IN THE SUPREME COURT
STATE OF GEORGIA

CASE № S22A0964

GARRY DEYON JOHNSON
APPELLANT,

v.

STATE OF GEORGIA,
APPELLEE.

Brief of the Prosecuting Attorneys' Council of Georgia as *Amicus Curiae*

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Pursuant to Rule 23 and at the invitation of this Court, the Prosecuting Attorneys' Council of Georgia serves notice on all parties and the Court of their interest and intent to appear in this matter now pending before this Court as neutral *amicus curiae*.

I. Identity of *Amicus* and Statement of Interest

The Council is an agency of the State of Georgia,[1] created for the purpose of assisting the prosecuting attorneys throughout the State of Georgia in their efforts against criminal activity in the state.[2] As part of its objective of promoting the just and efficient administration of the criminal justice system, the Council provides training and legal research, as well as trial and appellate assistance, to the District Attorneys, the Solicitors-General of the State Courts and municipal court prosecuting attorneys. This assistance includes providing support and training,

[1] O.C.G.A. § 15-18-40, et seq.
[2] *State v. Cook*, 172 Ga. App. 433, 436 - 439 (1984)

particularly in the area of prosecutor ethics and the Rules of Professional Conduct with regard to conflicts of interest.

The Council also provides assistance to the appellate courts of this State as *amicus* when requested by its members and the court itself. The Council thanks the Court for the invitation to participate and hopes that this brief will be of value in ruling upon the questions presented by the Court.

II. Question Presented

As stated in the invitation to file briefs, this Court directed the parties to address this question:

> Is a pro se filing made by a defendant who is actually or presumptively represented by counsel always a nullity? Compare *White v. State*, 302 Ga. 315, 319 (806 SE2d 489) (2017) ("The trial court … correctly treated [White's] pro se filings as legal nullities, because he was [presumptively] represented by counsel when he made them."); *Cotton v. State*, 279 Ga. 358, 361 (613 SE2d 628) (2005) ("Since [Cotton] was represented by new appellate counsel at the time he filed this pro se motion,… it was unauthorized and without effect."); and *Brooks v. State*, 265 Ga. 548, 551 (458 SE2d 349) (1995) (dismissing Brooks's pro se notice of appeal when counsel also filed a notice of appeal of the same conviction), with *Hance v. Kemp*, 258 Ga. 649, 650 (373 SE2d 184) (1988) ("[A]lthough a defendant may not insist on acting as co- counsel, the trial court may, as here, allow him to do so.").

Amicus contends that the answer to this question is **YES** based on Georgia law and practical considerations.

III. Argument and Citation to Authority

Both the United States and Georgia Constitutions recognize the right of a citizen to be represented by an attorney if they cannot afford one. Sixth Amendment to the United States Constitution; Ga. Const. Art. I, § I, Para. XIV. As with many rights, Georgia's Constitution provides additional protections for its citizens, beyond those contained in the United States Constitution and Bill of Rights. Georgia has done that through Ga. Const. Art. I, § I, Para. XII which guarantees our citizens the right to access the courts and represent themselves. As noted in *Cargill v. State*, 255 Ga. 616, 622, 340 S.E.2d 891, 900 (1986), the 1976 version of Paragraph XII read "no person could be deprived of the right to defend himself, in person, by attorney, *or both*." (emphasis in original). However, with the adoption of the 1983 Constitution, Georgia altered this Paragraph. The current version reads "No person shall be deprived of the right to prosecute or defend, *either in person or by an attorney*, that person's own cause in any of the courts of this state" Ga. Const. Art. I, § I, Para. XII (emphasis added)

This Court in *Cargill* found that change significant and affirmed the trial court's denial of Cargill's request to act as co-counsel and cited to a decision of the Court of Appeals, *Jones v. State*, 171 Ga. App. 184, 185, 186 (2),319 S.E.2d 18 (1984). The Court of Appeals in *Jones* also affirmed a trial court's decision to not allow a defendant to engage in hybrid representation where they have both an attorney and act in a *pro se* capacity. "A person no longer has the right to represent

himself and also be represented by an attorney, i.e., the right to act as co-counsel." *Id.*

The Court of Appeals had previously noted - that the ability to operate as co-counsel under the previous version of Paragraph XII was subject to the trial court's discretion. *Hiatt v. State*, 144 Ga. App. 298, 300, 240 S.E.2d 894, 896 (1977). Absent a timely request and leave from the trial court, the right was not absolute and failure to allow co-counsel was not deemed reversible error. Even this Court acknowledged that allowing a defendant the ability to proceed in a hybrid manner would negatively affect the order, decorum and efficiency of the courts. "Confusion and perplexity would necessarily arise if a cause were to be conducted at the same time both by counsel and by the party himself." *Heard v. State*, 126 Ga. App. 62, 65, 189 S.E.2d 895, 897 (1972) quoting *Moyers v. State*, 61 Ga. App. 324, 328, 6 S.E.2d 438 (1939); *Loomis v. State*, 78 Ga. App. 153, 160, 51 S.E.2d 13 (1948). See also *Roberts v. State*, 14 Ga. 18, 21 (1853).

The perplexing issue is how to handle this Court's actions in *Hance v. Kemp*, 258 Ga. 649, 373 S.E.2d 184 (1988). *Hance* was a habeas petition on a sentencing hearing in a death penalty case. During his 1978 trial for murder, Hance represented himself. When his death sentence, but not convictions, were set aside by the Eleventh Circuit, Hance chose to be represented at the sentencing hearing. The trial court allowed him to serve as co-counsel. *Hance v. State*, 254 Ga. 575, 332 S.E.2d 287 (1985).

> This Court started its opinion
>
> [T]he Sixth Amendment right does not afford the defendant the hybrid right to simultaneously represent himself and be represented by counsel. [Cit.]" Cargill v. State, 255 Ga. 616, 622 (340 S.E.2d 891) (1986). As a result of changes in the Georgia Constitution, a criminal defendant in Georgia "'no longer has the right to represent himself and also be represented by an attorney, i.e., the right to act as co-counsel.' [Cit.]" Cargill, supra, 255 Ga. at 623.
>
> Nonetheless, although a defendant may not insist on acting as co-counsel, the trial court may, as here, allow him to do so.

Hance v. Kemp, 258 Ga. at 650, 373 S.E.2d at 186.

Perhaps this was an acknowledgement that Hance's trials started during a time when the Constitution permitted such practice and thus the right would continue as long as the matter was under litigation. Or as noted at the end of the decision, "9. Hance has submitted numerous pro se briefs to this court. An examination of the pro se briefs and errors enumerated therein do not reveal any errors that should be considered in the interest of justice." *Id*. at 660, 192. Hance was not listed as co-counsel on the briefs before this Court, unlike on the direct appeal. The practice was phased out as the Constitution no longer allowed it.

As this Court wrote in *Morrison v. State*, 258 Ga. 683, 686, 373 S.E.2d 506, 509 (1988), "an attorney is not merely the client's "alter ego" functioning only as the

client's "mouthpiece." ABA Standards for Criminal Justice, The Defense Function, Commentary to Standard 4-1.1 at 4-9. The lawyer is an "independent . . . professional representative," not an "ordinary agent." *Id*. Counsel has his or her own duties to investigate and provide sound legal advice based on their knowledge and understanding of the relevant laws involved in the matter. However, it is the client who has the ultimate decision about whether or not to enter a guilty plea, to testify in his or her own behalf, and other issues. The Eleventh Circuit described the relationship as the attorney "is still only an assistant to the defendant and not the master of the defense." *Mulligan v. Kemp*, 771 F.2d 1436, 1441 (11th Cir. 1985).

This Court has been clear in what the representational status of the Appellant was.

> [A]t a minimum, legal representation continues — unless interrupted by entry of an order allowing counsel to withdraw or compliance with the requirements for substitution of counsel, see USCR 4.3 (1)-(3) — through the end of the term at which a trial court enters a judgment of conviction and sentence on a guilty plea, during which time the court retains authority to change its prior orders and judgments on motion or sua sponte for the purpose of promoting justice. See Tolbert v. Toole, 296 Ga. 357, 362 (767 SE2d 24) (2014) ("A formal withdrawal of counsel cannot be accomplished until after the trial court issues an order permitting the withdrawal. Until such an order properly is made and

entered, no formal withdrawal can occur and counsel remains counsel of record." (citation and punctuation omitted)).

White v. State, 302 Ga. 315, 319, 806 S.E.2d 489, 492 (2017)

IV. **Conclusion**

Hance v. Kemp does not authorize hybrid representation. If anything, this Court repudiated the notion. The current state of the law is clear. Any filing made by a represented party is a nullity and should be dismissed.

Respectfully submitted this 12th day of September 2022.

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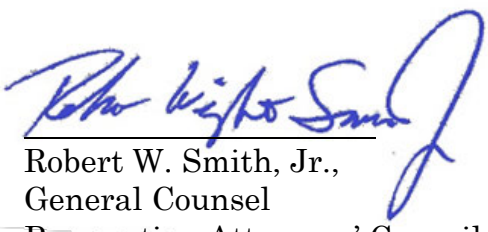

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Entry of Appearance on behalf of the Prosecuting Attorneys' Council of Georgia to be served upon counsel for the parties by placing true and accurate copies of the same in the United States Postal Service with adequate postage thereon and addressing it to:

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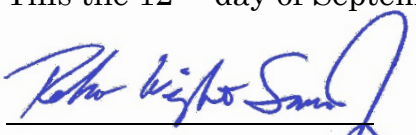

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