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APR 06 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

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

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


v.

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

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PETITION FOR REHEARING

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

*Counsel for Appellant*

## PETITION

Petitioner respectfully submits that the Court's decision overlooked or misapprehended facts and/or points of law that are essential to the determination of the issues. Accordingly, Petitioner moves for a rehearing based on the following.

This Court's decision turns on a finding that the Appellant's *pro se* motion for new trial and notice of appeal constituted "hybrid" representation. The Court's decision overlooks the fact that although Devore technically may have still had an attorney of record from the trial, the attorney was not *actively* representing him after the conclusion of the trial during the time for filing post trial motions or notice of appeal. Counsel took no action. As a result, under the circumstances of this case, Devore's *pro se* filings did not create or constitute a prohibited "hybrid" representation.

This Court's application of cases relating to "hybrid" representation is in error. Cases relied on by this Court involved filings by *both* the attorney and represented party. In Stuckey the issue of "hybrid" representation arose out of dual filings of what the Supreme Court specifically termed "substantive documents". State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998). The same is true in Miller, where counsel and the defendant were each filing conflicting documents. In the present case the attorney did not take any action to preserve Devore's right to a direct appeal. Only Devore did. As a result, there was no dual or conflicting filings as seen in Stuckey, Miller, or other "hybrid" representation cases. The present case is therefore distinguishable.

The theory of "hybrid" representation arose out of cases where the attorney and

client were *both* filing or undertaking actions at the same time. This is evident in Stuckey where counsel and client *each* filed appellate briefs and designations of matter. Similarly, in Miller, the defendant filed a post trial motion conflicting with the attorney's filing of a notice of appeal. The theory of hybrid representation rests on this type of dual action. The present case is distinguishable in that was no action at all taken by counsel to protect Devore's right to direct appeal. Here there is no conflict or dual action, and therefore, no basis or reason for the application of the "hybrid" representation rule. The only action taken in this case was by the Appellant. "Hybrid" cases, including Stuckey and Miller, are therefore inapplicable to the facts of this case.

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).


"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 (2d Cir. 1986); U.S. v. Green (D.Conn. 2-1-2013). In the present case, in the absence of action by counsel, Devore had an absolute right to protect his right to an appeal.

Our Supreme 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, Stuckey and other "hybrid" cases involve representation evidenced by dual action on the part of counsel and the represented party, not the existence of a lingering technical obligation that may still be owed by counsel. In the present case, counsel took no action. There was no "partial" representation by counsel, and therefore, there could be no "hybrid" representation. The present case is clearly distinguishable from "hybrid" representation cases.

#### CONCLUSION

Based on the foregoing the Court should reconsider its decision to dismiss the appeal in this case.

Respectfully submitted,

  
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April 6, 2016.

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April 6, 2016

Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
PO Box 11629  
Columbia, SC 29211

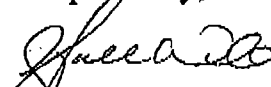
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Re: State v. Johnie Allen DeVore, Jr.  
C.A. No.: 2012-GS-23-2124  
Appellate Case No.: 2013-000883

Dear Ms. Kitchings,

Enclosed please find the Appellant's Petition for Rehearing. Consistent with my understanding of the rules and common practice of the Court, I am faxing the Petition and mailing by U.S. Mail. Faxing will be considered as actual receipt when done in conjunction with the mailing. If this is incorrect please let me know immediately and I will have the petition hand delivered tomorrow.

Respectfully,

  
J. Falkner Wilkes

c.

J. Benjamin Aplin, Assistant General  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

via facsimile to Court and AG

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY  
COURT OF GENERAL SESSIONS  
Garrison D. Hill, Circuit Court Judge

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

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SC Court of Appeals

State of South Carolina, ..... Respondent,  
v.  
Johnnie Allen Devore, Jr., ..... Appellant.

CERTIFICATE

I certify that on April 6, 2016, I served the Appellant's PETITION FOR REHEARING and CERTIFICATE OF SERVICE on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, as indicated below:

J. Benjamin Aplin, Assistant Attorney General  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

and by facsimile to: J. Benjamin Aplin, AAG (803) 253-6283  
Clerk of Court of Appeals, (803) 734-1839

Respectfully submitted,



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April 6, 2016.