IN THE SUPREME COURT OF THE STATE OF OREGON

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| STATE OF OREGON,<br><br>Plaintiff-Respondent,<br>Respondent on Review,<br><br>v.<br><br>GREGORY LEON HIGHTOWER,<br>aka Gregory Leon Hightower, Sr.,<br><br>Defendant-Appellant,<br>Petitioner on Review. | Multnomah County Circuit Court<br>Case No. 120632737<br><br>CA A154220<br><br>**S063924** |

# REPLY BRIEF – PETITIONER ON REVIEW

Review of the decision of the Court of Appeals on an appeal from a judgment of the Circuit Court for Multnomah County
Honorable Edward J. Jones, Judge

Opinion Filed: December 9, 2015
Author of Opinion: Sercombe, Presiding Judge,
Concurring Judges: Hadlock, Judge, and Tookey, Judge

Review Allowed: May 18, 2016

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## PETITIONER'S REPLY BRIEF

## INTRODUCTION

The state, in essence, responds with a single argument to defendant's assertion that the trial court erred in disallowing defendant's exercise of his right to self-representation. It relies on this court's cases to argue that, by exercising his right to assistance of counsel, defendant relinquished his right to self-representation:

> "Although a defendant may have a right to represent himself at trial, that right must be exercised before trial begins. Once the defendant has chosen to proceed with the assistance of counsel, the trial court has broad discretion to deny a motion for self-representation to ensure that the trial is conducted in an orderly and efficient manner."

Respondent's Brief on the Merits (RBOM) at 1.

> "Applying the state's proposed rule to this case, the trial court did not err by denying defendant's midtrial request for self-representation. As explained above, the request was not timely. As such, defendant had no absolute right to represent himself. And the court was within its discretion in determining that the interest in ensuring an orderly trial outweighed defendant's interest in representing himself."

RBOM at 18.

Defendant files this reply brief to explain why the state's rule does not adhere to this court's precedent. Accordingly, this court should reverse the judgment imposing conviction and sentence for life without the possibility of release or parole, and it should remand the case for a new trial.

## ARGUMENT

### A. This court has held that a trial court does not err by refusing to allow a defendant to exercise a constitutional right *when the defendant invokes, or tries to exercise the right, after the time to exercise that right expires.*

The state cites two cases to support its assertion that defendant relinquished his right to self-representation when trial began with the assistance of counsel. RBOM 9-11 (citing, in pertinent part, *State v. Mills*, 354 Or 350, 373, 312 P3d 515 (2013), and *State v. Lotches*, 331 Or 455, 484, 17 P3d 1045 (2000)). But those cases hold that a defendant's constitutional right is not impinged when the interval in which to exercise the right passes before the defendant invokes, or tries to exercise, the right.

In *Mills*, this court reexamined whether the Article I, section 11, "right to public trial by an impartial jury in the county in which the offense shall have been committed" made venue an element of an offense, *i.e.*, whether "that provision implicitly requires the state to treat the location where the offense was committed as a material allegation, which it must prove beyond a reasonable doubt." 354 Or at 351. After examining the provision's text, historical circumstances, and pertinent case law (and considering *stare decisis* principles), this court held

> "that Article I, section 11, enumerates a defendant's right to a trial in a particular place: 'the county in which the offense shall have been committed.' It does not codify the common-law rule requiring the state to prove venue as a material allegation. The old

> common-law rule was one of jurisdiction. The constitutional guarantee is a matter of personal right, which—like other constitutional rights—may be forfeited if not timely asserted."

*Id.* at 528 (citation omitted). Turning to "the question of when the right must be asserted to avoid waiver," this court concluded that a defendant must exercise the right to have the trial in a particular place before the place of trial is fixed:

> "The Washington Supreme Court, for example, has concluded that its state's constitutional venue guarantee generally requires a defendant to raise the issue of venue *before trial begins*—that is, *before the jury is empaneled, in the case of a jury trial, and before the court begins to hear evidence, in a trial to the court*.
>
> "That seems to us an appropriate requirement."

*Id.* (emphasis added; citation and footnote omitted).[1]

Similarly, in *Lotches*, the defendant voiced his intention to testify at various points during the trial, but the defense rested defendant being called as a witness. 331 Or 478-82. This court held that, given that the interval in which

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[1] Yet even in that case, this court remanded after concluding that "it would be unfair to [the] defendant to hold that he forfeited the opportunity to challenge venue, in light of the fact that the law in effect at the time of trial permitted him to wait until the state rested to raise the issue." *Mills*, 354 Or at 529. Besides invoking fairness principles, the court's decision in that respect reflects its long-standing view that a defendant may not be deprived of constitutional rights in absence of a valid waiver, *e.g.*, "a defendant does not relinquish the right to counsel or the opportunity to raise a violation of that right on appeal unless the record demonstrates that the defendant expressly waived the right to counsel and that the waiver was voluntary, knowing, and intelligent." *State v. Steen*, 346 Or 143, 151, 206 P3d 614 (2009).

the defendant could have exercised his right to testify on his own behalf elapsed without an effort to exercise it, there was no error:

> "[T]he trial court was entitled to conclude that [Lotches] had waived his right to testify in his own behalf *at the close of the defense case*. Although it is true that, at various times, [Lotches] had expressed a desire to testify, he remained silent at all critical moments when his lawyers and the court discussed resting the defense case. Given [Lotches]'s loquacious participation in earlier discussions on the topic, his silence at that moment spoke volumes. [Lotches] does not argue that trial courts have an affirmative duty to determine whether a silent defendant has knowingly and intentionally waived his constitutional right to testify. Indeed, [Lotches] concedes that the courts do not have such a duty. Accordingly, *when [Lotches]'s counsel rested the case in open court, without calling [Lotches] to testify or notifying the court of his desire in that regard, the trial court was permitted to assume that [Lotches]and his lawyers mutually had decided that [Lotches] would not testify.*"

*Id.*, 331 Or at 484 (emphasis added; footnote omitted).

*Mills* and *Lotches* at most instruct that a defendant who does not invoke a constitutional right, or does not try to exercise the right, during the interval in which one would exercise the right *has not been deprived of that right*. They do not lend any support to the state's assertion that a defendant who "elects to begin trial with appointed counsel * * * has opted to exercise his right to assistance of counsel and necessarily relinquished his right to self-representation at trial." RBOM at 10-11.

**B. This court has held that, although a trial court has broad authority to limit how a defendant exercises a constitutional right, *the court may not eradicate the right for mere efficiency.***

The state contends that, because defendant invoked his right to self-representation after trial had begun, "the court was within its discretion in determining that the interest in ensuring an orderly trial outweighed defendant's interest in representing himself." RBOM at 18. The state cites *State v. Rogers*, 330 Or 282, 4 P3d 1261 (2000) (*Rogers II*), as support for its insistence that abrogating defendant's right to self-representation was well within the trial court's inherent authority to "conduct the trial as an orderly and expeditious proceeding." RBOM at 10. This case, however, concerns the annulment—not abridgement—of a constitutional right.

In *Rogers II*, the defendant wanted to make an unsworn statement to the jury after closing arguments. 330 Or at 292. This court considered whether the trial court impermissibly impinged the defendant's Article I, section 11, "right to be heard" when it required that "[the] defendant read from a prepared statement and submit the statement to the trial court in advance for review." 330 Or at 300. This court held that *limiting* the defendant's right in such a manner was well within the court's authority:

> "A trial court's authority to exercise reasonable discretion to ensure that the trial is orderly and expeditious does not evaporate when the parties assert their constitutional rights during trial. *Rather, a trial court is obliged to accommodate the exercise of all*

> *pertinent constitutional and statutory rights by all parties within the context of an orderly and expeditious trial. See State v. Burdge*, 295 Or 1, 14, 664 P2d 1076 (1983) (proposition that disqualification of testimony is too grave a sanction for unintentional violation of exclusion order represents 'a practical and sensitive accommodation between a criminal defendant's right to present witnesses in his behalf and the court's need to control the trial proceedings'); *Still* [*v. Benton*, 251 Or 463, 474, 445 P2d 492 (1968)] ('Cross-examination is a matter of right, but the bounds of proper cross-examination are necessarily within the sound discretion of the trial judge, and this is particularly so when applied to recross-examination. It must be clear that counsel cannot be permitted to prolong the course of trial by continually returning to matters already considered or as to which he has been given ample opportunity to examine; otherwise, there would be no orderly procedure, and nothing but confusion.') (citation omitted).
> * * * .
>
> "We conclude that, by requiring defendant to read from a prepared statement and to submit the statement in advance for review, the trial court acted within its discretion to ensure orderly and expeditious proceedings and to avert error."

*Rogers II*, 330 Or at 301-02 (emphasis added; citation omitted).

Were this a case in which defendant was complaining that restrictions that the trial court placed on how he exercised his right to self-representation unduly impinged that right, *Rogers II* would be apropos. Under those circumstances, this court would view differently whether the trial court committed reversible error by, for example, restricting the scope of defendant's inquiry to a witness, refusing to allow defendant to call newly identified witnesses, or limiting the time allotted for closing argument. Here, however, the trial court flatly refused to allow defendant to exercise his right to self-

representation. The trial court's decision to do so did not fall within its discretion to conduct an orderly trial.

## CONCLUSION

Because the trial court violated defendant's right to self-representation, this court should reverse the judgment of the trial court and remand the case for a new trial.

Respectfully submitted,

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

Petition length

I certify that (1) this petition complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word-count of this petition (as described in ORAP 5.05(2)(a)) is 1,703 words.

Type size

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Reply Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on August 19, 2016.

I further certify that I directed the Petitioner's Reply Brief to be served upon Benjamin Gutman attorney for Respondent on Review, on August 19, 2016, by having the document personally delivered to:

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Respectfully submitted,
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