IN THE SUPREME COURT OF THE STATE OF OREGON

MARTIN ALLEN JOHNSON, Petitioner-Respondent/ Cross-Appellant, Respondent on Review, v. JEFF PREMO, Superintendent Oregon State Penitentiary, Defendant-Appellant/ Cross-Respondent, Petitioner on Review.	Marion County Circuit Court No. 06C16178 Court of Appeals No. A154129 Supreme Court No. S061670

RESPONDENT ON REVIEW JOHNSON'S COMBINED BRIEF ON THE MERITS and SUPPLEMENTAL EXCERPT OF RECORD

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Marion County
Honorable DON DICKEY, Sr. Judge

Court of Appeals Order Filed: August 23, 2013
Before: Chief Judge Rick T. Haselton

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BRIEF ON MERITS OF PETITIONER JOHNSON

SUMMARY OF ARGUMENT

For purposes of clarity, this brief refers to respondent on review Martin Allen Johnson as "petitioner,"[1] and petitioner on review Jeff Premo (Superintendent of the Oregon State Penitentiary) as "the state."[2]

The Court of Appeals' order in this case should be affirmed, because it establishes a reasonable procedure for bringing to the court's attention what post-conviction petitioners consider to be "legitimate requests" or "legitimate instructions" made to their appointed counsel, as required by *Church v. Gladden*, 244 Or 308, 417 P2d 993 (1966). Based on more than two decades of its own precedent, the Court of Appeals correctly concluded in this case that *Church* applies on appeal. And the Court of Appeals' order does not authorize "hybrid representation"—*i.e.*, self-representation and representation by counsel—nor does it apply to post-conviction trial courts. The state's arguments to the contrary are unpreserved, mischaracterize both *Church* and the Court of Appeals' order, and do not justify the disruption that will result from overruling years of Court of Appeals' precedent.

ARGUMENT

Church v. Gladden requires a post-conviction petitioner to "inform the court at first opportunity of his attorney's failure" "to follow any legitimate request" or "failure to follow legitimate instructions[,]" and "ask to have him replaced, or ask to have him instructed by the court to carry out petitioner's

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[1] *See* ORAP 5.15 ("[i]n the body of a brief, parties shall not be referred to as appellant and respondent, but as they were designated in the proceedings below," except in domestic relations proceedings).

[2] *See Lichau v. Baldwin*, 333 Or 350, 39 P3d 851 (2002) (post-conviction appeal referring to respondent superintendent as "the state"); *Gorham v. Thompson*, 332 Or 560, 34 P3d 161 (2001) (same).

request." 244 Or at 311-12. The Court of Appeals in this case established the following procedure for implementing that requirement on appeal:

> * * * A petitioner in a post-conviction relief case who is represented by appointed counsel on appeal may file a motion in his or her own name based on a showing that the petitioner has a good faith and objectively reasonable belief that counsel lacks, or is failing to exercise, the "skills and experience commensurate with the nature of the conviction and complexity of the case."
>
> To facilitate the determination as to whether any future submissions by petitioner comport with that standard, in any future motion filed by petitioner himself when he is represented by counsel, petitioner must, in the introduction to [t]he motion: (1) clearly state the 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 petitioner has a good faith belief that counsel's failure to file the requested motion results from counsel's failure to render suitable representation; and (4) explain why petitioner's belief in that regard is objectively reasonable.

(ER-9 to ER-10; *quoting* ORS 138.590(1), which governs the statutory right to counsel in a post-conviction proceeding). By setting out the procedural steps and obligating the petitioner to spell out exactly what he or she perceives the problem with appointed counsel to be, the Court of Appeals reasonably and correctly applied the principles of *Church* to this case. This court should reject the state's arguments to the contrary, for the following reasons.

I) The Court of Appeals correctly ruled that *Church* applies on appeal.

The state's first argument—that *Church* applies only at the post-conviction trial level, and not on appeal—is incorrect and unpreserved.

A) The state's arguments mischaracterize *Church*.

In asserting that *Church* makes post-conviction petitioners personally responsible *only* for identifying their chosen grounds for post-conviction relief—as opposed to other issues for post-conviction litigation—the state mischaracterizes this court's opinion in *Church*.

As it did in the Court of Appeals, the state initially contends here that "*Church* held *only* that a petitioner *must assert all grounds for relief* in the first

post-conviction proceeding at the risk of seeing those grounds barred by ORS 138.550(3) in a subsequent post-conviction action." (State's Brief on Merits ("BOM") 8; emphasis added). (*See also* State's BOM 2: "*Church* holds *only* that post-conviction petitioners are responsible—necessarily at the trial court level—*for identifying the grounds for relief* they want to litigate"; emphasis added). That is not correct. In addition to holding that the petitioner in *Church* could not obtain a second post-conviction proceeding on the basis of his counsel's refusal in the first post-conviction proceeding *to assert certain claims for relief*, this court also rejected the petitioner's reliance on his counsel's failure in that initial proceeding *to present certain evidence* in support of the claims already asserted.

Specifically, in *Church*, this court upheld the dismissal of the petitioner's claims brought in a second post-conviction proceeding, because the excuses he offered for not litigating those claims in his first post-conviction proceeding were insufficient to overcome the *res judicata* barrier of ORS 138.550(3). 244 Or at 311-12. ORS 138.550(3) provides, in part,[3] that any grounds for post-conviction relief not "asserted in the original or amended petition * * * are deemed waived unless" they "could not reasonably have been raised in the original or amended petition." The petitioner in *Church* had alleged

> that the first and third grounds for relief stated [in his second post-conviction proceeding] were not raised in his previous post-conviction proceeding, but could not reasonably have been raised then *because his court-appointed attorney failed and refused to do so, although requested*

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[3] ORS 138.550(3) provides, in full:

> All grounds for relief claimed by petitioner in a petition pursuant to ORS 138.510 to 138.680 must be asserted in the original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition. However, any prior petition or amended petition which was withdrawn prior to the entry of judgment by leave of the court, as provided in ORS 138.610, shall have no effect on petitioner's right to bring a subsequent petition.

> *to pursue such course of action by the petitioner*. Petitioner also allege[d] that he did raise the second ground for relief in his previous post-conviction proceeding but that he was not given a fair and complete hearing on the issue because *three of his witnesses were not present and did not testify, although petitioner requested his attorney to have them present and his attorney promised that he would do so*.

244 Or at 310-11 (emphasis added). In holding that those reasons did not provide legitimate exceptions to ORS 138.550(3), this court reasoned that

> [i]f 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.

244 Or at 311-12.

In other words, this court in *Church* did not make the petitioner responsible *only* for identifying and/or asserting the claims for post-conviction relief he wanted presented—contrary to state's initial argument—but also for ensuring that *the evidence he wanted presented in support of such claims was in fact presented*. *See, e.g., State v. Gaffield*, 1 Or App 202, 207, 460 P2d 863 (1969) (*citing Church* for proposition that, "[w]here defense counsel decides *not to call a certain defense witness*, the defendant is deemed to have acquiesced in that decision unless he makes timely complaint to the court") (emphasis added).

1) The state's arguments are not preserved.

In apparent recognition that its argument to the Court of Appeals was not supported by this court's actual opinion in *Church*, the state argues for the first time in its brief on the merits in this court that *Church* also requires a post-conviction petitioner to ensure "that his chosen grounds for relief *are litigated* in the trial court." (State's BOM 12). (*See also* State's BOM 13: "*Church* places on a post-conviction petitioner only a narrow responsibility to identify *and pursue* the grounds for relief in the case"; State's BOM 20: "the petitioner

is responsible only for identifying the grounds for relief to be litigated and for seeking assistance from the court if his appointed attorney does not *pursue* those grounds for relief"; emphases added). That argument is not preserved, because the state did not present it to the Court of Appeals.

The state's only argument on this issue in the Court of Appeals was that "the sole purpose of *Church*—which was a 'successive petition' post-conviction case—was to require a petitioner *to assert a claim for relief* before the post-conviction court or forever lose it. Thus, if counsel either refuses or neglects to assert a particular *claim*, petitioner has an obligation to notify the court at the earliest opportunity possible." (Defendant-Appellant's Petition for Reconsideration ("Pet Recon") at 5; first emphasis added, second in original). More specifically, the state argued that

> [t]he narrow issue before the court in *Church* was whether the petitioner had alleged sufficient reasons *for failing to assert*—in his first petition for post-conviction relief—*two new claims* for relief, thus excusing the petitioner from the statutory bar on successive petitions:
>
> > "Petitioner alleges that the first and third grounds for relief stated above were not raised in his previous post-conviction proceeding, but could not reasonably have been raised then because his court appointed attorney failed and refused to do so, although requested to pursue such course of action by the petitioner. * * * The question is squarely raised whether petitioner has alleged sufficient reasons for failing to assert two of the present grounds for relief in his first petition * * *."

(Pet Recon at 7-8, *quoting Church*, 244 Or at 310-11; emphasis added). According to the state's argument below, that was the only "narrow question presented" in *Church*. (Pet Recon at 8). (*See also* Pet Recon at 10: "*Church* holds that a petitioner who feels that his post-conviction attorney is not asserting *claims* that the petitioner thinks should be pursued must notify the court of post-conviction counsel's alleged derelictions"; emphasis in original).

The state's argument in the Court of Appeals did not quote or acknowledge the portion of *Church* involving the petitioner's additional complaint about his counsel's failure *to present testimony* in support of a *third*

claim that had been asserted in the initial post-conviction proceeding, nor this court's statement that there was an additional question "squarely raised" as to "whether petitioner has alleged sufficient reasons * * * *for failing to exhaust all of his evidence on another ground at the prior hearing*." 244 Or at 311 (emphasis added). Nor did the state otherwise acknowledge that this court's holding in *Church* therefore also necessarily made the petitioner personally responsible for ensuring that *his chosen evidence was presented* in support of his selected claims for relief.

And in its petition for review to this court, the state gave no indication it had abandoned its prior interpretation of *Church*, but instead continued to rely on that interpretation. In the "Proposed Rule of Law" in its petition for review, the state asserted that a "post-conviction petitioner who is represented by counsel may file motions only through counsel, except where he believes that his counsel has *improperly failed to raise a specific ground for relief*, in which case *Church v. Gladden* allows him to bring that failure to the post-conviction trial court's attention." (Pet Rev 6-7; emphasis added). (*See also* Pet Rev 10-11: "This court should take review of the Court of Appeals' order to make clear what while a post-conviction petitioner is responsible *for identification of the grounds for relief* he or she wants appointed counsel to litigate, that responsibility does not extend to prosecution of the case that would justify the kind of 'hybrid' representation that the Court of Appeals' order authorizes."; emphasis added). Contrast that with the "Proposed Rule of Law" in the state's brief on the merits, which asserts, in part, that "*Church* stands for the limited proposition that a post-conviction petitioner has a procedural right—in the trial court—to seek that court's assistance if the petitioner's attorney is *not pursuing* the grounds for relief that the petitioner wants to litigate." (State's BOM 2; emphasis added).

As such, the Court of Appeals and petitioner—and even this court—were denied the opportunity to address the additional argument the state makes for the first time in its brief on the merits in this court, which is therefore not preserved for review. *See Davis v. O'Brien*, 320 Or 729, 737, 891 P2d 1307 (1995) (preservation requirement is intended to ensure parties clearly present arguments to lower court and that opponents are not taken by surprise, misled, or denied opportunities to contest opposing arguments); *see also Finney v. Bransom*, 326 Or 472, 482, 953 P2d 377 (1998) (declining to consider party's arguments on review "because they were not raised before the Court of Appeals"). And because, as discussed, *Church* did *not* hold that post-conviction petitioners are responsible *only* for *asserting* their chosen claims for relief, and the state's erroneous assertion to the contrary was its sole basis for arguing below that *Church* has no application on appeal (Pet Recon at 5), the Court of Appeals was correct in rejecting that argument, for that reason alone.

2) *Church* is not limited to defining a petitioner's responsibilities only in the post-conviction trial court.

Alternatively, even if the state's new interpretation of *Church* is properly before this court and its current argument is sufficiently preserved, that new interpretation is inconsistent with this court's broadly worded holding in *Church*, which does not support the state's contention that *Church* "has no role to play on appeal." (State's BOM at 2, 8-9, 14; *see also* 10, 16). As noted, in concluding that the conduct of the petitioner's first post-conviction counsel in *Church* did not provide an exception to ORS 138.550(3), this court held that the petitioner was required to "inform the court at first opportunity of his attorney's failure" "to follow *any legitimate request*" or "failure to follow *legitimate instructions*[,]" and "ask to have him replaced, or ask to have him instructed by the court to carry out petitioner's *request*." 244 Or at 311-12 (emphasis added). If—as the state now asserts—*Church* was intended narrowly to limit a post-

conviction petitioner's personal responsibility *only to asserting and litigating the claims for relief* in the post-conviction trial court, this court would not have spoken so broadly about requiring the petitioner to complain about counsel's failure to "follow *any* legitimate request" or "legitimate instructions." *Id.* (Emphasis added).

Indeed, in apparent reliance on the broad scope of *Church*'s holding, the Court of Appeals for more than two decades has reasonably interpreted *Church* to mean that "the ultimate responsibility *for prosecuting the proceeding* lies with the petitioner, not with counsel[,]" *Miller v. Baldwin*, 176 Or App 500, 507, 32 P3d 234 (2001), and that "a post-conviction petitioner has the responsibility to see that *all issues* that he wants raised in the post-conviction proceeding are brought to the court's attention." *McClure v. Maass*, 110 Or App 119, 123, 821 P2d 1105, *rev den* 313 Or 74 (1992) (emphases added).

Though *McClure* involved a habeas-corpus plaintiff's failure to raise claims for relief in his prior post-conviction proceeding, 110 Or App at 123-24,[4] the Court of Appeals in *Miller* relied on *Church* to deny a post-conviction petitioner's motion for a delayed appeal. In *Miller*, the Court of Appeals rejected the petitioner's attempt to blame that delay on his post-conviction counsel's failure to file a timely notice of appeal, in part because *McClure*'s

[4] In *McClure*, the Court of Appeals held that a habeas corpus plaintiff's failure to raise a merger claim in a prior post-conviction proceeding could not be excused by his post-conviction counsel's refusal to raise that claim, where the "[p]laintiff did not alert the trial court in the first post-conviction proceeding to his appointed counsel's refusal to raise the merger issue." 110 Or App at 123 (*citing Church*). Though the plaintiff in *McClure* also argued that it was appointed counsel's obligation to raise a consecutive-sentence issue in post-conviction court, even though the plaintiff had not requested it, the Court of Appeals rejected that argument on the ground that it was also the plaintiff's responsibility to search the record and raise that issue. *Id.* at 123-24. According to the Court of Appeals, "[t]he petitioner, not his subsequently appointed counsel, has the duty to file the petition. Concomitant with the duty to file the petition is the duty to select the issues that the petitioner wants to litigate. * * * The responsibility for discerning and selecting the issues for litigation rests with the petitioner." *Id.* at 124.

interpretation of *Church* "demonstrates that the petitioner in a post-conviction proceeding personally bears the responsibility for *presenting all relevant issues* to the court" and thus "makes clear that the ultimate responsibility *for prosecuting the proceeding* lies with the petitioner, not with counsel." 176 Or App at 506-07 (emphases added). *Miller* and *McClure* provided the basis for the Appellate Commissioner's underlying order in this case. (ER-5, ER-6).

Aside from its incorrect arguments about the scope of *Church*'s holding, the state makes no attempt in this court to explain why the Court of Appeals' holding in *Miller*, or its rationale in *McClure*, should be overruled—which are the necessary consequences of accepting the state's argument. Indeed, other than citing *McClure* and *Miller* in describing the arguments petitioner's appellate counsel made to the Appellate Commissioner, and quoting from the Appellate Commissioner's ruling itself (State's BOM 5), the state on review does not even acknowledge those opinions, much less the consequences of overruling them. In contrast to the purported problems the state claims would result from affirming the Court of Appeals' order—which, as demonstrated *infra*, simply do not exist—accepting the state's interpretation of *Church* would cause more uncertainty and consume more judicial time and resources, by making it unclear whether *Miller* is still valid[5] and the extent to which post-conviction petitioners would no longer be responsible for their counsel's decisions or lapses on appeal.

[5] In addition to *McClure*, the Court of Appeals in *Miller* also relied on its decisions in *Hetrick v. Keeney*, 77 Or App 506, 507, 713 P2d 688, *rev den* 300 Or 722 (1986), and *Page v. Cupp*, 78 Or App 520, 523, 717 P2d 1183, *rev den* 301 Or 338 (1986)—which held that the inadequacy of post-conviction counsel does not provide grounds for post-conviction relief. 176 Or App at 507-08. But *Page* was based partly on this court's opinion in *Church*. 78 Or App at 524-25. This portion of *Miller* therefore is not wholly independent of *Church*.

For these reasons, this court should reject the state's interpretation of *Church*. And because that interpretation is the primary basis for the state's argument in this court that *Church* was not intended to apply on appeal (State's BOM 8-9, 12-14, 16, 20, 21), that argument also should be rejected.

B) There is no merit to the state's additional reasons for not applying *Church* on appeal.

1) The Court of Appeals' procedure does not increase appellate court workloads, and instead eases the strain on attorney-client relationships.

Nor is there merit to the implication of the state's contention that applying *Church* on appeal would increase the workload of appellate courts by forcing them "to conduct a post-conviction hearing within a post-conviction appeal." (State's BOM 15). The state contends that the Court of Appeals' procedure "will require, for each *pro se* motion submitted, an independent assessment of whether the represented petitioner has an 'objectively reasonable' belief that his attorney's performance is deficient," before such motion is accepted—which, according to the state, means that each motion "must be addressed on the merits (at least partially) simply to decide the threshold question of whether the petitioner has satisfied the requirements[.]" (State's BOM 15).

But the state does not explain how that is any different from the inquiry already required when a post-conviction petitioner moves to have appointed counsel removed—the very "remedy" the state itself asserts would apply in the absence of the Court of Appeals' procedure. (State's BOM 15). According to this court, a criminal "defendant has 'no right to have another court-appointed lawyer in the absence of a *legitimate complaint* concerning the one already appointed for him.'" *State v. Langley,* 314 Or 247, 257, 839 P2d 692 (1992), *adh'd to on recons,* 318 Or 28, 861 P2d 1012 (1993) (*quoting State v. Davidson,* 252 Or 617, 620, 451 P2d 481 (1969); emphasis added). There is no reason a

different analysis should apply in a post-conviction case, and the state itself admits that *Church* requires a determination of "whether the petitioner has a *legitimate complaint* about the attorney's performance[.]" (State's BOM 8; emphasis added). The state does not even attempt to demonstrate, however, why an appellate court determining the legitimacy of a petitioner's complaint in ruling on a motion to remove counsel under *Langley* and *Davidson*, would be any different from ruling under the Court of Appeals' procedure on whether the petitioner has an objectively reasonable belief that his counsel's performance is deficient. And if this court agrees with the state that *Church* does not apply on appeal—and reverses the Court of Appeals' procedure—the next logical step for post-conviction litigants such as petitioner in this case would simply be to file a motion to remove appointed counsel for failure to submit their requested *pro se* motions. Appellate courts will then face the same inquiry.

Moreover, the Court of Appeals' procedure has the added benefit of providing intermediate steps before forcing a petitioner to resort to the drastic remedy of trying to sever the attorney-client relationship, which remedy itself—even if ultimately denied—places a strain on that relationship and threatens further delay. Specifically, if a motion to remove counsel is filed, not only could counsel feel compelled to take the time to respond, but there is a risk of counsel electing to stop work on the client's appeal entirely until that motion is resolved or—depending on the circumstances—joining that motion, or moving independently to withdraw.[6] And appointing new counsel to start all over from scratch, or allowing the petitioner to proceed *pro se*, would only cause additional delay and consume additional resources.

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[6] *See* Oregon Rule of Professional Conduct ("RPC") 1.16(b)(4), (6) ("a lawyer may withdraw from representing a client if * * * the client insists upon taking action * * * with which the lawyer has a fundamental disagreement[,]" or "the representation * * * has been rendered unreasonably difficult by the client").

Conversely, under the Court of Appeals' procedure, appointed counsel can continue focusing and working on the merits of the client's appeal, without the threat of removal hanging over counsel's head. Indeed, in this case, the record demonstrates that nearly all of petitioner's *pro se* motions on appeal have been denied for failure to satisfy the threshold showing required by the Court of Appeals' procedure, without reaching the question of whether counsel should be directed to file such motions, or removed.[7]

2) ORAP 5.92 does not allow post-conviction petitioners to raise *Church*-type claims.

There is also no merit to the state's contention that the supplemental *pro se* brief allowed by ORAP 5.92 already provides "a mechanism that petitioners may use to identify issues that they believe are important but that the attorney * * * has decided not to raise." (State's BOM 16). By its own terms, ORAP 5.92 allows *only challenges to court rulings*, and not complaints about other issues appointed appellate counsel refuses or fails to address. *See* ORAP 5.92(2) ("The brief shall identify questions or issues to be decided on appeal as assignments of error *identifying precisely the legal, procedural, factual, or other ruling that is being challenged*.") (emphasis added). If, in a supplemental *pro se* brief under ORAP 5.92, a post-conviction petitioner attempts to raise issues that do not involve such rulings, the state could simply move to strike for violating subsection (2) of that rule.

Additionally, ORAP 5.92(2) also provides that, "[u]nless the court orders otherwise, the statement of the case, including the statement of facts, and the argument together *shall be limited to five pages*." (Emphasis added). In this

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[7] (*See* ER-8 [6/20/13 Order]; ER-10 [8/23/13 Order]; SER-1 _ [10/8/13 Order Striking "12th Pro Se" Motion]; SER-2 [12/5/13 Order Striking 13th *Pro Se* Pleading]).

The three *pro se* motions the Appellate Commissioner addressed and denied on their merits were those petitioner had filed before appellate counsel had been appointed and/or had appeared on petitioner's behalf. (ER-7 to ER-8).

case, the Attorney General's office already has communicated to petitioner's appellate counsel its objection to any attempt by petitioner to exceed that limit. Under those circumstances, the state cannot credibly point to ORAP 5.92 as an adequate alternative for petitioner to raise *Church* issues. That is particularly so, where the post-conviction court explicitly denied relief on the merits on 20 of petitioner's *pro se* claims for post-conviction relief (*see* 1/22/13 Letter Opinion at 48-61, 88), and petitioner is likely to need space in his supplemental *pro se* brief to address those issues on cross-appeal.

II) The state's arguments mischaracterize the Court of Appeals' order, which does not authorize "hybrid representation."

The state also repeatedly mischaracterizes the Court of Appeals' order, in asserting that its procedure authorizes "hybrid representation" by permitting a represented post-conviction petitioner "to file motions on any topic he chooses" or otherwise "to engage in motion practice[.]" (*See* State's BOM 2-3, 8, 9, 10, 16-17, 21). As noted, the Court of Appeals' procedure does not allow a represented petitioner to file a "motion" in the traditional sense, but instead requires a threshold showing that the petitioner's subjective belief—"that counsel's failure to file the requested motion results from counsel's failure to render suitable representation"—is "objectively reasonable." (ER-9 to ER-10). If the petitioner cannot make that threshold showing, then the *pro se* motion is denied at that point, without ever reaching its merits. As also noted, the record in this case demonstrates that nearly all of petitioner's *pro se* motions filed on appeal have been denied for failure to make that showing.[8] Alternatively, even if the petitioner satisfies that threshold requirement, that does not automatically result in a ruling on the merits. Under *Church v. Gladden*—on which the state concedes the Court of Appeals' procedure is based (State's BOM 1, 8, 9-11, 15-

[8] (*See* footnote 7, *supra*).

17, 20)—the most a post-conviction petitioner can obtain is the removal of counsel, or a judicial instruction for counsel "to carry out petitioner's request[,]" 244 Or at 311-12, and not a ruling on the merits.

Therefore, because the Court of Appeals' procedure does not allow post-conviction petitioners to file "motions" or engage in "motion practice" in the typical sense, it also does not authorize "hybrid representation." Instead, as demonstrated, the Court of Appeals' procedure provides a reasonable, workable, and efficient means for represented post-conviction petitioners to bring issues they wanted litigated to the appellate court's attention, consistently with the requirements of this court's holding in *Church*.

III) The Court of Appeals' procedure will not cause problems in post-conviction trial courts.

The state is also incorrect in asserting that the Court of Appeals' procedure "may lead to confusion at the trial level[,]" or that it "very likely will be adopted by other post-conviction petitioners and pursued at trial." (State's BOM 9, 10-11). As the state itself admits elsewhere in its brief (State's BOM 6), the Court of Appeals' order explicitly provides that its procedure applies "on appeal[.]" (ER-9). Accordingly, there is little chance of any "confusion" about whether that procedure applies in post-conviction trial courts—when it clearly does not—nor that other post-conviction petitioners will be successful in attempting use that procedure at the post-conviction trial level.[9]

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[9] The need for a *Church* procedure applicable *only* to appellate courts is exemplified by the difference between trial and appellate courts, *vis-à-vis* the petitioner's ability to appear in person. A represented post-conviction petitioner—even if incarcerated—generally has the opportunity to physically appear in person before a post-conviction trial court, and therefore can voice his or her objections to that court in the way this court held the petitioner in *Church* could have. 244 Or at 312 ("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."). In contrast, an incarcerated petitioner generally does not have a similar opportunity for a personal physical appearance before an appellate court. Moreover, as demonstrated by the local supplemental rules the state cites from Malheur, Umatilla, Morrow, Multnomah, and Washington

Footnote continued…

Though the state further contends that petitioner "himself has already carried the [Court of Appeals'] order to the [post-conviction] trial court" (State's BOM 11), that court to date has denied each and every one of those *pro se* motions primarily on grounds that have nothing to do with the Court of Appeals' procedure.[10]

The state is therefore incorrect in asserting that the Court of Appeals' procedure will cause problems in post-conviction trial courts.

CONCLUSION

For the reasons asserted, this court should affirm the Court of Appeals' order in this case.

Respectfully submitted,

s/ Daniel J. Casey

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Respondent on Review

(…continued)
counties, circuit courts appear able to fashion their own methods for allowing post-conviction petitioners the opportunity to raise the issues they want litigated under *Church*. (*See* State's BOM 11 n 5, *citing* Malheur County SLR 4.105(1), Umatilla/Morrow County SLR 4.105(2), Multnomah County SLR 7.206(2), and Washington County SLR 4.105(2)). The validity or correctness of those courts' methods are not at issue in this case.

[10] (*See* SER-3 [7/3/13 Order to Strike]; SER-4 [10/14/13 Order on *Pro Se* Motions]; SER-5 [9/20/13 Letter Ruling]; SER-8 [11/21/13 Order on *Pro Se* Motion U-3]; SER-9 [11/8/13 Letter Ruling]).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I filed the COMBINED RESPONDENT'S BRIEF ON THE MERITS and SUPPLEMENTAL EXCERPT OF RECORD on March 7, 2014 with the Appellate Court Administrator, Appellate Records Section, by using the court's electronic filing system. I certify that I served the COMBINED RESPONDENT'S BRIEF ON THE MERITS and SUPPLEMENTAL EXCERPT OF RECORD on March 7, 2014 upon Kathleen Cegla and Leigh Salmon, attorneys for petitioner on review, by using the court's electronic filing system. I further certify that I served a copy of the COMBINED RESPONDENT'S BRIEF ON THE MERITS and SUPPLEMENTAL EXCERPT OF RECORD upon respondent on review Martin Allen Johnson on March 7, 2014 by mailing it, with postage prepaid, in an envelope addressed to:

Martin Allen Johnson
SID # 5410056
Oregon State Penitentiary
2605 State Street
Salem, Oregon 97310-0505

s/Daniel J. Casey

_____

DANIEL J. CASEY
Attorney for Martin Allen Johnson
Respondent on Review

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that this response complies with the word-count limitation in ORAP 5.05(2)(b)(i), allowing up to 14,000 words, and that the word count of this brief is 5,064 words. I further 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).

s/Daniel J. Casey

_____

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