IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent Respondent on Review, v. TASI AUTELE, aka Brian Mulivai Autele, aka Tasi Mulivai Autele, Defendant-Appellant, Petitioner on Review.	Washington County Circuit Court Case No. 17CR69755 CA A172873 SC S070046

PETITIONER'S REPLY BRIEF

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court
for Washington County
Honorable Ricardo J Menchaca, Judge

Opinion Filed: January 5, 2023
Author of Opinion: Ortega, P.J.
Before Ortega, Presiding Judge, and Powers, Judge, and Hellman, Judge.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

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While defendant's petition for review was pending, this court requested supplemental briefing from the parties "on the question whether the Court of Appeals was correct in holding that 'the record [was] inadequate for [its] review' and, by extension, whether the record is adequate for the Supreme Court's review." Letter of Supreme Court, Sept 11, 2023. The parties responded as requested. Appellant's Memorandum of Law (Memo) filed Sept 22, 2023; Response to Request for Supplemental Briefing (Response), filed Sept 22, 2023.

Thus, advised on the adequacy of the record, this court allowed defendant's petition for review in part, and it limited review to the following question:

> "Does a trial court deny a defendant the right to retained counsel of the defendant's choosing, under the state or federal constitutions, when the court denies retained counsel's request to represent the defendant after retained counsel—having previously withdrawn from representation due to a conflict—later tells the court that, in counsel's view, the conflict no longer exists and that defendant and counsel both want the representation to resume?"

Order Allowing Review issued Oct 19, 2023. Defendant filed a brief on the merits consistent with the court's order. Petitioner's Brief on the Merits (PBOM), 2 (restating the court's question and proposing a responsive rule).

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The state's brief, in contrast, identifies three novel (and argumentative) questions presented and relitigates the issues of record development and preservation. Respondent's Brief on the Merits (RBOM), 1-4, 12-26. The first and second questions focus on purported record defects. RBOM at 2-3. The third comes closest to tracking this court's question, but it suffers from affirming its own minor premise: "[M]ay a trial court deny a request that counsel be reappointed [1] *if the trial court determines that the significant ethical conflict poses a risk of unreasonably disrupting the trial proceedings*?" RBOM at 2 (emphasis added).

Finally, the state offers a competing narrative of historical facts in two significant respects. First, in the state's view, defense counsel informed the trial court that the conflict requiring their previous withdrawal "may" or "may not" have been resolved. RBOM at 1, 3, 4, 37, 40, 45. Second, in the state's view, albeit phrased in a few ways, the trial court "determined that an ethical conflict posed a serious risk of unreasonable disruption to the trial court proceedings." RBOM at 2, 3, 37, 41, 44.

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[1] Defendant notes that the state repeatedly adopts the trial court's view that it was asked to "reappoint" defense counsel. RBOM at 1, 2, 3, 4, 6, 13, 14, 18, 26, 35, 36, 37, 39, 41, 44.

Defense counsel were retained, not "appointed," and as such they could not be "reappointed." Rather, counsel asked the trial court to acknowledge—rather than disallow—defendant's exercise of his right to select them as retained counsel.

The state is incorrect. This court should reject the state's effort to frustrate review by recasting the record in a new light. The record establishes that defense counsel represented to the trial court that the ethical conflict had been resolved; indeed, the parties' briefing below relied on that representation. Moreover, *whether* the record demonstrates that the trial court determined that an ethical conflict posed a risk of unreasonable disruption to the proceedings—or *whether* the court engaged in a proper exercise of discretion under the correct legal standard—is the issue on review.

ARGUMENT

I. The state's "factual disputes" supplant the question before this court with its answer.

For the first time on review, the state parses the record such that defense counsel who asked to resume their representation of defendant did not thereby affirmatively represent that the "significant" "ethical conflict" that required their previous motion to withdraw had resolved between the April 2, 2019 hearing and the April 11, 2019 hearing. *See, e.g.*, RBOM at 40 (contending that defendant "is mistaken" that "counsel represented that the ethical conflict had been resolved"). If that were so, this case would not deserve this court's

attention.[2] But the state's fresh take is an unnatural reading of the record and comes too late.

This court identified a question presented when allowing review that accepted as historical fact that defense counsel represented to the trial court that the conflict that demanded withdrawal was no longer an impediment to representing defendant. PBOM at 2 ("after retained counsel—having previously withdrawn from representation due to a conflict—later tells the court that, in counsel's view, the conflict no longer exists"). That question reflects what all had accepted at that point.[3]

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[2] This court knows how imperative the stability of the factual record is to exercise discretionary review of the decisions of circuit courts and the Court of Appeals. ORAP 9.07(1)(7) (including, as criteria "relevant to the decision whether to grant discretionary review," "whether the case is free from factual disputes * * * that might prevent the [court] from reaching the legal issue"). Indeed, that stability often determines "[w]hether the record does, in fact, present the desired issue." ORAP 9.07(1)(8). This court should be wary when a respondent then suggests a new reading of the record that would thwart review of the issue that this court identified.

[3] Earlier briefing demonstrates as much. *See, e.g.*, Appellant's Opening Brief, 20 ("retained counsel asked to get back onto the case, signaling that the former conflict had in fact been resolved"); Respondent's Answering Brief, 6 (acknowledging that "counsel's request may have reflected that they personally considered the conflict resolved," but arguing the impossibility of determining "what weight counsel's opinion regarding the conflict should have carried"); Appellant's Reply Brief, 10 ("[I]mplicit in counsel's request to return to the case was a representation that the prior ethical conflict had been resolved."); Memo at 12 ("[D]efense counsel's request to resume representation of defendant adequately communicated that the potential for an ethical rule arising at trial had been resolved."); Response at 7 (faulting defense counsel for failing to "describe[] how, in their view, that conflict had been resolved").

The state now suggests that the trial court's grudging acknowledgment that the conflict that *required* defense counsel to withdraw "may or may not have resolved itself" was, instead, a literal rendition of defense counsel's representation. That is, defense counsel—ethically prohibited from representing a client if "the representation will result in violation of the Rules of Professional Conduct or other law," ORPC 1.16(a)(1)—had asked to resume representation because the former conflict was resolved, *maybe*. This court should reject such a strained reading of the record, which it appears to have done by allowing review after asking the parties to address the issue.

Similarly, the state asserts as historical fact that the trial court determined that an ethical conflict posed a serious risk of unreasonable disruption to the trial court proceedings. But that is a restating of the *legal* question before the court, the answer to which as defendant contends is:

> "[T]his court should hold that, when a trial date has not yet been set, a trial court may prevent the defendant from exercising his right to retained counsel of choice only if the trial court determines that counsel's ethical obligations create a substantial risk of retrial, the record shows that the court balanced those concerns, and the record supports that determination."

PBOM at 40-41; *see also id.* at 2 (stating proposed rule of law). The state is free to contend that the trial court did not err because its ruling comported with the law. But its efforts to portray the trial court's ruling in such a manner—as given historical fact—mistake assertion with argument.

And regarding the rule that this court may adopt, defendant recognizes that the rule he advances would predicate interference with a defendant's right to counsel of choice on a risk of retrial, rather than "unreasonable disruption." This court's job, of course, is to draw that line where it sees fit. Defendant has asked this court to engage in that exercise, which is the issue presented by the record and before this court.

II. The record is adequate to review the trial court's ruling; neither defendant, nor the defense counsel prevented from representing defendant, needed to ask the trial court to buttress its adverse ruling with additional findings, a more complete explanation, or a balance of factors.

Between the parties' memoranda and the state's brief on the merits, this court now has over 40 pages of argument regarding the adequacy of the record by defendant's count. Defendant is loath to contribute more. But regardless of outcome, the record below is sufficient to review the trial court's ruling, defendant's assignment of error on appeal, and the question on review.

Defendant does not claim that the trial court "erred by failing to make findings or balance factors on the record." RBOM at 14, 24. Defendant's first assignment of error is that "[t]he trial court erred in denying retained counsel's request to resume defendant's representation." Appellant's Opening Brief, 12. This court will decide whether the trial court so erred based on the record below, which is easily identified:

Defense counsel moved to withdraw based on "some ethical considerations" that the trial court and counsel found "significant." April 11, 2019, Tr 4. When defense counsel later asked to resume defendant's representation, the trial court noted that, notwithstanding that "[t]he conflict may or may not have resolved itself," it was "not willing to reappoint [defense counsel] to retain—to represent [defendant]," due to the court's "concerns about the ethical obligations that were [previously] raised." April 11, 2019, Tr 4.

The record speaks for itself. The state would have this court hold that the trial court did not err, because the trial court "determine[d] that the significant ethical conflict pose[d] a risk of unreasonably disrupting the trial proceedings." RBOM at 3. The record cannot sustain the state's attribution. A trial court's unspecified "concerns" about indefinite "ethical obligations" do not amount to a reasoned determination that defendant's *right* to counsel of choice must yield to the *substantial* risk of *unreasonably* disrupting the trial proceedings or, as defendant argues, risk of retrial, due to a *significant* ethical *conflict*.

The state's refrain should recall its argument in *State v. Hightower*, 361 Or 412, 422, 393 P3d 225 (2017), "that, given the stage of the proceedings and [the] defendant's prior record of disruptive behavior, 'the trial court reasonably could have' determined that the interest in orderly and expeditious trial outweighed any prejudice to [the] defendant's right to self-representation." As

this court noted then, "[t]he test is whether the record reflects that the trial court's actual decision amounted to a reasonable exercise of its discretion." *Id.*

This court should find error because the record does not reflect that the trial court's decision below amounted to a reasonable exercise of discretion. The trial court's response to defendant's request was that, given the court's "concerns about ethical obligations," it was "just not willing to reappoint [defense counsel] to retain Mr.—to represent [defendant]." April 11, 2019 Tr 4. That response reflects an understanding that, once retained counsel had been allowed to withdraw, defendant no longer had a *right* to counsel of choice. The court's statement does not reflect an exercise of discretion or any finding that allowing defendant's exercise of his right to counsel of choice would risk retrial, or significant delay or disruption. Rather, it appears to reflect an understanding that, once retained counsel has withdrawn but the necessity to withdraw has been ameliorated, the law does not give a defendant the right to choose the same counsel. That is an incorrect understanding of the law and of the scope of a trial court's discretion to defeat the right to counsel of choice.

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The trial court violated defendant's Article I, section 11, right to retained counsel of choice when it prevented defendant from exercising fully that right, the record does not support a significant "concern" that counsel's "ethical obligations" would jeopardize the integrity and fairness of the trial or the court's interest in orderly and expeditious proceedings, and the record does not show that the trial court weighed—or how it weighed—defendant's right to counsel of choice against its other obligations. *Hightower*, 361 Or at 421-22; *State v. Rogers*, 330 Or 282, 301-02, 307-08, 4 P3d 1261 (2000).

CONCLUSION

Because the trial court violated defendant's right to retained counsel of choice, this court should reverse the decision of the Court of Appeals and the judgment of the trial court.

Respectfully submitted,

Signed
By ErnestG Lannetat 1:52pm, Feb 15, 2024

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 and (2) the word-count of this brief is 2,067 words.

Type size

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.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Reply Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on February 15, 2024.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Reply Brief will be eServed on Benjamin Gutman #160599, Solicitor General, and Christopher Perdue #136166, Assistant Attorney General, attorneys for Plaintiff-Respondent.

Respectfully submitted,

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