

**COURT OF APPEALS OF GEORGIA**  
**DOCUMENT RETURN NOTICE FOR BRIEFS OR MOTIONS**

July 7, 2015

**To:** Mr. Ernest Howard, Sr., 169 Hidden Lakes Drive, Gray, Georgia 31032

**Docket Numbers:** A15A1611      **Style:** Ernest Howard, Sr. v. The State

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IN THE COURT OF APPEALS  
STATE OF GEORGIA

ERNEST HOWARD, SR.  
Appellant,

APPEAL CASE NO.  
A15A1611

STATE OF GEORGIA,  
Appellee.

RE: APPELLANT'S BRIEF

DIRECT APPEAL FROM FEB. 3, 2014 ORDER

DENYING, SEPT. <sup>ET</sup> 23, 2013, DEC. 5, 2013,  
ETC., MOTIONS FOR OUT OF TIME APPEAL  
AND APPOINT COUNSEES FOR DIRECT APPEAL

FROM:

BIBB COUNTY SUPERIOR COURT

PRO SE' APPELLANT

ERNEST HOWARD, SR.  
169 HIDDEN LAKES DR.  
GRAY, GA. 31032

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## TABLE OF CONTENTS

	Page
1. STATEMENT OF PROCEEDINGS BELOW . . . . .	1-2
2. ENUMERATED ERRORS . . . . .	2
3. ARGUMENT AND CITED AUTHORITY . . . . .	3-4
CONCLUSION . . . . .	4
CERTIFICATE OF SERVICE . . . . .	5

## INDEX OF CASES AND AUTHORITY = PAGE

DAVIS V. FRAZIER, 285 GA. 16,673 S.E. 2d 215 (2009) . . . . .	4
McAuliffe v. Rutledge, 231 GA. 745 . . . . .	4
Stephen v. State, 291 GA. 837 (2012) . . . . .	3
Case No. A15A1612 (Appeal processed March 2015) . . . . .	1-4

NOTICE: Herein the Appellant makes numerous references to the Index of Records in Case No. A15A1612 because it appears that the trial court sent those records up with that appeal but ~~to~~ not for the instant appeal

IN THE COURT OF APPEALS  
STATE OF GEORGIA

Ernest Howard, SR,  
Appellant,

vs.

STATE OF GEORGIA,  
Appellee,

APPEAL CASE NUMBER -

A15A1611

APPELLANT'S BRIEF

DIRECT APPEAL FROM

FEBRUARY 3, 2014 ORDER

DENYING SEPT. 23, 2013, DEC.

5, 2013, ETC. MOTIONS FOR OUT

OF TIME APPEAL AND APPOINTED

COUNSEL FOR DIRECT APPEAL

1. STATEMENT OF PROCEEDINGS BELOW

Appellant was convicted on Feb. 26, 1987 in Bibb County Superior Court (see Trial Transcript of Indictment No. 27976), Appointed counsel timely filed a Motion for New Trial on March 30, 1987, (Record of Case No. A15A1612-p. 26). A hearing was held on Aug. 9, 1989, Appellant filed a Pro Se' Notice of Appeal on Sept. 19, 1989 (Record of Case No. A15A1612 pp. 43-44). Another hearing was held on Sept. 28, 1989 and during that hearing Appellant's appointed counsel REQUESTED AND WAS ALLOWED TO WITHDRAW FROM REPRESENTATION. (see Sept. 28, 1989 Hearing

Transcript pp. 75-76). At that same hearing Appellant notified the court that he wanted another counsel appointed. (id, at p. 113)

The trial court never appointed another counsel for Direct Appeal and the Appellant could not otherwise make his Direct Appeal timely because the trial court refused to timely provide him with the November 2, 1989 Order denying his Motion for New Trial (see - Case No. A15A1612 Index of Record pp. 131-37)

Thereafter, the Appellant submitted numerous Motions for Out of-Time Appeal and for Appointed Counsel for Direct Appeal, (see - Case No. A15A1612 Index of Record pp. 28, 88, 92-3, 94-5, 127-130 etc,) including on Sept. 23, 2013 and Dec. 5, 2013. The Trial court never held hearings on those Motions and did not rule on the Sept. 23, 2013 and Dec 5, 2013 Motions until Feb. 3, 2014 (see - Case No. A15A1612 Index of Record pp. 131-137, 138-139), Appellant submitted a Timely Notice of Appeal by Mail on February 26, 2014 but the trial court did not process the appeal until March 15, 2015 (see Case No. A15A1612) (see Record - Document 1) (see record pp 1-5) (FN-1)

On April 30, 2015 Appellant submitted a brief this appeal and the Appeal from a Aug. 27, 2013 order. Appellant submitted one brief because the trial court sent the Appeals up as one Appeal, on about March 15, 2015. (see Case No. A15A1612)

By order dated June 9, 2015 the Court of Appeal directs the Appellant to file this brief under case No. A15A1611 in accordance to the trial courts Records

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(FN-1) - the trial court processed this appeal in the appeal from the denial of a Aug. 27, 2013 order. Appeal covered both appeals in one Brief and showed that the trial court incorrectly stated that Appellant's Notices of Appeal were not filed until January 29, 2015 (see case No. A15A1612)

## 2. ENUMERATED ERRORS

A.) The trial court made ERROR where it failed to hold any hearing on Motions for out-of-time Appeal ... of Sept. 23, 2013, Dec. 5, 2013, etc., before issuing its Feb. 3, 2014 order which denied those motions, where Appellant has never made a Direct Appeal since his conviction.

B.) The trial court made ERRORS where it Denied Appellant's Sept. 23, 2013, Dec. 5, 2013, <sup>PK's</sup> Motions for out of Time Appeal and for Appointed Counsel for Direct Appeal by its Feb. 3, 2014 order, even though it can not be disputed, by the records, that appointed counsel requested and was allowed to withdraw and the trial court refused to appoint Appellant another counsel for appeal (AND REFUSED to timely provide Appellant with the November 2, 1989 Order denying the Motion for New Trial). The trial court was fully aware that Appellant wished to make his direct appeal and wanted appointed counsel for Direct Appeal.

This court has jurisdiction of this appeal from the superior court order.

## 3. ARGUMENT AND CITED AUTHORITY

In Stephens v. State, 291 GA. 837 (2012) the court concluded that the trial court must hold an evidentiary hearing before deciding a Motion for Out-of-time Appeal. In the instant case the records shows that no hearing were held in response ~~to~~ <sup>E.H.</sup> to Appellant's Sept. 23, 2013 and Dec. 5, 2013 Motions for out-of-time Appeal. (see Case No. A5A1612 Index of Record at pp. 131-137, 138-139). In fact, the trial

COURT NEVER held a hearing on any of the NUMEROUS Motion for out-of-time Appeals submitted by Appellant (see Case A15AK12 Index of Records)

It is beyond question that an indigent defendant has right to appointed counsel on direct Appeal (see DAVIS V. FRAZIER, 285 GA. 16, 673 S.E. 2d 215 (2009); In the instant case the trial court was aware the Appellant wished to appeal and wanted counsel for his direct Appeal (see A15AK12 (March 2015) Index of Records pp. 43-44; see Sept. 28, 1989 Hearing Transcript at pp. 75-76, 113).

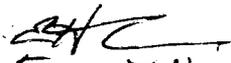
The Motion for out-of-time Appeal is a judicially created device which help ensure a criminal defendant's right to appeal has not been waived due to constitutionally defective assistance of counsel. McAuliffe v. Rutledge In the instant case appointed counsel requested and was allowed to withdraw (see Sept. 28, 1989 Hearing Transcript pp. 75-76, 113) and the court refused to appoint another counsel, thus causing loss of direct appeal, (which was also caused by the trial court's refusing to timely provide Appellant with the Nov. 2, 1989 order denying Motion for New Trial).

Therefore the trial court Errored by denying Appellant a Hearing and/or Denying Appellant's Sept. 23, 2013 and Dec. 5, 2013 Motions for out of Time Appeal....

### CONCLUSIONS

Wherefore, based on the facts and Arguments herein Appellant prays that this Appeal is GRANTED and case be Remanded for out-of-time Appeal OR at minimum a Hearing Be ordered and counsel be ordered for direct Appeal.

Respectfully submitted this 2nd day of July 2015

  
Ernest Howard, Sr.,

IN THE COURT OF APPEALS  
STATE OF GEORGIA

ERNEST HOWARD, SR.,  
Appellant,

vs.

STATE OF GEORGIA,  
Appellee.

APPEAL CASE NO. A15A1611

REQUEST TO PROCEED IN FORMA  
PAUPERIS WITH AFFIDAVIT

Come now ERNEST Howard sr., Pro se Appellant herein and Request to be allowed to proceed in forma Pauperis because he can not pay cost or give security to proceed with this matter due to his poverty, but is entitled to Redress;

I Ernest Howard Sr., swear under penalty of perjury the following is true;

I am over age 18; I am not currently employed but seeking disability benefits; for the past 12 months (and since 1986) I have had no income. I do not own any property, stock, bond, etc., I only have \$2500 cash at this time but own nothing else of value

By signing below I swear the above to be True.

Executed this \_\_\_\_\_ day of \_\_\_\_\_ EH/ERNEST HOWARD SR.

CERTIFICATE OF SERVICE

This is to certify that I forwarded the above and true copy of APPELLANT BRIEF - DIRECT Appeal from Feb, 3, 2014 ORDER Denying... MOTION FOR OUT-OF-TERM Appeal...

To: Clerk  
Georgia Court of Appeals  
334 STATE JUDICIAL Bldg  
ATLANTA, GA, 30334

and DAVID COOKE, DISTRICT ATTORNEY  
3rd Floor Grand Bldg  
661 Mulberry St  
MACON GA. 31201

By us. mail This 2nd Day of July 2015.

EH  
ERNEST HOWARD SR  
169 HIDDEN LAKES DR.  
Graf GA. 31032