No. S22A0964

In the Supreme Court of Georgia

GARY DEYON JOHNSON,
Appellant,

v.

THE STATE,
Appellee.

On Direct Appeal from
the Superior Court of Burke County
in No. 2019R0218

Hon. James G. Blanchard Jr., Presiding

Brief of the Georgia Association of Criminal Defense Lawyers as Neutral Amicus Curiae

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INTRODUCTION

This Court invited, *inter alia*, the Georgia Association of Criminal Defense Lawyers (GACDL) to weigh in on whether a represented defendant's pro se filings are always nullities or whether courts retain discretion to honor those filings under appropriate circumstances. The question arose upon the Court's having reconsidered its dismissal of Appellant Gary Johnson's protracted appeal from his 2000 Burke County

conviction for murder. Though Johnson himself filed a timely motion for a new trial, this Court initially determined that filing to be ineffective to invoke the superior court's jurisdiction or toll the opportunity to later invoke this Court's jurisdiction. Because only one of Johnson's two trial counsel had withdrawn, this Court's precedents nullified his pro se filing.

As amicus explains below, the rigid rule that a court may *never* honor a represented defendant's pro se filings is in error. Courts retain discretion to treat those filings as valid. And they would be prudent to do so in cases like this one, where the decision to file is wholly within the defendant's province.

As always, GACDL is pleased to serve as amicus curiae and hopes the Court finds its views helpful. GACDL's position as to this appeal is neutral: It takes no position on whether the Court should exercise discretion to reach the merits or, if it does, how it should rule on them. Accordingly, GACDL's brief is timely today, 12 September 2022, ten days after Johnson's reply would have been due. Ga. Sup. Ct. R. 23(2); see Ga. Sup. Ct. R. 10(3).

Interest of Amicus Curiae

A frequent friend of this Court, the Georgia Association of Criminal Defense Lawyers (GACDL) is a domestic nonprofit corporation whose members routinely execute the only office of the court dignified in the

Bill of Rights: defending the life and liberty of the accused against the powers of organized society and ensuring the processes of law that they are due. GACDL's membership comprises both public defenders and private counsel. They are united in their dedication to the rule of law, the fair and impartial administration of criminal justice, the improvement of our adversarial system, the reasoned and informed advancement of criminal jurisprudence and procedure, and the preservation and fulfillment of our great constitutional heritage.

VIEWS OF AMICUS

In all candor, the context for the question in this case requires that amicus acknowledge the difficulties the Court's opinion in *Cook v. State*, 313 Ga. 471 (870 SE2d 758) (2022) created earlier this year. An untold number of defendants lost the opportunity for appellate review of their convictions. Many, doubtless including some whose convictions were on the precipice of reversal, have no mechanism at state law to restore that right.

As this case demonstrates, the post-trial-motions process in Georgia can be ponderously slow. See *Owens v. State*, 303 Ga. 254, 258–60(4) (811 SE2d 420) (2018). Trial counsel's failure to file timely post trial motions or notices protracts that process even more. Up to March, convicted defendants in that situation could avail themselves of a court-manufactured process (the motion for an out-of-time appeal) to restore

the rights that their lawyers wrongly forfeited on their behalf. No longer. That remedy is defunct. Now the only vehicle for relief is an application for a writ of habeas corpus. *Cook*, 313 Ga. at 505–06(5). Trouble is that the limitations period to apply for habeas relief in Georgia is four years from the date the conviction became final. OCGA § 9–14–42(c)(1). For people affected by *Cook*, that date was the last day that they could have timely filed a motion for a new trial or notice of appeal. See *Stubbs v. Hall*, 305 Ga. 354, 359–62(3)(b) (840 SE2d 407) (2020). And someone who was travelling on a motion for out-of-time appeal for more than four years is without recourse, as none of the § 42(c) tolling provisions would apply.

That would be the case for Johnson. The superior court entered its final judgment of conviction and sentence against him on 17 November 2000. The last day he could have filed a motion for a new trial was Monday, 18 December 2000. See OCGA § 5–5–40(a); see also OCGA § 1–3–1(d)(3) ("[I]f the last day [of a statutory window to file] falls on Saturday or Sunday, the party having such privilege or duty shall have through the following Monday to exercise the privilege or to discharge the duty."). The superior court, however, did not grant Johnson leave to file an out of time appeal under 18 years later—well outside of when he could have applied for habeas relief. Thus, if the Court has no discretion to honor his pro se filing, he is forever out of luck.

Fortunately for those in Johnson's position, the Court does have that discretion. While Johnson may not insist that the Court exercise that discretion on his behalf, there is no bar on the Court's doing so. And the Court's precedents to the contrary, e.g., *White v. State*, 302 Ga. 315, 319(2) (806 SE2d 489) (2017) ("The trial court … correctly treated [the defendant's] pro se filings as legal nullities, because he was represented by counsel when he made them."); *Cotton v. State*, 279 Ga. 358, 361(5), (613 SE2d 628) (2005) ("Since [the defendant] was represented by new appellate counsel at the time he filed this pro se motion, … it was unauthorized and without effect."); *Brooks v. State*, 265 Ga. 548, 551(7) (458 SE2d 349) (1995) (dismissing a defendant's pro se appeal because he was simultaneously represented on a parallel appeal from the same judgment), overstate the rule.

(1) A defendant cannot demand hybrid representation under the Sixth Amendment or the Georgia Constitution.

Under the Sixth Amendment, one has the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (83 SCt 792, 9 LEd2d 799) (1963); *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (58 SCt 1019, 82 LEd 1461) (1938); see also *Cooke v. United States*, 267 U.S. 517, 537 (45 SCt 390, 69 LEd 767) (1925) (holding that due process requires the provision of counsel in a contempt proceeding, if requested), or to self-representation, *Faretta v. California*, 422 U.S. 806, 818–32(III) (95 SCt 2525, 45 LEd2d 562)

(1975), but not both, *McKaskle v. Wiggins*, 465 U.S. 168, 183(V)(A) (104 SCt 944, 79 LEd2d 122) (1984). The rule in Georgia is the same. "A criminal defendant in Georgia does not have the right to represent himself and also be represented by an attorney, and pro se filings by represented parties are therefore 'unauthorized and without effect.'" *Tolbert v. Toole*, 296 Ga. 357, 363(3) (767 SE2d 24) (2014) (quoting *Cotton*, 279 Ga. at 361).

(2) Georgia once recognized a right to hybrid representation, but it no longer does.

Notably though, Georgians once enjoyed a constitutional right to hybrid representation, at least from Reconstruction till 1983. The Georgia Constitutions of 1877 (Art. I, § I, ¶ VI), 1945 (Art. I, § I, ¶ VI), and 1976 (Art. I, § I, ¶ IX) all guaranteed that "[n]o person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this state, in person, by attorney, *or both*" (emphasis added). Thus, the assertion of the right to counsel, though it waived the Sixth Amendment right to self-representation, did not waive the analogous right under the state constitution. *Burney v. State*, 244 Ga. 33, 36(2) (257 SE2d 543) (1979). Georgia dropped the *or both* from the Constitution of 1983 (Art. I, § I, ¶ XII), however, so the *right* to hybrid representation did not

survive Reagan's first term.[1] *Cargill v. State*, 255 Ga. 616, 622–23(3) (340 SE2d 891) (1986), overruled on other grounds by *Manzano v. State*, 282 Ga. 557 (651 SE2d 661) (2007).

(3) Even if defendants cannot insist on hybrid representation, courts have discretion to allow it.

Simply because the 1983 Constitution foreclosed the *right* to hybrid representation, it does not automatically follow that the practice is now barred. To the contrary, hybrid representation is fully compatible with the right to counsel. Take *Wiggins*, for example. There, the defendant exercised his right to self-representation, though the trial court appointed standby counsel. 465 U.S. at 171–73(I). Though the defendant initially objected to standby counsels' involvement, he expressly agreed to allow standby counsel to conduct certain portions of the proceedings, including voir dire, opening statements, and objections. *Id.* The Supreme Court of the United States saw no error in that arrangement. *Id.* at 187–88(IV). The Court further explained that "*Faretta* [did] not require a trial judge to permit "hybrid" representation of the type [the defendant] was actually allowed." But in finding no harm in it, the Court

[1] In fact, the deletion of *or both* appears to have been a response to mischief that followed in *Burney*'s wake. *Seagraves v. State*, 259 Ga. 36, 37 (376 SE2d 670) (1989); see *Nelms v. Georgian Manor Condo. Ass'n, Inc.*, 253 Ga. 410, 413 n.7(3) (321 SE2d 330) (1984); *Jones v. State*, 171 Ga.App. 184, 186(2) (319 SE2d 18) (1984).

acknowledged (at least implicitly) that how much hybrid representation to allow was in trial courts' discretion.

That *Wiggins* involved a defendant waiving the right to counsel and the scenario at issue here involves the exercise of the right to counsel does not derogate from the force of its reasoning. A defendant who elects to have a lawyer does not yield all autonomy to counsel:

> The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. The counsel provision supplements this design. It speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed

> him by the Constitution, for, in a very real sense, it is not his defense.
>
> *Faretta*, 422 U.S. at 819–21(III)(A).

And there is much that defense counsel cannot decide on their clients' behalf—i.e., "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751(II) (103 SCt 3308, 77 LEd 2d 987) (1983); compare Unif. Super. Ct. R. 4.12 (allowing lawyer in civil matters, but not criminal, to enter binding agreements). Plus, a defendant can, in some instances, lodge objections to counsel's decisions that a trial court must honor—e.g., a concession of guilt before the factfinder, *McCoy v. Louisiana*, 584 U.S. ____ (138 SCt 1500, 200 LEd2d 821) (2018), and a waiver of the defendant's presence at certain proceedings, see *Champ v. State*, 310 Ga. 832, 841(2)(c) (854 SE2d 706) (2021) (explaining that a defendant may relinquish the constitutional right to be present, *inter alia*, "if … counsel waives the right and the defendant subsequently acquiesces to that waiver").

If a trial court may allow hybrid representation when a defendant is pro se and must respect certain wishes of a represented defendant, it is no far cry to say that a trial court has discretion to honor a defendant's other actions. Indeed, it was such an exercise of discretion that this Court blessed in *Hance v. Kemp*, 258 Ga. 649, 650(1) (373 SE2d 184) (1988). Following the vacatur of his death sentence by the Eleventh Circuit, the defendant (who had elected to represent himself at

trial) persuaded the superior court to let him act as co-counsel in his re-sentencing hearing. 258 Ga. at 649–50. This Court reaffirmed that a defendant had no right to demand hybrid representation. *Id.* at 650(1) (citing *Cargill*, 255 Ga. at 622). But a trial court could allow it. *Id.*

To be sure, every federal circuit has acknowledged that hybrid representation is permissible and within a district court's discretion. *United States v. Nivica*, 887 F.2d 1110, 1121–22(III)(C) (1st Cir. 1989); *United States v. Tutino*, 883 F.2d 1125, 1141(M) (2d Cir. 1989) (citation omitted); *United States v. Moro*, 505 F.App'x 113, 115(II)(A) (3d Cir. 2012) (citing *United States v. Bankoff*, 613 F.3d 358, 373–74(II)(B) (3d Cir.2010)); *United States v. Singleton*, 107 F.3d 1091, 1100(V) (4th Cir. 1997); *United States v. Patterson*, 42 F.3d 246, 248(I) (5th Cir. 1994) (citation omitted); *United States v. Mosely*, 810 F.2d 93, 98(II) (6th Cir. 1987); *United States v. Chavin*, 316 F.3d 666, 671(II)(A)(4) (7th Cir. 2002); *Fiorito v. United States*, 821 F.3d 999, 1003–04(II) (8th Cir. 2016); *Locks v. Sumner*, 703 F.2d 403, 408(2)(B) (9th Cir. 1983); *United States v. Hill*, 526 F.2d 1019, 1024 (10th Cir. 1975); *United States v. Mills*, 704 F.2d 1553, 1557(II) (11th Cir. 1983); *United States v. Leggett*, 81 F.3d 220, 224(II) (D.C. Cir. 1996). So too have most states. *Arthur v. State*, 711 So.2d 1031, 1046(I) (Ala. Crim. App. 1996), *aff'd sub nom. Ex parte Arthur*, 711 So.2d 1097 (Ala. 1997) (citation omitted); *Martin v. State*, 797 P.2d 1209, 1217 (Alaska Ct. App. 1990) (citation omitted); *State v. Cornell*, 878 P.2d 1352, 1363(D) (Ariz. 1994); *In re Barnett*, 73

P.3d 1106, 1110(II) (Cal. 2003); *In re Haskins*, 551 A.2d 65, 66 (Del. 1988) (citation omitted); *Ferguson v. United States*, 977 A.2d 993, 999(II)(B) (D.C. 2009) (citation omitted); *McCray v. State*, 71 So.3d 848, 865(1) (Fla. 2011); *State v. Hirano*, 802 P.2d 482, 484(I)(A) (Haw. App. 1990) (citation omitted); *Johnson v. State*, No. 38425, 2012 WL 9490829, at *2 (Idaho Ct. App. Feb. 3, 2012) (citation omitted); *People v. Redd*, 670 N.E.2d 583, 601(3)(B) (Ill. 1996); *Lock v. State*, 403 N.E.2d 1360, 1365(II) (Ind. 1980); *State v. Johnson*, 756 N.W.2d 682, 688–89(III) (Iowa 2008); *State v. Holmes*, 102 P.3d 406, 421(2)(A) (Kan. 2004); *Nunn v. Commonwealth*, 461 S.W.3d 741, 748(II)(B) (Ky. 2015);[2] *State v. Mathieu*, 68 So.3d 1015, 1019 (La. 2011); *Wilson v. State*, 408 A.2d 1058, 1065(2) (Md. App.1979); *Commonwealth v. Kenney*, 769 N.E.2d 1231, 1239 (Mass. 2002); *People v. Kevorkian*, 639 N.W.2d 291, 320–21(IV)(D)(3) (Mich. App. 2001) (citation omitted); *Henley v. State*, 729 So.2d 232, 236(I) (Miss. 1998); *State v. Williams*, 681 S.W.2d 948, 951 (Mo. Ct. App. 1984) (citation omitted); *State v. Wilson*, 564 N.W.2d 241, 252 (Neb. 1997) (citation omitted); *State v. Settle*, 455 A.2d 1031, 1034 (N.H. 1983) (citation omitted); *State v. Figueroa*, 897 A.2d 1050, 1052 (N.J. 2006) (citations omitted); *People v. Rodriguez*, 741 N.E.2d 882, 883 (N.Y. 2000); *State v. McDonnell*, 837 P.2d 941, 952(I) (Or. 1992);

[2] The Kentucky Constitution guarantees a right of hybrid representation. Ky. Const. § 11 ("In all criminal prosecutions the accused has the right to be heard by himself and counsel ….").

Commonwealth v. Pursell, 724 A.2d 293, 302(II)(A) (Pa. 1999); *State v. Franklin*, 714 S.W.2d 252, 258(II)(A) (Tenn. 1986); *Scarbrough v. State*, 777 S.W.2d 83, 92(II) (Tex. Crim. App. 1989); *In re Morales*, 151 A.3d 333, 342(III) (Vt. 2016); *State v. Young*, 771 N.W.2d 928 (Wis. Ct. App. 2009). This Court's holdings to the contrary all trace back to the blanket assertion in *Cargill* that the 1983 Constitution dispensed with the right of hybrid representation.[3] 255 Ga. at 623. As demonstrated above, however, that a defendant cannot demand hybrid representation does not mean that a trial court lacks discretion to give it. Amicus suggests, for that reason, that the Court's opinions since *Cargill* which hold that a represented defendant's pro se pleadings are nullities should be overruled.[4] The more accurate statement would be that a court has sound

[3] Even after the 1983 change, this Court carved out a special right to hybrid representation when the represented clients are themselves lawyers. *Cherry v. Coast House, Ltd.*, 257 Ga. 403, 405–06 (359 SE2d 904) (1987). But it specifically foreclosed that right to laypeople. *Seagraves*, 259 Ga. at 38.

[4] Stare decisis offers no significant hurdle to overruling those precedents: Their reasoning is unsound. *Cook*, 313 Ga. at 486(3)(b) ("We have consistently said that the soundness of the reasoning of the relevant precedent is the most important factor in the stare decisis analysis."). This Court has recently overturned older precedents of similar age and older. See *id.* at 489(3)(c) (collecting citations). As a procedural rule, it cannot have garnered any of the traditional reliance interests that stare decisis is concerned with. See *id.* at 489–90. And the correct rule is no more or less unworkable than the current one. See *id.* at 493–94(3)(d). Plus, the correct rule creates at least the opportunity for courts to be more just.

discretion to entertain or not a represented defendant's pro se pleadings.[5]

(4) A prudent exercise of the discretion to permit hybrid representation would be to honor timely pro se ministerial filings of papers that defense counsel would have no authority to refuse, like notices of appeal.

The inevitable follow-up question is "When should a trial court exercise that discretion?" The candid answer is "rarely." "[H]ybrid representation creates more problems than it can solve." *United States v. Couch*, 758 F. App'x 654, 657 (10th Cir. 2018) (citation omitted and punctuation altered). And the sound reasons to refuse a request for

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[5] One of the three cases this Court cited in its order reconsidering dismissal is explicable on this basis, *Brooks*, 265 Ga. at 548. There, this Court dismissed a pro se appeal from the same judgment as the appeal on which the appellant was represented. *Id.* at 551. Limiting an appellant to only one appeal would be a more-than-justifiable exercise of discretion. Interestingly, however, *Brooks* relies on *Reid v. State*, which held that a represented defendant had no right to take a parallel pro se appeal, 235 Ga. 378, 379–81(1) (219 SE2d 740) (1975). *Brooks* also cited *Daniel v. State*, where this Court allowed a parallel pro se appeal, 248 Ga. 271, 272(2) (282 SE2d 314) (1981). When this Court decided *Reid*, however, the 1945 Constitution reigned. And when it decided *Daniel*, the Constitution of 1976 was in effect. So, consistent with *Bruney*, the appellants could have claimed a right to hybrid representation. Neither *Reid* nor *Daniel* mentions the hybrid-representation clause, however. And "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Albany Fed. Sav. & Loan Ass'n v. Henderson*, 198 Ga. 116, 134 (31 SE2d 20) (1944) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (45 SCt 148, 69 LEd 411) (1925)).

hybrid representation are myriad: "The potential for undue delay and jury confusion is always present when more than one attorney tries a case. Further, where one of the co-counsel is the accused, conflicts and disagreements as to trial strategy are almost inevitable." *Mosely*, 810 F.2d at 98. And it can become a vehicle for a represented defendant to make an unsworn and un-cross-examined statement to the jury in the guise of a closing argument. *United States v. Robinson*, 783 F.2d 64, 66(II)(B) (7th Cir. 1986). In addition, a trial court dealing with even a partially pro se defendant "must not only safeguard the orderly processes of trial against the incursions of a neophyte, but must take on an added responsibility for protecting the defendant from the consequences of his own folly." *Nivica*, 887 F.2d at 1122.

But there is one circumstance in particular when the discretion would be most prudent: when the defendant timely files a ministerial pleading that counsel would have no discretion to refuse, e.g., a notice of appeal. Counsel has no discretion to refuse to file a notice of appeal for a defendant who timely requests one, even when an appeal would be frivolous. *Garza v. Idaho*, 586 U.S. ____ (139 SCt 738, 745–46(II)(B)(2)–(C), 203 LEd2d 77) (2019); *Roe v. Flores-Ortega*, 528 U.S. 470, 478(II)(A) (120 SCt 1029, 145 LEd2d 985) (2000); see *Rodriquez v. United States*, 395 U.S. 327, 331–32(II) (89 SCt 1715, 23 LEd2d 340) (1969). Nor, for that matter, can counsel refuse to file a motion for a new trial or a motion to withdraw a guilty plea, if directed. See *Dos Santos v. State*, 307

Ga. 151, 156–57(5) (834 SE2d 733) (2019). Yet, for whatever reason, such ministerial papers are either untimely filed or not filed at all. And since this Court's March decision in *Cook*, defendants whose counsel have been derelict have no recourse other than an application for a writ of habeas corpus, which they have no right to appointed counsel on, *Gibson v. Turpin*, 270 Ga. 855, 856–57(1) (513 SE2d 186) (1999).

At least some of those defendants will have tried to be diligent on their own behalf, even if their lawyers have not. See, e.g., *White*, 302 Ga. at 319–20 (noting that the defendant's motion to withdraw his guilty plea would have been timely but for his having been represented by counsel when he filed it). But under this Court's precedents, those filings are without effect if the trial court has not released counsel. See *Dos Santos* at 157–58. Still, a pro se notice of appeal (or a motion for a new trial or to withdraw a plea) from a represented defendant is at least prima facie evidence both that the defendant intends to exercise that right and that counsel has dropped the ball, even if innocently. And the right to appeal is the defendant's to waive, besides. See *Garza*, 139 S.Ct. at 746. To insist on forfeiture because defendants cannot secure their lawyers' signatures on papers they have a right to file seems awfully shabby treatment.

CONCLUSION

The answer that amicus proposes may not do much for the uncounted class of the defendants whom *Cook* left in the lurch and without clear remedy. But it will help some who, like Johnson, were diligent custodians of their own rights, even if their lawyers were not. And a little help is better than none at all, particularly when it is legally correct.

In sum, represented defendants have no right under state or federal law to insist that courts honor their pro se pleadings. Courts, however, retain discretion to do so in appropriate cases. The precedents to the contrary are too rigid. And amicus urges this Court to so hold.

Respectfully submitted on 12 September 2022 by:

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CERTIFICATE OF SERVICE

On 12 September 2022 and consistent with this Court's Rule 6(b), I served a copy of this brief via first-class United States mail with adequate postage on

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