IN THE SUPREME COURT
OF THE STATE OF OREGON

GABRIEL DAVID SILLS, Petitioner-Appellant, Petitioner on Review, v. STATE OF OREGON, Defendant-Respondent, Respondent on Review.	Marion County Circuit Court Case No. 16CV15239 CA A171781 S068724

REPLY BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review the decision of the Court of Appeals
on an appeal from the Judgment of the Circuit Court
for Marion County
Honorable Lindsay R. Partridge, Judge

Affirmed Without Opinion: April 28, 2021.
Before: Armstrong, Presiding Judge, and Tookey, Judge, and Aoyagi, Judge.

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SUMMARY OF ARGUMENT

The parties' dispute centers on the scope of inherent judicial authority. Contrary to the arguments in the state's brief, Resp BOM 16-20, this court exercises inherent judicial authority when necessary to protect a court's proceedings and judgments. The former-fugitive rule is unnecessary to protect a court's proceedings and judgments in post-conviction cases governed by the Post-Conviction Hearing Act (PCHA) and subject to the Oregon Rules of Civil Procedure. Pet BOM 21-34. In addition, the former-fugitive rule is inconsistent with the justifications for Oregon's fugitive dismissal rule. Pet BOM 21-26. There is no former-fugitive rule in Oregon.

However, reversal is required, even if this court adopts the state's rule. The state's first proposed rule of law is that "[a] post-conviction trial court has inherent authority to dismiss an action under the former-fugitive doctrine where the petitioner's flight would *cause* prejudice to the state in litigating a retrial." Resp Br 2 (emphasis added). Here, the state failed to establish that the flight itself—rather than the normal passage of time between the criminal trial and the post-conviction trial—would cause prejudice to the state during a retrial. The primary concerns the

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state cites, including the possible unavailabilty of the victims or their memory loss, are purely hypothetical on this record. Moreover, even if the facts are as the state fears, its concerns would be sufficiently remedied by admission of the unavailable witnesses' testimony from the original criminal trial at the subsequent retrial, were petitioner to obtain post-conviction relief. Even the state's speculative concerns do not create a need to prohibit petitioner from bringing a post-conviction challenge. This court should reverse and remand to allow petitioner to litigate his petition for post-conviction relief.

ARGUMENT

I. Inherent judicial authority exists where necessary to protect court proceedings and judgments.

The necessity limitation on an exercise of inherent judicial authority is well established in Oregon. This court unambiguously stated that rule in *Ortwein v. Schwab*, 262 Or 375, 385, 498 P2d 757 (1972).

In *Ortwein*, the petitioner argued that the Court of Appeals had inherent authority to waive a legislatively prescribed filing fee for mandamus actions. The petitioner cited cases from California and Washington holding that those states' courts had "inherent power to waive the payment of fees." *Id.* (citations omitted). This court rejected the petitioner's argument. In Oregon, inherent judicial authority is defined by the necessity to protect judicial proceedings and judgments:

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> "We accept the doctrine of inherent power for the judiciary; however, we view it as a more limited source of power than apparently the California and Washington courts do. In *State ex rel Bushman v. Vandenberg*, 203 Or 326, 335, 276 P2d 432, 280 P2d 344 (1955), we quoted with approval from Rottschaefer, Constitutional Law, 56 (1939):
>
> > '"* * * The judicial power thus conferred is generally held to include not merely that of deciding cases but also *incidental powers necessary to the effective performance of that primary function*.'
>
> "We look upon the doctrine of inherent judicial power as the source of power to do those *things necessary to perform the judicial function for which the legislative branch has not provided*, and, in rare instances, to act contrary to the dictates of the legislative branch."

Ortwein, 262 Or at 385 (asterisks in original, emphasis added). Because waiver of the filing fee was unnecessary, it exceeded the court's inherent authority:

> "We do not, however, view the legislative requirement of a filing fee as a prerequisite to processing an appeal from an administrative ruling as such a restriction upon the performance of a judicial function that it must be ignored. It would be incongruous to hold that the requirement of a filing fee is not contrary to the Due Process and Equal Protection Clauses but is such a restriction upon the performance of the judicial function that the court can ignore the legislative command under the guise of exercising its inherent power."

Id. at 385-86.

The state misreads *Ortwein*. It argues that "in *Ortwein* this court observed that although it had inherent authority to waive a statutorily required filing fee, it would not do so because that fee was not a 'such a restriction upon the performance of a judicial function that must be ignored.'" Resp BOM at 17

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(quoting *Ortwein*, 262 Or at 365). That is incorrect. Rather, this court held that—in contrast with other states that recognize broader inherent authority—the Oregon Court of Appeals did not have authority to waive the fee "under the guise of exercising its inherent power" because waiver was not necessary to process the appeal. *Id.* at 386. Oregon courts have consistently applied that rule. Pet BOM 16-17 (setting out this court's case law restating necessity limitation); *Cox v. M.A.L.*, 239 Or App 350, 354, 244 P3d 828 (2010) (rejecting proposed rule of inherent judicial authority as unnecessary to protect the court's proceedings or judgments, citing *Orwein*); *State ex rel. Coastal Mgmt., Inc. v. Washington Cty.*, 178 Or App 280, 288, 36 P3d 993, 997 (2001), *rev den*, 334 Or 190 (2002) (same); *Snow v. State Highway Comm'n*, 19 Or App 610, 615–16, 528 P2d 1368 (1974) (same); *Baker Cty. v. Wolff*, 16 Or App 1, 13, 516 P2d 1307 (1973) (same). That rule is also consistent with the reasoning and holding in *Espinoza v. Evergreen Helicopters*, 359 Or 63, 93, 376 P3d 960 (2016), in which this court explained that inherent authority to apply the "forum non conveniens" doctrine is exercised to ensure the "fair and effective administration of justice" and that the "possession of [inherent] power involves its exercise as a duty whenever public or private interests *require*." (Quoting *State ex rel. Ricco v. Biggs*, 198 Or 413, 430, 255 P2d

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1055 (1953), *overruled in part on other grounds by State ex rel. Maizels v. Juba*, 254 Or 323, 460 P2d 850 (1969)) (emphasis added).

As explained in petitioner's brief on the merits, the former-fugitive rule is unnecessary to protect a post-conviction trial court's proceedings and judgments, and it therefore exceeds the court's inherent authority. Pet BOM 21-34. The possibility that the state will have difficulty retrying the case is not a factor the court considers under the PCHA. ORS 138.530 (defining grounds for post-conviction relief); Pet BOM 31. And a post-conviction court has multiple tools to address and deter flight, including under the Rules of Civil Procedure. Pet BOM 26-30. Further, the post-conviction petitioner bears the burden of proof, meaning that he will have to contend with the delay from his previous flight in order to obtain relief in the first place. Pet BOM 29-30.

The former-fugitive rule is also incompatible with this court's case law on the fugitive dismissal rule. The state appears to concede, as it must, that this court has never cited prejudice to the state as a justification for Oregon's fugitive dismissal rule. Resp BOM 11. The closest citation for its position the state finds is to *State v. Broom*, 121 Or 202, 208, 253 P 1044 (1927), where this court reasoned that an appeal of presently absconding appellant "should ordinarily not be permitted until he returns and submits to the law, because the ends of justice may

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require him to be held to answer to some other proceeding should this one be reversed." (Quoting 1 Bishop's New Criminal Procedure, § 269, par 3). *Broom* is about enforceability—specifically, the concern that an absconding appellant who is successful on appeal will not appear at retrial—not prejudice to the state.

Further, as in *Ortwein*, this case involves a court's purported exercise of inherent authority against the backdrop of a specific legislative command. The Post-Conviction Hearings Act (PCHA), "both created a right to post-conviction relief and established a comprehensive set of procedures for resolving post-conviction claims." *Ware v. Hall*, 342 Or 444, 449, 154 P3d 118 (2007). A post-conviction trial court does not have the ability to override the PCHA unless it imposes "such a restriction upon the performance of a judicial function that it must be ignored." *Ortwein*, 262 Or at 385.

A recaptured post-conviction petitioner's prior flight does not meet that standard. Instead, dismissing a petition for post-conviction relief based solely on the petitioner's prior flight undermines the right to state collateral review provided by the PCHA. *Cf. State v. Moss*, 352 Or 46, 74-75, 279 P3d 200 (2012) (Durham, J., dissenting) ("If Oregon's rule now purports to authorize an appellate court to dismiss an appeal even though the defendant has submitted to the state's authority and is in custody, then the rule undermines the statutory right of appeal.").

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As petitioner explains in his opening brief, the *Moss* dissent resulted in the amendment of ORAP 8.05(3) to its current version, which limits dismissal to cases where the defendant is presently absconding at the time the court decides the motion. Pet BOM at 25-26 (citing *State v. Lazarides*, 358 Or 728, 738-39, 369 P3d 1174 (2016)). The amendment strongly suggests that the former-fugitive rule exceeds Oregon courts' authority. Pet BOM 14-15. The state nevertheless argues that "there is no conflict between ORAP 8.05(3) and the former-fugitive doctrine, and a court may exercise its inherent authority to dismiss an appeal involving a former-fugitive while also adhering to ORAP 8.05(3) in appeals involving currently absconding appellants." Resp BOM 23. That argument ignores the plain language of ORAP 8.05 and the enactment history set out in *Lazarides*. In fact, the Court of Appeals routinely denies motions to dismiss based on the defendant's flight because the defendant is in custody by the time the court decides the motion. *See, e.g.*, *State v. Sullivant*, 313 Or App 159, 160, 490 P3d 183 (2021) (per curiam) ("While this appeal has been pending, the state moved to dismiss on the ground that defendant had absconded from justice. *See* ORAP 8.05(3). We have since been notified that defendant is in custody; therefore, he is no longer on 'abscond status' within the meaning of ORAP 8.05(3). [] *Lazarides*, 358 Or [at 736]. For that

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reason, we deny the motion to dismiss."). There is no former-fugitive rule in Oregon.

II. The possibility of prejudice to the state did not authorize the court to dismiss the petition for post-conviction relief.

If this court rejects petitioner's first argument and determines that a post-conviction trial court has inherent authority to dismiss a petition for post-conviction relief due to the petitioner's prior flight and recapture, it should still reverse here.

As a preliminary matter, the state's framing of the justification for the exercise of inherent authority it seeks is inaccurate. The state effectively asks this court to adopt the United States Supreme Court's former-fugitive rule. But the state ignores that even that rule is limited by necessity. *Degen v. United States*, 517 US 820, 829, 116 S Ct 1777, 135 L Ed 2d 102 (1996) (rejecting fugitive dismissal rule in civil forfeiture case out of recognition that "[a] court's inherent power is limited by the necessity giving rise to its exercise."). Further, in the state's view, inherent judicial authority to apply the former-fugitive doctrine exists to protect the state from prejudice. Resp BOM 1 ("A corollary to [the fugitive dismissal doctrine], the former fugitive-doctrine, exists to address the prejudice to the state from a defendant's prior flight—the kind of prejudice at issue here."). That is incorrect. Under the United States Supreme Court's case law the state asks this court to

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adopt, the purpose of inherent judicial authority is to allow courts to "protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen*, 517 US at 823.

Courts that consider prejudice to the state under the former-fugitive rule consider it only to the extent that such prejudice affects the function of the court deciding the motion to dismiss. *Ortega-Rodriguez v. United States*, 507 US 234, 249, 113 S Ct 1199, 122 L Ed 2d 581 (1993). In *Ortega-Rodriguez*, the Court explained that "some actions by a defendant, though they occur while his case is before the district court, might have an impact on the appellate process sufficient to warrant an appellate sanction." *Id.* "For example," the Court explained, "a long escape, even if ended before sentencing and appeal, may so delay the onset of appellate proceedings that the Government would be prejudiced in locating witnesses and presenting evidence at retrial after a successful appeal." *Id.* The focus of the inquiry is on the effect of the delay on the court and its proceedings, not the state. *Id.*

For that reason, the state is incorrect that the post-conviction court was bound by the Court of Appeals' dismissal of petitioner's direct appeal under the former fugitive rule. Resp BOM 32-34. A court's "discretion to dismiss a fugitive's case flows from its 'inherent power' to protect its *own* 'proceedings and

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judgments'—not another court's." *In re Kupperstein*, 943 F3d 12, 22 (1st Cir 2019) (quoting *Degen*, 517 US at 823-24 (emphasis in original)). Even if prejudice to the state is a factor the court may consider, application of that factor depends on case- and court-specific circumstances. *Ortega-Rodriguez*, 507 US at 249-51; *Degen*, 517 US at 823-24.

Indeed, the state acknowledges that at least one of the considerations the Court of Appeals relied on when dismissing the direct appeal no longer existed by the time of the post-conviction trial. Resp BOM 28 n 7 (conceding that the development of case law favorable to the defendant did not justify dismissal of the petition for post-conviction relief, even though the Court of Appeals relied on that factor in the direct appeal). The inquiry here if this court recognizes the former-fugitive rule is whether petitioner's flight so impacted the post-conviction proceedings—not the direct appeal—that dismissal was necessary. The direct appeal opinion does not answer that question.

The state failed to establish that petitioner's flight during his criminal trial made dismissal of his post-conviction proceeding necessary. *See Ortega-Rodriguez*, 507 US at 251 (holding that the government, the moving party, failed to meet burden of production and persuasion). The state focuses on the possible effects of the passage of time on the victims' testimony. For example, the state

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argues that it may have been unable to locate the victims and that, "[e]ven assuming that the state could locate them again, their memories may have faded in that time, thereby benefiting petitioner in a retrial." Resp BOM 2-3, 29. But the state failed to make a record to support that argument, even though it had the opportunity to produce facts to support its motion to dismiss. Victims have the right to notice of post-conviction proceedings and the "right to consult with counsel for the state regarding the post-conviction proceeding[.]" ORS 138.627. The state did not present evidence regarding its efforts to contact and consult the victims and, critically, whether that effort revealed anything about the victims' availability at a possible future retrial.

Moreover, even if the record permitted the inferences drawn by the state, that fact would not have made dismissal of the post-conviction case necessary. "Where a witness is unavailable for trial, despite the good faith efforts of the state to procure his [or her] live testimony, it does not violate the state confrontation clause, Article I, section 11, to admit into evidence a transcript of that witness's prior sworn testimony," so long as the defendant had the opportunity to cross-examine the witness. *State v. Moen*, 309 Or 45, 86, 786 P2d 111 (1990); *see also* OEC 804(3)(a) (hearsay exception for prior sworn testimony). Admission of a transcript of prior testimony in that circumstance also does not violate the federal

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confrontation clause. *Id.* (citing *Crawford v. Washington*, 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177 (2004)). "Unavailability" includes memory loss. OEC 804(1)(c). Thus, the victims' prior testimony would have been admissible and available to the state, in the event the victims were unavailable for trial or unable to adequately recount the alleged crimes. Thus, petitioner would not obtain such a "benefit" from the delay at a hypothetical retrial that dismissal of his post-conviction relief case was necessary. And he would not be able to successfully argue that "the almost two decades that have passed between trial and the events—much of which he himself caused by absconding—establish reasonable doubt, because the witnesses' memories have been affected by some passage of time," as the state erroneously suggests. Resp BOM 29.

The state also relies on the Court of Appeals' statement in the direct appeal that petitioner's flight could affect the jury's assessment of the victims' testimony at a retrial. Resp BOM 27-28. The Court of Appeals reasoned that, were defendant to obtain reversal on direct appeal, the "jury may react differently to the testimony of the now older victims than they would have to the testimony of 14-year-olds" at a retrial. *State v. Sills*, 260 Or App 384, 392-93, 317 P3d 307 (2013), *rev den*, 355 Or 380 (2014). The state now attempts to push that argument further, suggesting that "[t]he victim of petitioner's sexual abuse, who was 13 years old in 1999, now

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would be 35 years old, and a jury might well react differently to the testimony of an adult than they would have to the testimony of a teenager recounting the same event." Resp BOM 28. That argument fails, because the victim would no longer have been a teenager after petitioner's post-conviction trial, even without the delay from petitioner's flight. The state attributes almost 10 years of delay to petitioner. Resp BOM 3-4. Assuming that is the correct number, the pertinent comparison is the effect on the jury of a 25-year-old's testimony versus a 35-year-old's testimony, not a 35-year-old versus a 14-year-old, as the state would have it. The Court of Appeals' concern for the relative impact of an adult's testimony versus a teenager's on the jury no longer supports dismissal, because that impact is unaffected by petitioner's flight.

The state acknowledges that "[i]t is an unremarkable fact that post-conviction relief proceedings often can produce delays, and cases have to be tried years after the fact." Resp BOM 31. For that very reason, the mere fact of delay is not enough to necessitate dismissal of a petition for post-conviction relief. The state's own proposed rule is that "[a] post-conviction trial court has inherent authority to dismiss an action under the former-fugitive doctrine where the petitioner's flight would *cause* prejudice to the state in litigating a retrial." Resp BOM at 2 (emphasis added). But the state failed to establish that petitioner's

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former flight *caused* it prejudice and, as a result, significantly interfered with the post-conviction proceeding. The post-conviction trial court did not have inherent authority to preclude petitioner from obtaining state collateral review of his convictions.

CONCLUSION

A criminal defendant's flight and recapture during his criminal trial does not create inherent authority for a post-conviction trial court to dismiss a subsequent civil post-conviction proceeding. For the reasons provided in petitioner's brief on the merits and this reply, this court should hold that the former-fugitive doctrine does not apply in post-conviction trials and reverse the decisions of the Court of Appeals and trial court.

DATED February 14, 2022.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) that the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,181 words.

Type Size

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

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Reply Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records section, 1163 State Street, Salem, OR 97301.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Robert M Wilsey, #085116, attorney for Defendant-Respondent.

DATED February 14, 2022.

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