



March 22, 2023

FYI: JOHNSON v. STATE

The Georgia Supreme Court overturns the absolute rule that pro se filings by a criminal defendant who is actually or presumptively represented by counsel is always a “legal nullity” and rules that trial courts may use their discretion to allow “hybrid representation.”

In *Johnson v. State*, S22A0964 (3/15/23), the record, very briefly stated, showed that appellant was convicted of malice murder and robbery in 2000. Although appellant was still presumptively represented by counsel, he filed a timely pro se motion for a new trial on December 13, 2000. Appellant was appointed appellate counsel in 2001 and then again in 2017. In 2018, the trial court entered a consent order granting appellant leave to file an “out of time motion for new trial and appeal.” Hearings were held on the motion in December 2018, May 2019, and May 2021. On January 28, 2022, the trial court denied the motion. Through counsel, appellant filed a notice of appeal on February 21, 2022.

Relying on *White v. State*, 302 Ga. 315, 319 (2) (2017), the Court dismissed the appeal because the December 13, 2000, motion for new trial was a legal nullity since it was filed pro se at a time when appellant was presumed to be represented by counsel. Also, the later motion for new trial filed by appellate counsel was untimely and to the extent it was filed with leave from the trial court as an out-of-time motion for new trial or appeal, those remedies were no longer cognizable after *Cook v. State*, 313 Ga. 471, 506 (5) (2022). However, on reconsideration, the Court asked the parties and invited amici curiae to address whether “a pro se filing made by a defendant who is actually or presumptively represented by counsel [is] always a nullity.”

The Court stated that although a defendant does not have a constitutional or statutory right to represent himself while he is also represented by counsel, nothing in our Constitution or Code prohibits “hybrid representation” either. Generally, “hybrid representation” refers to when a defendant acts on his or her own behalf in court while he is at the same time represented by counsel. And courts otherwise have broad discretion to control their processes and the conduct of those appearing before them.

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The Court conducted an extensive review of its decisions regarding such hybrid representation and found that a few of its decisions correctly recognized that courts retain the discretion to allow hybrid representation. At the same time, the Court found that its decisions adopting and applying the contrary rule are virtually unreasoned. At most, these decisions point out that a defendant does not have a *right* to hybrid representation—but of course, not having a right to do something does not mean one is *prohibited* from doing it. And the Court found, its decisions offered nothing further in support of an absolute rule against recognizing a pro se filing by a counseled defendant. Thus, the Court concluded, “Put simply, those decisions were just wrong.”

Furthermore, the Court found, its error is not harmless. After a judgment of conviction, defendants have a short window within which they can preserve their right of appeal, but absent an order allowing their counsel to withdraw, they are presumptively represented by counsel. In cases like appellant’s, where counsel for some reason fails to take the steps that would preserve the right to appeal, an attentive and diligent defendant could save the appeal with a simple pro se filing, but the absolute nullity rule leaves the defendant powerless to do so. And, the Court noted, after its recent decision in *Cook*, which eliminated the judge-made “motion for out-of-time appeal,” that direct appeal is lost—unless the defendant can somehow revive it in a habeas corpus proceeding, where the defendant no longer has the right to counsel, may assert only constitutional claims, and is subject to a four-year statute of limitations.

In sum, the Court found the following: 1) Nothing in our Constitution or Code either prohibits hybrid representation as a general matter or requires treating pro se filings by counseled defendants as *always* nullities; (2) courts have broad discretion to control their processes and the conduct of those before them; (3) the Court’s decisions adopting and applying the nullity rule offer no reasoning in support of it beyond the implicit and obviously wrong suggestion that the absence of a right to hybrid representation somehow prohibits it; (4) there is no serious argument that these decisions can be reconciled with its earlier decisions recognizing a court’s discretion to allow hybrid representation; and (5) after *Cook*, the rule works real and irreparable harm to the appeal rights (and other rights of review) of criminal defendants whose counsel have abandoned them or otherwise failed to discharge their duties. Therefore, the Court found, because stare decisis does not require the perpetuation of a legal rule that is so obviously and harmfully wrong, the Court overruled its past decisions to the extent they hold that a pro se filing by a counseled defendant is *always* a legal nullity.

In so holding, the Court stated that it expects trial courts will exercise discretion to recognize pro se filings by counseled defendants sparingly. And because it expects that the recognition of pro se filings by counseled defendants will be the exception and not the rule, the Court stated that unless the record

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indicates that the court recognized the filing, it will be presumed that the court did not do so. Thus, the Court directed, when a court chooses to recognize such a filing—as when trial counsel has failed to act within the prescribed time period to preserve the defendant's right to appeal and the defendant timely makes a pro se filing that would preserve that right—the trial court should make that exercise of discretion clear on the record. And, the Court stated, the decision whether to recognize a pro se filing by a counseled defendant is “committed to the court's *sole discretion*.” (Emphasis supplied).

Moreover, the Court stated, it will not undo what has been done with respect to any pro se filings in cases that have already been adjudicated through direct appeal. The Court noted that it has “long followed” the “pipeline” approach for determining how new rules of criminal procedure apply to criminal cases. Under this approach, a new state rule of criminal procedure will be applied to all cases then on direct review or not yet final. Therefore, the Court held, its holding here only applies to future cases and those pending cases whose direct appeals have not yet been adjudicated.

Finally, turning to back to appellant's factual situation, the Court remanded the case back to the trial court with direction to exercise its discretion to determine whether to recognize and rule on any pro se post-conviction motions appellant filed.

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