

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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MAY 23 2016

SC SUPREME COURT

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., Petitioner.

PETITION FOR WRIT OF CERTIORARI

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

Counsel for Petitioner

PETITION

The issue presented in this case is whether a criminal defendant represented by an attorney at trial can file his own notice of appeal without having the trial attorney relieved as counsel.

The court of appeals held in this case held that the Petitioner did not have the right to file a *pro se* notice of appeal in a criminal case if his trial attorney had not been relieved. The trial attorney in the Petitioner's case did not file post trial motions or a notice of appeal. The Petitioner attempted to file his own notice of appeal. The court below essentially held that only the attorney of record can file a notice of appeal and, if the attorney does not, for what ever reason, a defendant does not have the right to seek to protect his right to direct appeal *pro se*. In doing so the court of appeals stretched the meaning of "hybrid" representation beyond its practical limits and former application.

The decision of the court of appeals turned 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 Petitioner 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 to preserve the Petitioner's right to a direct appeal. As a result, under the circumstances of this case, Petitioner's *pro se* filings did not create or constitute a prohibited "hybrid" representation.

The court of appeal's application of cases relating to "hybrid" representation is in

error. Cases relied on by the court below involved filings by *both* the attorney and represented party. In Stuckey the issue of “hybrid” representation arose out of dual filings of what this 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 Petitioner’s right to a direct appeal. Only the Petitioner 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 Petitioner’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).

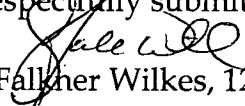
"The right of a defendant in a criminal case to act as his own lawyer is unqualified" Williams v. Bartlett, 44 F.3d 95, 99 (2d Cir. 1994) (*quoting* United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965)) Moreover, a court's denial of the right to self-representation is not subject 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, Petitioner had an absolute right to protect his right to an appeal.

This 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. The court of appeals decision was therefore in error.

CONCLUSION

Based on the foregoing the Court should grant the petition and allow briefing in this case.

Respectfully submitted,


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Counsel for Appellant

May 18, 2016.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF GENERAL SESSIONS
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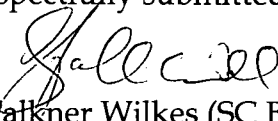
Case No. 2012-GS-23-2124
Court of Appeals Appellate Case No.: 2013-000883

State of South Carolina, Respondent,
v.
Johnie Allen Devore, Jr., Petitioner.

CERTIFICATE

I certify that the that a petition for rehearing or reinstatement was made and finally ruled on by the Court of Appeals.

Respectfully submitted,


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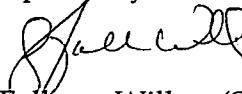
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CERTIFICATE

I certify that on May 19, 2016, I served the Appellant's PETITION FOR WRIT OF CERTIORARI 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
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Respectfully submitted,



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May 19, 2016.