johnson.** Convicted of Robbery in the Second Degree (five counts) and Kidnapping in the Second Degree on April 1, 2002. Sentenced to a total of 150 months incarceration under Ballot Measure 11 and 36 months post-prison supervision. I conditionally commuted his sentence on July 7, 2010.

Mr. Johnson was 16 years old when he and a co-defendant entered the trailer of neighbors with a gun and the intent to steal money and drugs. Mr. Johnson was incarcerated for over eight of his twelve and a half year sentence at the Oregon Youth Authority. During that time he took full advantage of every educational, treatment and career opportunity available. OYA staff corroborate that he has taken genuine responsibility for his actions. In addition to obtaining his high school diploma in 2007, Mr. Johnson served as a facilitator and mentor in treatment groups and tutored developmentally disabled youth. He obtained a welding certificate and a pet care technician certificate.

The district attorney office opposed commutation. I granted this conditional commutation on Mr. Johnson's twenty fifth birthday when he would have aged-out of OYA and been placed in an adult prison to serve out the remaining four years of his sentence at the Department of Corrections. This conditional commutation was based on numerous affirmative signs that he has taken his own rehabilitation seriously. Because it is a conditional commutation, if Mr. Johnson fails to abide by the conditions I have placed on him, the commutation will be revoked and Mr. Johnson shall be returned to prison to serve out the time then-remaining on his sentence according to the terms of the Judgments of Conviction.

(2) **Sisi Raufa Fuapau.** Convicted of Robbery in the First Degree, Robbery in the Second Degree (nine counts) and Assault in the Third Degree on February 15, 2001. Sentenced to a total of 180 months incarceration and 36 months post-prison supervision. I conditionally commuted his convictions on January 6, 2011.

Shortly before graduating from high school, Mr. Fuapau, 17 years old, went on a three week crime spree. On four separate occasions he and friends threatened and robbed nine victims, seeking beer money. Mr. Fuapau was under the influence of drugs and alcohol at the time. Five of the victims were physically harmed.

Under Measure 11, Mr. Fuapau received a combined sentence totaling 15 years. He served the first seven years incarcerated at the Oregon Youth Authority. While at OYA, Mr. Fuapau took full advantage of every educational and treatment opportunity. Staff at OYA corroborate that Mr. Fuapau took his rehabilitation seriously. He volunteered to raise money for veterans and people in need and served as an academic mentor to other youthful offenders. He earned an Associate's Degree from Chemeketa Community College. On July 3, 2008 he was transferred to DOC custody. Mr. Fuapau has taken advantage of the opportunities available to him while incarcerated at DOC and had no disciplinary violations in prison.

OYA staff supported Mr. Fuapau's commutation request as did two of the victims. One victim was opposed to commutation at this time as was the district attorney.

I granted this commutation based on the factors that Mr. Fuapau has demonstrated extraordinary progress with considerable evidence of rehabilitation. This commutation is conditional so that if Mr. Fuapau fails to abide by the conditions of the commutation, it will be revoked and Mr. Fuapau shall be returned to prison to serve out the time then-remaining on his sentence according to the terms of the Judgments of Conviction.

In conclusion, I wish to point out that my decisions on the conditional commutations of Mr. Johnson and Fuapau only highlight the need for further reform in the sentencing of juvenile offenders under mandatory minimum sentences.

When I designed the re-write of the juvenile justice system in 1995 with the legislation that created the Oregon Youth Authority, it included the concept of "Second Look" for juvenile Measure 11 offenders. This concept would have allowed judges to review the records of youth convicted of Measure 11 sentences, receive input from the parties and victim and make a decision on whether continued incarceration would be appropriate. I have exercised my commutation authority in a way that is consistent with the intention behind the second look – in order to give a second chance to young people who accepted personal responsibility for their serious crimes and demonstrated rehabilitation.

My commutation decisions are informed by the research that shows that the risk recidivism for juvenile offenders is higher when youth are incarcerated in the adult system. As a state, Oregon has wisely chosen to invest in treatment and education for youth that commit crimes. If our juvenile justice system is going to be one that seeks to accomplish the objectives of accountability, reformation and overall public safety, I believe that the second look concept should be enacted immediately.

Sincerely,

THEODORE R. KULONGOSKI
Governor

TRK: jo:fal

JOHN A. KITZHABER, MD
Governor

March 1, 2012

The Honorable Peter Courtney
President of the Senate
S-201 State Capitol
Salem, OR 97301

The Honorable Bruce Hanna
Co-Speaker of the House
H-269 State Capitol
Salem, OR 97301

The Honorable Arnie Roblan
Co-Speaker of the House
H-295 State Capitol
Salem, OR 97301

Dear President Courtney, Co-Speaker Hanna, Co-Speaker Roblan:

Pursuant to ORS 144.660, I am reporting to the Legislative Assembly at its regular session each reprieve, commutation, pardon, remission of penalty or forfeiture granted since the beginning of the previous legislative session.

Since January 11, 2011, I have received 147 requests for executive clemency. I have received 86 applications for commutation of sentence, none of which have been granted: 29 have been denied, one was withdrawn by the applicant, one where the applicant died before any action was taken, and 55 are pending. I have received 61 applications for pardon, none of which have been granted: 24 have been denied and 37 are pending. I issued one reprieve, as explained below.

I issued the following reprieve:

> **Gary D. Haugen** - Mr. Haugen was convicted of aggravated murder in Marion County Circuit Court on May 3, 2007. He was sentenced to death, and the Oregon Supreme Court automatically and directly reviewed the case and affirmed the judgment of conviction and sentence of death. Subsequently, he waived his available appeals, and the circuit court issued a death warrant scheduling his execution for December 6, 2011. Because Oregon's application of the death penalty is not fairly and consistently applied, and because I do not believe that state-sponsored executions bring justice, I granted Mr. Haugen a temporary reprieve for the duration of my service as Governor.

Sincerely,

John A. Kitzhaber, M.D.
Governor

JAK/LR/ja

CERTIFICATE OF FILING

I certify that I electronically filed the foregoing BRIEF OF *AMICUS CURIAE* with the State Court Administrator for the Court of Appeals of the State of Oregon by using the appellate electronic filing system on June 2, 2015.

CERTIFICATE OF SERVICE

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that (1) BRIEF OF *AMICUS CURIAE* complies with the 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 9,100 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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