

**AMICUS BRIEF OF THE GEORGIA PUBLIC
DEFENDER COUNCIL**

COMES NOW Amicus Curiae Georgia Public Defender Council, by and through undersigned counsel, and files, pursuant to Rule 10 and Rule 23 of the Rules of the Georgia Supreme Court, this Amicus Brief of the Georgia Public Defender Council on behalf of Appellant Garry Johnson, and shows the Court as follows:

**STATEMENT OF THE CASE
AND STATEMENT OF THE FACTS**

A. Type of Case

Appellant Garry Johnson was tried before the Superior Court of Burke County in November of 2000, and at the conclusion of Mr. Johnson's jury trial Mr. Johnson was found guilty by the jury of one (1) count of Murder and one (1) count of Robbery. (R. 1025 - 1027.)¹ While the State sought the death penalty against Mr. Johnson, the jury declined to sentence Mr. Johnson to death. (R. 1028.) The trial court subsequently sentenced Mr. Johnson to life without the possibility of parole on the (1) count Murder and to a consecutive twenty (20) years to serve without the possibility of parole on the (1) count of Robbery. The trial court's Final Disposition and Sentence was entered by the trial court with the Clerk of the Superior Court of Burke County on November 17,

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Citations are all to the Clerk of the Court's record prepared for appeal as "R" followed by page number(s) in the Clerk's record and to the Clerk's transcripts prepared for appeal as "T", followed and page number(s) in the Clerk's transcripts.

2000. (R. 1022 - 1024.)

B. Issue Addressed

Is a pro se filing made by a defendant who is actually or presumptively represented by counsel always a nullity?

The short answer: No. Georgia Public Defender Council asserts that timely filed pro se pleading in the nature of a motion for new trial or notice of appeal made by an indigent defendant who is actually or presumptively represented by counsel should not be considered a nullity when counsel neglects to file a timely motion for new trial or notice of appeal.

C. Statement of the Facts

Subsequent to the entry of the Final Disposition and Sentence against Mr. Johnson on November 17, 2000, Mr. Johnson's appointed trial counsel, Attorney Jack E. Boone, Jr., failed to file a timely Motion for New Trial and failed to file a timely Notice of Appeal on behalf of Mr. Johnson. Instead, Mr. Johnson's appointed trial counsel, Attorney Jack E. Boone, Jr., filed a Motion to Withdraw from Representation on December 12, 2000, with the trial court granting the Motion to Withdraw from Representation on the same day. (R. 1047 - 1050.)

While Mr. Johnson's appointed counsel failed to file a timely Motion for New Trial or a timely Notice of Appeal, Mr. Johnson, himself, filed a number of pro se

pleadings including 1) a pro se Preliminary Motion to Vacate Judgment, and/or Motion for New Trial on November 14, 2000, 2) a pro se Motion for Judgment Notwithstanding the Verdict on November 17, 2000, and 3) a pro se Extraordinary Motion for New Trial on December 13, 2000. (R. 1013 - 1015, 1032 - 1034, 1051 - 1055).

PART II

JURISDICTION AND POSITION OF THE AMICUS

A. Jurisdiction

The Supreme Court of Georgia has jurisdiction over this appeal rather than the Court of Appeals since this matter involves an appeal from a Superior Court of the State of Georgia for a felony conviction for Murder for which the right of direct appeal to the Supreme Court of Georgia exists pursuant to and under Article 6, Section 6, Paragraph 3, Subparagraph 8 the Constitution of the State of Georgia.

B. Position of the Amicus

Under these unique facts, the nullity rule should not be applied as defendants in this situation have counsel in name only and have done what is reasonable to protect their post conviction rights. The Georgia Public Defender Council will provide representation post conviction to these defendants upon application for services. Counsel's neglect should not bar the consideration of timely filed pro se

pleadings which in substance are motions for new trial or notices of appeal. The Indigent Defense Act of 2003 provides the statutory mechanism to assure Mr. Johnson and all of the indigent defendants in Georgia are constitutionally guaranteed the right counsel for their first level appeal from a prior felony conviction. OCGA sec; 17-12-1 et seq. The Georgia Public Defender Council stands ready to provide representation for indigent individuals convicted in the Superior and Juvenile Courts of Georgia whose appellate rights are jeopardized by the neglectful representation of counsel in failing timely post conviction pleadings upon application for services and urges this Court not to shift this issue to the habeas petitions and permit the pro se pleadings to serve as placeholders until counsel is appointed for post conviction representation.

PART III

ARGUMENT AND CITATION OF AUTHORITY

The constitutional requirement that indigent defendants are entitled to state appointed counsel against felony criminal prosecutions is well settled. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In addition, the courts have recognized that indigent defendants are entitled to effective assistance counsel during the pendency of a felony criminal prosecution. *Strickland v. Washington*, 466 U.S. 668 (1984) (defendants have a right to effective assistance of counsel not just a right to counsel). The right to court appointed counsel for indigent defendants is constitutionally

guaranteed effective assistance of counsel through their first level appeal from a felony criminal conviction. *Halbert v. Michigan*, 545 U.S. 605 (2005). *Garza v. Idaho*, 586 U.S. _____, 139 S. Ct. 738 (2019). The Georgia Public Defender Council is statutorily required to provide counsel through the first direct appeal of a criminal conviction. OCGA sec. 17-12-23(a)(4).

In the instant case, Attorney Jack E. Boone, Jr., was appointed to represent indigent defendant Mr. Johnson in a jury trial wherein Mr. Johnson was convicted of murder and robbery... (R. 1022 - 1024, 1025 - 1027.) His sentence was entered on November 14, 2000. Counsel failed to file a timely Motion for New Trial and failed to file a timely Notice of Appeal on behalf of Mr. Johnson. Instead, prior to the expiration of the thirty days in which these pleadings would be timely if filed by counsel, Counsel filed a Motion to Withdraw from Representation on December 12, 2000, which was granted on the same day. (R. 1047 - 1050.)

While Mr. Johnson's appointed counsel failed to file a timely Motion for New Trial or a timely Notice of Appeal, Mr. Johnson filed a number of prose pleadings during the time between his conviction and the order permitting counsel to withdraw. Mr. Johnson filed 1) a pro se Preliminary Motion to Vacate Judgment, and/or Motion for New Trial on November 14, 2000, 2) a pro se Motion for Judgment Not-Withstanding the Verdict on November 17, 2000, and 3) a pro se Extraordinary

Motion for New Trial on December 13, 2000. (R. 1013 - 1015, 1032 - 1034, 1051 - 1055).

Counsel's failure to file a timely Motion for New Trial and/or a timely Notice of Appeal equates to representation by counsel in name only and, in reality, left Mr. Johnson pro se during this crucial time frame. Counsel's failure to fulfil his duties to Mr. Johnson without Mr. Johnson's pro se filings being considered by the Court, leaves Mr. Johnson with the unfair and unjust prospect of losing his constitutionally guaranteed first level appellate rights because his counsel failed him.

As to the specific question that has been posed by the Court to which this Amicus Brief has been filed, the Georgia Public Defender Council asserts that where the appointed attorney has effectively ceased to represent an indigent defendant by failing to file a timely Motion for New Trial and/or a timely Notice of Appeal and the indigent defendant has filed a timely pro se Motion for New Trial and/or has filed a timely Notice of Appeal, then the pro se pleadings of the indigent defendant should be considered by the courts to prevent the loss of the indigent defendant's constitutionally guaranteed appellate rights. It is incumbent upon the trial courts of Georgia to consider the pro se pleadings timely filed and permit the post conviction process to proceed forward and not to punish a defendant who timely protects his or her rights in the face of a counsel who fails the defendant.

CONCLUSION OF THE AMICUS

For the foregoing reasons, Amicus Curiae Georgia Public Defender Council submits that pro se filings made by an indigent defendant who is actually or presumptively represented by counsel are not always a nullity, and further submits that an indigent defendant's pro se filings should be considered valid by the courts when an appointed attorney has ceased to represent their indigent client by failing to file a timely Motion for New Trial and/or failing to file a timely Notice of Appeal.

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IN THE SUPREME COURT

STATE OF GEORGIA

GARRY JOHNSON,

Appellant,

v.

THE STATE.

:
:
: **CASE NUMBER: S22A0964**
:
: **ON APPEAL FROM THE**
: **SUPERIOR COURT OF**
: **BURKE COUNTY**
: **CRIMINAL ACTION FILE**
: **NUMBER: 98-CR-58**
:
:

CERTIFICATE OF SERVICE

The undersigned attorney certifies and states that he served the foregoing **AMICUS BRIEF OF THE GEORGIA PUBLIC DEFENDER COUNCIL ON BEHALF OF APPELLANT** upon the District Attorney and all counsel of record by placing a copy of same in the United States Mail with adequate postage affixed thereto and addressed as follows:

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