STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM COLLETON COUNTY
Court of General Sessions
Thomas W. Cooper, Jr., Circuit Court Judge

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Appellate Case No. 2015-000995

THE STATE, .....RESPONDENT,

v.

ALBERT EDWARD SIDERS.....APPELLANT.

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# AMENDED INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT



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## STATEMENT OF ISSUE ON APPEAL

The trial judge properly denied Appellant's motion to relieve counsel because it was untimely, Appellant failed to prove an actual conflict of interest, and Appellant never requested to proceed pro se.

## STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

## STATEMENT OF FACTS

On April 20, 2015, the day Appellant's trial was set to commence, Appellant filed a motion to relieve his trial counsel. In his motion, Appellant claimed: (1) trial counsel failed to meet with Appellant, despite the latter's requests; (2) trial counsel met with Appellant only twice in the fourteen months prior to trial; (3) trial counsel failed to take action on Appellant's behalf during that period; (4) Appellant did not understand all the conversations he had with trial counsel; and (5) trial counsel had a conflict of interest because of a civil action Appellant filed against counsel in federal court. (Pro Se Motion, Apr. 20, 2015).

### Pretrial Hearing

A pretrial hearing was held to address Appellant's motion, during which Appellant restated in his motion and informed the court his civil action was filed in the United States District Court of Greenville. The trial judge asked Appellant why he did not file his action locally at the Federal District Court of Charleston. Appellant replied he had his "reasons" and could not explain them in open court. (Pretrial Motion Tr.p.3, line 2–p.5, line 6).

The trial judge asked trial counsel about Appellant's allegations, and trial counsel explained: (1) Appellant's real concern was that he had a defense he wanted to use, but felt he could not present it in open court; (2) Appellant wrote a twenty-page letter to the Honorable David C. Norton, United States District Court Judge in Charleston in June 2014, wherein he explained his thoughts on the case and the defense he wished to assert; (3) he had met with Appellant in July 2014, at which time they discussed the June 2014 letter; (4) as a result of that letter and discussion, counsel had two subpoenas served on witnesses requested by Appellant; (5) trial counsel presented and discussed everything in his discovery file with Appellant; (6) counsel

had not been served on a civil action as of the hearing; and (7) counsel was prepared and ready to try Appellant's case. (Pretrial Motion Tr.p.5, line 7–p.7, line 6).

Appellant asserted he was serving trial counsel in the courtroom, but the documents only included (1) a letter to a judge in Greenville;[1] (2) documents counsel sent Appellant; (3) a letter to the "Greenville County Clerk of Court regarding an indictment";[2] and (4) an order dated February 24, 2015 from the Honorable Kevin McDonald, United States District Court Judge in Greenville naming "We the People" as plaintiff and "David Matthew"[3] as one of five defendants which granted the motions of twenty-four unnamed detainees to file *in forma pauperis* and submit their own individual complaints relating to "jail conditions, lock-up status, and access to meaningful exercise or recreation." (Pretrial Motion Tr.p.7, line 7–p.8, line 4; Court's Exhibit 1; Pro Se Motion, Apr. 20, 2015).

Upon trial counsel's request, Appellant agreed to allow the trial judge to look at the documents. After reviewing them, the trial judge asked Appellant which requested actions trial counsel failed to complete. Appellant again claimed there were specifics of his case he could not discuss in open court. The trial judge asked Appellant what documents trial counsel failed to send, and Appellant stated the missing documents were three warrants he had seen in July 2014 concerning his charges in the case. After additional questions, Appellant conceded he had received copies of the warrants, but had items he needed to discuss "privately" with the trial judge. Appellant then stated, "Your Honor, what I really want to convey to you, as far as what I'm trying to say, I can't say it in open court. This is why I need to talk to you." The trial judge

[1] This letter and its contents were not included in trial court record.

[2] No such letter is included in the trial court record. It appears trial counsel was referring to a letter sent to the Honorable Patricia C. Grant, Colleton County Clerk of Court, listing Appellant's indictment numbers and requesting the clerk of court to file Appellant's motion to relieve counsel. The letter is undated and was received by the clerk's office on April 20, 2015. Pro Se Motion, Apr. 20, 2015.

[3] Trial counsel's name is David Mathews.

continued the motion hearing until later in the day to clear out non-essential court personnel from the courtroom. (Pretrial Motion Tr.p.8, line 5–p.13, line 14).

Later that day, with only the parties and essential court staff present, the trial judge continued the hearing. Trial counsel began by giving a summary of Appellant's actual issue, which he believed was Appellant's desire to present evidence he was coerced into committing the crime. Counsel explained: (1) Appellant was forced to commit the robbery by two men,[4] one of whom he heard referred to as "Dread"; (2) the men threatened to kill Appellant if he failed to cooperate; (3) they selected Appellant as their patsy because Celestra Rivers, also known as "Cornbread," informed the two men Appellant had worked as a confidential informant for police; and (4) Appellant would be killed if he testifies in open court the two men forced him to commit the robbery. Trial counsel also noted that in accord with Appellant's story, he subpoenaed both Rivers to verify Appellant's version of the robbery and Officer Edward Marcurella[5] to testify Appellant had worked as a confidential informant for the Colleton County Sheriff's Office. Given the overwhelming evidence against Appellant, including video images of him committing the robbery and his confession to police, trial counsel stated Appellant's two logical choices were to accept the State's offer to plead guilty in exchange for a recommended sentence of twenty years' incarceration, or testify to his version of the robbery. He asserted he explained to Appellant the necessity of him, Rivers, and Officer Marcurella testifying to support the allegations of coercion. Trial counsel emphasized Appellant "really really really really really" wanted to present his story, including his hesitation to testify, to the trial judge. (Tr.p.3, line 2–Tr.p.7, line 5).

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[4] Throughout most of his pretrial statements, Appellant referenced only two men. However, at one point he mentioned a third man arrived and brought the BB gun Appellant used to rob the store. (Tr.p.19, lines 1–11).

[5] Officer Marcurella, who testified during Appellant's trial, was mislabeled as "Officer Mike Orella" in this portion of the transcript. (Tr.p.4, line 24–Tr.p.5, line 1).

Appellant addressed the court, admitting trial counsel "basically . . . covered" his concerns, but added: (1) the men armed him with only a BB gun; (2) they recorded him commit the crime so, if caught, the men could make it look like they were stopping, not participating in, the robbery; (3) Appellant intentionally left his face uncovered so that police could locate him; and (4) he never pointed the BB gun at the victim or otherwise threatened her. He claimed he never had a chance to tell his version of events in his prior court appearances because he believed there were people in the courtroom who would reveal his statements to individuals who might harm him. He discussed his role as a confidential informant for the sheriff's office, including a controlled purchase from Rivers and Rhonda Moochry which resulted in them discovering his work as an informant and disseminating that information to the community. He requested the sheriff's office give him protection after Appellant's infamy in the community resulted in a string of failed controlled purchases. Officer Marcurella failed to provide him with the requested help and eventually Appellant was forced to commit the charged robbery.

After listening to Appellant's statements, the trial judge denied his motion to relieve trial counsel. He noted trial counsel understood the facts of Appellant's case, including the information in Appellant's twenty-page letter describing both his history as a confidential informant and his allegations he was forced to commit the robbery. Additionally, the trial judge noted trial counsel had subpoenaed the witnesses needed to establish Appellant's defense, but it was up to those witnesses and Appellant to provide supporting evidence. The trial judge concluded Appellant had not presented any evidence counsel was ill-prepared or unable to represent him.

Appellant made one final statement, indicating he had been told the civil action lawsuit created a conflict of interest for his trial attorney. The trial judge explained it did not

automatically create such a conflict, noting case law supported his position and a rule finding such lawsuits created an automatic conflict of interested would be routinely abused by defendants on the eve of trial.

## ARGUMENT

**The trial judge properly denied Appellant's motion to relieve counsel because it was untimely, Appellant failed to prove an actual conflict of interest, and Appellant never requested to proceed pro se.**

Appellant argues the trial judge erred in denying Appellant's motion to relieve counsel because he failed to evaluate the potential conflict of interest and failed to advise Appellant of his right to proceed pro se. The State disagrees.

A motion to relieve counsel is addressed to the discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Childers, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2007) (citing State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005); State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). The movant bears the burden to show satisfactory cause for removal. Childers, 373 S.C. at 372, 645 S.E.2d at 235 (citing Gregory, 364 S.C. at 152, 612 S.E.2d at 450; Graddick, 345 S.C. at 385, 548 S.E.2d at 211).

The Sixth Amendment's protection to a criminal defendant of the right to effective assistance of counsel includes a right to counsel "unhindered by a conflict of interest." Cuyler v. Sullivan, 446 U.S. 335, 345–50, 355 (1980) (quoting Holloway v. Arkansas, 435 U.S. 475, 483 n. 5, (1978)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." Gregory, 364 S.C. 152, 612 S.E.2d 450 (citing Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993)). However, a defendant need not demonstrate prejudice if there is an actual conflict of interest. Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984) (citing Cuyler,

446 U.S. at 348-350). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001).

In Duncan v. State, the South Carolina Supreme Court set forth the following test to determine when an actual conflict of interest occurs:

> [W]hen a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.

Duncan, 281 S.C. at 438, 315 S.E.2d at 811 (citing Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir. 1979)). In Duncan, an appeal from the denial of a post-conviction relief (PCR) action, Duncan asserted, *inter alia*, that the attorneys within the public defender office who represented him acted under a conflict of interest resulting in a denial of his sixth amendment right to counsel because that office also represented Leroy Davis, a witness who testified against him. Duncan, 281 S.C. at438, 315 S.E.2d at 811. In its opinion, the Duncan Court wrote:

> This is a case of concurrent representation. The Public Defender's Office represented both Duncan and Leroy Davis, a witness against Duncan. Steve Henry, an Assistant Public Defender, made a conscious decision not to reveal the prior inconsistent statement of Davis to Duncan or his attorney. Henry, representing Davis on an unrelated murder charge, felt he had an ethical duty not to reveal the statement. Thus, Henry states that he acted under what he perceived to be a conflict of interest.

Id. However, the Duncan Court found a conclusory statement of a perceived conflict of interest is insufficient in cases of concurrent representation at public defender's offices and there must be some evidence in the record to establish an actual conflict of interest. Duncan, 281 S.C. at 438,

315 S.E.2d at 811. The Court found Duncan failed to show an actual conflict of interest existed from this dual representation of a defendant and witness by the public defender's office. Id.

In Richardson v. State, 377 S.C. 103, 659 S.E.2d 493 (2008), the South Carolina Supreme Court noted PCR applicants often file complaints against appointed counsel with the Office of Disciplinary counsel then use the complaint as a basis for a subsequent motion to relieve counsel. The court cautioned that "the filing of a disciplinary complaint should not result in an automatic removal of appointed counsel." Id. at 107, 659 S.E.2d at 495. Instead, it held "[t]he basis for the complaint should be explored and the PCR judge should exercise discretion in determining whether the basis for the complaint constitutes sufficient cause to relieve counsel." Id.

South Carolina appellate courts have made clear one can waive one's right to counsel based on Faretta v. California, 422 U.S. 806 (1975). State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009). "The right to proceed pro se must be clearly asserted by the defendant prior to trial." State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) (emphasis added). "It is the trial court's responsibility to determine whether there was a knowing and intelligent waiver by the accused." Bryant, 383 S.C. at 414, 680 S.E.2d at 13. "To effectuate a valid waiver, the accused must (1) be advised of the right to counsel and (2) be adequately warned of the dangers of self-representation." Id. (citing State v. McLauren, 349 S.C. 488, 493 94, 563 S.E.2d 346, 348 49 (Ct. App. 2002)); see also Faretta, 422 U.S. at 835.

In the instant case, the motion to relieve counsel was made the day of trial. When asked about the grounds of his motion, Appellant claimed trial counsel: (1) met with him only twice in the fourteen month period prior to trial; (2) did not act on his behalf during the course of his representation; and (3) failed to fully explain the items discussed in their conversation. However, when questioned on those items, he admitted he had communicated with counsel

during the period and counsel had sent copies of the three warrants he originally claimed he had not received. Appellant admitted those items were not the concern, and his real issue could not addressed in open court. During the closed hearing, trial counsel: (1) explained the facts of Appellant's case; (2) mentioned the witnesses he subpoenaed to prove Appellant was coerced into committing the robbery; (3) described Appellant's work as a confidential information; (4) informed the trial judge of Appellant's fear that he would be harmed if he presented his theory of the case at trial; and (5) summarized his discussions with Appellant regarding the latter's chances of prevailing at trial. Appellant admitted trial counsel "basically . . . covered" his issues, and used his opportunity to speak only to more fully explain how he was forced into committing the robbery. Thus, Appellant's own statements indicate he did not actually desire for trial counsel to be relieved or that he had any issue with counsel's representation.

Notably, Appellant admitted he filed the civil lawsuit because he was told such action would create a conflict of interest. However, South Carolina courts are loath to relieve counsel when a defendant attempts to manufacture an artificial conflict of interest for the purpose of delaying trial. Cf. Richardson, 377 S.C. at 107, 659 S.E.2d at 495 (noting PCR applicants often file complaints against appointed counsel with the Office of Disciplinary Counsel to manufacture a conflict of interest, and courts should determine whether such claims possess merit before relieving counsel).

Regardless of Appellant's intent, there is no evidence the civil lawsuit created an actual conflict of interest or otherwise impacted trial counsel's ability to represent Appellant. The only evidence such a lawsuit was filed is the statement of Appellant; although he attempted to "serve" counsel in court, he failed to present documentation of any claims against him. The sole document (possibly) relating to the lawsuit presented was an order allowing members of "We the

People" to submit cases relating to jail conditions, lock-up status, and access to meaningful exercise or recreation. Not only were these items outside of trial counsel's control or his representation of Appellant, but no evidence was submitted showing Appellant was a party in the lawsuit. See Childers, 373 S.C. at 372, 645 S.E.2d at 235 (stating it is the moving' party's burden to show a satisfactory cause for removal of counsel).

As an alternative grounds for relief, Appellant argues that even if his stated issues were not sufficient to warrant substitution of counsel, his request "indicated a desire to proceed pro se sufficient to trigger Faretta." (Br. of Appellant, p.11). However, Appellant failed to make any such request or statement. See Reed, 332 S.C. at 41, 503 S.E.2d at 750 (stating a motion to proceed pro se must be clearly asserted by the defendant prior to trial); also State v. Winkler, 388 S.C. 574, 587, 698 S.E.2d 596, 603 (2010) (finding Appellant who did not timely waive his right to counsel and proceed pro se was not entitled to Faretta warnings). Furthermore, Appellant misconstrues the purpose of Faretta: the purpose of such warnings are not to persuade a defendant with no desire to proceed pro se to do so; quite the reverse, Faretta warnings are designed to apprise a defendant invoking his right to self-representation of the dangers of such a course of action. Id. at 41, 503 S.E.2d at 750. Accordingly, the trial judge had no reason to sua sponte instruct Appellant on Faretta.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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March 27, 2017

STATE OF SOUTH CAROLINA
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APPEAL FROM COLLETON COUNTY
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Appellate Case No. 2015-000995

THE STATE, .....RESPONDENT

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ALBERT EDWARD SIDERS.....APPELLANT.

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**PROOF OF SERVICE**

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I, Keely Carter, certify that I have served the within the Amended Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura R. Baer, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 27th day of March, 2017.

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March 27, 2017

Laura R. Baer, Esquire
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RE: State v. Albert E. Siders
Appellate Case No. 2015-000995

Dear Ms. Baer:

I am enclosing two (2) copies of the Amended Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
S.C. Bar No. 100231

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services

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