In the Supreme Court of the State of Oregon

Martin Allen Johnson,

Petitioner-Respondent,

Cross-Appellant

v.

Jeff Premo Warden OSP-ODOC,

Defendant-Appellant,

Cross-Respondent,

Marion County Circuit Court Case No PCR 0616178

Appeal Number A154129

Oregon Supreme Court number pro-se S064002, attorney general state S065132 Pro-se brief ORAP 5.92 for 0616178, A154129, S064002, and S065132 in the Oregon Supreme Court.

1. Please note it takes routinely 7 days to get a computer legal file printed out off USB and photocopy of legal work from the OSP-ODOC law library, as ODOC -OSP has no same day service. Please note that the ODOC only allows a limited-restricted, abridged, hindered, impaired, impeded access for 8 hours a week to the legal computers Lexis and MS word processor for legal work and research and to read law and case law and type up pleadings which is inadequate and ineffective. So I have to work as can and this requires additional "pleadings" as reading and research discover information allowed and new current recent case law.
2. So Please excuse all minor requirements-rules for the prose brief under ORAP "Rule 1.20 Administrative Authority to Refuse Filings; Sanctions for Failing to Comply with Rules; Waiver of Rules (5) For good cause, the court on its own motion or on

motion of any party may waive any rule." So I request relief under UTCR "1.100 Relief from Application of Court Rules Relief from application of these rules or SLR in an individual case may be given by a judge on good cause shown if necessary to prevent hardship or injustice." So this is as timely as possible under the circumstances.

3. Death penalty cases are supposed to be given the highest priority and resources by the State of Oregon, Attorney General, District Attorney, Courts, Judges, Defense Counsel, which is not the practice and reality in the Oregon Judicial System in the administration of justice.
4. I would first like to raise and point out an issue of subject matter jurisdiction in the court of appeal for this case S064132 and reaching back to include all prior appeals A160579, A162502, A154129, A155455, and all appeals arising from the PCR case 0616178 and in particularly the March 30, 2016 opinion A154129 and the method of using a Petition for Review ORAP 9.05 by the state in S064132 and derivate opinion for Martin Allen Johnson, v Jeff Premo, 355 Ore 866, 333 P3d 288, August 14, 2014, pro-se Motion for reconsideration 2014 Ore lexis 878, denied November 20 2014, for application of ORS 138.650 (1) which would required criminal appeals statues such as 138.012 for automotive direct review in all death penalty sentences capital cases for PCR appeal to ORS 138.504 to apply also. "138.650 Appeal. (1) Either the petitioner or the defendant may appeal to the Court of Appeals within 30 days after the entry of a judgment on a petition pursuant to ORS 138.510 to 138.680. <u>The manner of taking the appeal and the scope of review by the Court of Appeals and the Supreme Court shall be the same as that provided by law for appeals in criminal actions, except that</u>:"
5. These issues need to be addressed for subject matter jurisdiction and exhaustion and ADEPA under State v Gaines, 346 Ore. 160; 206 P.3d 1042; 2009 Ore. LEXIS 18,

SC S055031, January 7, 2008, Argued and Submitted April 30, 2009, Filed, State v. Gaines, 211 Ore. App. 356, 361, 155 P.3d 61, modified and adh'd to as modified on recons, 213 Ore. App. 211, 159 P.3d 1291 (2007), and ORS 174.020 in which I have no access to the legislative history of ORS 138.650 (1) which has been changed and modified over the years. So ORS 138.650 at present states , underlined section is the question of subject matter jurisdiction and appeals.

6. Petitioner claims "Actual Innocence" of the Washington County June 15, 2001 indictment 01-1654 for ORS 163.095 aggravated murder charges, as expert testimony in PCR showed actual causation of death was by a mixed combination of drugs for an synergetic accidental drug overdose, not for any intentional, and deliberate murder, and that the alleged crime was not committed personally by Mr. Johnson, and was by not strangulation by ligature strangulation or manual strangulation, as the state claims, see Couch v Booker, 632 F3d 241, 6th Circuit, February 3, 2011, Sims v Lively, 970 F2d 1575, 6th Circuit, August 3, 1992, McQuiggin v Perkins, 133 Sct 527, 188 Led2d 1019, 2013 US lexis 4068, May 28, 2013.
7. Please note I converted all my PCR pro-se pleadings, motions, exhibits into affidavits under oath, see In Ward v Moore, 414 F3d 968, 970, 8th circuit, 2005, Hart v Hairston, 343 F3d 762, 5th circuit, 2003, a verified complaint may serve as competent summary judgment evidence, Schroder v McDonald, 55 F3d 454, 460, 9th Circuit, 1995, Neal v Kelly, 963 F2d 453, 457, DC Circuit 1992, To verify a complaint the plaintiff must swear or affirm that the facts in the complaint are true under the pain and penalties of perjury, Hayes v Garcia, 461 FSupp2d 1198, 1204 SC Cal, 2006, affd 293 F3d Appx 447, 9th Circuit 2008, so I have in effect converted my complaint, exhibits, and all my prose pleadings based on my personal knowledge into affidavits and verified them under oath.

Assignment of error # 1.

Petition Martin Allen Johnson was not allowed to testify during the PCR trial to call his counsel Dave Peters a liar who committed perjury, to rebut his testimony. Dave Peters who never discussed any meaning of the word or term "allocution" with Mr. Johnson during any break and how the word "allocution" was never mentioned until by the judge only after the jury had been dismissed and a death sentence had already been found by the dismissed jury, and only then did the judge say I had a right to "allocution" to the court. But I was not allowed to testify or make an offer of proof of my testimony and what I would have said, in PCR Trial about these facts, the truth and only I was only allowed by Judge Dickey to submit a sealed box for the appeals courts to please review, so all this was a clear violation as said in Allen v Palmateer, 182 P3d 25, 219 Oreapp 221, April 9, 2008,

> "Petitioner appeals a judgment denying his petition for post-conviction relief, arguing, among other things, that the court erred in denying him an opportunity to testify in support of his claims for relief. We agree with petitioner that the court erred in refusing to allow petitioner to testify and, hence, do not reach petitioner's other claims of error. We therefore reverse and remand the judgment that dismissed petitioner's post-conviction claims. Based on our review of the transcript, we conclude that the post-conviction court denied petitioner an opportunity to testify at the post-conviction trial. We further conclude that the court denied petitioner the opportunity to make an offer of proof about his proposed testimony. We therefore conclude that, notwithstanding the absence of an offer of proof that would permit us to determine whether the court's decision to exclude evidence prejudiced petitioner, see OEC 103, we must reverse the judgment and remand the case for a new post-conviction trial. See, e.g., State v.

> Rodriguez, 115 Ore. App. 281, 287, 84 P.2d 711 (1992) (court commits reversible error by refusing to permit a party to make an offer of proof regarding excluded evidence). Reversed and remanded."

So any thing said during PCR trial and any assumptions or interferences or facts to be drawn from the record are suspect and not complete as my testimony is lacking and leads to false conclusions. The court of appeals makes the mistaken fact and reading into the record

> "The record does not demonstrate that petitioner refused to testify under all circumstances, but rather that he declined to testify when the defense related to venue".

This misses the point and the ongoing conflict of interest with both counsel Keith Walker and Dave Peters and the basis-reasons that I made multiple oral and written OJIN 105 motion 99-0528, sealed envelopes, May 4, 2001, June 18, 2001, and all through June 2001, with many multiple requests for new counsel as I did not agree with counsel's defense 100%. But I could not get new counsel and I could not explain the conflict of interest with the WCDA sitting in the court room listening. Please note that OJIN # 105 99-528 is a very thick pro-se motion for new counsel with multiple reasons listed in the many pages for new counsel, and that the court judge in front of me gave the WCDA a copy of my pro-se motion OJIN # 105 for new counsel listing the multiple confidential privileged reasons counsel was in conflict and not performing his job at all, with OJIN # 105 containing facts, events, statements of evidence, and names of witnesses for counsel to talk to, which was placed in the WDCA hands by the court judge. The opposing defense team's play book was given to the WCDA by the Court Judge and my counsel did not object and when I objected I was told to sit down and shut up. Even in later attempts when again asking for new counsel on new indictment of June 15, 2001, 01-1654 June 18, 2001, arraignment I was told not to speak, to file

motions through counsel only, and I was removed from the court when I tried to speak up and be heard by the judge who ordered to the bailiff to remove me from the courtroom. See transcripts for June 18, 2001 arraignment on new June 15, 2001 indictment 01-1654 for 11 counts for aggravated murder ORS 163.095. So if I had spoken up to show the obvious conflict of interest with both counsel Dave Peter and Keith Walker's chosen strategic and tactical false defenses that is now plain, clear, and obvious to see and is now on full display in the PCR proceedings, see my deposition and investigations reports, see my sealed box, please read and see Pro-se PCR # 35 with detailed notes of communications with both trial counsel and Miranda facts no counsel has ever used or presented, so any of my statements and reasons to back my requests for new counsel at trial would not have been protected or privileged communications, and could be used against me in court or used as impeachment material. See attached exhibits or take Judicial Notice OEC 201, ORS 40.060 to 40.085 out of PLN August 2016, for pages 13 and 14 describing common problems with expert medical opinion and testimony . There was no Chinese wall or fire wall between the WCDA and my requests for new counsel. So the PCR record without my testimony and only my sealed box of writing, pro-se motions and exhibits shows the Hobson's choice I had at criminal trial and the conflict of interest that required new counsel. I had no chance and no choice to testify on my own testimony without expert medical support to back my story up, or I would have blown-up both Keith Walker and Dave Peters perjured defense, suborned perjury defense sky high and my testimony would have been opposing, not only against the state claims but also against my own attorney defense and claims. My testimony would have destroyed, contradicted both counsel's defense and plan, on venue, as a polar opposite, and ruined any of counsel's false defenses of venue and under ORS 131.325. I would have destroyed the case for myself and counsel in the first words out of my mouth. I would have had to commit perjury and lie under oath to

support both Keith Walker and Dave Peter's versions of their false defense of drowning, and that the victim was still alive when her body entered the Columbia River. No jury would buy my testimony without support of expert medical testimony. Read the records of my PCR Navy military history as a Vietnam veteran navy Corpsmen and combat USMC 8404 medic and licensed EMT paramedic starting in 1976 in California after taking US Navy Field Medical Combat "B" school in Camp Pendleton with years experience in surgery and years medical training and experience in the reserve. See pages 1 to 16, 15 and 16 in particular, and 13 and 14, excerpts of records and/or to take Judicial Notice of OEC 201 ORS 40.060 to 40.085. Dave Peters said to me that it was his belief that this was an assault and murder by strangulation because of the evidence of blood "petechiae" that in his 20 years experience as a lawyer experience proved to him that I killed Heather in the heat of passion and that was that. Dave Peters refused to believe my story and called me a lair, Dave Peters told me that when I get a law degree and 20 years experience I could tell him what to do. Dave Peters would not listen to me and when I told him he was fired and off my case, he said he was on the case until the judge removed him and I had to file my own motions for new counsel and good luck with that as no judge is going to replace him. All multiple requests for new counsel were denied by the judge. This is a common confusion in expert witness swearing contests for cases with defendant and counsel at odds see attached pages 13 and 14 for PLN August 2016, pages 15 and 16 OEC 201, ORS 40.060 to 40.085, as supplement authority and proof of evidence showing conflicts of interest with my trial counsel and the strong basis-logical reasons for my grounds for new counsel.

At the very least the court can address under Priest v Pearce 314 Ore. 411, 415-16, 840 P2d 65 (1992), historical analysis that ORS 131.325 is unconstitutional under Article I, Section 11, and that shows additionally how counsel's defense did not even try to do this simple challenge before relying on a broken failed defense of venue with made up,

incomplete, shaped, textured, guided, blind, expert testimony. Counsel put horse blinders on the Expert Dr Ferris by not telling Dr Ferris my version of events and my story at all, withholding vital needed information from the expert witness, to make an informed opinion from all the facts.

As an example I would like the court to consider a defendant that is changed with an assault at a bar. The Defendant claims self defense in the fight and tells counsel his story and ask for counsel to interview his friends at the bar, but counsel say no I am going to present a defense of alibi that you were at work and the eye witness identity is mistaken. How then can a defendant testify at a trial that he was there and a fight occurred when three guys came up on him for talking to some guys girlfriend and buying her a drink and then the three guys attacked him with a pool sticks and it was self defense. Take the reverse a guy is charged in the same bar fight and claims he left the bar before the fight happened and went to work and had 10 witness to verify he was at work 20 miles away, and his brother who looks like him stayed at the bar and got into the fight. The attorney decides not to present an alibi defense and instead claims self defense against three big guys attacking him with pool sticks. How can a defendant testify without blowing up and destroying counsel defense and claims? How can a defendant ask for new counsel without letting the cat out of the bag and incriminating himself some way or some how in open court.

The court kicked the ball to the PCR court and passed the buck to the PCR court for all motions for new counsel in STATE OF OREGON, Plaintiff on Review, v. MARTIN ALLEN JOHNSON, Defendant on Review. SUPREME COURT OF OREGON 340 Ore. 319; 131 P.3d 173; 2006 Ore. LEXIS 226 SC S48826 September 8, 2005, Argued and Submitted March 30, 2006, Filed.

VI. DEFENDANT'S REQUEST FOR APPOINTMENT OF NEW COUNSEL.

Defendant next argues that the trial court erred in denying his various requests for appointment of new counsel. He cites to various "relevant" portions of the transcript, but is otherwise unspecific about what motions were made, which rulings were objectionable, and which facts support his claim. We assume that defendant's challenge is directed at two "rulings": (1) the trial court's May 4, 2001, refusal to accept defendant's pro se motion for substitute counsel and its comment, after hearing defendant's complaints, that, "based on what I've heard there, I wouldn't remove [counsel]"; and (2) the trial court's failure to act on an "affidavit" that defendant filed on July 23, 2001, asking the court to replace defendant's lawyers or "instruct them to follow [his] legitimate requests." 20 {340 Ore. 348} In his argument to this court, defendant does not rely on or even advert to any particular inadequacies of trial counsel. Instead, he focuses on the broader proposition that the trial court erred by failing to make a sufficient inquiry into his complaints. He notes that, under State v. Langley, 314 Ore. 247, 257, 839 P.2d 692 (1992), adh'd to on recons, 318 Ore. 28, 861 P.2d 1012 (1993), a defendant's request for new counsel "requires a factual assessment of whether the complaint is 'legitimate.'" Defendant acknowledges that a trial court's denial of a request for substitute counsel is reviewed for abuse of discretion, id. at 258, but he contends that, in his case, the trial court erred by exercising its discretion without inquiring adequately into the legitimacy of his complaints.{131 P.3d 191} This court recently considered a similar claim in State v. Smith, 339 Ore. 515, 123 P.3d 261 (2005). There, the defendant indicated to the trial court, on the day of trial, that he was dissatisfied with his trial lawyer. The trial court listened to the defendant's complaints and ultimately concluded that trial counsel was adequate. Upon his conviction, the defendant appealed and argued, inter alia, that the trial court had erred by not holding a hearing

or otherwise inquiring into the basis of the defendant's dissatisfaction with his lawyer. The Court of Appeals agreed with that argument, State v. Smith, 190 Ore. App. 576, 80 P.3d 145 (2003), and remanded the defendant's case for a hearing about defendant's complaints. On review, we held that, contrary to the Court of Appeals decision, there is no rule of law requiring a trial court to conduct an inquiry into, and make a factual assessment of, a defendant's complaints about appointed counsel. Smith, 339 Ore. at 530. 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. Id. at 531.{340 Ore. 349} Our decision in Smith resolves much of defendant's assignment of error. Specifically, it disposes of his claim that the trial court erred in failing to hold an inquiry into defendant's complaints and to make a "factual assessment" based on that inquiry. That leaves us to consider whether, on the record that was before it, the trial court abused its discretion in denying defendant's requests for substitute counsel. Defendant's claim is directed at two specific decisions by the trial court denying such requests. We turn to those decisions.

On May 4, 201, the trial court indicated that defendant must make any request for substitute counsel through his lawyers, but also allowed defendant at that time to describe his concerns orally. Defendant indicated that trial counsel had refused to file motions that defendant wished them to file, on the ground that such filings

would be a waste of time. Defendant also indicated that he had asked his lawyers to research various issues and implied that they had declined to do so. The trial court suggested that the lawyers had been right about certain of defendant's requests being a waste of time. It also explained that most of defendant's complaints were about strategic decisions that were for the lawyers, and not defendant, to make. Ultimately, the court told defendant that the two lawyers were "the best that I can give you" and that he would not remove them based on what he had heard. In sum, the trial court considered defendant's complaints and -- on this record, at least -- reasonably concluded that those complaints did not present a legitimate reason for appointing new counsel. The trial court did not abuse its discretion in denying defendant's May 4, 2001, request for substitute counsel.

On July 23, 2001 -- in the midst of voir dire -- defendant again asked the court to appoint new counsel "or instruct them to follow my legitimate requests." Trial counsel explained, at that time, that defendant was unhappy about counsel's "inability or refusal to carry out a wide variety of legal tasks that he has asked us to do that he feels are appropriate." The trial court reiterated its earlier position -- that defendant was complaining about legal and strategic decisions that were not his to make. The trial court then invited defendant to compile and file a list of complaints, which it would consider and then seal for purposes of appeal. In response to that invitation, defendant presented the court {340 Ore. 350} with a large folder on August 9, 2001, which purportedly contained a "list of items" relating to his complaints about trial counsel. Apparently, the trial court found nothing in the material that defendant presented to suggest a legitimate reason for granting defendant's request for {131 P.3d 192} new counsel. The court did not grant defendant's request.

> We have reviewed the material that defendant presented to the trial court and find it to be more of the same -- i.e., complaints that trial counsel failed to file motions that defendant wished to file, failed to pursue issues and strategies that defendant wished to pursue, and generally failed to follow defendant's instructions. Neither the materials, nor defendant's similar oral complaints to the trial court, constitute a basis for concluding that the trial court abused its discretion in denying defendant's request for new counsel."

So the conflict of interest with counsel is now present, clear, and obvious as are the multiple myriad reasons I asked for new counsel, repeatedly made multiple requests new counsel. Counsel did not believe my story and called me a liar, and did not use due diligence in defending me based upon what I told counsel and investigators from the start in 1999. So this is not an "expert" issue, it is a new counsel substitution of counsel issue. Trial Counsel Keith Walker and Dave Peters choose a defense made out of whole false cloth, and did not back me up. Counsel Keith Walker told me if I would just testify that I got in a fight with Heather Fraser on the Astoria bridge and she accidently fell off the bridge things would be ok. Dave Peters told to me to admit I got in a fight in the heat of passion and strangulated Heather Fraser then it is just murder and not aggravated murder and that then he can win the case. I told counsel bullshit and I said you are fired and I told them to get off my case and I requested new counsel before the court until I was blue in the face. I cooperated 100% with counsel and investigators up until May 4 2001 and forward on to trial protesting all the way but I was answering all counsel question and demanding counsel follow my instructions and requests , call witness and interview witness and have investigators video tape and record all interviews and make written reports which was never done and when I requested new counsel and after May 4 2001 then I was just the helpless doom passenger on a coming train wreck going off a high cliff I could see before me with no control of the train that

counsel was driving and engineering. Keep in mind all three investigators resigned and quit the case in M May 2001 in protest in what counsel was doing and not doing that in their professional opinion was malpractice and negligence. So it was not my dissatisfaction with counsel alone as my reason, and many , many reasons to request new counsel.

So be careful in using assumptions and interferences without my testimony in PCR trial, in which I was denied the right to testify on my own behalf to set the record straight, also without a Longo-Brumwell protective order in place. My deposition testimony by the Attorney General testimony was compelled but I was not allowed to do anything other than answer the questions the state asked.

But please avoid sending this case back to PCR court for a remand and for decades more court hearings and appeals by the state. Now that the cat is out of the bag so to speak, the milk is spilled, the bell has rung and has spread like the mighty Mississippi all over the internet and newspapers with many witness who testified at trial, told police stories that became reports, and the many family members of Heather Fay Fraser reading the PCR opinions and newspapers and making comments on internet web cites on the PCR story, such as pages 1 to 12, and much more public reports, that the court can take Judicial notice of OEC 201, ORS 40.060 to 40.085 of the damage done and taint of many witnesses, without a Longo/Brumwell protective order in place. How this will shape and change witness testimony in a new trial is of great a concern to me. Now is the time to have the court correct many prior errors and grant my repeated multiple motions for new counsel and order a new trial on that legal fact and basis.

The court remedy that should be done is to reverse/remand and the court should grant the repeated multiple motions for new counsel and/or to go pro-se and to order a new fast and speedy trial "without delay".