

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Edgefield County
The Honorable Eugene C. Griffith, Circuit Court Judge
Appellate Case No. 2017-000152

RECEIVED
FEB 12 2018
SC Court of Appeals

The State,

Respondent,

v.

Timothy Wayne Wheeler,

Appellant.

**MOTION TO HOLD APPEAL IN ABEYANCE
AND TO REQUIRE APPELLANT TO ORDER TRANSCRIPT**

Respondent State of South Carolina, hereby moves to hold the above-captioned appeal and all deadlines in abeyance pending receipt of a missing transcript, and to require counsel for Appellant to request that transcript since it is directly relevant to the issue he raises on appeal. In support of this Motion, Respondent submits the following:

1. The primary issue in this appeal is whether the circuit court erred in relieving Appellant's counsel as counsel for a co-defendant, and proceeding with Appellant's trial.
2. In the course of preparing Respondent's initial brief, the undersigned realized the trial transcript indicated the court had conducted an on-the-record conference in chambers, which apparently included the issue of counsel's potential conflict of interest in representing the two co-defendants called for trial. The trial judge expressly stated the court reporter had taken down

everything said during the chambers conference. (See Exhibit A, attached hereto). In addition, defense counsel submitted a motion to be relieved and for a continuance during the chambers conference, which was entered into the record as Court's Exhibit 1. (See Exhibit B attached hereto)

3. In light of the error alleged by Appellant, and counsel's motion to be relieved, the transcript of the chambers conference is particularly vital to this appeal. Accordingly, Appellant should be required to obtain the missing transcript.

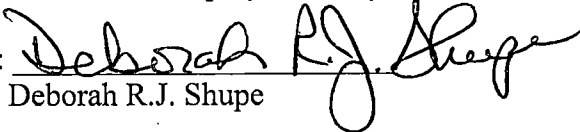
4. The undersigned conferred with advised opposing counsel about this motion.

Based on the foregoing, Respondent respectfully asks the Court to require Appellant to request the transcript of the in-chambers conference, and to hold this appeal and all time lines in abeyance pending receipt of that transcript. If this motion is denied, Respondent requests the deadline for serving and filing the Initial Brief of Respondent and Designation of Matter be set for thirty days from the date of the Court's decision.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

BY: 
Deborah R.J. Shupe

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ATTORNEYS FOR RESPONDENT

February 12, 2018

EXHIBIT A

1 **THE COURT:** All right. Gentlemen, do y'all want to
2 let me to speak to the jury briefly and send them to lunch
3 and get them back here at 1:15, something like that, before
4 1:30 and we get started or do we have pre-trial stuff we
5 need to do?

6 **MR. MAYE:** I don't have any pre-trial motions. I
7 don't know if they do.

8 **MR. THUSS:** No, Your Honor. I do want to put this
9 -- that memo into the court record, the one I submitted to
10 you --

11 **THE COURT:** Yes, sir.

12 **MR. THUSS:** -- and ask that to be --

13 **THE COURT:** We'll accept that as a Court's exhibit
14 and we can -- and so the Court -- we have a record of what
15 we did today in chambers and so I don't need to go any
16 further on that because Ms. Johnson took down everything
17 that was said in the chambers here.

18 **MR. THUSS:** Yes, Your Honor.

19 **THE COURT:** Okay. Fair enough.

20 (Court's Exhibit Number 1 was marked for
21 identification.)

22 **MR. THUSS:** Did you want to say anything to Ms. Hall?

23 **THE COURT:** I actually want her to know that you've
24 been relieved of representing her and we'll either let her
25 hire private counsel or I'll appoint her a public defender

1 off of the conflict of the interest list because the public
2 defender is representing a co-defendant. We'll figure that
3 out later today who that will be unless you want to hire
4 private counsel.

5 Now that being the case, I don't think it would be
6 appropriate for her to be seated at counsel table. We'll
7 put her in the audience right there and we'll bring the
8 jury back out, okay?

9 **MR. THUSS:** Okay. Thank you, Your Honor.

10 **THE COURT:** Do you understand?

11 **MS. HALL:** Yes, sir.

12 **MR. MAYE:** And may it please the Court, Your Honor? I
13 don't know if they're gonna move -- it may be strategy not
14 to move to suppress the search warrant, so if they don't
15 want to take that up pretrial, you know, I -- that's what
16 we did last week. I'm not trying his case for him. If
17 that's not part of their strategy, I'll stand aside, but we
18 do have a search warrant.

19 **THE COURT:** All right.

20 **MR. THUSS:** Yes, Your Honor. I was here and I was
21 able to hear the -- hear the argument in court. It was a
22 search warrant that was supported by sworn oral testimony
23 and within the four corners of the search warrant it looked
24 like there could be issues and those issues were presented
25 by Mr. Drylie, but then after hearing Investigator Smith's

EXHIBIT B

STATE OF SOUTH CAROLINA)
COUNTY OF EDGEFIELD)
STATE OF SOUTH CAROLINA)
Plaintiff,)
vs.)
TIMOTHY WAYNE WHEELER,)
Defendant.)
vs.)
HEATHER LEIGHANN HALL,)
Defendant.)

IN THE GENERAL SESSIONS COURT

MEMORANDUM IN SUPPORT OF
MOTION TO BE RELIEVE AS COUNSEL
AND FOR A CONTINUANCE

Warrant Nos. 2015A1910100-717,
-720, -723, -724, -725, -726, -727,
-731, -732, -733, -740, -742, -764

Warrant Nos. 2015A1910100-719,
-722, -728, -729, -734, -736, -737,
-741, -746, -750, -753, -757, -765

The above named Defendants submit this memorandum in support of their motions filed January 13th, 2017.

I. FACTS

1. In late February, 2016, the defendants entered into a joint representation agreement with undersigned counsel, wherein the defendants gave informed written consent to joint representation.

2. At a subsequent bond review hearing, both defendants affirmed the joint representation before the court. Although one client received bond following their second bond review, one client was denied bond and has been and is held in the Edgefield County Detention Center.

3. Through October, 2016, this matter was believed to be in preparation for adoption by federal authorities. But, in October, 2016, undersigned counsel was advised that this case

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PENICOLA 800-831-6888	COURT'S
	EXHIBIT NO. <u>1</u>
	IDENTIFICATION/EVIDENCE
	DKT.# <u>Wheeler</u>
DATE: <u>1/17/17</u>	

would not be federally adopted.

4. Unbeknownst to these defendants or counsel, a co-defendant, David Coon, on bond review, was granted an order that he be tried in January, 2017, or be granted a personal recognizance bond.

5. On December 16th, 2016, defendants' counsel was provided with discovery concerning the identity, background, and expected testimony of a confidential informant who provided the Edgefield County Sheriff's Department information leading to the issuance of a search warrant.

6. On this date, defendant's counsel asked the State about plea offers for these defendants. From communications with Coon's attorney in this time frame, I learned that Coon had been made a plea offer for himself and these co-defendants. However, this offer was not communicated to me or these defendants until after Coon rejected the offer. On this date, I asked State's counsel about the plea offer, and a harsher plea offer, contingent upon co-defendant Coon's acceptance, was communicated. I asked about the fourth co-defendant and was told that she was not testifying against these defendants. These defendants were advised and informed about this offer, and both rejected it, based on all circumstances known.

7. On or about December 20th, 2016, defendants' counsel received notice that their case was added to the January, 2017 Term of Court trial roster.

8. Coon's trial was scheduled for the January 9th term of court, and was tried. On January 12th, the fourth co-defendant appeared as a witness against Coon. The witness had given an oral statement to Edgefield County and federal law enforcement officers on or about December 23rd, 2015. On Thursday morning, the undersigned was given a copy of this witness' written statement that contradicted her prior statement, as did her testimony, which made new

and serious allegations against both Hall and Wheeler. After the close of the State's case, Mr. Coon pled guilty to all charges and gave a statement that the other co-defendants had no knowledge of the contraband in Coon's home.

9. After Coon's trial ended, I asked the Deputy Solicitor Maye for a plea offer for Hall and Wheeler, and the offer made favors one client over the other. My clients are facing identical charges and evidence that will most likely survive directed verdict and expose both clients to trafficking over 400 grams of meth.

10. Additionally, on Thursday, I learned that the fourth co-defendant, who had not previously been charged with trafficking meth, the most serious charge involved, had been charged with trafficking. This new charge only appeared on the Public Index on Friday, January 13th, although it bears a 2016 case number. I may not have been provided a rap sheet or other discovery for this witness.

11. Additionally, Coon made a motion to suppress evidence on grounds the affidavit that led to the search warrant was lacking. However, supplemental oral testimony taken during Coon's motion now shows that this defense will not be availing for Hall and Wheeler.

II. REQUEST FOR A CONTINUANCE IS WARRANTED

In the past four days, the defendants have learned of important new evidence that will be presented against them at trial. The defendants have not have an opportunity to adequately consult with counsel, investigate, and prepare a defense against this new highly material evidence. They are facing most serious charges, and should be granted time to prepare for testimony against them by the fourth co-defendant. This witness' expected testimony as a co-defendant and eye-witness is highly material to the trafficking charges and is surprising in light of her prior statement. Furthermore, defendants'

counsel has not had adequate opportunity to fully and fairly advise both clients of the change in their circumstances and obtain supplemental written conflict of interest waivers due to time constraints, the logistics of arranging a meeting with both clients. One client is detained at the Edgefield County Detention Center and the other is out on bond, but does not possess a reliable phone nor have her own transportation.

Therefore, the defendants respectfully request the court exercise its sound discretion and grant them a continuance of this trial until the next term of court, as provided by Rule 7, SCRCP.

III. A CONFLICT OF INTEREST HAS ARISEN THAT REQUIRES DEFENDANTS' COUNSEL TO MOVE TO BE RELIEVED

The South Carolina Supreme Court and Court of Appeals decisions provide guidance on the permissible boundaries to joint representation. In the most recent published decision, *Gonzales v. State* (S.C. 2017), decided on January 5th, 2017, in Opinion No. 27695, the Court wrote:

A criminal defendant's Sixth Amendment 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)). When counsel is burdened by an actual conflict of interest, he "breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Strickland v. Washington*, 466 U.S. 668, 692 (1984). Due to the seriousness of the breach and the difficulty in "measure[ing] the precise effect on the defense of representation corrupted by conflicting interests," the *Strickland* ineffective assistance of counsel standard is modified in actual conflict of interest cases in that the defendant is not required to show prejudice. *Strickland*, 466 U.S. at 692; see also *Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting *Cuyler*, 446 U.S. at 348). In other words, a defendant is not required to show prejudice in the traditional *Strickland* sense, i.e., that there is a reasonable probability the result of the proceeding would have been different. *Strickland*, 466 U.S. at 692-94 (citing *Cuyler*, 446 U.S. at 345-50). Rather, "prejudice is presumed" if the defendant demonstrates that counsel "'actively represented conflicting interests' and that 'an actual

conflict of interest adversely affected his lawyer's performance." *Strickland*, 466 U.S. at 692 (quoting *Cuyler*, 446 U.S. at 350); *see also* *Duncan*, 281 S.C. at 438, 315 S.E.2d at 811 (quoting *Cuyler*, 446 U.S. at 348)); *Lomax v. State*, 379 S.C. 93, 102, 665 S.E.2d 164, 168 (2008). An actual conflict of interest arises where:

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.

Jordan v. State, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013) (quoting *Duncan*, 281 S.C. at 438, 315 S.E.2d at 811 (quoting *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979))).

The *Gonzales* court concluded that both the PCR judge and Court of Appeals erred in finding and holding that whether an attorney recognizes an actual conflict of interest, if the conflict adversely affects the attorney's performance, the applicant has established entitlement to relief. This holding may have changed precedent in that some prior decisions considered the attorney's subjective view and *Gonzales* may now have moved this analysis toward a more objective standard. *Jordan*, cited in *Gonzales*, also discussed waiver of conflicts of interest, as some conflicts are may be waived following explanation of the precise nature of the conflict and knowing, voluntary, and intelligent consideration by the defendants, as set forth in the following short excerpt:

Here, however, there is simply no evidence that DePew informed Petitioner or the trial court of his dual representation of Petitioner and Summers, or that Petitioner knowingly, voluntarily, and intelligently waived any potential conflict of interest. *See Thomas*, 346 S.C. at 144, 551 S.E.2d at 256 ("To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently.") (citing *United States v. Swartz*, 975 F.2d 1042, 1048-49 (4th Cir.1992); *Hoffman v. Leeke*, 903 F.2d 280, 289 (4th Cir.1990)). The only evidence at the PCR hearing on this issue was the testimony of both Petitioner and DePew that Petitioner was not informed of the precise nature of the conflict of interest.

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unless defendant knows of precise form of conflict of interest that eventually results); *Hoffman*, 903 F.2d at 289 (Hoffman's waiver not intelligent "because Hoffman could not waive what he did not know").

Petitioner has shown an actual conflict of interest that adversely affected her attorney's performance. Further, her initial waiver of a potential conflict did not act as a waiver of this actual conflict. As a result, counsel was ineffective and the PCR court erred by denying her PCR application.

Thomas is good law and the undersigned has reviewed the decisions citing *Thomas*. In particular, *State v. Gregory*, 612 S.E.2d 449, 364 S.C. 150 (S.C. 2005) may provide additional guidance. In *Gregory*, Defendant's counsel moved to be relieved on the first day of trial and for a continuance. The conflict issue, distinguishable from this matter, involved defense attorney's representation of an assistant solicitor in her divorce. The trial judge denied the motion and continuance and our Supreme Court reversed. The following excerpts are helpful:

"[A] motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *State v. Graddick*, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001) (citation omitted). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants. *Fuller v. State*, 347 S.C. 630, 557 S.E.2d 664 (2001). The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction. See *Langford v. State*, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) citing *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). 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 v. Sullivan*, 446 U.S. 335, 348-350, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980).

In *Duncan v. State*, 281 S.C. at 438, 315 S.E.2d at 811 (1984), this Court set forth the following test to determine when an actual conflict of interest occurs:

... when 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

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defendant's.

citing Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir.1979).

The question in this case is whether defense counsel owed duties to a party whose interests were adverse to Gregory. Under this Court's holding in *Duncan* and the case cited therein, *Zuck v. Alabama*, we find that he did. In *Zuck v. Alabama*, the Fifth Circuit Court of Appeals held that where the law firm retained to represent the defendant in a murder trial also represented the state prosecutor in an unrelated civil trial, there was an actual conflict of interest, and the conflict rendered the trial fundamentally unfair. The court noted that "the basis of these decisions is our belief that the sixth amendment requires that **a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client.... This possibility is sufficient to constitute an actual conflict as a matter of law.**" 588 F.2d at 440 (emphasis supplied)[by the court].

Therefore, the Defendants respectfully move for a continuance of this matter until the next scheduled term of court so that counsel may have adequate opportunity and time to confer with both clients concerning new allegations, and determine whether he must withdraw from representation of one or both clients after investigation of the new evidence. If the court, in its sound discretion, is not inclined to grant the continuance, then undersigned counsel must respectfully withdraw from representation of both clients.

In conclusion, on grounds and for reasons set forth herein above, and in their respective motions, and for other reasons that may be set forth during argument of this motion, the undersigned respectfully requests the court grant the defendants relief.

Respectfully Submitted,

January 17th, 2017
Columbia, SC



Robert R. Thuss, Esq.
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(803) 640-1000

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IN THE COURT OF APPEALS

Appeal from Edgefield County
The Honorable Eugene C. Griffith, Circuit Court Judge
Appellate Case No. 2017-000152

The State,

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v.

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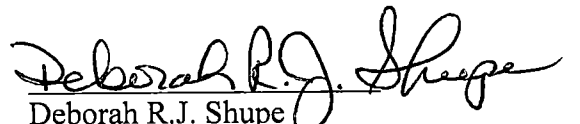
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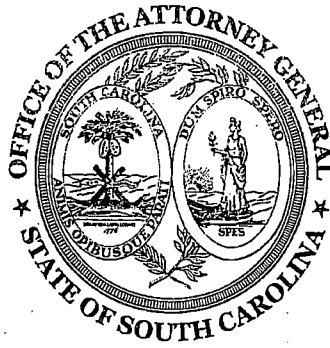
I, Deborah R.J. Shupe, certify I have served a copy of the Respondent's Motion to Hold in Abeyance and to Require Appellant to Order Transcript, by depositing a copy in the United States Mail, postage prepaid addressed to:

Taylor D. Gilliam
Assistant Appellate Defender
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 115889
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 12th day of February, 2018.


Deborah R.J. Shupe
Senior Assistant Deputy Attorney General
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803-734-3970



ALAN WILSON
ATTORNEY GENERAL

February 12, 2018

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SC Court of Appeals

HAND-DELIVERY

The Honorable Jenny A. Kitchings
Clerk of Court, SC Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: The State v. Timothy Wayne Wheeler
Appellate Case No. 2017-000152

Dear Ms. Kitchings:

Enclosed for filing are the original and seven (7) copies of Respondent's Motion to Hold in Abeyance and to Require Appellant to Order Transcript, with proof of service, in the above-referenced appeal.

Sincerely,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/
Enclosures

cc: Taylor D. Gilliam, Assistant Public Defender
Victim Advocacy Division