STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO JASPER COUNTY
Michael G. Nettles, Circuit Court Judge

Opinion No. 5579 (S.C. Ct. App. Filed August 1, 2018)

THE STATE,

Respondent,

v.

NATHANIEL WRIGHT,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Appellate Case No. 2018-001882

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STATEMENT OF ISSUES ON CERTIORARI

I. The trial court did not abuse its discretion by refusing to relieve Petitioner's appointed counsel where she had no actual conflict of interest.

II. Petitioner's challenge to the trial court's refusal to grant a continuance to allow retained counsel more time to prepare for trial is not preserved for appellate review because Petitioner did not move for a continuance on this basis at trial. Even if preserved, the trial court did not abuse its discretion by refusing to grant a continuance.

STATEMENT OF THE CASE

A Jasper County grand jury indicted Petitioner for murder, possession of a weapon during the commission of a violent crime, and failure to stop for a blue light. Assistant Public Defender Stephanie Smart-Gittings was appointed to represent Petitioner. On February 8-10, 2016, Petitioner proceeded to jury trial before the Honorable Michael G. Nettles. On the day before trial, Ms. Smart-Gittings moved for a continuance. She argued that she had not had time to adequately prepare for trial, and that a conflict of interest existed because another lawyer in her office had previously represented a witness in the case. The court denied her motion. After denying the motion, the Court noted that Petitioner had retained private counsel, Jared Newman. Mr. Newman informed the court that he had spoken with Petitioner's family about representing Petitioner, but did not believe he was adequately prepared to do so. Nevertheless, Newman agreed to represent Petitioner in the role of co-counsel. Following the impaneling and swearing of the jury, Petitioner 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. The jury convicted Petitioner of voluntary manslaughter and possession of a weapon during the commission of a violent crime. Judge Nettles sentenced Petitioner 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 a blue light, with all sentences to be served concurrently. The Court of Appeals affirmed Petitioner's convictions in a published opinion on August 1, 2018. State v. Wright, 424 S.C. 335, 818 S.E.2d 236 (Ct. App. 2018) (Opinion No. Op. 5579). Petitioner filed a petition for rehearing which was denied on September 20, 2018.

STATEMENT OF FACTS

On the afternoon of October 1, 2014, various members of the Wright family gathered at Lucille Wright's home off of Captain Bill Road in Ridgeland, South Carolina, including Lucille's sons Nathaniel (Petitioner) and Maurice Wright, Maurice's wife and five children, Lucille's sister Belinda Wright, and family member Antoine Drake. (R. 112, 189, 303-04). Petitioner and Drake had spent the day together in Bluffton before coming to Lucille's house to work on Petitioner's car. (R. 303). Throughout the afternoon, Petitioner and Maurice argued about money, specifically Lucille's bills. (R. 305-07).

Petitioner and Maurice continued to argue, even when Petitioner 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 Petitioner got into his vehicle, Maurice struck Petitioner. (R. 307). Petitioner 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 Petitioner and Maurice, desperately tried to break up the fight and physically got between the brothers. (R. 308-10). Petitioner told Drake the fight did not involve him and to get out of the way. (R. 309-10). Petitioner continued to shoot in Maurice's direction while Maurice tried to find cover and ran from Petitioner. (R. 309-10). Petitioner chased Maurice while continuing to shoot him until Maurice eventually fell to the ground. (R. 309-11). Petitioner 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). Petitioner then got into his car, a green Honda Accord, and quickly fled the scene. (R. 117-18, 315). Maurice passed away shortly thereafter from at least eight gunshot wounds, including two to the head. (R. 281, 336, 341-42). The forensic pathologist testified the shot to the back left of Maurice's head would have been fatal by itself. (R. 341).

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 Petitioner. (R. 118-20).

Petitioner led Deputy Brown and other officers on a lengthy high-speed chase and ultimately back to the scene of the shooting. (R. 120-21, 154). Petitioner was forced to stop his vehicle because law enforcement and emergency medical service vehicles blocked the roadway. (R. 121-22, 154-55). Once Petitioner came to a stop, Deputy Ellis drew his weapon and ordered Petitioner out of his vehicle at gunpoint. (R. 123, 157). Once he was out of the car, Petitioner kicked his car tired and said "slow-assed car." (R. 158). Petitioner kneeled then eventually laid on the ground in response to officers' commands. (R. 289). Deputy Brown and Deputy Elvin Wright placed Petitioner under arrest and secured him in handcuffs. (R. 123, 158, 289). Petitioner spontaneously stated, "I'm not going to let this [n****] disrespect me. I'm not going to let him disrespect me." (R. 123-24). Deputies conducted a pat down search of Petitioner to check for weapons and placed him in an unoccupied patrol car. (R. 123-24, 133, 158, 289). While Petitioner was in the patrol car, Petitioner's mother Lucille Wright and two other women approached the car to speak with him. (R. 133-34). One of the women asked Petitioner a

question and he responded "fuck that [n****]." (R. 133-34). From the scene, a deputy transported Petitioner to the hospital for an evaluation and then to the detention center. (R. 134-36).

Trial

Petitioner 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. Petitioner proceeded to a jury trial on February 8, 2016. On the day before trial, appointed defense counsel, Stephanie Smart-Gittings of the Jasper County Public Defender's Office, moved for a continuance. (R. 10). In support of her motion, Smart-Gittings argued the State had not yet provided Petitioner's medical records from his hospitalization following his arrest, the State had not provided the names of two 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). 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 informed the Court that Petitioner wanted her to raise a conflict of interest issue. (R. 14-15). Smart-Gittings explained her supervisor in the public defender's office, Stephen Plexico, previously represented one of the

State's recently disclosed confidential witnesses, Antoine Drake. (R. 15-16). Drake had been tried in his absence on an unrelated drug case and received a two-year sentence. (R. 323). The State agreed to a reduction in sentence in exchange for Drake's cooperation in Petitioner's case.[1] Drake was an eyewitness to the shooting, but was not charged with any crime or otherwise made a party to the case. Smart-Gittings argued she might need to call Plexico as a witness to testify about Drake's deal. (R. 14-16). The prosecutor responded she intended to ask Drake about any deals he made with the State, 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, Petitioner felt his case had not been fully investigated due to Plexico's representation of Drake. (R. 17).

In reply to Smart-Gittings' 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

[1] It is unclear how this sentence reduction was carried out and whether Drake's sentencing judge consented to the arrangement beforehand. Drake also had a gun possession charge dismissed. (R. 323).

> 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 situation 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). The prosecutor disputed this characterization, telling the court that it appeared Smart-Gittings had known the identity of the witness for some time, and that she had asked Plexico to give her information about him. (R. 24). Smart-Gittings admitted she had asked Plexico about the witness despite a court order that his identity was not to be revealed, but Mr. Plexico told her he didn't know the identity of the confidential informant. (R. 24-25). Plexico also told her he didn't even remember Drake's plea. (R. 25).

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 asked

whether he had discussed the case with Smart-Gittings. Hughes responded he had not. (R. 20-21). The trial court then placed Plexico under oath and made a similar inquiry of him. (R. 21). Plexico responded he had not discussed 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 Petitioner'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 Petitioner's right to a fair trial. (R. 25-26). Smart-Gittings then stated again that Petitioner 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 Petitioner's right to a fair trial. (R. 26-29). Upon examination by the court, Smart-Gittings admitted she was never involved in the representation of Drake and had not received any confidential information pertaining to Drake's case. (R. 27-28). Smart-Gittings confirmed Plexico's statement that they had not discussed the facts of Petitioner's case, but they did discuss legal issues that were relevant to the case. (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). Smart-Gittings agreed with the court that she was bound by ethical obligations to take direction from her client and not from Plexico or the Public Defender's Office. (R. 28).

Thereafter, Jared Newman, a member of the private bar, addressed the trial court and indicated he had been contacted by Petitioner's family last week about taking over Petitioner'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 Petitioner's wishes. (R. 32-33). The trial court granted Petitioner's request to have Newman serve as co-counsel alongside Smart-Gittings. (R. 33).

Smart-Gittings then informed the trial court that she had previously been appointed to represent the decedent, Maurice Wright, in an unresolved assault and battery case that was pending at the time of his death. (R. 33-34). She 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 too created a conflict of interest because she intended to raise decedent's propensity for violence during Petitioner'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 Petitioner. Newman handled the vast majority of Petitioner'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. Smart-Gittings' only role was making an opening statement.

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 allowed Drake to receive probation in exchange for his cooperation in this case, 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 Petitioner'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 Petitioner, as well as "everybody" else, and that Petitioner 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 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, Petitioner called two witnesses (both of whom were examined by Newman) who testified decedent had a reputation in the community as a violent person. (R. 359, 362, 370). One of Petitioner's witnesses testified Drake 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 Petitioner of the voluntary manslaughter and possession of a weapon during the commission of a violent crime.

ARGUMENT

I.

The Court of Appeals correctly held the trial court did not abuse its discretion by refusing to relieve Petitioner's appointed co-counsel where she had no actual conflict of interest.

No conflict of interest existed in this case. Petitioner has presented no evidence that his appointed lawyer had divided loyalty or was otherwise tempted to dampen the ardor of her representation. His arguments related to Plexico's prior representation of an eyewitness in an unrelated case are immaterial to his Sixth Amendment claim because he is required to show **his** lawyer was limited by an actual conflict of interest, and Plexico played no part in his defense. Although the Court of Appeals correctly determined no ethical violation occurred, hypothetical conflicts based on the Rules of Professional Conduct provisions related to imputed conflicts are not controlling of Petitioner's constitutional claim. The trial court ensured no conflict existed when it prompted Plexico and Smart-Gittings to confirm that none of their respective clients' confidential information was exchanged and that they did not discuss the facts of Petitioner's case. Even if Smart-Gittings had been conflicted, Petitioner still has not established a Sixth Amendment violation because she played almost no part in his defense at trial. Retained counsel performed every aspect of his defense except the opening statement, meaning Petitioner enjoyed the benefit of conflict-free representation in all material respects.

Standard of Review

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)). "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 question whether a defense attorney is operating under a conflict of interest is a question of fact. Mickens v. Taylor, 535 U.S. 162, 177 (2002) (Kennedy, J. concurring).

No Actual Conflict of Interest Existed

The Sixth Amendment guarantees a criminal defendant's 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)). To prevail on a conflict of interest claim, a petitioner must establish the existence of an actual conflict of interest. Id. An actual conflict of interest is "an active representation of competing interests." Burger v. Kemp, 483 U.S. 776, 783 (1987). In Duncan v. State, the South Carolina Supreme Court defined an actual conflict of interest:

> [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.

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 a direct appeal from the denial of a continuance premised on a defense lawyer's conflict of interest, the question is "whether defense counsel owed duties to a party whose interests were adverse to [his client's]." State v. Gregory, 364 S.C. 150, 153, 612 S.E.2d 449, 450 (2005).

In regards to witness Drake, Petitioner insists "[t]he conflict in the public defender office constituted an actual conflict of interest." Petition, 9. However, Petitioner has failed to identify an actual conflict. Instead Petitioner argues "under the **imputation** of conflicts, the public defender **office** owed a duty to witness Drake that was adverse to Petitioner." Petition, 9

(emphasis added). Petitioner's reliance on the rule against imputed conflicts reveals he is unable to make the necessary showing that **his** lawyer (not another lawyer in the public defender's office) had an actual conflict— one that would tempt her to "dampen the ardor of [her] defense in order to placate [her] other client." State v. Gregory, 364 S.C. 150, 153, 612 S.E.2d 449, 450–51 (2005). The Sixth Amendment is concerned with actual conflicts of a defendant's actual lawyer, not hypothetical or imputed conflicts arising from a lawyer's association with a law firm as described in the Rules of Professional Conduct. "[T]he Supreme Court has never applied the ethical imputed disqualification rule in Sixth Amendment analysis." Lambert v. Blodgett, 393 F.3d 943, 986 (9th Cir. 2004). Indeed, "the Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 794 (1993); see Nix v. Whiteside, 475 U.S. 157, 165 (1986) ("When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct[.]").[2]

Petitioner likely attempts to characterize the alleged conflict in the public defender's office as an actual conflict to take advantage of the rule that a defendant who demonstrates his lawyer was limited by an actual conflict of interest is not required to show prejudice therefrom. State v. Gregory, 364 S.C. 150, 154, 612 S.E.2d 449, 451 (2005). However, the presumption of prejudice discussed in Gregory refers to a harmless error analysis (typically in post-conviction actions) and only applies once a defendant shows his lawyer's conflict of interest "actually affected the adequacy of his representation." Mickens, 535 U.S. at 171; see Holloway v.

[2] The State recognizes that ethical rules may be instructive in Sixth Amendment conflict of interest cases. As explained in the Court of Appeals' opinion, no ethical rules were violated in this case.

Arkansas, 435 U.S. 475, 491 (1978) (explaining "an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation"); State v. Sterling, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008) (explaining "prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'").

Petitioner's argument that Smart-Gittings was corrupted by an actual conflict of interest amounts to an ill-conceived conspiracy theory that Plexico abused his authority to instruct Smart-Gittings to temper her representation of Petitioner to benefit Plexico's former client in an old drug case Plexico didn't even remember. (R. 25). The implication of Petitioner's argument is that Plexico engaged in this blatantly unethical conduct in order to protect his former client's suspended two year sentence at the expense of Petitioner, on trial for murder. The Chief Public Defender admitted as much when he told the court "the chief problem in this case is that Ms. Smart is basically telling her client and her client is saying, 'well you're just going to do whatever he tells you to do'... it's the appearance of impropriety... that really makes this a bad situation." (R. 23). The absurdity of the suggestion is underscored by Smart-Gittings' refusal to endorse it and her revelation that she was only raising the issue because her client wanted her to. (R. 14, line 21; R. 17, lines 13-17).

"The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." Gregory, 364 S.C. at 152, 612 S.E.2d at 450. As in Duncan, Petitioner's claims are no more than a conclusory statement of perceived conflicts of interest without support in the record. See also United States v. Trevino, 992 F.2d 64, 66 (5th Cir. 1993) ("Typically, the potential for a multiple representation conflict exists when codefendants are represented by the *same* attorney. The potential for such conflicts, however, does not necessarily

exist when, as in this case, codefendants are represented by different attorneys, albeit in the same public defender office. The duty of loyalty runs only to that attorney's client; the attorney is in no way being asked to serve two masters.") (emphasis in original).

The Court of Appeals correctly held that the trial court's examination of the various public defenders involved in this matter guaranteed no actual conflict existed. The judge held an exhaustive hearing and concluded that Petitioner would suffer no adverse effects from Plexico's former representation of Drake. He obtained assurances from Plexico, Smart-Gittings, and another public defender who previously represented Petitioner that none of them shared any confidential information with one another. (R. 20-21; R. 27-28). Smart-Gittings agreed with the trial court that she was bound by ethical obligations to take directions from her client that were in his best interest— not in the interest of Mr. Plexico's former client or the public defender's office. (R. 28). The trial judge did exactly what he should have done— he took "adequate steps to ascertain... the risk" of conflicted representation and concluded there were none. Holloway v. Arkansas, 435 U.S. 475, 484 (1978). See also United States v. Blount, 291 F.3d 201, 212 (2d Cir. 2002) (no Sixth Amendment violation where another lawyer in defense attorney's firm represented the government's witness in an unrelated matter, particularly when no confidential information was shared); United States v. Medina, 161 F.3d 867, 870 (5th Cir. 1998) (no necessity to relieve public defender when she learned one week before trial another attorney in her office represented a government witness, but no confidential information was shared). It is difficult to conceive how Petitioner could have been prejudiced by Plexico's former representation of Drake without resorting to imaginative conspiracy theories. Plexico took no part in Petitioner's case and Smart-Gittings took no part in Drake's case.

The same analysis applies to Smart-Gittings' former representation of the deceased victim, Maurice Wright. Smart-Gittings indicated she had previously represented Maurice in an unrelated assault and battery case that was pending at the time of his death, but that he had subsequently retained private counsel. (R. 33-34). There was no evidence presented that she learned any confidential information she would be bound to withhold or which would limit her representation of Petitioner, or that she even met with Maurice. See Williams v. French, 146 F.3d 203, 212 (4th Cir. 1998) (no conflict existed where defendant's lawyer briefly advised a codefendant at the outset of a case and there was no evidence that any confidential information was discussed); State v. Sterling, 377 S.C. 475, 480, 661 S.E.2d 99, 101 (2008) (finding no Sixth Amendment violation where lawyer's representation of witnesses ceased before defendant's indictment and Petitioner showed no actual conflict).

Smart-Gittings suggested a conflict may have existed if Maurice's propensity for violence became an issue in the trial. However, the Court need not even address this issue because it is not preserved for review. Although Smart-Gittings raised the issue before trial, the judge seemed to accept the solicitor's argument that the situation presented no conflict and stated he would address the issue if it was raised during trial. He did not explicitly rule on the motion and the issue was never raised again (likely because Newman had taken full control of the case). Regardless, Petitioner has not articulated any reason why Smart-Gittings would have been limited in any way by her prior representation of the deceased victim and has therefore failed to show an actual conflict existed.

Finally, on a more fundamental level, the entire conflict of interest issue is moot because Petitioner enjoyed the right to conflict-free counsel. Before trial, Petitioner retained counsel from the private bar. Jared Newman, who had no relationship to the public defender's office,

handled the vast majority of Petitioner's trial, including a vigorous cross-examination of Drake and the introduction of numerous instances of the decedent's reputation for violence. Smart-Gittings' involvement was limited to the opening statement, a task she performed admirably but which undoubtedly had no bearing on the outcome of the trial. In her opening statement, Smart-Gittings attacked Maurice Wright's character, calling him an "aggressive person." (R. 102). She also attacked the credibility of Antoine Drake, labelled him as biased, and told the jury Drake would tell them "what the State wants him to tell you so that he doesn't have to go to jail." (R. 103). Smart-Gittings obviously did not pull any punches in her brief appearance, further showing she was not limited by a divided loyalty. Newman's representation of Petitioner makes the conflict issue moot, and narrows this Court's review to the trial court's decision not to continue the case on the day before trial to give Newman more time to prepare.

Petitioner'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 on the day before trial. Even more fundamentally, Petitioner enjoyed the unconflicted and obviously competent representation of Jared Newman. The Court of Appeals correctly affirmed the trial court's decision. Certiorari should be denied.

II.

Petitioner's challenge to the trial court's refusal to grant a continuance to allow retained counsel more time to prepare for trial is not preserved for appellate review because Petitioner did not move for a continuance on this basis at trial. Even if preserved, the trial court did not abuse its discretion by refusing to grant a continuance.

Petitioner's argument that the trial court erred by refusing to grant a continuance to allow retained counsel more time to prepare is not preserved for appellate review because he did not move for a continuance on this ground at trial. Even if preserved, Petitioner has not shown an abuse of discretion in the denial of a continuance. Certiorari should be denied.

Standard of Review

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).

Discussion

Petitioner's argument that the trial court erred by denying his motion for a continuance to allow private counsel more time 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 from the grounds Petitioner 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 petitioner; (3) raised in a timely manner; and (4) raised to the trial court with specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "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).

Before trial (and before Mr. Newman appeared on behalf of petitioner), appointed counsel moved for a continuance to allow her additional time to review jail phone calls and

hospital records provided by the State the week before. The trial court asked appointed counsel if she could review the calls that evening and she agreed that she could. The court declined to rule upon this motion until after counsel completed her review of the calls. The issue was not raised again thereafter.

Later, when Newman addressed the trial court, he did not ask for a continuance. Rather, he requested the trial court allow him to act as co-counsel alongside Smart-Gittings. Petitioner never moved for a continuance on the grounds he now raises on appeal— 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) ("Petitioner is limited to the grounds raised at trial.").

Petitioner claims it would have been futile to request a continuance because the court already indicated "we're moving forward." (R. 32). But Newman was required to at least ask. "[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 306 S.E.2d 750, 759 (1997).

Even if preserved, Petitioner has not shown an abuse of discretion. The decision 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 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 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 petitioner. . . . [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).

It is clear from the record that this case was subject to prior scheduling and oversight by the court. The court discussed the case with the attorneys, including Jared Newman, on a conference call the week before trial. (R. 31, lines 22-24). The court knew of the confidential witness even earlier and gave the State a deadline by which to disclose his identity. (R. 25, lines 19-23). Apparently Smart-Gittings also knew the identity of the witness prior to its formal disclosure by the State because she pressed Plexico for more information about him. (R. 24-25). Obviously, Smart-Gittings' would have known of the potential conflict arising from her former representation of Maurice Wright much earlier. Undoubtedly the trial court knew more information than what appears in the record, but it is clear Petitioner was not taken by surprise when the case was called for trial. Knowing this background, Newman voluntarily agreed to represent Petitioner on the eve of trial and acted as co-counsel alongside Smart-Gittings. Newman performed admirably, obtaining a not guilty verdict on Murder even though the evidence showed Petitioner shot his brother in the head as he begged for his life. (R. 315). Petitioner has not offered any explanation how his defense would have changed if the continuance had been granted. This Court owes deference to the trial court's decision not to continue the case. Cetiorari should be denied.

CONCLUSION

For all the foregoing reasons, this Court should deny certiorari.

Respectfully submitted,

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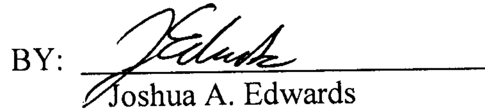
BY: 
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November 21, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO JASPER COUNTY
Michael G. Nettles, Circuit Court Judge

RECEIVED
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S.C. SUPREME COURT

Appellate Case No. 2018-001882

THE STATE, Respondent,

v.

NATHANIEL WRIGHT, Petitioner.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Return to Petition for Writ of Certiorari by delivering two copies of the same to Kathrine H. Hudgins, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Division, PO Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.
This 21st day of November, 2018.

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