

STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM JASPER COUNTY
Michael G. Nettles, Circuit Court Judge

APR 27 2017

SC Court of Appeals

Appellate Case No. 2016-000272

THE STATE,

Respondent,

v.

NATHANIEL WRIGHT,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. **The trial court did not abuse its broad discretion in refusing to relieve Appellant's co-counsel where there was no actual conflict of interest requiring co-counsel to be removed from Appellant's case.**

- II. **Appellant's appellate challenge to the trial court's refusal to grant a continuance to allow private counsel to prepare for trial is not preserved for appellate review because Appellant failed to raise such ground at trial. However, even assuming the issue was somehow preserved for appellate review, the trial court did not abuse its broad discretion in refusing to grant Appellant's continuance motion.**

STATEMENT OF THE CASE

On October 1, 2014, law enforcement officers with the Jasper County Sheriff's Office arrested Appellant Nathaniel Wright for the fatal shooting of his brother following a lengthy high-speed chase. During its November 2014 term, the Jasper County Grand Jury indicted Appellant for murder, possession of a weapon during the commission of a violent crime, and failure to stop for a blue light. Appellant was represented by Assistant Public Defender Stephanie Smart-Gittings, Esquire, and co-counsel Jared Newman, Esquire, of the private bar. On February 8, 2016, Appellant proceeded to a jury trial in Jasper County Court of General Sessions with the Honorable Michael G. Nettles, circuit court judge, presiding. Following the impaneling and swearing of the jury, Appellant elected to plead guilty to failure to stop for a blue light; Judge Nettles deferred sentencing until the conclusion of the trial on the remaining charges. On February 10, 2016, the jury convicted Appellant of the lesser-included offense of voluntary manslaughter and possession of a weapon during the commission of a violent crime. Judge Nettles sentenced Appellant to terms of imprisonment of twenty-three years for voluntary manslaughter, five years for possession of a weapon during the commission of a violent crime, and three years for failure to stop for blue lights, with all sentences to be served concurrently. Thereafter, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

On the afternoon of October 1, 2014, various members of the Wright family were gathered at Lucille Wright's home off of Captain Bill Road in Ridgeland, South Carolina, including Lucille's sons Appellant and Maurice Wright, Maurice's wife and five children, Lucille's sister Belinda Wright, and family member Antoine Drake. (R. 112, 189, 303-04). Appellant and Drake had spent the day together in Bluffton before coming to Lucille's house to work on Appellant's car. (R. 303). Throughout the afternoon, Appellant and Maurice were arguing about money, specifically about Lucille's bills. (R. 305-07). Eventually the arguing became too much for Belinda Wright, who told her nephews to stop bickering and went home. (R. 112).

Appellant and Maurice continued to argue, even when Appellant went to a neighbor's home to borrow a tool. (R. 369). The brothers returned to Lucille's house, where the fight turned physical. (R. 369-70). As Appellant got into his vehicle, Maurice struck Appellant. (R. 307). Appellant responded by pulling out a firearm from the center console of his car and shooting Maurice. (R. 307). Drake, concerned for the safety of both Appellant and Maurice, desperately tried to break up the fight and physically got between the brothers. (R. 308-10). Appellant told Drake the fight did not involve him and to get out of the way. (R. 309-10). Appellant continued to shoot in Maurice's direction while Maurice tried to find cover and ran from Appellant. (R. 309-10). Appellant chased Maurice while continuing to shoot him until Maurice eventually fell to the ground. (R. 309-11). Appellant then stood over Maurice with the gun pointed at him and said "You're going to die today," before shooting him a final time. (R. 314-15). Appellant then got into his car, a green Honda Accord, and quickly fled the scene. (R. 117-18, 315). Maurice passed away shortly thereafter from multiple fatal gunshot wounds. (R. 281, 341-42).

Meanwhile, Deputy Leonard Brown, a member of the Jasper County Sheriff's Office who was working as a school resource officer, was driving near Captain Bill Road in his unmarked police cruiser. (R. 116-17). As he turned onto Captain Bill Road, Deputy Brown saw people ducking in a yard and heard several gunshots. (R. 117). Deputy Brown turned his vehicle around and proceeded to the scene to investigate. (R. 117-18). As he got closer, Deputy Brown saw several people in the yard screaming and saw a green Honda Accord pull out of the driveway at a high rate of speed. (R. 117-18). Deputy Brown contacted dispatch to advise them of gunshots, to request emergency medical services come to the location, and to inform them he would pursue the green Honda Accord. (R. 118-19). Deputy Brown then initiated his sirens and blue lights and followed the green Honda Accord driven by Appellant. (R. 118-20).

Deputy Brown pursued Appellant in his vehicle through downtown Ridgeland. (R. 120-21, 154). Deputy Michael Ellis joined the pursuit and took the lead position so that he could use his patrol vehicle's recording equipment to record the chase. (R. 120-21, 153-54). Appellant continued driving at a high rate of speed and merged onto Interstate 95, where he reached speeds of 110 miles per hour as Deputies Ellis and Brown pursued him. (R. 121, 154). Appellant drove erratically, trying to run patrol vehicles, other cars, and pedestrians off the road during the pursuit and driving in the wrong direction for a period. (R. 121, 154). Appellant then used the interstate median to change directions and drove back to Captain Bill Road. (R. 121, 154-55). When he got close to the scene of the shooting, Appellant was forced to stop his vehicle because law enforcement and emergency medical service vehicles blocked the roadway. (R. 121-22, 154-55).

Once Appellant came to a stop, Deputy Ellis drew his weapon and ordered Appellant out of his vehicle at gunpoint. (R. 123, 157). Once he was out of the car, Appellant kicked his car

tired and said "slow-assed car." (R. 158). Appellant kneeled then eventually laid on the ground in response to officers' commands. (R. 289). Deputy Brown and Deputy Elvin Wright placed Appellant under arrest and secured him in handcuffs. (R. 123, 158, 289). Appellant spontaneously stated, "I'm not going to let this n****r disrespect me. I'm not going to let him disrespect me." (R. 123-24). Deputies conducted a pat down search of Appellant to check for weapons and placed him in an unoccupied patrol car. (R. 123-24, 133, 158, 289). While Appellant was in the patrol car, Appellant's mother Lucille Wright and two other women approached the car to speak with him. (R. 133-34). One of the women asked Appellant a question and he responded "fuck that n****r." (R. 133-34). From the scene, a deputy transported Appellant to the hospital for an evaluation and then to the detention center. (R. 134-36).

The Jasper County Sheriff's Office secured the scene shortly after the shooting and processed the scene with the assistance from the State Law Enforcement Division (hereinafter "SLED"). Law enforcement officers took photographs of the scene, made sketches of the scene, and scoured the scene for any ballistic evidence. (R. 142-46, 188-203). Officers also performed gunshot residue kits on Appellant and the decedent, as well as collected projectiles from decedent's body recovered during his autopsy. (R. 241-42, 249-53).

SLED Special Agent Tyler Sturkie, admitted as an expert in gunshot residue analysis at trial, analyzed the gunshot residue kits collected from both Appellant and the decedent. (R. 255-64). Special Agent Sturkie found gunshot residue and round particles consistent with gunshot residue on the hands of both Appellant and the decedent. (R. 262-64).

SLED Agent Michelle Eiechenmiller, admitted as an expert in firearms and ballistics analysis at trial, analyzed the various ballistics components compiled by law enforcement, including four fired cartridge cases, a fired bullet and bullet jackets, and fragments collected

during the autopsy of decedent. (R. 270-74). Based on her analysis, Agent Eiechenmiller concluded all the components that could be analyzed were likely fired from the same nine millimeter firearm. (R. 274-77).

Appellant was arrested and indicted for murder, possession of a weapon during the commission of a violent crime, and failure to stop for a blue light. Appellant proceeded to a jury trial on February 8, 2016. At the outset of trial, appointed defense counsel, Stephanie Smart-Gittings of the Jasper County Public Defender's Office, moved for a continuance. (R. 10). In support of this motion, Smart-Gittings argued the State had not yet provided Appellant's medical records from his hospitalization following his arrest, the State had not provided the names of two different confidential witnesses (Sadie Jackson and Derek Wright) until the Wednesday prior to trial (February 3rd) and therefore she needed additional time to investigate. (R. 11-13). Smart-Gittings also argued the State had recently provided her with jail phone calls that she needed additional time to review due to a lack of compatibility between her officer's computer system and the program that recorded the phone calls. (R. 13). When questioned by the trial court, Smart-Gittings conceded the State did not intend to use the phone calls in its case in chief and had offered to allow her to listen to the calls after-hours that day to see if the tapes yielded any exculpatory information. (R. 13-14). She also conceded she had been able to review the medical records over the weekend prior to trial. (R. 14). The Court declined to rule on the motion at that time, instead instructing Smart-Gittings to listen to the recordings first. (R. 14).

In addition to her motion for a continuance, Smart-Gittings also informed the Court that Appellant wanted her to raise a conflict of interest issue. (R. 14-15). Smart-Gittings explained her supervisor, Stephen Plexico, Esquire, represented one of the State's recently disclosed confidential witnesses, Antoine Drake, who received probation in lieu of a two-year term of

incarceration on an unrelated drug case in exchange for his favorable testimony in Appellant's case, and therefore, she opined she would need to call Plexico as a witness to testify about Drake's plea deal. (R. 14-16). The prosecuting assistant solicitor responded she intended to ask Drake about his plea deal, and if Drake provided inconsistent information, the State would be willing to stipulate as to the agreement with Drake. (R. 16). Smart-Gittings responded that because she and Plexico share the same investigator, Appellant felt his case had not been fully investigated due to Plexico's representation of Drake. (R. 17).

In reply to Smart-Gittings's arguments, the trial court asked the Chief Public Defender for the Fourteenth Circuit, Gene Hood, to address the potential conflict of interest. (R. 18). Hood responded:

My understanding of this particular situation of a Chinese wall, which is basically what we're talking about here today, is that if you have an office that has two cases and one case is going to be perhaps testifying against the other case, that the attorneys can successfully build a Chinese wall to prevent any—any problems as far as one knowing things about the other one's case and things of that nature. As long as you keep them separated, you can proceed like that.

The issue in this particular case comes down to a supervisor who is going to—his client is going to testify against Ms. Smart's client and, not only that, they were in the same office. And that to me is the main issue in this case, the fact that Mr. Plexico occupies this position of a supervisor over Ms. Smart and therefore her client obviously needs to know that that relationship exists and that Mr. Plexico is the supervisor of Ms. Smart. And that he would then basically have the option in my opinion, even with the Chinese wall, of saying, well, you know, you're just going to do whatever he tells you to do because he's your supervisor.

That's the issue as far as I'm concerned and as far as the Chinese wall is concerned. We have done this on several different occasions and particularly here in Jasper and Hampton and Allendale. We have three offices and Mr. Hughes occupies space here in Jasper County. We have space again only in Hampton

County in which Ms. Smart and Mr. Plexico are housed in the same—same office with the same investigator.

Now, Mr. Hughes originally had this case and had another case also and he did the right thing in just passing it on to Ms. Smart and kept one of the other cases down here in this office. So there is no—no relationship between these two as a supervisor over the other or having some—you know, that type of a relationship that would create a problem.

So we could have gone ahead and done the cases, but this case is entirely unique. Had we know that Mr. Plexico was the one who cut this deal for this person—

(R. 18-19). The court interjected that Plexico was aware of the potential conflict, and Hood responded that while Plexico knew, the issue was that Smart-Gittings was unaware of the conflict until the previous Wednesday, which he opined was too late to avoid any conflicts arising out of the same office representing two involved parties in the same case. (R. 19-20).

Next, the trial court placed Robert Hughes, a public defender in Jasper County who had previously transferred the case to Smart-Gittings due to another conflict, under oath and inquired as to whether he had discussed the case with Smart-Gittings; Hughes responded he had not discussed the case with Smart-Gittings. (R. 20-21). The trial court then similarly placed Plexico under oath and made a similar inquiry of him. (R. 21). Plexico responded he had not had any substantive discussions about the facts of the case with Smart-Gittings, but he did provide answers to general questions on points of law that would have been relevant to any case. (R. 21). He further testified he had not discussed anything with Smart-Gittings that would either give her an advantage or disadvantage in Appellant's case. (R. 21). Hood again stressed the root of this particular conflict was that Plexico was Smart-Gitting's supervisor. (R. 21-24). The State responded that there was no conflict of interest that would impair Appellant's right to a fair trial.

(R. 25-26). Smart-Gittings then stated again that Appellant did not want her to represent him. (R. 26).

After an hour-long recess, the trial court returned to the bench and ruled there was no conflict of interest that would impede Appellant's right to a fair trial. (R. 26-29). Specifically, the trial court ruled this particular scenario was governed by Rule 1.10(e) of the Rules of Professional Conduct and noted that Smart-Gittings was never involved in the representation of Drake and had not received any confidential information pertaining to Drake's case. (R. 27-28). The court then noted that Smart-Gittings was bound by ethical obligations to take direction from her client "as whether or not to testify, whether or not to plead guilty." (R. 28). The trial court further stressed these decisions were Appellant's to make and that "[Smart-Gittings] take directions from [Appellant]. . . . [not from] from the Public Defender's Office." (R. 28).

In response, Smart-Gittings reminded the trial court that there was no timely screening in this case due to the initial confidentiality of Drake as a State's witness and that she had discussed legal issues with Plexico. (R. 29-30). The trial court again stated the crux of the issue was whether confidential information had been discussed and again confirmed from Smart-Gittings that she had not received or divulged any confidential information pertaining to this case with Plexico. (R. 30-31).

Thereafter, Jared Newman, a member of the private bar, addressed the trial court and indicated he had been contacted by Appellant's family last week about taking over Appellant's case and the retainer fee was currently being held in a trust account. (R. 31). Newman informed the court he had spoken with Smart-Gittings about the case and reviewed the case file, but he was concerned about taking over the case without time to conduct his own full investigation. (R. 32). Newman did not ask for a continuance, but asked the trial court if he could serve as co-

counsel along with Smart-Gittings in accordance with Appellant's wishes. (R. 32-33). The trial court granted Appellant's request to have Newman serve as co-counsel alongside Smart-Gittings. (R. 33).

Smart-Gittings then informed the trial court that Plexico had previously represented decedent on unresolved assault and battery in the first degree warrants that were pending at the time of his death and that Plexico had given the case to her due to an unrelated conflict. (R. 33-34). She also informed the trial court decedent had hired private counsel to represent him on these charges, but she was never formally relieved as his counsel because a hearing had not yet been held to relieve her. (R. 33-34). Smart-Gittings argued this created a conflict of interest because she intended to raise decedent's propensity for violence during Appellant's defense. (R. 34-35). The State responded it intended to object to the admission of any such evidence. (R. 34-35). The trial court indicated it would address the admissibility of the reputation for violence of decedent at an appropriate time. (R. 35).

The trial then commenced with Smart-Gittings and Newman jointly representing Appellant at trial.¹ The trial court ultimately allowed Appellant to introduce evidence of decedent's propensity for violence. (R. 218-30). Antione Drake testified during the State's case in chief. (R. 301-30). Newman handled the cross-examination of Drake on behalf of the defense team. (R. 323-39). Newman questioned Drake on his December 2015 arrest for unlawful possession of a pistol stemming from an incident at a night club, his two year prison sentence for a cocaine charge he received after he was tried in his absence, Plexico's brokering of a deal that

¹ Although Newman and Smart-Gittings formally worked jointly as co-counsel on behalf of Appellant based on the trial court's ruling, Newman handled the vast majority of Appellant's defense, including the cross-examination of all of the State's witnesses, the direct examination of both defense witnesses, the pre-trial arguments to the trial court, the motion for directed verdict at the close of the State's case and the close of all evidence, and the closing argument. Essentially, other than Smart-Gittings giving the opening statement, Appellant's defense was solely handled by Newman.

allowed Drake to receive probation in lieu of active incarceration in exchange for his cooperation in this case—including a statement and testimony on behalf of the State, Drake’s inability to read or write and its implications on his ability to give a statement to law enforcement, and decedent’s reputation for carrying weapons. (R. 323-25). Newman also questioned Drake about whether he or decedent’s (and Appellant’s) mother took crack cocaine, a cell phone, or a firearm out of decedent’s pants after he died. (R. 325-26). Newman also elicited testimony from Drake that decedent was abusive and aggressive towards Appellant, as well as “everybody” else, and that Appellant tried to remove himself from the altercation with decedent. (R. 326, 329). Newman got Drake to concede that he did not make any statements until he was incarcerated and that he was high on a cocktail of various illegal drugs at the time of the shooting. (R. 326-28). Additionally, Newman inquired as to whether Drake was aware that Plexico was Smart-Gittings’s supervisor and Drake responded that he was unaware. (R. 324).

During the presentation of his defense, Appellant called two witnesses (both of whom were handled by Newman) who both testified that decedent had a reputation in the community as a violent person. (R. 359, 362, 370). Furthermore, one of Appellant’s witnesses testified Drake had made statements to her that he was so high during the incident that he passed out and had no memory of the events. (R. 360-61).

Following closing arguments and the court’s jury charge (including an instruction on self-defense and the lesser-included offense of voluntary manslaughter), the jury convicted Appellant of the voluntary manslaughter and possession of a weapon during the commission of a violent crime.

ARGUMENT

I. The trial court did not abuse its broad discretion in refusing to relieve Appellant's co-counsel where there was no actual conflict of interest requiring co-counsel to be removed from Appellant's case.

At trial, Appellant was represented by privately retained counsel, Jared Newman, and appointed counsel from the public defender office, Stephanie Smart-Gittings, who acted as co-counsel together at Appellant's trial.² Before jury selection, Smart-Gittings informed the trial court Appellant had requested she raise a concern over a presumed conflict of interest—specifically, that Smart-Gitting's supervisor, Stephen Plexico, represented one of the State's witnesses, Antoine Drake, who would be testifying in exchange for a probationary sentence in lieu of active incarceration based on a deal Plexico negotiated. After listening to arguments from Smart-Gittings, the solicitor, and the Public Defender for the Fourteenth Judicial Circuit, as well as taking sworn testimony from Plexico and fellow public defender Robert Hughes, the trial court ruled there was no conflict of interest that would impede Appellant's right to a fair trial, as Smart-Gittings was never involved in the representation of Drake and had not received or divulged any confidential information pertaining to this case with Plexico. A short time later, Smart-Gittings informed the trial court Appellant was also concerned because Smart-Gittings represented decedent for a brief period of time on charges that were still pending at the time of his death. Smart-Gittings stated she feared a conflict of interest existed because Appellant wanted to introduce the decedent's reputation for violence. The trial court deferred a ruling as to whether Appellant could introduce evidence of decedent's reputation for violence, but ultimately ruled such evidence was admissible.

² Smart-Gittings handled the opening statement, while Newman handled all other substantive aspects of Appellant's trial.

On appeal, Appellant contends the trial court erred in refusing to relieve Stephanie Smart-Gittings, and more generally, the entire public defender office, due to conflicts of interest based on Plexico's representation of Drake and Smart-Gitting's former representation of decedent. Appellant asserts these conflicts constituted actual conflicts of interest and because timely screening did not take place, the trial court erred in refusing to relieve the public defender office. To the contrary, the trial court did not abuse its broad discretion in refusing to relieve Smart-Gittings where there was no actual conflict of interest requiring her removal from Appellant's case. Appellant's convictions should be affirmed.

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, the appeal from the denial of a post-conviction relief action, Duncan asserted, amongst other allegations, 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 the public defender office also represented Leroy Davis, a witness who testified against him. Duncan, 281 S.C. at 438, 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 more than a conclusory statement of a perceived conflict of interest is needed in cases of concurrent representation at public defender 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 office. Id.

In the present case, the trial court properly refused to relieve co-counsel Smart-Gittings, or more generally, the public defender office, from Appellant's case because there was no actual conflict of interest requiring removal. Contrary to his claims, Appellant had Smart-Gitting's complete loyalty and no conflict existed from either Plexico's representation of Drake or Smart-Gitting's former representation of decedent. Smart-Gittings had not discussed any confidential matters with Plexico or any other member of the public defender office pertaining to Appellant's case and she had not received any information that would give her an advantage or disadvantage in Appellant's case, as she assured the trial court when questioned along with her fellow public defenders. Smart-Gittings agreed with the trial court that she was bound by ethical obligations to take direction from her client that were in his best interest—not in the interest of the public defender office. Similar to Duncan, Appellant's claims are no more than a conclusory statement of perceived conflicts of interest without any evidence in the record to support such a conclusion.

Furthermore, there is nothing in the South Carolina Rules of Professional Conduct that required removal of Smart-Gittings from Appellant's case. Rule 1.7(a) of the South Carolina Rules of Professional Conduct pertains to conflicts of interest with current clients and provides:

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's

responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 407, SCACR. Rule 1.10(a) of the South Carolina Rules of Professional Conduct addresses the imputation of conflicts of interest to other lawyers in a firm and provides:

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Rule 407, SCACR. Rule 1.10(e) of the South Carolina Rules of Professional Conduct affords an exception for public defender offices and provides:

A lawyer representing a client of a public defender office, legal services association, or similar program serving indigent clients shall not be disqualified under this Rule because of the program's representation of another client in the same or a substantially related matter if: (1) the lawyer is screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client; and (2) the lawyer retains authority over the objectives of the representation pursuant to Rule 5.4(c).

Rule 407, SCACR.

Appellant asserts that because there was no timely screening to avoid a potential conflict from the dual representation of Appellant and Drake by the public defender office, an actual conflict could not be avoided and the trial court should have relieved Smart-Gittings. Appellant appears to be arguing that the lack of a timely screening in this case means an actual conflict of interest should be presumed. However, as discussed previously, there was no actual conflict in the present case—no confidential information was shared between Smart-Gittings and Plexico and Smart-Gittings's loyalty lied exclusively with Appellant.

Similarly, Rule 1.9(a) of the South Carolina Rules of Professional Conduct does not require the removal of Smart-Gittings from Appellant's case based on her brief representation of decedent on unrelated charges. Pursuant to Rule 1.9(a), "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the **same or a substantially related matter** in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Rule 407, SCACR. In the present case, Smart-Gittings had previously represented decedent on unresolved charges still pending at the time of his death and although she had not been formally relieved as counsel, decedent had retained private counsel to handle the matter. Decedent's charges were wholly unrelated to Appellant's case and there were no conflicting interests between her former, short-lived representation of decedent and her current representation of Appellant. There was no actual conflict of interest requiring Smart-Gittings's removal.

Moreover, it is important to note that Appellant was also represented by counsel from the private bar, Jared Newman, who had no relationship whatsoever to the public defender office. Newman handled the vast majority of Appellant's trial, including a vigorous cross-examination of Drake and the introduction of numerous instances of decedent's reputation for violence.

Appellant's assertions that his Sixth Amendment right to conflict-free counsel was compromised are not supported by the record. The trial court properly determined there was no actual conflict of interest and refused to relieve Smart-Gittings. Appellant's convictions should be affirmed.

II. Appellant's appellate challenge to the trial court's refusal to grant a continuance to allow private counsel to prepare for trial is not preserved for appellate review because Appellant failed to raise such ground at trial. Additionally, notwithstanding those preservation concerns, the trial court could not have abused its broad discretion because it declined to rule on Appellant's continuance motion. Moreover, Appellant has not presented sufficient grounds to establish he was entitled to a continuance to allow private counsel additional time to prepare for trial.

Before the jury was sworn, Appellant, though counsel Smart-Gittings, moved for a continuance to allow the defense additional time to review medical records and jail phone calls the State had recently provided and to investigate two witnesses the State had recently disclosed. When questioned by the trial court, Smart-Gittings acknowledged she had reviewed some of the materials over the weekend and agreed to review the remaining materials that evening. The trial court declined to rule on the continuance motion at that time. Smart-Gittings then addressed the purported conflict of interest issues and the trial court ruled no actual conflict of interest existed. Thereafter, Jared Newman, a member of the private bar, addressed the trial court and informed the court he had been contacted by Appellant's family last week about taking over Appellant's case and the retainer fee was currently being held in a trust account. Newman told the trial court he had spoken with Smart-Gittings about the case and reviewed the case file, but he was concerned about taking over the case without time to conduct his own full investigation. Crucially though, Newman did not ask for a continuance, but rather, asked the trial court if he could serve as co-counsel along with Smart-Gittings in accordance with Appellant's wishes. The trial court granted Appellant's request to have Newman serve as co-counsel alongside Smart-Gittings. Newman handled the vast majority of Appellant's case—all portions of the case other than the opening statement given by Smart-Gittings.

Now, on appeal, Appellant argues the trial court erred in refusing to grant a continuance to allow Newman to prepare for trial. Appellant contends the public defender office was

conflicted from representing Appellant as a matter of law, and therefore, the trial court's refusal to grant a continuance to allow Newman to prepare for trial constituted a reversible error of law. Initially, Appellant's appellate arguments are not preserved for this Court's review because Appellant did not move for a continuance based on these grounds before the lower court. Additionally, notwithstanding those preservation concerns, the trial court could not have abused its broad discretion because it declined to rule on Appellant's continuance motion made based upon other grounds. Moreover, Appellant has not presented sufficient grounds to establish he was entitled to a continuance to allow private counsel additional time to prepare for trial. Appellant's convictions should be affirmed.

As an initial matter, Appellant's argument the trial court erred in denying his motion for continuance to allow private counsel time to prepare for trial is not preserved for appellate review because the grounds raised in support of his continuance motion during trial were entirely different from the grounds Appellant is now raising on appeal. In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). It is well

established that asserted errors not presented to the lower court cannot be raised for the first time on appeal. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005).

In the case at bar, whether the trial court erred in denying Appellant's continuance motion to allow Newman to prepare for trial is not preserved for appellate review because the grounds raised in support of his continuance motion at trial were entirely different than the grounds he is now asserting on appeal. Critically, during trial, Appellant moved for a continuance to allow him additional time to review discovery materials recently provided by the State; the trial court declined to rule upon this motion. Later, when Newman addressed the trial court, he did not move for a continuance to afford him additional time to prepare for Appellant's trial, but rather, requested the trial court allow him to act as co-counsel alongside Smart-Gittings. Appellant **never** moved for a continuance to allow Newman time to prepare for trial. Accordingly, it is not preserved for this Court's review. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.")

Despite acknowledging that counsel never moved for a continuance on these grounds, Appellant claims the issue is preserved for this Court's review because the public defender had already moved for a continuance on other grounds and any additional grounds of argument would have been futile. However, this argument ignores one of the most fundamental requirements behind issue preservation—the appellant generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724. Here, Appellant never presented the arguments he now raises on appeal to the lower court, but instead argued for a continuance on entirely different grounds. Because he never afforded the trial court an opportunity to rule on these arguments, Appellant had failed to preserve them for this Court's

review. See Roche v. South Carolina Alcoholic Beverage Control Comm'n, 263 S.C. 451, 211 S.E.2d 243 (1975) (purpose of an appeal is to determine whether the trial court erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal). Appellant's argument that the trial court erred for failing to grant a continuance to allow private counsel to prepare for trial was not properly preserved for appellate review and cannot now appropriately be raised or addressed on appeal.

Notwithstanding Appellant's failure to raise his appellate argument that he was entitled to a continuance to allow Newman to prepare for trial, the trial court could not have abused its broad discretion by denying Appellant's continuance motion because the court never ruled on Appellant's continuance motion made on other grounds. The trial court's failure to rule upon that issue would clearly establish the issue was not properly preserved for appellate review in light of the fact an issue must be raised to **and** ruled upon before it can properly be raised and addressed on appeal. See State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. **If the issue is raised but not ruled on, it is not preserved for appeal.**" (emphasis added)); see also State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."); State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) ("Only matter that has been ruled on below can be reviewed[.]").

Moreover, Appellant has not presented sufficient grounds to establish he was entitled to a continuance to allow private counsel additional time to prepare for trial. A decision on whether to grant or deny a motion for continuance rests in the sound discretion of the trial court. State v.

Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). Appellate courts in South Carolina typically show great deference to the trial court regarding these decisions. State v. Colden, 372 S.C. 428, 435, 641 S.E.2d 912, 916 (Ct. App. 2007). The denial of a motion for continuance will not be disturbed on appeal absent a clear abuse of discretion. State v. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010). “The granting or refusal of a motion for continuance is within the discretion of the trial judge and his disposition of such a motion will not be reversed on appeal unless it is shown that there was an abuse of discretion to the prejudice of appellant. . . . [R]eversals of refusal of continuance **are about as rare as the proverbial hens’ teeth.**” State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957) (emphasis added).

Here, Appellant has failed to establish sufficient grounds that he was entitled to a continuance directly before trial. As previously discussed, the trial court properly determined there was no conflict of interest requiring the removal of the public defender office. Newman voluntarily agreed to enter into a retainer to represent Appellant very soon before his trial and acted as co-counsel alongside Smart-Gittings, who was prepared for trial. The trial court did not abuse its discretion, as the ruling is supported by the record and not controlled by an error of law. See McDonald, 343 S.C. at 325, 540 S.E.2d at 467 (“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. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996) (“The trial court’s refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion.”). Appellant’s convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment and conviction of the lower court.

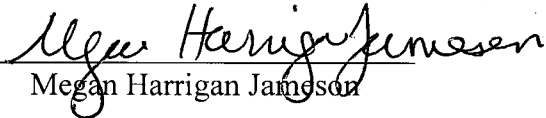
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April 27, 2017

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APR 27 2017

APPEAL FROM JASPER COUNTY
Michael G. Nettles, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2016-000272

THE STATE,

Respondent,

v.

NATHANIEL WRIGHT,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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