***JOHNSON v. STATE* – HYBRID REPRESENTATION - EPISODE NOTES**

Hello everyone and welcome back to the Good Judge-Ment Podcast. I am Wade Padgett

*And I am Tain Kell.*

Today we are going to discuss a specific recent appellate decision and the larger body of law behind that decision

*Here at the Good Judge-Ment Podcast, we are always looking for ways to share the latest appellate decisions in a way that is beneficial to our listeners. Today is just another one of those examples.*

Today, we are going to discuss the decision from the Georgia Supreme Court in *Johnson v. State*, which was decided on March 15, 2023.

*When this decision was published, Wade and I both immediately realized that 1) this decision needed to be discussed on the podcast; and 2) this was an important decision.*

The citation we have for this decision at the time of recording is only the Supreme Court case number, S22A0964. I am sure by the time this episode is published, there will be more citation information.

*You do not need to stop what you are doing to write down that citation. It is in our episode notes which can be found at goodjudgepod.com .*

With any further ado, let’s get into it.

Let’s begin by discussing the facts of the *Johnson* case.

But before we jump into the facts, we need to define a term for out listeners that is going to be discussed prominently during this episode

This sort of feels like “word of the day” on Sesame Street!

“Hybrid representation” this term refers to when a defendant acts on his/her own behalf in court while he is at the same time represented by counsel.[[1]](#endnote-1)

So, our word of the day is “hybrid representation”

Extreme facts sometimes lead to interesting appellate decisions and the facts of this case are clearly both extreme and unique

This case came out of Augusta and the oral arguments were actually conducted in Augusta during one of the occasions that the Supreme Court conducted appellate arguments outside of the Deal Building

Mr. Johnson was tried and convicted of murder and other counts for acts that occurred in 1997.

The State sought the death penalty but the jury recommended a sentence of life without parole. That sentence was imposed in November 2000.

We all know that a motion for new trial must be filed within 30 days of the judgment becoming final – and a “conviction” is final when there is a verdict (or plea accepted), a written sentence is issued and it is FILED with the clerk of court.

In this case, the sentence was entered on November 17, 2000 and the lead counsel (remember: 1)this was a death penalty case that predated the Capital Defender’s Office being created; and 2) That two lawyers had to be appointed to defend a death case) filed a motion to withdraw on December 12, 2000 which the trial court granted on the same day. That left one lawyer and about 5 days for Mr. Johnson’s motion for new trial to be filed.

 The co-counsel never withdrew or filed a motion for new trial.

However, the day after the lead counsel withdrew, the DEFENDANT HIMSELF filed a pro se “Extraordinary Motion for New Trial.”

Two days later, the defendant sent the trial court a letter in which he requested his trial transcript and said, “at this time, I have no attorney and wish to proceed with my appeal pro se.”

The Defendant wrote the clerk again in January 2021, requesting copies of documents which he received from the clerk. It was very clear that the defendant had not waived his right to appeal and was interested in doing so.

Later that year, the defendant wrote to the clerk again and was told that a specific attorney had been appointed for the appeal and that he would need to seek additional documents through his attorney.

The defendant responded to the clerk by indicating “the appointed attorney…has not responded to any of my requests at all.” That appointed appellate counsel never filed any entry of appearance in the case.

Over the following decade (yes, decade) the defendant continued to correspond with the clerk, noting that the lead attorney had then died, that the other trial attorney was no longer practicing law and that he was indigent. (Again, evidence that he was interested in pursuing an appeal)

In December 2017, the defendant’s current appellate lawyer entered an appearance. (Remember, the conviction was entered November 17, 2000 – this is over 17 years later) and that lawyer had the trial judge enter an order appointing a special master to attempt to recreate the case file, to include the files of his lawyers, the transcript and every other aspect of the file.

In December 2018, the trial judge entered an order, allowing the defendant leave to file an “out of time motion for new trial and appeal.” Hearings were conducted over the next few YEARS, and in January 2022, the trial court denied the motion for new trial.

When the appeal was first docketed, the Supreme Court dismissed the appeal, citing the existing case law[[2]](#endnote-2) which held that after a conviction, the trial counsel continued to represent the defendant, absent a formal withdrawal or substitution of counsel. Therefore, because of that presumption, the defendant’s pro se filing of a motion for new trial – made while an attorney represented him – was a nullity.

We are going to address the case law relating to what became known as “hybrid representation” during this episode. But let’s finish the factual background of the case first.

The Supreme Court then reversed their decision to dismiss the appeal and allowed the appeal to move forward. They did so while asking the parties to answer a specific question, “whether ‘a pro se filing made by a defendant who is actually or presumptively represented by counsel [is] always a nullity.’”

There were several amicus briefs filed which attempted to answer that question for the court.

So that is the factual background of the *Johnson* case. The defendant was convicted, no attorney filed a timely motion for new trial, and he filed a “timely” pro se motion for new trial while the “presumption of continued representation” remained viable.

Stated another way, this defendant was convicted of murder, ordered to serve a sentence of life without parole and, under existing law, he could not ever get his case appealed.

**Brief reminder about *Cook*:**

Before launching into the implications of the case (which are not nearly as dire and drastic as some people have initially assumed), we need to venture off into related case law that is fairly recent.

Remember the case of *Cook v. State*?[[3]](#endnote-3) We have an episode about that decision but let’s revisit it for a minute.

Some listeners are probably asking themselves why the trial judge in *Johnson* simply did not allow the defendant’s appellate lawyer to file an out-of-time appeal when it was clear that he had not been afforded a fair opportunity to appeal his conviction.

 The answer to that question is the 2022 decision in *Cook*.

The decision in *Cook* essentially eliminated the right of the trial judge to grant a “motion for out-of-time appeal.”

You may recall that the *Cook* decision held that if a defendant does not file a timely notice of appeal (or a timely motion for new trial which tolls the time to file the notice of appeal), he/she cannot simply show “cause” to the trial court and be given the permission to file an out-of-time appeal.

The *Cook* decision says that if the defendant did not file a timely notice of appeal, his/her only recourse is to seek appellate review as part of a habeas corpus proceeding.

But you will also recall that in a habeas corpus proceeding, the defendant does not have the right to counsel. He/she can only assert constitutional violation claims. And there is a four year statute of limitations.

Applying all of that law to Mr. Johnson, he would be out – now that 17 years had passed since his conviction.

 Back to the decision in *Johnson*

So the *Johnson* decision points out that this defendant was really in a no win situation

His lawyers did not file a notice of appeal or motion for new trial in a timely manner. The defendant himself filed a document that would serve as a timely motion for new trial but the “nullity rule” made him “powerless to do so.” Finally, the *Cook* decision meant that even a new appellate counsel could not “save” the situation because the defendant had never filed a habeas action.

To use a more common term, he was screwed!

Enter the decision from the Supreme Court

 They found that the defendant does not have a right to hybrid representation

That rule IS NOT CHANGED by this decision! The defendant does not have a right to hybrid representation.

Instead, the Court noted that merely because a defendant does not have ***the right*** to hybrid representation does not mean that there is a prohibition against it. Hybrid representation ***may be*** ***allowed*** by the trial judge in the appropriate case.

Let’s say that again – merely because the defendant does not have a right to represent himself while he is simultaneously being represented by counsel does not mean it is prohibited

Instead, the Court notes, it is up to the trial judge whether to allow hybrid representation, where appropriate.

In their language, the Supreme Court held that “our decisions [that] support an absolute rule against recognizing a pro se filing by a counseled defendant” were “just wrong.”

In summary, they said, “a court has the discretion to recognize a timely and otherwise procedurally proper pro se filing made by a defendant who is still formally represented by counsel.”

In essence, the Court abandoned an absolute rule that allows trial judges to prevent gross miscarriages of justice when the defendant actually filed something that looks like a timely motion for new trial or appeal.

Then the Court said something that we hope will allow all of our judge listeners who became apoplectic when this decision first came out to breathe a sigh of relief (and this is important)

“Given the logistical and legal problems hybrid representation can cause, we expect that courts will exercise this discretion only rarely, as when trial counsel has failed to act within the prescribed time period to preserve the defendant’s right to appeal and a pro se filing would preserve that right. And when a court chooses to recognize such a filing, it should make that exercise of discretion clear on the record.”

The decision is very interesting and contains some really interesting points of law relating to how Georgia’s constitution differs from the US Constitution on points relevant to this case.

And how later versions of Georgia’s constitution changed the language that is similar to the 6th Amendment to the US Constitution to effectively remove the “right” to hybrid representation

In a different setting, examining all of the remainder of the case would be really valuable – but for the purposes of a podcast episode, we want to go in a different direction – the practical realities of the *Johnson* decision.

Judges routinely receive what is commonly referred to as “jail mail.” A defendant writes lengthy letters to the Court about any number of issues (This issue was the first thing that came to mind when this decision came out)

Some judges have a pattern response which notes that the defendant is represented by counsel and that the “filing” by the represented defendant is a nullity

Nothing in the *Johnson* decisions changes that fact – UNLESS the judge reads the letter/filing and decides that the defendant is asserting something that would otherwise be time barred or which needs to be addressed – and, for whatever reason, the defendant’s lawyer failed to address the issue…

The next thing that came to mind was pro se statutory speedy trial demands.

I cannot begin to estimate the number of those that I/we have seen over the years

UNLESS THE COURT EXERCISES DISCRTION TO ALLOW THAT FILING, a pro se motion for speedy trial demand made while the defendant is simultaneously represented by counsel need not be given effect.

But, judges who use pattern responses to jail mail, pro se motions and similar filings need to rethink their response. It is no longer sufficient, in my mind, to simply cite one of the dozens of cases that have held that such a filing is a legal nullity and, instead, indicate that the court is declining to exercise its discretion to allow for hybrid representation – citing *Johnson*.

Finally, the *Johnson* decision does not allow a represented defendant to decide he/she wants to make closing arguments during trial (or take on any other role in his/her trial)

Remember judges, when that occurs, citing the old case law that forbids hybrid representation is not the correct response after *Johnson*.[[4]](#endnote-4) Instead, the judge needs to use some additional words and find that he/she is not exercising discretion to allow for hybrid representation – assuming that is what you find is appropriate

So, that’s all for this episode dealing with the *Johnson* decision and hybrid representation

*Just because you do not have the right to hybrid representation does not mean that hybrid representation is barred.*

Even after *Johnson*, there is no right to hybrid representation.

*But it can be allowed where not doing so would result in an injustice.*

The outline is full of statutory and case citations. That outline can be found at **goodjudgepod.com**.

Reach out to us on goodjudgepod@gmail.com with all of your podcast topic ideas

**I’m Wade Padgett**

*And I’m Tain Kell…Are you old enough to remember the world-wide event known as Live Aid? It occurred in 1985 and really was a world-wide phenomenon. Musicians gathered in both London and Philadelphia simultaneously – it was attended live by over 150,000 people between the two venues and was seen via satellite broadcast by more than 1.9 million people. It was a fundraiser for famine relief in Ethiopia.*

 *I tell you all that to remind you of this fun fact – most of the biggest names in music appeared and performed. That included Elvis Costello. The performance was running long and Costello was asked to ditch his planned set and only perform by himself. Therefore, Elvis Costello’s only performance on Live Aid was a single cover song. Guess which song he performed?*

 *Give up?* All you Need is Love *by the Beetles.*

*It really is amazing the things you learn on this podcast, huh?*

1. *Cargill v. State*, 255 Ga. 616, 622 (1986), overruled on other grounds, *Manzano v. State*, 282 Ga. 557, 560 (2007). Cited in the *Johnson*  decision. [↑](#endnote-ref-1)
2. *White v. State*, 302 Ga. 315, 319 (2017). [↑](#endnote-ref-2)
3. *Cook v. State*, 313 Ga. 471, 506 (2022). [↑](#endnote-ref-3)
4. *Seagraves v. State*, 259 Ga. 36, 39 (1989). [↑](#endnote-ref-4)