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IN THE SUPREME COURT OF THE STATE OF OREGON

Martin Allen Johnson	) Marion County Circuit Court PCR No 0616178
Petitioner-Respondent,	) Court of Appeals No A154129
Cross-appellant	)
Respondent on Review	) Supreme Court No S061670
v.	)
Jeff Premo, Superintendent	)
Oregon State Penitentiary,	)
Defendant-appellant	)
Cross-respondent	)
Petitioner on Review	)

Respondent on review's Prose Brief ORAP 5.92. Mailed out April 2014

Question presented for SO61670 ORAP 5.92 Prose Brief Pleading/Motion related to 0616170/A154129 to present claims/issues and to give a full and fair presentation to provide the state with an opportunity to review claims and to preserve, exhaust, federalize all claims and to prevent procedural default under the AEDPA and to show due diligence and cover my legal ass. So please consider this my act of "due diligence' and for diligently protecting and pursuing my legal rights under Holland v Florida, 130 Sct 2549, 177 Led2nd 130, June 14, 2010, and Pace, 125 1807.

Assignment of Error # 1. The Court of Appeals was in error in ignoring/denying/whitewashing prose pleadings # 2 to #14 and imposing additional unconstitutional unnecessary barriers/roadblocks for Mr. Johnson to jump through hoops, leap over hurdles, pole vault over high bars, in order to be heard by himself.

Authority for Petitioner's prose motions/pleadings rights and responsibilities to present claims and to give a full and fair presentation to provide the state with an opportunity to review claims and to preserve, exhaust, federalize all claims and to prevent procedural default under the AEDPA, can be found in the following case law, Under the 1st, 4th, 5th, 6th, 8th, 9th, and 14th Amendments and Article I, Sections, 8, 9, 10, 11, 12, 13, 15, 16, 20, and 33,

Church v Gladden, 417 P2d 993, 244 Or 308, September 9, 1966,

> "In our opinion petitioner has not alleged sufficient reasons to escape the application of the res judicata provision of ORS 138.550(3). If petitioner's attorney in the first post-conviction proceeding failed to follow any legitimate request, petitioner could not sit idly by and later complain. He must inform the court at first opportunity of his attorney's failure and ask to have him replaced, or ask to have him instructed by the court to carry out petitioner's request. This is not too great a burden to place upon a petitioner when the attorney's failure to follow legitimate instructions takes place in petitioner's presence. All petitioner had to do was to speak to the court during his hearing on the first petition. He had immediate access to the judge by merely raising his voice. The words of this court in Delaney v. Gladden, 232 Or 306, 308, 374 P2d 746, cert. den. 372 U.S. 945, 83 S Ct 940, 9 L Ed 2d 970 (1963), are equally applicable to the factual situation here: "* * * The state is not obliged to provide a forum to hear and rehear cases that have already reached a lawful termination. The issues attempted to be raised in this case were just as available at the time of the direct appeal as they are now." Petitioner acquiesced in his attorney's failure to raise the issues and to call the witnesses when he did not call to the court's attention his desire to have additional matters presented."

SO under Church I have to follow certain steps to preserve my record:

1. Inform the court of Counsel's failures,
2. Ask to have counsel instructed by the court to carry out petitioner's legitimate requests,
3. If the court instructs counsel to follow my legitimate request but counsel refuses to do so then I have to request new counsel,
4. If counsel fails to follow my legitimate requests then I have to request new counsel

Under the Court of Appeal new procedures I have new hoops to jump through in a 4 steps process:

1. Clearly state relief sought
2. State that (a) he asked counsel to file a motion seeking the same relief and (b) counsel either explicitly declined to do so or failed to respond to the request for such a substantial period of time as to have implicitly declined to do so,
3. state that the petitioner has a good faith belief that counsel's failure to file the requested motions results from counsel's failure to render suitable representation, and
4. explain why petitioner's belief in that regard is objectively reasonable.

Page v Cupp, 717 P2d 1183, 78 Oreapp 520, McClure v Maass, 771 P2d 275, 307 Ore 606, Miller v Maass, 845 P2d 933, 117 Orapp 610, Temple v Zeon, 862 P2d 585, 124 OreApp 388, State v Stevens, 902 P2d 1137, 322 Ore 101, Elkins v Thmpson, 25 P3d 376, 174 Orapp 307, Miller v Baldwin, 32 P3d 234, 176 Orapp 500, Due-Donohue, 80 P3rd 529, 2003, Petitioner's Church Claims and the need for evidence are based in part upon State v Johnson 131 P3d 173, 340 Or 319, "We also held that a trial court's failure to inquire into the facts underpinning a complaint about counsel does not violate a defendant's constitutional right to assistance of counsel, because post-conviction procedures provide a constitutionally sufficient mechanism for obtaining relief when

trial counsel has been inadequate. Id. at 530. Finally, we held that, where the defendant had expressed general concerns about "fair representation" and had suggested that defense counsel had not investigated his case sufficiently, the trial court had not abused its discretion in denying the motion on the ground that the defendant had not advanced any legitimate reasons for appointing substitute counsel." Knox v Nooth, 260 P3d 562, 244 Orapp 57, June 29, 2011, Bailey v Nooth, 269 P3d 80, 247 Orapp 240, State v Langley opinion, issued March 29, 2012, SC # S053206, which made the case law clearer and more defined, Page 25 Lines 6 to 15

Federal case law is needed as counsel did not federalize his brief very much: Milton v Morris, 767 F2d 1443, "If he elects to do so by rejecting the services of an attorney to conduct his defense, he cannot be confined to his jail simply to look at the four walls and appear on the day of trial to defend himself. He must be afforded reasonable access to resources, and providing a counsel's assistance in conducting his own defense is one way of accomplishing this. Other reasonable alternatives consistent with jail or prison management can be utilized." Clemmons v Delo, 124 F3d 944, "Here, Clemmons did the only thing he could do: he tried to bring the issue to the attention of the Missouri Supreme Court himself. We do not criticize that Court for refusing leave to file the supplemental brief. Such matters are within the Court's discretion. 4 Our own practice is usually to refuse leave to file supplemental briefs in cases in which counsel has appeared. The fact remains that Clemmons called the attention of the Missouri Supreme Court to his Brady claim, among many others. We do not know what else he could have done, as a practical matter, to present the claim to that Court for decision on the merits. 5 We therefore hold that the claim was fairly presented, and that the merits are now open for decision on federal habeas corpus. * * * * The State argues that Clemmons did not properly present his Confrontation Clause claim to the Missouri Supreme Court in the 29.15 appeal. As Clemmons argues, he attempted to bring this issue to the attention of

the Missouri Supreme Court, first by instructing post conviction counsel to raise it, and then by filing his own pro se brief incorporating pleadings that raised it. 11 As we have held in Part II of this opinion, these efforts by Clemmons were sufficient to present the issue to the Missouri Supreme Court. US v Than Huu Lam, 251 F3d 852, USAPP Lexis 11586, enbanc denied 262 F3d 1033, 2001, opinion reported as 2011 Usapp lexis 18826, habeas corpus denied 2008, USDIST Lexis 2559, "Significantly, notwithstanding his letters requesting a speedy trial, Lam never moved to substitute counsel or dismiss the indictment prior to trial. * * * See United States v. Hall, 181 F.3d 1057 (9th Cir. 1999) (holding that a defendant who directly asserted his statutory speedy trial right, moved to substitute counsel, and moved to dismiss the indictment prior to trial sufficiently preserved the right on appeal, even though counsel failed to raise the issue);" Custer v Hill, 378 F3d 968, 9th Circuit, " Nevertheless, Custer relies upon Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997), to support his position. Clemmons is somewhat analogous to this case, in that post-conviction counsel in Clemmons refused a specific request by the petitioner to raise the claim. Petitioner then moved for leave to file a supplemental brief pro se. Id. at 948. Similarly, Custer requested and received permission from the Oregon Court of Appeals to file a pro se brief citing to the federal Constitution for the ineffective assistance of counsel claim. However, the pivotal difference between the two cases is that the petitioner in Clemmons requested leave of the Missouri Supreme Court to file his pro se brief. Id. The Eighth Circuit found that the petitioner had fairly presented his claim to that court because he "did the only thing he could do: he tried to bring the issue to the attention of the Missouri Supreme Court himself." Langley v Belleque, 2005 US District Lexis 4867, CV 046197AA, Smith v Baldwin, 510 F3d 1127, "The alleged errors of his attorney in the first state post-conviction trial proceedings did not prevent Smith from thereafter raising his substantive post-conviction claims with the Oregon Court of Appeals and the Oregon Supreme Court. See Custer v. Hill, 378 F.3d

968, 974-75 (9th Cir. 2004) (holding that a federal habeas petitioner could not rely on state post-conviction attorney errors to overcome procedural default when the petitioner did not preserve the substantive claims by presenting them pro se to the Oregon Supreme Court)." Mark Pinnell v Belleque, USDC federal habeas corpus death penalty case opinion Lexis 55102, Jackson v Belleque, Lexis 5763, 08-6411BR, "The Court notes Petitioner's Section B of his Balfour brief also failed to fairly present to the Oregon Court of Appeals the ineffective assistance of counsel claims alleged in his federal habeas petition. In his Section B, Petitioner focused on the trial court's alleged errors of state law in sentencing Petitioner. Petitioner referred only in passing to trial counsel's failure to object to the alleged sentencing errors; moreover, Petitioner did not indicate he intended to present ineffective assistance of counsel as a federal claim." Cabine v Belleque, 2010 USDC Lexis 27019, "The Supreme Court has clearly held that this approach is insufficient to fairly present a claim on appeal. See Baldwin, 541 U.S. at 32 ("ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material . . . that does so."); see also Castillo v. McFadden 399 F.3d 993, 1000 (9th Cir. 2005) (in order to exhaust, a petitioner must present his federal constitutional issue "within the four corners of his appellate briefing"); see also Jackson v. Belleque, 2010 U.S. Dist. LEXIS 5763, 2010 WL 348357 *4 (D. Or. Jan. 21, 2010) (rejecting argument that attaching PCR petition as part of Excerpt of Record constituted fair presentation of claims alleged therein). Petitioner's citation to the Oregon Supreme Court's recent decision in Farmer v. Baldwin, 346 Ore. 67, 205 P.3d 871 (2009) is unavailing." Beller v Martinez, 2012 USDC Oregon, Lexis 47545, "While Petitioner contends his Balfour briefs were comparable to those filed by Farmer, there is no evidence in the record that Petitioner submitted what was intended, or could be construed to be Section B of a Balfour brief - that is, his presentation of the

issues he sought to raise - or that he cross-referenced an assignment of errors submitted to the Court of Appeals in his petition for review to the Oregon Supreme Court." Parra-Moo v Coursey, 2010 USDC Oregon Lexis 51186, 105 P3d 915, 197 Orapp 404, "Petitioner argues that by seeking leave to file a Balfour brief to include these claims in the Oregon Court of Appeals, he did all he could be expected to do, thus fairly presenting his claims. To support this contention, he directs the court's attention to Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997). * * * * "The holding in Clemmons was not based upon the inaction of the petitioner's lawyer, but upon the action of the petitioner." Custer v. Hill, 378 F.3d 968 (9th Cir. 2004) (emphasis in original). In this case, petitioner did not take any personal action to bring his claims to the attention of the Oregon Court of Appeals." Yarra v Belleque, USDC Oregon, Lexis 68231, "To the extent Petitioner argues the Ninth Circuit decisions in Smith v. Baldwin and Custer v. Hill, 378 F.3d 968 (9th Cir. 2004) were incorrectly decided, this Court nevertheless remains bound thereby. Moreover, Petitioner's attempt to distinguish his case from Smith and Custer is unavailing. Here, Petitioner made no attempt to file a supplemental pro se brief with the Oregon Court of Appeals. As such, his argument that a supplemental pro se petition for review might not have been accepted is without merit." Reeves v Baldwin, 2010 USDC Oregon Lexis, 88961, "Indeed, petitioner offers no explanation for the post-conviction appellate attorney's failure to file a petition for review. Petitioner presents no facts establishing that petitioner contacted the attorney to file the petition for review or that the attorney refused to do so. And finally, because petitioner does not have a right to post-conviction counsel, petitioner must bear the risk of attorney error. * * * * . In contrast, petitioner here did nothing to alert the Oregon Supreme Court as to the substance of the claims he wished them to hear. Parra-Moo v. Coursey, 2010 U.S. Dist. LEXIS 51186, 2010 WL 2035368, *3 (D. Ore. May 21, 2010) (distinguishing Clemmons on similar grounds). Instead, petitioner submitted a short

letter asking that it serve as his petition for review. And, petitioner offers no explanation as to why he did not ask his post-conviction appellate attorney to file a Balfour brief or why he did not file a pro se petition for review. Id. Again, it appears that petitioner's argument concerning cause to excuse his default is more appropriately directed at his PCR appellate attorney for not pursuing a petition for review. However, counsel's performance does not constitute cause sufficient to excuse petitioner's procedural default." Whaley v Belleque, 520 F3d 997, Reeves v Belleque, 2010 Lexis 88961, Martinez v Ryan, United States Supreme Court, decided March 20, 2012, No. 10-1001,Jones v Barnes, 463 US 745, 103 Sct 3302, 1983, Justice Blackman concurring. SO the court has to allow me to present my prose claims/issues so that the prose claims/issues are preserved and presented to the court and state for a full and fair opportunity to respond and to make a record for further review and AEDPA review for exhaustion, to prevent procedural default, federalized, preservation, argument, due diligence, and to cover my legal ass, etc.

Certificate of Service

I certify that on or about April 4, 2014 I sent a copy of this pleading Slopak v Cupp, 513 P2d 531, PCR Counsel Robert Huggins and Daniel J Casey for copying and service upon the Attorney General and the Oregon Supreme Court at the addresses below pursuant to Houston v Lack, 108 Sct 2379, Jones v Blanas, 393 F3d 918, Aryes 97 P3d 1, Stull v Hoke, 948 P2d 722, Hicky v OPS, 874 P2d 102, Bittaker v Woodford, 331 F3d 715.

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