

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

APPEAL FROM GREENVILLE COUNTY  
COMMON PLEAS COURT  
Garrison D. Hill, Circuit Court Judge

---

Case No. 2012-GS-23-2124  
Appellate Case No.: 2013-000883

---

State of South Carolina, ..... Respondent,

v.

Johnie Allen Devore, Jr., ..... Appellant.

---

REPLY OF APPELLANT

---

RECEIVED

FEB 09 2015

SC Court of Appeals

J. Falkner Wilkes (SC Bar #12893)  
114 Whitsett Street  
Greenville, SC 29601  
(864) 282-1292  
(864) 271-6035 (facsimile)

*Counsel for Appellant*

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

APPEAL FROM GREENVILLE COUNTY  
COMMON PLEAS COURT  
Garrison D. Hill, Circuit Court Judge

---

Case No. 2012-GS-23-2124  
Appellate Case No.: 2013-000883

---

State of South Carolina, ..... Respondent,

v.

Johnie Allen Devore, Jr., ..... Appellant.

---

REPLY OF APPELLANT

---

J. Falkner Wilkes (SC Bar #12893)  
114 Whitsett Street  
Greenville, SC 29601  
(864) 282-1292  
(864) 271-6035 (facsimile)

*Counsel for Appellant*

**TABLE OF CONTENTS**

Table of Authorities ..... i

Statement of the Issues on Appeal ..... 1

ARGUMENT

    I.    APPELLATE JURISDICTION IS PROPER IN THIS CASE.

CONCLUSION ..... 7

## TABLE OF AUTHORITIES

### *Cases*

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) . . .	4,5
Johnstone v. Kelly, 808 F.2d 214 (2nd Cir. 1986) . . . . .	6
Lafler v. Cooper, 132 S.Ct. 1376, 1385 (2012) . . . . .	3
McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) . . . .	5
Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010) . . . . .	6
Missouri v. Frve, 132 S.Ct. 1399, 1405 (2012) . . . . .	3
Parker v. State, 1976 OK CR 293 . . . . .	4
Smith v. Murray, 477 U.S. 527 (1986) . . . . .	3
State v. Barnes, 27322 (S.C. 1-15-2014) . . . . .	4
State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997) . . . . .	4
State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013) . . . . .	2
State v. Starnes, 388 S.C. 590 (2010) . . . . .	5
Traylor v. State, 596 So.2d 957 (Fla.1992) . . . . .	4
Turner v. Calderon, 281 F.3d 851, 879 (9th Cir. 2002) . . . . .	3
U.S. v. Green (D.Conn. 2-1-2013) . . . . .	6
United States ex rel. Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965) . . . . .	6
Williams v. Bartlett, 44 F.3d 95, 99 (2d Cir. 1994) . . . . .	5

*Statutes*

U.S. Const, Amend. VI ..... 4,5  
S.C. Const., art. 1, § 14 ..... 4

*Rules*

S.C. Rules of Criminal Procedure, Rule 29 ..... 2

## STATEMENT OF ISSUES IN REPLY

1. WAS THE APPELLANT ENTITLED TO FILE A POST TRIAL MOTION OR NOTICE OF APPEAL PRO SE WHERE HE WAS NOT BEING ACTIVELY REPRESENTED BY AN ATTORNEY SUBSEQUENT TO THE TRIAL?
2. WERE THE APPELLANT'S FILINGS SUFFICIENT TO VEST APPELLATE JURISDICTION IN THIS COURT?

## ARGUMENT

### I. APPELLATE JURISDICTION IS PROPER IN THIS CASE.

The State's argument is based on the claim that the Appellant's *pro se* motion for new trial and notice of appeal constituted "hybrid" representation. The State's argument overlooks the fact that although Devore had an attorney of record from the trial, he did not have an attorney *actively* representing him after the conclusion of the trial, or during the time for filing post trial motions or notice of appeal. As a result, under the circumstances of this case, Devore's *pro se* filings did not create or constitute a prohibited "hybrid" representation.

The State's argument that the appeal should be dismissed and the issue best raised through a PCR is flawed. A post-conviction relief hearing would be unwarranted in this case as it is not necessary to resolve a factual dispute and would not aid the Court in its application of the law. *See State v. Rivera*, 402 S.C. 225, 741 S.E.2d 694 (2013). The question presented is not whether an issue could be raised in a post conviction relief hearing, but simply whether this Court has jurisdiction for the direct appeal.

Devore was represented at trial by counsel, however, subsequent to

trial counsel left the country without filing a notice of appeal or Rule 29 motion. Clearly Devore sought to have a new trial and/or appeal from the conviction. There was no action taken by trial counsel. Accordingly, Devore timely filed a *pro se* request for a new trial and subsequently a *pro se* request for an appeal. When Devore filed these documents, he was not being actively represented by counsel. There was therefore, no prohibited “hybrid” representation.

Under Rule 29 of the South Carolina Rules of Criminal Procedure, Devore was entitled to make a motion for new trial. Devore was also constitutionally guaranteed the right to an appeal from a criminal case. There appears no case holding that a criminal defendant is prohibited from filing a *pro se* motion for new trial, or an appeal, when he is no longer being actively represented by counsel.

The Sixth Amendment guarantees criminal defendants the right to representation by counsel at every critical stage of the prosecution. Turner v. Calderon, 281 F.3d 851, 879 (9th Cir. 2002). The Sixth Amendment right to counsel extends to all critical stages of a criminal proceeding. *See, e.g., Missouri v. Frve*, 132 S.Ct. 1399, 1405 (2012); Lafler v. Cooper, 132 S.Ct.

1376, 1385 (2012); Smith v. Murray, 477 U.S. 527, 535-36 (1986). A critical stage of trial is "any stage that may significantly affect the outcome of the proceedings" Traylor v. State, 596 So.2d 957, 968 (Fla.1992).

The Sixth Amendment further guarantees every criminal defendant the "right to proceed without counsel when he voluntarily and intelligently elects to do so." State v. Barnes, 27322 (S.C. 1-15-2014) *citing* Faretta, 422 U.S. at 807. Faretta established that a defendant has an independent fundamental right guaranteed by the Sixth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, to represent himself at all stages of criminal proceedings if he elects to do so. A trial court cannot force a defendant to accept counsel or refuse to dismiss a court appointed counsel if the defendant elects to represent himself. *See* Parker v. State, 1976 OK CR 293.

In addition to the Sixth Amendment, the right to represent one's self is also protected by the South Carolina Constitution. The South Carolina Constitution provides that every criminal defendant has the right to represent himself and makes no distinction between capital and non-capital defendants. S.C. Const., art. 1, § 14; State v. Brewer, 328 S.C.

117, 492 S.E.2d 97 (1997). Additionally, the United States Supreme Court has interpreted the United States Constitution as providing a right to self-representation. See Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) ("The Sixth Amendment, when naturally read, thus implies a right of self-representation."). State v. Starnes, 388 S.C. 590 (2010). See also: McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

Unlike the case in Miller, cited by the State, this case involves a filing in a criminal, not civil case. Also unlike in Miller, Devore was not acting in parallel with an attorney actively engaged in his representation. Here there was no "hybrid" representation as counsel had concluded his representation and left the country. When counsel, for whatever reason, does not file a motion under Rule 29 or direct appeal, the duty to do so does not alone establish "hybrid" representation when the defendant files his own. Here counsel never filed any post trial motion or notice of appeal. There was therefore, no representation by counsel. As a result, Devore was entitled to self-representation in order to protect his rights.

"The right of a defendant in a criminal case to act as his own lawyer is unqualified ..." Williams v. Bartlett, 44 F.3d 95, 99 (2d Cir. 1994) (*quoting United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965))

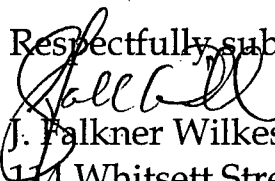
Moreover, a court's denial of the right to self-representation is not subject to harmless error analysis, and requires automatic reversal of a criminal conviction. *See Johnstone v. Kelly*, 808 F.2d 214, at 218 (2nd Cir. 1986); U.S. v. Green (D.Conn. 2-1-2013). In the present case, in the absence of counsel, Devore had an absolute right to represent himself and file a *pro se* motion for a new trial and notice of appeal. Allowing Devore to proceed under the circumstances is consistent with the decision in Miller. The Miller court specifically defined "hybrid" representation as "partially *pro se* and partially by counsel". Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010). Miller involved a case where the represented party and the attorney were each filing post trial motions and notices of appeal independently of each other. In this case, there was no "partial" representation by counsel, and therefore, no "hybrid" representation. Miller is therefore clearly distinguishable. Jurisdiction is proper here where Devore filed a timely motion under Rule 29 which was heard by the circuit court while the

appeal was held in abeyance. Subsequent to the circuit court's ruling on the Rule 29, the undersigned timely filed an amended notice of appeal including the conviction and the denial of Rule 29 relief by the circuit court. This Court therefore has jurisdiction in this matter.

Based on the foregoing, the appellate jurisdiction is proper in this Court.

#### CONCLUSION

Based on the foregoing arguments the Appellant's conviction should be reversed.

Respectfully submitted,  
  
J. Falkner Wilkes, 12893  
114 Whitsett Street  
Greenville, SC 29601  
(864) 282-1292  
(864) 271-6035 facsimile  
Counsel for Appellant

February 5, 2015.