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 CA A154129 SC S061670

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, JEFF PREMO

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

Continued…

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BRIEF ON THE MERITS OF
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STATEMENT OF THE CASE

Martin Johnson sought and obtained post-conviction relief, and the superintendent appealed from that judgment.[1] Throughout the underlying trial, Johnson was represented by court-appointed counsel, but he continuously submitted his own *pro se* filings, asserting that *Church v. Gladden*, 244 Or 308, 417 P2d 993 (1996), required him to do so. The post-conviction trial court, also citing *Church*, rejected most of Johnson's 100+ *pro se* filings, but allowed some of the grounds for relief in his *pro se* petition to go forward.

On appeal, again while represented by appointed counsel and again citing *Church*, Johnson continued to file *pro se* motions. The Court of Appeals ruled that, under *Church*, a post-conviction petitioner may file any motion that his or her attorney declines to file, so long as the petitioner has an "objectively reasonable" belief that his attorney lacks, or is failing to exercise, the "skills and experience commensurate with the nature of the conviction and complexity of the case."

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[1] To avoid confusion over the identity of the parties, this brief refers to defendant/appellant/petitioner on review as "the superintendent" and to petitioner/cross-appellant/respondent on review as "Johnson."

But *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, and it explains what a petitioner must do to avoid waiver of the chosen grounds for relief. Because *Church* is limited to matters that must be raised at the trial level, it has no role to play on appeal. As important, *Church* does not broadly authorize a represented petitioner to file motions on any topic he chooses. This court should therefore reverse the Court of Appeals' ruling that applies *Church* to cases on appeal and clarify that *Church* does not create a broad right to "hybrid" representation for post-conviction petitioners at either the appellate or the trial level.

QUESTION PRESENTED

By statute and rule, represented parties may appear only through their attorneys, who must sign any written submissions. Does *Church v. Gladden*, change that general rule and allow a represented post-conviction petitioner to file *pro se* motions on appeal?

PROPOSED RULE OF LAW

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. Thus, *Church* has no application on appeal. Moreover,

Church does not alter the general prohibition on "hybrid" representation, in either the appellate or trial courts.

STATEMENT OF FACTS

The issue in this case is whether a post-conviction petitioner may submit *pro se* filings while represented by an attorney on appeal. To explain the Court of Appeals' ruling, and because the *pro se* filings themselves illustrate why the "hybrid representation" aspect of that ruling should be reversed, the superintendent describes the filings in some detail.

Martin Johnson obtained post-conviction relief in *Johnson v. Premo*, Marion County Circuit Court case number 06C16178, and the superintendent appealed. At the trial level, although he was continuously represented by appointed attorneys, Johnson submitted over 100 *pro se* filings, asserting that he was required to do so by *Church v. Gladden*, 244 Or 308, 417 P2d 993 (1996), to protect his rights. The post-conviction court disagreed and refused to accept most of those filings, ultimately allowing some of Johnson's *pro se* grounds for relief to go forward, along with the claims litigated by his attorneys.

While Johnson was still represented by his post-conviction trial counsel, he personally filed a combined notice of cross-appeal (captioned "1st *pro se* motion") and second *pro se* motion seeking appointment of three attorneys to prepare for the criminal-case retrial that the post-conviction court had granted

as relief. (ER 1-3). On the same date, Johnson filed his third, fourth, and fifth *pro se* motions. (ACMS A154129, 4/26/2013).

Shortly thereafter, Johnson's post-conviction trial attorney also filed a notice of cross-appeal. The trial attorney then withdrew, and a substitute attorney was appointed for the appeal. (ER 4-5). Given the multiple filings in the Court of Appeals—and in light of the ban on written submissions by a represented party—the superintendent moved for clarification of whether Johnson was represented by counsel and, relatedly, which of the two notices of cross-appeal was controlling. (ER 4; ACMS A154129, 5/08/2013).

While that motion was pending, Johnson continued to file *pro se* motions. The superintendent responded to the Second through Seventh *pro se* motions by asking the court to strike them, on the ground that Johnson was represented by counsel and counsel had not signed the motions, citing ORS 9.320, ORCP 17, and ORAP 1.40(4).[2] (ER 4-5; ACMS A154129, 5/28/2013 and 5/31/2013). Johnson's appellate attorney replied that the court

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[2] As relevant, ORS 9.320 provides, "Where a party appears by attorney, the written proceedings must be in the name of the attorney, who is the sole representative of the client of the attorney, as between the client and the adverse party." ORCP 17 A provides, in part, that "[e]very pleading, motion and other document of a party represented by an attorney shall be signed by at least one attorney of record who is an active member of the Oregon State Bar." ORCP 17 B provides that an unsigned pleading "shall be stricken * * *." ORAP 1.40(4) adopts ORCP 17 as "a rule of appellate procedure applicable to the Supreme Court and the Court of Appeals."

was required to accept and consider Johnson's *pro se* motions. Citing *Church v. Gladden*, 244 Or 308, 417 P2d 993 (1966), *McClure v. Maass*, 110 Or App 119, 821 P2d 1105, *rev den* 313 Or 74 (1992), and *Miller v. Baldwin*, 176 Or App 500, 32 P3d 234 (2001), he argued that a post-conviction case is not governed by the law cited by the superintendent, because a post-conviction petitioner is responsible for "prosecuting" the case. Thus, the petitioner must be allowed to file any *pro se* motions he or she chooses to file, regardless of whether the petitioner is represented by an attorney. (ER 5; ACMS A154129, 6/14/2013, Amended Reply 3-6).

The Appellate Commissioner ruled that both notices of appeal were operative and that the court would receive Johnson's *pro se* motions, generally adopting the argument that Johnson's attorney had made:

> *Church*, *McClure*, and *Miller* make clear that the petitioner in a post-conviction case remains personally responsible for prosecution of the post-conviction action. Therefore, under some circumstances, the petitioner may appear in his or her own name.

(ER 6).

The commissioner saw *Church* as "potentially conflicting" with ORS 9.320, ORCP 17, and ORAP 1.40(4). To reconcile that conflict, the

commissioner cited the statutory right[3] to the appointment of "suitable" counsel and set out the following rule:

> A petitioner who is represented by appointed counsel may file a motion in his or her own name when the petitioner has a good faith 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." ORS 138.590(1).

(ER 6-7, footnote omitted).

The superintendent petitioned for reconsideration, arguing that *Church* applies only to proceedings in the trial court and that neither *Church* nor any other legal authority authorizes the broad hybrid representation that the commissioner's order would allow. (ACMS A154129, 7/03/2013, PTRC at 7-9).

The court adhered to the commissioner's order, but modified it by specifying that the rule applies "on appeal" and that the petitioner's assessment of his attorney's performance must be "objectively reasonable." (ER 9). The court further ruled that, before a *pro se* motion will be considered, it must satisfy the following requirements:

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[3] ORS 138.590(1) provides that a petitioner who cannot afford to retain "suitable counsel possessing skills and experience commensurate with the nature of the conviction and complexity of the case" may proceed as a financially eligible person. ORS 138.590(4), in turn, provides for the appointment of "suitable" counsel.

> [P]etitioner must, in the introduction to the 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 9-10).

By the time the court addressed the superintendent's petition for reconsideration, Johnson had filed four more *pro se* motions (the 8th, 9th, 10th, and 11th), which the court decided. (ER 10). To date, Johnson has filed 14 motions in the Court of Appeals that were drafted and submitted independently of his attorneys, and he has begun using the court's newly required language. (*See, generally*, ACMS, A154129). At the same time, Johnson continued to file *pro se* motions in the closed Marion County Circuit Court post-conviction case, and he included in some of those later filings the language required by the Court of Appeals' order.[4]

[4] Johnson has appealed the post-conviction court's order denying his 13 post-judgment *pro se* motions; that appeal (case number A155455) was opened separate from the superintendent's appeal of the judgment granting post-conviction relief. This court may take judicial notice of the OJIN and ACMS records for those post-judgment, trial-level *pro se* motions and appeal. OEC 201(f) ("Judicial notice may be taken at any stage of the proceeding.").

SUMMARY OF ARGUMENT

The Court of Appeals interpreted *Church v. Gladden*, 244 Or 308, 417 P2d 993 (1996), in a way that grants financially eligible post-conviction petitioners on appeal the right to a form of hybrid representation that is not justified by law or by sound policy. The court's order allows a represented petitioner to file motions on any topic, so long as the petitioner includes in that motion prefatory language prescribed by the court, most significantly that the attorney has declined to file the motion and that the petitioner has an "objectively reasonable" belief that his attorney is not providing "suitable" representation.

But *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. Thus, if the petitioner's post-conviction trial attorney either refuses or neglects to assert a particular ground for relief, the petitioner must notify the trial court at the first opportunity. The court may then determine whether the petitioner has a legitimate complaint about the attorney's performance and take steps accordingly. The concern underlying *Church* completely dissipates once the case has been tried to judgment, because entry of the judgment necessarily finalizes the grounds for relief that were asserted in the case. Thus, *Church*'s

limited holding has no role to play on appeal. The Court of Appeals' ruling to the contrary should be reversed.

Moreover, while *Church* makes a post-conviction petitioner responsible for one aspect of the case, it does not authorize represented petitioners to submit *pro se* filings on any chosen topic, either on appeal or at trial. The Court of Appeals has extended *Church* far beyond its narrow holding to create an unwarranted exception to the laws that require represented parties to appear through their attorneys. While this court need not reach this issue if it agrees with the superintendent's first argument, allowing the second aspect of the court's ruling to stand may lead to confusion at the trial level. This court should clarify that *Church* does not authorize "hybrid" representation in post-conviction proceedings, either on appeal or at trial.

ARGUMENT

A. Introduction

This case presents no dispute over the general proposition that, if a party is represented by an attorney, all written submissions must be made through that attorney, as required by ORS 9.320, ORCP 17, and ORAP 1.40(4). Both Johnson's attorney and the Court of Appeals accepted that proposition, but they both interpreted *Church v. Gladden* to create an exception to the general requirements. Thus, the dispute in this case centers on whether this court's

decision in *Church v. Gladden* authorizes post-conviction petitioners who are represented by attorneys to file their own *pro se* motions. It does not.

This brief addresses the two different ways that the Court of Appeals misconstrued *Church*. First, the court applied *Church* to post-conviction cases on appeal, when it has no role to play there. Second, the court expanded *Church* to cover substantive motions on any topic the petitioner chooses to raise. Both of those interpretations of *Church* are wrong.

On the first issue, the holding in *Church* narrowly defines the steps that a represented post-conviction petitioner must take—at the trial level—to ensure that the grounds for relief he wants to litigate are presented to the post-conviction trial court. Thus, *Church* has no role whatsoever to play on appeal, and the Court of Appeals' holding that it *does* apply should be reversed.

On the second issue, *Church*'s narrow holding does not open the door to a broad exception, either on appeal or at trial, that would allow a represented post-conviction petitioner to engage in motion practice beyond seeking the trial court's assistance to ensure that his appointed attorney will litigate the petitioner's chosen grounds for relief. This court should clarify that *Church* does not create any right to "hybrid" representation.

The superintendent recognizes that if this court holds that *Church* simply has no application on appeal and therefore reverses on the first issue, it need not address the second issue. But, if left to stand, the court's second

misinterpretation of *Church* very likely will be adopted by other post-conviction petitioners and pursued at trial. As shown above, Johnson himself has already carried the court's order to the trial court. It can be anticipated that he will not be the last petitioner to do so.

Furthermore, a decision explaining that *Church* is narrowly constrained will assist post-conviction trial practitioners and courts. Several counties have adopted supplementary local rules that address *Church*, but not in a uniform fashion.[5] To the extent that the courts are unclear about the meaning of *Church*, this court may provide guidance, even if a ruling on that portion of the Court of Appeals' order is not required to resolve the superintendent's challenge to the order.[6]

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[5] Consistent with the superintendent's argument here, Malheur County allows a represented petitioner to file a "*Church v. Gladden*" notice if the petitioner "believes that counsel has failed to raise all meritorious claims on his or her behalf." Malheur County SLR 4.105(1). The Umatilla/Morrow County rule allows a represented petitioner to file a "*Church v. Gladden*" notice "alleging ineffective assistance of currently assigned counsel." Umatilla/Morrow County SLR 4.105(2). Both Multnomah and Washington Counties allow post-conviction petitioners to file "*Church v. Gladden*" notices, but neither county defines the parameters of such a notice. Multomah County SLR 7.206(2) (exception to the general requirement that all submissions be signed exclusively by counsel "is for a *Church v. Gladden* * * * notice filed by the petitioner"); Washington County SLR 4.105(2) (same).

[6] And if this court should conclude that *Church* does apply on appeal, it should decide the second issue to define the permissible scope of motion practice by represented *pro se* petitioners in the appellate courts.

B. *Church v. Gladden* imposes a limited responsibility on a post-conviction petitioner to ensure, at trial, that all grounds for relief are litigated in a first post-conviction action.

The holding in *Church* is narrow, imposing on a post-conviction petitioner only a responsibility for ensuring that his chosen grounds for relief are litigated in the trial court. In *Church*, the petitioner's second post-conviction action had been dismissed, and the issue on appeal was whether he had alleged sufficient reasons to avoid the bar on subsequent petitions set out in ORS 138.550(3).[7] *Church*, 244 Or at 310. This court framed the issue before it:

> 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 and for failing to exhaust all of his evidence on another ground at the prior hearing.

Id. at 311.

In his second post-conviction case, the petitioner alleged that he could not have raised two of his grounds for relief in the first case, because his attorney had refused to raise them. He also alleged that he did not receive a full and fair hearing on a third ground (which *had* been litigated in the first case),

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[7] ORS 138.550(3) provides:

> 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.

because his post-conviction attorney had not called witnesses to support it. *Id.* at 310-11. The court held that those reasons were not sufficient to avoid the statutory bar:

> 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.

Id. at 311-12 (emphasis added).

Because the holding of *Church* arises from ORS 138.550(3) and addresses only the waiver of grounds for relief and the process for avoiding waiver under that statute, it necessarily applies only at the point where a petitioner can raise grounds for relief—at the trial level. For the same reason, *Church* places on a post-conviction petitioner only a narrow responsibility to identify and pursue the grounds for relief in the case: A petitioner must tell the court at the first opportunity that his attorney is not pursuing the petitioner's chosen grounds for relief, so that the court may take steps to remedy the problem if warranted. Then, as with any other complaint about an appointed attorney's performance, the trial court may consider a range of possible remedies. For example, the court could:

- Advise the petitioner that his complaints about his attorney have no merit and urge the petitioner to cooperate with counsel.

- Instruct the attorney to include and pursue the requested ground for relief, if it appears to have merit.
- Dismiss the appointed attorney and appoint a replacement.
- Allow the appointed attorney to withdraw and allow, or require, the petitioner to proceed *pro se*.

Given the limited issue in the case, *Church* announced only a narrow rule that defines how a represented post-conviction petitioner can avoid the waiver of his grounds for post-conviction relief, which steps necessarily must be taken at the trial level.

C. *Church* has no role to play on appeal.

When its scope and purpose are properly understood, it can be seen that *Church* has no role to play on appeal. In contrast to the moving parts of trial litigation, by the time a post-conviction case has reached the appellate level, the grounds for relief have been identified and decided, the record has been made, and any issues on appeal are limited to legal questions appearing on the face of the record. *See generally* ORAP 3 (record on appeal); ORAP 5.45 (assignments of error in opening brief). Thus, if the petitioner has not satisfied the obligation, as *Church* requires, to identify and pursue the chosen grounds for relief before the litigation has ended, it is simply too late to take those necessary steps to ensure that the grounds for relief are not waived.

Moreover, a functional obstacle also supports the conclusion that *Church* was never meant to have any application on appeal. Interpreting *Church* in the way the Court of Appeals did 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 the court will know whether to accept for filing any *pro se* motion that contains the requisite prefatory language. The appellate courts would, in essence, be forced to conduct a post-conviction hearing within a post-conviction appeal. The superintendent assumes, as a practical matter, that an appellate court will not conduct a hearing on those questions. Thus, when a *pro se* motion that includes the mandated representations is submitted, it must be addressed on the merits (at least partially) simply to decide the threshold question of whether the petitioner has satisfied the requirements for the court to accept and consider the motion. Those problems also demonstrate that *Church*'s narrow holding should not be extended to the appellate venue.

All that said, however, a ruling by this court that *Church* applies only at the trial level, with a concomitant reversal of the Court of Appeals' order, will not leave a represented post-conviction petitioner who is dissatisfied with his attorney's performance on appeal with no remedies. As in any case involving appointed counsel, a post-conviction petitioner may move for the appointment of substitute counsel or may dismiss the attorney and proceed *pro se*.

Furthermore, ORAP 5.92 authorizes the filing of a supplemental *pro se* brief, if a person who is represented by court-appointed counsel is dissatisfied with the brief the attorney has filed. Thus, already built into the appellate system is a mechanism that petitioners may use to identify issues that they believe are important but that the attorney—in an exercise of professional judgment—has decided not to raise. *Pratt v. Armenakis*, 335 Or 35, 56 P3d 920 (2002) (appellate counsel are expected to exercise professional judgment to pick and choose among arguments to assert on appeal). *See also Farmer v. Baldwin*, 346 Or 67, 205 P3d 871 (2009) (discussing application of the ORAPs to *pro se* filings and noting that the "ultimate question whether a litigant has raised a claim for review by this court is a matter committed to this court's discretion").

In sum, while *Church* places a responsibility on post-conviction petitioners to take steps to ensure that their chosen grounds for relief are litigated at the trial of the first post-conviction proceeding, it has no role to play once the case is on appeal.

D. *Church* does not create a broad right for a represented post-conviction petitioner to submit filings on any topic he chooses.

1. Introduction

The Court of Appeals did not limit its ruling, as *Church* does, to the petitioner's responsibility to identify the grounds for relief. Instead, its interpretation establishes a right for a represented post-conviction petitioner to

engage in motion practice alongside (and possibly in conflict with) an appointed attorney at both the trial and appellate levels. That interpretation conflicts with well-established authority rejecting hybrid representation. If this court accepts the superintendent's first argument and holds that *Church* has no application on appeal, it need not reach this argument. But, as shown by the course of this case, and the supplementary local rules authorizing *Church* "notices"—but with no uniform understanding of what such a notice legally may contain—a clarification of *Church*'s holding would assist both the bench and bar.

2. The ban on "hybrid" representation is strong and rational.

This court consistently has held that an attorney acts as the representative for the client, in both criminal and civil cases. *State v. Mullins*, 352 Or 343, 354-355, 284 P3d 1139 (2012) (counsel for a criminal defendant effectively serves as a representative or agent for the defendant in a court proceeding for which an attorney is appointed or retained); *Granewich v. Harding*, 329 Or 47, 56 n 5, 985 P2d 788 (1999) (citing agency principles in context of attorney-client relationship).[8] This court has recognized the difficulties flowing from

[8] *See also State v. Langley*, 331 Or 430, 445-46, 16 P3d 489 (2000) (lack of objection by trial counsel to testimony constituted a waiver by the defendant of the psychotherapist-patient privilege); *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or 336, 342-343, 838 P2d 1069, 1073 (1992) (absent evidence to the contrary, "an inference may be drawn that a lawyer who voluntarily turns over privileged material during discovery acts within the scope of the lawyer's authority from the client and with the client's consent"); *Louth*

Footnote continued…

pro se filings: "The lay litigant frequently brings pleadings that are awkwardly drafted, motions that are inarticulately presented, proceedings that are needlessly multiplicative" and the lay litigant "lacks many of the attorney's ethical responsibilities, *e.g.*, to avoid litigating unfounded or vexatious claims." *Oregon Peaceworks Green, PAC v. Secretary of State*, 311 Or 267, 272 n 4, 810 P2d 836 (1991) (internal quotations omitted).[9]

The superintendent has been unable to locate any case from any jurisdiction in which a civil, post-conviction litigant was *entitled* to the kind of hybrid representation the Court of Appeals interpreted *Church* to authorize. *See, e.g., Lee v. State of Alabama*, 406 F2d 466 (5th Cir 1968) (in habeas corpus proceeding, petitioner "had a right to represent himself or to be represented by counsel, but he had no right to a hybrid representation partly by himself and

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(…continued)
et al. v. Woodard, 114 Or 603, 609, 236 P 480 (1925) (client was bound by his attorney's acts when attorney appeared for him in lawsuit; client knew about lawsuit and representation, but he did not "disavow and disaffirm" the attorney's action).

[9] And this case provides examples of such pleadings. Johnson's *pro se* motions in the Court of Appeals have asked the court to undertake a variety of actions ranging from ordering the United States District Court to preserve records, to appointing three trial attorneys to begin preparing for his retrial on the aggravated murder charges, including that they take depositions. During the post-conviction litigation, he filed 121 *pro se* motions in the trial court, totaling over 6,000 single-spaced pages of argument. Among those filings was Johnson's demand that the Department of Corrections provide him with a personal laptop computer and unrestricted Internet access.

partly by counsel"); *Pagliaccetti v. Kerestes*, 948 F Supp 2d 452 (ED PA, 2013) (refusing to address *pro se* pleadings submitted by represented federal habeas petitioner); *Commonwealth v. Pursell*, 555 Pa 233, 724 A 2d 293, 301-02 (Pa 1999) (holding that a post-conviction court is not obligated to accept *pro se* filings when the appellant is represented by counsel).

Even in the criminal context, where an accused has a right under Article I, section 11, of the Oregon Constitution "to be heard by himself and counsel," this court has rejected the proposition that a represented defendant must be allowed to personally participate in the litigation. A trial court may, in its discretion, allow a defendant to engage in hybrid representation, but there is no right to it. *State v. Stevens*, 311 Or 119, 123-25, 806 P2d 92 (1991). *See also McKaskle v. Wiggins*, 465 US 168, 183, 104 S Ct 944, 79 L Ed 2d 122 (1984) (Sixth Amendment does not require a trial judge to permit "hybrid" representation).

Because no right to hybrid representation exists in a criminal case, such a right surely does not exist in a civil case, instituted by a post-conviction petitioner. As with any other legal proceeding, a post-conviction petitioner's choice is simple: Accept counsel and be bound by what counsel does or does not do, or elect self-representation.

3. Combining *Church* with ORS 138.590(1), as the Court of Appeals did, does not create a right for represented post-conviction petitioners to file substantive *pro se* motions.

As set out above, the court's ruling is based on the premise that *Church* and its progeny hold that the petitioner is personally responsible for "prosecuting" the case while the petitioner also has a statutory right to the appointment of "suitable" counsel. Thus, the court apparently reasoned that if an appointed attorney fails to provide "suitable" representation, the petitioner must step in to file motions that the attorney refuses or neglects to file. However, as shown above, *Church* does not place such a broad responsibility for prosecution of the case on post-conviction petitioners.[10] Rather, 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. That responsibility can be adequately carried

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[10] The three non-Oregon opinions the superintendent has found that cite *Church v. Gladden* have used it for the same narrow holding discussed above: Issues that could have been litigated in an earlier proceeding cannot be litigated in a collateral or successive proceeding, unless the petitioner provides a sufficient reason. *See State ex rel Hopkinson v. District Court, Teton County*, 696 P2d 54, 64-65 (Wyo 1985) ("[O]ur post-conviction statute does not offer remedies previously pursued to completion * * * Endless repeating must stop"); *Johnson v. State of Wyoming*, 592 P2d 285 (1979) (same); *Rogers v. Warden, Nevada State Prison*, 86 Nev 359, 468 P2d 993 (1970) (court is not required to entertain successive petitions unless the petitioner "satisfactorily explains" why he did not assert the grounds in his original, supplemental or amended petition).

out in the manner described in *Church*— the petitioner must ask the court to remove the attorney or to instruct the attorney to pursue the chosen issues.

When the mistaken, *Church*-based premise of the analysis is corrected, the link to "suitable" counsel on which the court's order relies is broken, and the right of a represented post-conviction petitioner to file substantive *pro se* motions evaporates. Because no source of law makes a post-conviction petitioner responsible for prosecution of the case—beyond the narrow provisions set out in *Church*—the conflict of law that the Court of Appeals perceived, and reconciled with its order, does not exist. No other source of law authorizes hybrid representation in a post-conviction case, either.

CONCLUSION

Church v. Gladden holds only that a post-conviction petitioner is responsible for ensuring that the grounds for relief he seeks to litigate have been presented to the post-conviction trial court. Given its narrow holding, *Church* has no application whatsoever at the appellate level. Further, there is no exception for represented post-conviction petitioners to the general requirement that written submissions by a represented party must be made through the

party's attorney. This court should reverse the Court of Appeals' order and should clarify the narrow limits of *Church*.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 30, 2014, I directed the original Brief on the Merits of Petitioner on Review, Jeff Premo to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Daniel J. Casey, attorney for respondent, by using the electronic filing system. I further certify that on January 30, 2014, I directed the Brief on the Merits of Petitioner on Review, Jeff Premo to be served upon Robert L. Huggins, Jr., attorney for respondent, by mailing two copies, with postage prepaid, in an envelope addressed to:

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 5,080 words. I further 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(2)(b).

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