

# The Supreme Court of South Carolina

Donald James Hurlbert, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212353

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## ORDER

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This is a post-conviction relief (PCR) case. By Form 4 order dated May 24, 2012, the circuit court granted the State's motion to dismiss petitioner's application because it failed to state a claim cognizable under the Uniform Post-Conviction Relief Procedures Act.

On June 23, 2012, petitioner filed a *pro se* notice of appeal. George Emanuel Counts, Esquire, who was apparently appointed to represent petitioner by the circuit court, was informed by letter dated July 25, 2012, that he remained counsel of record for petitioner pursuant to Rule 264(a), SCACR. Mr. Counts was asked to advise this Court of the date on which he received written notice of entry of the order on appeal so that the timeliness of the appeal could be determined. Mr. Counts provided this information by letter dated July 30, 2012, and the appeal was determined to be timely. However, Mr. Counts took no further action on the appeal.

By order dated September 5, 2012, the appeal was dismissed because petitioner had neither provided this Court with a copy of correspondence showing the transcript had been ordered nor had he filed a petition for a writ of certiorari and appendix if no transcript was required. *See* Rule 243(b) and (d), SCACR.

That same day, this Court received an "Affidavit of No Merit and Request to be Relieved" from Mr. Counts. Therein, Mr. Counts maintained he had reviewed the

matter and determined the appeal lacks merit. By order dated September 17, 2012, Mr. Counts' request to be relieved as counsel was denied and he was instructed to follow the *Anders* procedure approved in *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988) if he believes there are no issues of arguable merit. The order further stated any petition for reinstatement had to be filed within fifteen days of the date of the order.

Petitioner filed a *pro se* petition for reinstatement on September 17, 2012. Meanwhile, on September 12, 2012, Mr. Counts filed another "Affidavit of No Merit and Request to be Relieved" identical to the earlier one that was denied.<sup>1</sup>

The *pro se* petition for reinstatement is improper since petitioner is represented by counsel. Accordingly, it will not be considered. *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010); *Jones v. State*, 348 S.C. 13, 558 S.E.2d 517 (2002); *State v. Stuckey*, 333 S.C. 56, 508 S.E.2d 564 (1998); *Foster v. State*, 298 S.C. 306, 379 S.E.2d 907 (1989). Any petition for reinstatement must be filed by counsel.

Mr. Counts' second request to be relieved as counsel in this matter is hereby denied. As indicated in the prior order, the proper procedure to be followed when counsel believes an appeal in a PCR matter is wholly frivolous is not to file an affidavit and motion to be relieved as counsel but to instead follow the procedure set forth in *Johnson v. State, supra*. This includes the filing of an appendix, a petition for a writ of certiorari, referred to as a *Johnson* petition, and a motion to be relieved as counsel.<sup>2</sup> It is noted that Mr. Counts' continued failure to perfect this appeal could lead to a subsequent PCR action pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *See also King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992). In an effort to avoid the need for such action, and the duplication of efforts it places on all involved, Mr. Counts will be given a final opportunity to file a petition for reinstatement on petitioner's behalf. Any petition for reinstatement

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<sup>1</sup> This document was erroneously filed in the Court of Appeals, which received the document on September 17, 2012. The document was then transferred to this Court.

<sup>2</sup> If counsel does not understand the procedure to be followed under *Johnson*, he should contact the Division of Appellate Defense to discuss the procedures they follow in such cases.

must be served and filed within fifteen (15) days of the date of this order.

 C.J.  
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FOR THE COURT

Columbia, South Carolina  
September 28, 2012

cc: George Emanuel Counts, Esquire  
Ashleigh Rayanna Wilson, Esquire  
Mr. Donald J. Hurlbert