THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2011-GS-32-1255
Appellate Case No. 2014-002288

The State of South Carolina,..... Respondent,

v.

Hank Eric Hawes, ... Appellant.

INITIAL BRIEF OF APPELLANT

NELSON MULLINS RILEY & SCARBOROUGH, LLP
Miles E. Coleman
A. Mattison Bogan
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
(803) 799-2000

SOUTH CAROLINA COMMISSION OF INDIGENT DEFENSE
Robert M. Dudek, Chief Appellate Defender
1330 Lady Street, Suite 401
Columbia, South Carolina 29201
(803) 734-1343

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

STATEMENT OF ISSUES

1. Did the Trial Court err by permitting the State to introduce numerous graphic photographs of the decedent's body where the probative value, if any, of those photographs was outweighed by the resulting unfair prejudice, and where the State successfully, though improperly, employed those photographs in closing argument by juxtaposing them with smiling photos of the decedent to elicit an emotional response from the jury?

2. Did the Trial Court err by permitting the State, a day after it concluded its cross examination of Mr. Hawes, to recall him to the stand for a single question intended solely to elicit testimony from him that would permit the State to then call "impeachment" witnesses to testify about Mr. Hawes' prior acts that would otherwise be inadmissible?

3. Did the Trial Court err by permitting testimony regarding a prior argument between Mr. Hawes and the decedent?

4. Did the Trial Court err by refusing to recuse the Fifth Circuit Solicitor's office from prosecuting a case in which two fact witnesses were an assistant solicitor and her husband?

STATEMENT OF THE CASE

This appeal arises from the errors of law committed during the prosecution and conviction of Hank Eric Hawes. On October 5, 2011, the State of South Carolina indicted Mr. Hawes for murder. (R. __.) Prior to trial, Mr. Hawes' counsel moved to recuse the Fifth Circuit Solicitor's office from prosecuting the case in light of the fact that two material fact witnesses in the case were an assistant solicitor and her husband. (*See* Def. Motion to Recuse, R. ___.) Judge DeAndrea Benjamin held a hearing on the motion on December 19, 2012 (*see* Transcript of Pre-Trial Hearing, R ___), and, in an Order filed February 8, 2013, denied the motion (*see* Order Denying Motion to Recuse, R. ___).

The action was tried before Judge J.C. Nicholson, Jr. on October 6–16, 2014. The Fifth Circuit Solicitor's office—represented by Dolly Garfield, Luck Campbell, and Foster Matthews—prosecuted the case. Mr. Hawes was represented by public defenders Doug Strickler, E. Fielding Pringle, and Megan Eigenbrot. During the ten-day trial, the State relied on the testimony of 35 witnesses, including the decedent's neighbors and coworkers, the police officers who responded to the scene, SLED evidence analysts, and several of Mr. Hawes' acquaintances. Mr. Hawes testified in his own defense and called one expert witness to present testimony regarding bloodstain pattern analysis at the scene. After the State concluded its cross examination of Mr. Hawes, the trial court permitted the State to recall him to the stand the following day in an effort to elicit "impeachable" testimony from him that would then permit the State to call witnesses to testify about prior bad acts—testimony that would otherwise be inadmissible.

At the close of the State's case, at the close of all evidence, and after the jury returned its verdict, the trial court orally denied Mr. Hawes' motions for directed verdict.

(Tr. 1037, 1285, and 1381.) The court instructed the jury on the elements of murder, voluntary manslaughter, and self-defense. (Tr. 1360–64, R. ____.) After deliberating for several hours on October 15 and several more hours on October 16, the jury returned a verdict finding Mr. Hawes guilty of murder. (Tr. 1376:25 to 1377:20; *see also* Verdict Form, R. ___.) The trial court sentenced Mr. Hawes to life in prison. (Tr. Tr. 1388:24 to 1389:2; *see also* Sentence Sheet, R. ____.) This appeal followed.

STATEMENT OF THE FACTS

Mr. Hawes and Jennifer Wilson met in February 2011 through the online dating site E-harmony. (Tr. 1051:23 to 1052:2.) The two began dating shortly thereafter, though neither of them treated their relationship as an exclusive one. (Tr. 1051:15-21; *see also* Tr. 344:3 to 346:1; Tr. 356:21 to 360:2; Tr. 821:6 to 827:22.) In June 2011, Mr. Hawes, who had previously resided in Simpsonville, South Carolina, moved to Columbia to be nearer to Ms. Wilson. (Tr. 1051:22 to 1052:1.) Mr. Hawes moved into a home on Woodrow Street in Columbia. (Tr. 1052:13–16.) Ms. Wilson, a professor at the University of South Carolina, lived nearby at 3721 Monroe Street in the Shandon neighborhood. (Tr. 28:9–13.)

The relationship, like many romances, was passionate and, at times, turbulent, leading some to classify it as an "off and on" relationship. (Tr. 250:8–9; Tr. 493:3–5.) Indeed, Mr. Hawes and Ms. Wilson themselves recognized their relationship was sometimes "stormy." (Tr. 655:25 to 565:4; Tr. 845:13–17; *see also* Tr. 1053:6–10 ("[W]e had a lot of ups and downs. We had some good days, we had some bad days.").)

During the final week of July and the first week of August 2011, Ms. Wilson—an avid yogi—travelled to Bali, Indonesia on a two-week group yoga trip. (Tr. 254:15–23.)

Over the course of the trip, she met a fellow USC professor named MVS Chandrashekhar, colloquially known as "Chandra." (Tr. 349: 21–25.) Upon returning from Bali, Ms. Wilson and Chandra communicated frequently and met for several meals at Chandra's home, around town, and at Ms. Wilson's home.[1] (Tr. 356:21 to 360:2.) Though Chandra and Ms. Wilson were not dating (Tr. 358:4), their text message exchanges indicated mutual interest in a romantic relationship. (*See* Tr. 358:15–19;[2] Tr. 359:12–17.[3]) In addition, shortly after her return from Bali, Ms. Wilson met for dinner with a former boyfriend, Steven Harrod. (Tr. 331:22 to 333:4.) Mr. Hawes noticed that, upon her return from Bali, Ms. Wilson "became more distant" from him. (Tr. 1056:6.) Accordingly, Mr. Hawes set up and paid for a couples counseling session that Ms. Wilson, at his behest, attended with him on August 26, 2011. (Tr. 784:21–24; Tr. 1056:19–25.)

On Saturday, August 27, 2011, Ms. Wilson texted Mr. Hawes, who was not feeling well, and offered to bring him breakfast on her way to yoga. (Tr. 699:19–24; Tr. 1057:15–22.) After bringing him breakfast and attending her yoga class, Ms. Wilson again texted with Mr. Hawes to inquire how he was feeling and whether she could bring

---

[1] On one occasion on August 18, 2011, Ms. Wilson and Mr. Hawes had been "sexting" and Mr. Hawes—in a somewhat excited state—arrived at Ms. Wilson's home, only to discover to his surprise and dismay that Chandra was there. (See Tr. 665:1–23; Tr. 786:7 to 787:17.)

[2] On cross-examination, Chandra testified as follows regarding text messages he exchanged with Ms. Wilson: "Q. Do you recall after she left that night sending her a text message that says, You drive me wild? A. I said that, yeah, I did. I said that to her. Q. And her saying the feeling is mutual? A. That may have happened."

[3] On cross-examination, Chandra testified as follows regarding text messages he exchanged with Ms. Wilson: "Q. [Do you recall] telling her, Can I come by and get a hug, but I promise no funny business? A. Yes. Q. And her saying, Between you and me, there's always funny business, do you recall that?"

him anything. (Tr. 700:11–22.) She subsequently invited him to stop by her house for lunch. (Tr. 701:1–4.) He did so, and the two were sexually intimate that afternoon. (Tr. 701:7–8; Tr. 1058:2–7.) Around 5:30 p.m., the two departed for their respective evening plans. (Tr. 1058:17–20.) Mr. Hawes went to Cantina 76, a restaurant on Devine Street in Columbia, for dinner and to socialize with a friend, Mr. Aaron Wilson. (Tr. 701:9–19; Tr. 1058:23 to 1059:5.) It was Mr. Hawes' impression that Ms. Wilson was going to attend a birthday party for a coworker and then join him around 8:00 p.m. (Tr. 1059:9–17.) Over the course of the evening, the two exchanged texts in which Ms. Wilson's itinerary kept "getting later and later." (Tr. 1059:17–21.) Mr. Hawes left Cantina 76 around 10:30 p.m. and headed home. (Tr. 1059:25 to 1060:9.)

Meanwhile, while Mr. Hawes had been having dinner at Cantina 76, Ms. Wilson had joined her former boyfriend, Mr. Harrod, to attend a birthday party held at Cowboy Steakhouse downtown Columbia. (Tr. 332:12–21.) The two met at Mr. Harrod's house at 7:15 p.m. and traveled to the steakhouse, where they remained until shortly after 10:00 p.m. (Tr. 333:5–16.) While at the steakhouse, Ms. Wilson exchanged text messages with Mr. Hawes in which she lied about the nature of the party and who else was present. (*Compare* Tr. 701:13 to 702:10 *with* Tr. 341:5–7.[4]) Ms. Wilson and Mr. Harrod subsequently traveled to a friend's house to continue the birthday party until they departed around midnight. (Tr. 334:3–16.) From there, they traveled together back to Mr. Harrod's house, where they arrived around 12:20 a.m. (Tr. 334:17–23.) At his house, she

[4] Ms. Wilson texted Mr. Hawes that the party was in the Vista area of Columbia and that she was "with 12 black people," was "the only white person" in the group, and was *not* on a date. (Tr. 701:13 to 702:10). However, Mr. Harrod—a Caucasian—testified that he and other white people were with Ms. Wilson at the birthday party that evening on Main Street. (Tr. 341:5–7.)

and Mr. Harrod spent some time leaning against the car and hugging and kissing one another before Ms. Wilson departed. (Tr. 344:21–25.) Ms. Wilson next traveled to Chandra's to attend *his* birthday party, where she stayed until around 1:30 a.m.. (Tr. 351:24 to 352:17.) Upon her departure, Chandra walked Ms. Wilson to her car and also gave her a kiss. (Tr. 352:18–24.)

Over the course of the evening, Mr. Hawes and Ms. Wilson had exchanged text messages regarding when that evening she would return home. (*See* Tr. 1059:17–21.) Ms. Wilson repeatedly indicated she would soon join Mr. Hawes, but then repeatedly delayed and postponed doing so. (*See, e.g.*, Tr. 701:23 to 702:24; Tr. 703:4–12; Tr. 703:23 to 704:4; Tr. 810:5 to 811:22.) As the evening got later and Ms. Wilson continued to delay her return, Mr. Hawes began feeling "[f]rustrated, blown off, [and] jerked around." (Tr. 1059:22–24.) Their final text message exchanged was at 2:03 a.m. on August 28, 2011, and Mr. Hawes telephoned Ms. Wilson at 2:13 a.m. and 2:14 a.m. (Tr. 704:11–13; Tr. 705:23 to 706:15.)

By that time, Mr. Hawes "was feeling upset" and "kind of blown off" by Ms. Wilson, and he "really realized that the relationship wasn't going anywhere and [he] just needed to end it." (Tr. 1061:9–12.) Accordingly, Mr. Hawes "decided to go ahead and go over there and just go ahead and tell her that . . . I didn't want to be in this relationship anymore." (Tr. 1061:19–22.[5]) Mr. Hawes drove to Ms. Wilson's duplex, parked in the normal spot in the back, knocked on the door, and was admitted by Ms. Wilson. (Tr. 1062:9–20.) He left his shoes on the back porch, which was in keeping with Ms. Wilson's

[5] *See also* Tr. 1049:10–13 ("Q. Why did you go? A. Basically, I saw the relationship wasn't going anywhere, so I went there just to have a clean break of it."); Tr. 1102:8–13 (same).

rule of not wearing shoes in her home. (Tr. 1063:2–14.) Upon entering the house, Mr. Hawes testified that he told Ms. Wilson that he wished to end their dating relationship. (Tr. 1066:8–12.) He testified that Ms. Wilson became angry, inquired if he'd been in communication with his former girlfriend, Dr. Stacey Newsom, and became enraged to hear that Mr. Hawes had been in touch with her. (Tr. 1066:12 to 1067:15.) Mr. Hawes extended a hand toward Ms. Wilson in an explanatory gesture, and Ms. Wilson reacted by biting down on his index finger. (Tr. 1067:17 to 1068:5; Tr. 1069:19–25.)

Mr. Hawes attempted to flee from the duplex, but the door was locked. (Tr. 1070:1–20.) Meanwhile, he testified, Ms. Wilson began screaming at him and pulling her hair. (Tr. 1070:22 to 1071:6.) The next thing he knew, Ms. Wilson had a knife and was advancing on him. (Tr. 1071:8–20.) Mr. Hawes grabbed a nearby kitchen knife in hopes of defending himself, when suddenly, "in a blink of an eye, she was on top of me." (Tr. 1071:20 to 1072:2.) In the shock and chaos of the resulting tussle, Mr. Hawes had no conscious memory of striking any particular blow. (Tr. 1073:7–16.) He testified that when he was finally able to extricate himself from her grasp, he "saw blood everywhere" and was in shock. (Tr. 1073:15–25.) He checked Ms. Wilson for a pulse and, when he found none, was overcome with an "overwhelming sense of grief" that compelled him to slash his own wrists. (Tr. 1074:2–20.) Mr. Hawes, who admits he was not at that time thinking rationally, then moved Ms. Wilson's body to the bedroom where he laid her on the bed. (Tr. 1075:10 to 1076:1.) Mr. Hawes then sat on the other side of the bed for some time, where he again cut his wrists and bled profusely. (Tr. 1082:14 to 1083:19.) At some point thereafter, Mr. Hawes—irrational from loss of blood—carried Ms. Wilson's body to the bathroom where he cleaned the blood off himself and her body. (Tr. 1089:4–

14; Tr. 1092:3–12.) He then placed the body on the living room couch on a blanket and some pillows. (Tr. 1092:13–25.) Mr. Hawes, who was still bleeding profusely, retrieved a soft-sided cooler from the kitchen to contain the blood pouring from his wrists as he sat next to the body for some time. (Tr. 1093:21 to 1094:4.) Mr. Hawes again cut his wrists in an attempt at suicide. (Tr. 1095:4–8.)

Ms. Wilson's neighbor in the duplex, Mr. Kelly Smith, had been awakened at 2:29 a.m. by the sounds of the struggle next door. (Tr. 256:5–18.) Mr. Smith called the police to report the disturbance. (Tr. 259:1.) The police arrived but observed no lights, sounds, or signs of any struggle, and thus did not enter the residence. (Tr. 283:17 to 287:25.) Over the next few hours, Mr. Hawes placed several calls to Dr. Stacey Newsom, a former girlfriend with whom he remained friends. (Tr. 1086:11 to 1087:16.) During these conversations, he was crying, upset, said he felt dizzy and weak, vomited several times, and there were long lapses of silence on the line (*Id.*; Tr. 549:5–25.) In addition, Mr. Hawes sent Dr. Newsom an email at 5:22 a.m. with the subject "Last Will," in which he left all his assets, including his dog, to Dr. Newsom. (Tr. 812:17–25.)

At 8:48 a.m., Mr. Hawes searched the internet for "criminal attorney in Columbia, South Carolina" (Tr. 708:15–25), and shortly thereafter called criminal defense attorney Jack Swerling and authorized him to call 911 to report Ms. Wilson's death. (Tr. 202:23 to 203:13; Tr. 709:4–13.) One of Ms. Wilson's neighbors—Mr. Eric Ashton—subsequently observed Mr. Hawes backing his vehicle out of Ms. Wilson's driveway and departing the scene. (Tr. 295:15 to 296:8.) Upon arriving at his own house, Mr. Hawes called EMS to request medical assistance for the injuries to his wrists. (Tr. 1101:18 to 1102:3.) EMS responded and took him to Baptist Hospital downtown Columbia where his wrists were

treated. (Tr. 565:9–10.) Meanwhile, after the police received Mr. Swerling's 911 call, officers responded to 3721 Monroe Street, where they found Ms. Wilson's body on the living room couch. (Tr. 206:25 to 207:20; Tr. 212:9 to 214:8.) Later that day, when law enforcement realized Mr. Hawes' involvement, officers traveled to the hospital, arrested him, and subsequently charged him with murder. (Tr. 555:23 to 556:23; Tr. 1102:4–7.)

STANDARD OF REVIEW

This appeal raises issues regarding the admissibility of evidence and testimony at trial and the recusal of a Solicitor's office. The admissibility of evidence "'is within the discretion of the trial court and will not be reversed absent an abuse of discretion.'" *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011). Similarly, whether a defendant has "opened the door" to otherwise inadmissible evidence is addressed to the circuit court's discretion. *State v. McCray*, 413 S.C. 76, 92–93, 773 S.E.2d 914, 923 (Ct. App. 2015). South Carolina's courts have not previously established what standard of review governs a trial court's refusal to disqualify a solicitor's office where an assistant solicitor was a witness to a crime being prosecuted by that office. In other factual settings, however, the decision to disqualify a solicitor's office is subject to the trial court's discretion. *See, e.g., State v. Bell*, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007).

ARGUMENT

I. The Trial Court erred by allowing the introduction of unnecessary and prejudicial photographic evidence used by the prosecution in closing arguments to arouse the passion and prejudice of the jury.

At trial, over defense counsel's objection, the Trial Court permitted the introduction of photographs of Ms. Wilson, including photographs of her smiling in happier times and graphic photographs of her uncovered body at the scene. These photos

were used to arouse the jury's emotion. Indeed, the State relied on both types of photographs in its closing argument, inducing jurors to cry. (*See* Tr. 1372–73.) As explained below, the admission of these photographs, none of which were necessary to substantiate material facts or conditions, were unfairly prejudicial because they suggesting to the jury an improper, emotional basis upon which to make its decision.

A. The Trial Court wrongly allowed the introduction of unnecessary, gruesome photographs and video.

During the testimony of the Crime Scene Investigator ("CSI"), the State sought to introduce nearly 100 photos of the scene and the decedent's body. Defense counsel objected to 70 of the photos, arguing their graphic nature meant the danger of unfair prejudice outweighed their probative value. (*See* Tr. 386–87 and 389–90.) Defense counsel also argued that the cases upon which the State relied—*State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014) and *State v. Gray*, 408 S.C. 601759 S.E.2d 160 (Ct. App. 2014)—were distinguishable because those cases involved autopsy photos needed to corroborate testimony and rebut opposing testimony, whereas here, the photos were *not* needed to corroborate the uncontested testimony of CSI witness regarding the wounds and the scene. (*See* Tr. 394.) The trial court excluded 10 of the photos but allowed the rest into evidence (Tr. 394–95), including:

- State's Exhibit 33 (photo of the victim's naked body lying on the living room couch with a cooler partially filled with blood on the floor);
- State's Exhibit 38 (photo of a bite mark on the victim's arm);
- State's Exhibit 41 (photo of neck and chest wounds);
- State's Exhibits 45 and 46 (photos of the wounds to the left and right sides of the victim's neck, respectively);
- State's Exhibit 54 (photo of a bruise on the victim's left leg);
- State's Exhibit 60 (close-up photo of a wound);

- State's Exhibit 62 (photo of back wounds); and
- State's Exhibit 142 (photo of stab wound to victim's left breast).

(*See* Tr. 388.) Later, over Defense counsel's objection, the State introduced a video of the crime scene depicting the victim's exposed body on the couch.[6] (*See* Tr. 604–07.) In addition, during the State's direct examination of the DNA analyst from SLED and the chief medical examiner who performed the autopsy, the State introduced even more graphic photos taken from the victim's autopsy. Defense counsel objected that (1) the resulting unfair prejudice outweighed the photos' probative value, and (2) the photos were cumulative. (*See* Tr. 891–92 and 961–63.)

The prejudicial effect of these many graphic photographs was clearly demonstrated when the State used some of them (namely Exhibits 46 and 202 (R. ___ and ___)) to conclude its closing argument to draw a contrast with a photo of the victim smiling in happier times (Exhibit 322 (R. ___)), which elicited an emotional response from jurors, causing at least one to cry. (*See* Tr. 1372–73.)

B. Photographs that invoke the jury's emotion, passion, or prejudice should be excluded, particularly where, as here, they are not needed to corroborate contested testimony or to rebut opposing testimony.

"Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) (citations omitted). A photograph is considered prejudicial if it creates "an undue tendency to

[6] The graphic and sensational nature of the video footage was demonstrated by the fact it prompted a trial attendee to lunge at Mr. Hawes in an attempted assault. (*See* Tr. 1169:4–5 (statement by Mr. Cronin that his disruptive actions on Thursday, October 9, 2014 were prompted by the fact that "Thursday was, obviously, very forensic and very graphic").)

suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991). For example, the Supreme Court has reversed and remanded for new trial in a case where the prosecution introduced graphic autopsy photographs that were not needed to corroborate the pathologist's testimony regarding the victims' undisputed wounds:

> [I]t is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial. [] Appellant's counsel offered to stipulate to any relevant information contained in the photographs, and it is clear the information was not really at issue. Furthermore, the testimony of the forensic pathologist negated any arguable evidentiary value of the photographs. The prejudice created by the photographs clearly outweighed any evidentiary value.

State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (citations omitted).

Similarly here, the photos were "not necessary to substantiate material facts." *Brazell*, 325 S.C. at 78, 480 S.E.2d at 72 (citations omitted). The nature and extent of Ms. Wilson's injuries was thoroughly established by the undisputed testimony of the State's witnesses. (*See, e.g.*, Tr. 213–14, 225–26, 955–60, 966–70.) Rather, the State's true motivation in introducing the photograph was made plain by its use in closing arguments, not to prove the existence of any fact, but rather to introduce an improper prejudice in the minds of the jury. Whatever minimal and redundant probative effect the photo may have had was outweighed by the danger—and demonstrated reality—of unfair prejudice. Accordingly, the photograph was unnecessary and irrelevant and should have been excluded. *Brazell*, 325 S.C. at 78, 480 S.E.2d at 72.

The erroneous admission of the unnecessary graphic images was compounded by the fact that the photos were contrasted with an irrelevant photograph of Ms. Wilson

smiling in happier times. The Supreme Court has previously recognized that such photographs are irrelevant, inflammatory, and prejudicial, and that their erroneous admission warrants reversal. *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999); *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997). Here, just as in *Langley* and *Livingston*, the smiling photo of Ms. Wilson was "not relevant to proving the guilt of appellant." *Langley*, 334 S.C. at 648, 515 S.E.2d at 100. In addition, *Langley* noted that "[b]ecause the evidence of appellant's guilt was not overwhelming, we cannot find this irrelevant evidence did not affect the outcome of the trial under a harmless error analysis." *Id.* Similarly here, evidence that Mr. Hawes was guilty of murder was far from overwhelming—it was very heavily disputed whether he had the requisite malice. Accordingly, just like in *Langley*, the erroneous admission and use of the prejudicial photographs was no harmless error, and Mr. Hawes is entitled to a new, fair trial.

II. The Trial Court erred by permitting the State to recall Mr. Hawes to the stand solely to elicit "impeachable" testimony that would permit the State to call witnesses to testify about prior acts that would otherwise be inadmissible.

At trial, over defense counsel's objection, the trial judge permitted the State to circumvent both the clear prohibition of Rule 404(b), SCRE and the trial judge's prior ruling prohibiting testimony of Mr. Hawes' purported past wrongs. As explained below, after finishing its cross examination of Mr. Hawes, the State concocted a scheme to recall him to the stand for a single question—a question designed solely to implicitly inform the jury of his past bad acts—and to then call "impeachment" witnesses to further paint Mr. Hawes with the guilt of his past wrongs. This scheme violated Rule 404(b), SCRE and constitutes reversible error.

A. The Trial Court permitted the State to introduce testimony that obliquely—yet unquestionably—informed the jury of Mr. Hawes' prior bad acts.

At the conclusion of the State's cross-examination of Mr. Hawes, the State argued he had opened the door to testimony about his prior acts of domestic violence. (*See* Tr. 1151–58.) The trial judge disagreed, stating:

> I'm not going to allow you to go into those at this point in time in the trial based upon this testimony. . . . At this point in time, I don't think he has opened the door and I don't think it's admissible under *Lyle* as a prior bad act.

(Tr. 1159:4–10.) The trial judge then asked the State if it had any further cross-examination of Mr. Hawes, to which the prosecutor replied, "No, sir." (Tr. 1159:4.) The trial judge made doubly sure the State was finished by again asking, "Any other questions of this witness?," to which the prosecutor again replied, "No, sir." (Tr. 1159:15–16.) Defense counsel then indicated he had no redirect examination (Tr. 1159:18–19), and the judge allowed Mr. Hawes to exit the witness box and return to the defense table (Tr. 1159:20 to 1160:3).

The following morning, notwithstanding its prior ruling excluding discussion of prior domestic violence, and notwithstanding the fact that testimony of such incidents was barred by Rule 404(b), SCRE, the trial court allowed the State to proffer the testimony of two of Mr. Hawes' former girlfriends regarding alleged abusive or violent incidents. (*See* Tr. 1170:9 to 1183:5.) The State argued that some of this testimony should be admitted to rebut Mr. Hawes' account of the killing. (Tr. 1183:8 to 1185:25.[7]) Defense counsel responded that under Rule 404, the proffered testimony regarding Mr. Hawes' prior bad

[7] The State relied on *State v. Beck*, 342 S.C. 129, 536 S.E.2d 679 (2000) and *State v. Michau*, 355 S.C. 73, 583 S.E.2d 756 (2003). (*See* Tr. 1183:24 to 1184:7.)

acts should be excluded. (Tr. 1186:1 to 1187:22.) The trial court agreed with the defense and again refused to allow the proffered testimony to be introduced. (Tr. 1189:19–24.) The court then took a recess for lunch. (Tr. 1189:19-24.)

During the lunch break, the State—apparently dissatisfied with the trial court's ruling—thought up yet another avenue by which to seek to introduce the otherwise inadmissible testimony. Accordingly, when the trial court resumed the proceeding after lunch, the State incorrectly asserted that Mr. Hawes was still on the stand and that the State could ask him one more question "for impeachment purposes," namely whether he had on one occasion told Dr. Stacey Newsom (his former girlfriend) that if she called the police, he'd make it look like it was her fault. (Tr. 1192:1 to 1194:22.) When the trial judge indicated he would permit further the State to question Mr. Hawes further, Defense counsel "strenuously" objected. (Tr. 1195:20–22.) Defense counsel raised the seeming inconsistency between the judge's ruling earlier that morning (excluding testimony regarding Mr. Hawes' prior domestic incidents) and the judge's plan to allow the State to re-open cross examination for the purpose of eliciting testimony that would permit the State to then introduce that very testimony in the guise of "impeachment" testimony. (Tr. 1196:3 to 1197:6.)

The trial court replied: "I'm not letting it come in in [the prosecutor's] case in chief. She wants to ask the question, lay the foundation on cross, then impeach him is what she wants to do. And I think she can do that on prior statements he made." (Tr. 1196:8–11.) Defense counsel continued to object, noting that the "impeachment" testimony from Mr. Hawes' former girlfriend was inseparable from Mr. Hawes' prior bad acts, which were inadmissible. (*See* Tr. 1198:9–13 ("There is no way for them to put Dr. Newsom on

the witness stand and her to offer testimony that doesn't go into the prior acts of violence that she alleges took place between her and Mr. Hawes. That is absolutely 404.").) The trial court, however, allowed the State to proceed. (Tr. 1198:14–17 and 1199:17–19.)

The State then recalled Mr. Hawes to the stand and asked him one question, namely if he remembered telling Stacey Newsom that if she called the police, he would make it look like it was her fault. (Tr. 1199:22 to 1200:2.) Mr. Hawes could not remember saying that. (Tr. 1200:3.) The State then recalled Stacey Newsome to the stand. Defense counsel again objected, noting that even the isolated question of what Mr. Hawes did or did not once say "leads to an implication to the jury and hamstrings me completely in my cross-examination." (Tr. 1219:6–8.) Ms. Newsom subsequently testified as follows:

> Q. Ms. Newsom, I'm going to direct your attention to the fall of 2010, do you recall having a conversation with Hank Hawes, I believe, at your house, I believe, you were living in Simpsonville at the time?
> A. Correct.
> Q. About what would happen if you called law enforcement?
> A. Yes.
> Q. And what did he say to you about that?
> A. . . . He told me that if I were to call law enforcement about --
> Q. Just what would happen --
> A. Law enforcement, that I would be the one to go to jail.

(Tr. 1225:2–15.) At the conclusion of Ms. Newsom's testimony, cross examination, and redirect examination, Defense counsel renewed its motion for a mistrial on the basis of her testimony. (Tr. 1231:23 to 1132:6.) The motion was denied. (Tr. 1132:7.) Defense counsel renewed the motion yet again at the conclusion of all evidence, and it was again denied. (Tr. 1284:24 to 1285:23.)

B. The introduction of testimony regarding Mr. Hawes' past wrongs violated Rule 404(b), SCRE and South Carolina precedent.

The Rules of Evidence are clear: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith" unless it is admitted "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

This prohibition bars testimony that expressly states or even *implies* the defendant engaged in past wrongs or crimes. *See State v. Traylor*, 360 S.C. 74, 84 n. 12, 600 S.E.2d 523, 528 n.12 (2004) (stating that certain types of evidence are inadmissible and their admission is prejudicial if they merely "*imply* a defendant's prior bad acts") (emphasis added); *State v. Nelson*, 331 S.C. 1, 13, 501 S.E.2d 716, 722 (1998) (noting that to be admissible under Rule 404(b), evidence "'must tend to prove or disprove an issue actually in dispute, without relying upon forbidden *inferences* of predisposition, character, or propensity'") (quoting *State v. Melcher*, 678 A.2d 146 (N.H. 1996)) (emphasis added); *State v. Tate,* 288 S.C. 104, 105, 341 S.E.2d 380, 381 (1986) (holding admission of photographic lineup which included a "mug shot" of defendant constituted reversible error because it "would clearly *infer* to the jury that appellant had a prior criminal record") (emphasis added); *see also United States v. Scott*, 677 F.3d 72 (2nd Cir. 2012) (reversing because trial court violated Rule 404(b), Fed. R. Evid. by allowing two detectives to testify they were familiar with the defendant and had spoken to him on occasion, which could imply or lead a jury to infer the defendant had engaged in past bad acts or was of unsavory character).

Here, the trial court permitted exactly what Rule 404(b) and binding precedent forbid, allowing testimony that clearly and unmistakably implied Mr. Hawes was guilty

of prior bad acts. The forbidden nature of this testimony is evidenced by the fact that the State was forced to concoct and rely on a peculiar procedural device—the reopening of Mr. Hawes' cross-examination solely to bait Mr. Hawes into supposedly "opening the door" to this otherwise impermissible testimony—to circumvent the normal safeguard afforded by the Rules. The trial court's ruling permitting this testimony was error—an error that prejudiced the jury against Mr. Hawes and which warrants reversal for a new and fair trial.

III. The Trial Court erred by permitting the State to introduce other impermissible testimony of Mr. Hawes' purported prior bad acts.

The Trial Court also erred by permitting a witness—the decedent's duplex neighbor, Mr. Kelly Smith—to present speculative and prejudicial testimony regarding a prior argument he had overheard between Mr. Hawes and Ms. Wilson. This erroneous ruling was based on the legally incorrect belief that the Defense counsel had "opened the door" to this inadmissible evidence of purported prior bad acts. As explained below, however, the door had *not* been opened, and the admission of this unduly prejudicial testimony was intended to—and did—inflame the jury's passion and prejudices against Mr. Hawes.

The morning the police responded to Ms. Wilson's apartment and discovered her body, Mr. Smith gave a written statement to law enforcement. Before trial, Defense counsel was given a copy of that statement, in which Mr. Smith stated he had on one previous occasion overheard an argument between Mr. Hawes and Ms. Wilson in which it sounded "like he was hurting her." (*See* Tr. 241:9–15, 242:15–18.) Prior to Mr. Smith's testimony, the trial judge ruled Mr. Smith could testify that he had overheard that prior argument but that he could ***not*** testify that it sounded "like he was hurting her" during

that argument. (*See* Tr. 241:9 to 243:19.) During the State's direct examination, the assistant solicitor asked Mr. Smith about his recollection of the prior argument he had overheard and about his written statement to the police. (Tr. 252:23 to 243:19; Tr. 255:3–17.) On cross-examination, Mr. Hawes' counsel likewise asked Mr. Smith about his statement to the police about the argument he had overheard. (Tr. 275:4 to 275:2.) The questions Defense counsel asked about this topic on cross-examination went no further than the scope of what had already been brought up during Mr. Smith's direct examination. (*Compare* Tr. 252:23 to 243:19 *with* Tr. 275:4 to 275:2.) Nevertheless, the State subsequently argued that Defense counsel had "opened the door" to the previously excluded portion of Mr. Smith's testimony. (*See* Tr. 279–80.) Defense counsel objected, but was overruled. (*See* Tr. 280–82.) Mr. Smith then proceeded to testify on re-direct examination that during the prior argument he had overheard, "I heard her screaming like he was hurting her and Jen saying no." (Tr. 279:11–12.)

Contrary to the Trial Court's ruling, however, Defense counsel's cross-examination of Mr. Smith did *not* "open the door" to this otherwise impermissible testimony. The relevant portion of the cross-examination is as follows:

> Q. . . . Now, you also testified -- and I may have misunderstand you, and I apologize if that's the case, when you talked about previous arguments --
>
> A. Sure.
>
> Q. -- between -- between them in the summertime?
>
> A. Uh-huh.
>
> Q. In your statement, you described -- well, the question is to you in the statement, Have you ever heard or seen Hank and Jen arguing or fighting before? Do you remember that?
>
> A. I do.
>
> Q. And your response is, Yes, one time before.

A. Correct.

Q. Correct?

A. Uh-huh.

Q. So when you describe prior difficulties between Ms. Wilson and Hank in that summer and you're asked whether you ever remember it, you mentioned yes, one time before?

A. One time.

Q. That's your testimony here today?

Q. One time?

A. Yeah.

A. Correct. One time that stood out.

(Tr. 275:4 to 276:2.) Nothing in this colloquy between defense counsel and Mr. Smith opened the door to his prejudicial and speculative statement regarding what might have been the nature of a dispute next door. Rather, defense counsel's questioning was clearly focused on the *quantity* of prior disputes, not the *quality* of that dispute.

As explained in Part II, *supra*, Rule 404(b) excludes evidence or testimony that states or implies the defendant engaged in past wrongs or crimes. Such evidence may, however, be admissible if a defendant himself specifically introduces that topic, evidence, or an argument that "opens the door" to that evidence or topic and entitles the opposing party to rely on otherwise inadmissible evidence to rebut the defendant's argument or evidence. *See State v. McEachern*, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012) ("When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially.") (citations omitted).

Here, the defense did *not* open the door to the impermissible evidence. Defense counsel did not introduce Mr. Smith's police statement into evidence (the *State* introduced that evidence), did not initiate the discussion of the argument he overheard (the *State* first brought up that topic), and did not make any argument to discredit Mr. Smith's account of the event. Instead, every aspect of the cross-examination that touched on the topic of the prior argument overheard by Mr. Smith relied on the same evidence introduced by the State. Stated differently, Defense counsel did not bring up any new evidence or argument that "opened the door" and entitled the State to rely on evidence prohibited by Rule 404(b). The Trial Court's erroneous and prejudicial ruling otherwise warrants reversal.

IV. The Trial Court erred by refusing to recuse the Fifth Circuit Solicitor's office from prosecuting a case in which two material witnesses of the alleged crime were an assistant solicitor and her husband.

South Carolina's courts have not previously confronted the question of whether recusal of a solicitor's office is required when an assistant solicitor and her husband were witnesses of the crime to be prosecuted by her office. As explained below, however, other jurisdictions to analyze this issue have concluded that recusal of the entire office is necessary to avoid the appearance of bias and to maintain the public's confidence and the defendant's confidence in the integrity and impartiality of the judicial system. Accordingly, the court's refusal to recuse the solicitor's office was reversible error.

A. The pre-trial hearing judge refused to recuse the solicitor's office and transfer the case to the Attorney General's office for prosecution.

Prior to trial, Mr. Hawes' counsel moved to recuse the Fifth Circuit Solicitor's office from prosecuting the case in light of the fact that two material fact witnesses in the case were an assistant solicitor (Kathryn Cavanaugh Ashton) and her husband (Eric

Ashton). (*See* Def. Motion to Recuse, R. ___.) Judge DeAndrea Benjamin held a hearing on the motion, during which Mr. Hawes' counsel explained that the Ashtons were next-door neighbors to the decedent, had provided statements to law enforcement, and "would be material to prove, amongst other things, that he was at the crime scene." (Transcript of Pre-Trial Hearing at 3:15 to 4:14.) Because this situation would, at minimum, give rise to an appearance of impropriety or partiality (and would, at worst, result in demonstrable unfairness or prejudice), the Defense sought to have the Fifth Circuit Solicitor's office recused and the case transferred to the Attorney General's office to prosecute. (*Id.* at 4:19 to 5:5.) In response, the Solicitor's office argued that a "Chinese wall" had been built around Ms. Ashton to prevent her involvement with the case. (*Id.* at 7:14–18.) Judge Benjamin subsequently denied the motion in a written order, stating, "[t]here is no inherent right to disqualification when a member of the Solicitor's Office is called as a witness in a case prosecuted by an attorney in the same office" and that "[t]o successfully recuse the Fifth Circuit Solicitor's Office, Defendant must demonstrate actual prejudice." *See* Order Denying Motion to Recuse at 1–2. As explained below, the trial court's failure to recuse the solicitor's office was error.

The State subsequently called Mr. Ashton to testify at trial, where he testified as the sole witness to observe Mr. Hawes at the scene. Mr. Ashton testified in dramatic terms of "the thing that I will never forget," namely Mr. Hawes' departure from the scene on the morning of August 28, 2011:

> And the thing that was very unique because he was driving very slowly, the windows were down and he had no shirt on and it looked like he was driving with his forearms. And I'll never forget that as long as I live. It was so odd and unique. That was, you know, something that stays with me to this day.

(Tr. 295:19 to 296:8.)

B. Although this is a novel issue in South Carolina, persuasive authority indicates the solicitor's office should have been recused, and the failure to do so was a prejudicial, reversible error.

There is no South Carolina authority addressing the precise scenario raised by Mr. Hawes' prosecution. The case that is the nearest to being on point—*State v. Inman*—held in part that "if a prosecutor is called as a witness *by the defense*, it is not always necessary for a trial judge to recuse the prosecutor or the prosecuting office in its entirety." 395 S.C. 539, 558, 720 S.E.2d 31, 41 (2011) (emphasis added). *Inman*, of course, is distinguishable from the case at bar in two significant regards: (1) it involved the question of whether the solicitor's office should be recused when a prosecutor was to be called as *defense* witnesses, and (2) the matter about which the witnesses in *Inman* would testify involved their own prosecutorial misconduct of intimidating a defense witness during Mr. Inman's sentencing hearing. *Id.* at 557–61, 720 S.E.2d at 41–43. Here, in contrast, Mr. Hawes' trial involved an assistant solicitor and her husband who could be (and one of whom actually was) called by the *prosecution* to testify regarding facts that were material to proving the charges against the defendant.

The distinction between *Inman* and the case at bar is further demonstrated by the authority upon which *Inman* relied. Specifically, the *Inman* Court relied on a California Court of Appeals opinion for the "'general rule . . . that a district attorney's office should not be recused from a case merely because one or more of its attorneys will be called as witnesses *for the defense*.'" *See id.* at 558, 720 S.E.2d at 41 (quoting *People v. Superior Court of San Luis Obispo*, 84 Cal. App. 3d 491 (Cal. Ct. App. 1978)) (emphasis added). California statutory law and case law, however, recognize a ***different*** rule where a prosecutor will be called as a ***prosecution*** witness. *See People v. Conner*, 666 P.2d 5

(Cal. 1983) (holding the trial court properly ordered the recusal of the entire district attorney's office because a member of the district attorney's staff was a material witness to the crime); *People v. Jenan*, 140 Cal. App. 4th 782 (Cal. Ct. App. 2006) (holding the trial court properly ordered the recusal of the entire district attorney's office because a district attorney's investigator would likely be a witness); *Lewis v. Superior Court*, 53 Cal. App. 4th 1277 (Cal. Ct. App. 1997) (reversing trial court's refusal to recuse district attorney's office where the effect of the defendant's conduct on the district attorney and his staff gave rise to an appearance of impropriety); *see also* Cal. Penal Code § 1424(a)(1) (stating that a motion to disqualify a district attorney from prosecuting a case may be granted if "the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial").[8] The Tenth Circuit has likewise noted that the recusal of a DA's office and the appointment of a special

[8] Other jurisdictions have likewise recused an entire district attorney's ("DA") office when a DA or assistant DA had a personal interest or prior involvement in the matter. *See, e.g., State v. Cooper*, 409 N.E.2d 1070 (Ohio Ct. Com. Pl. 1980) (holding entire DA's office should have been recused in light of the assistant DA's former representation of the defendant); *State v. Latigue*, 502 P.2d 1340 (Ariz. 1972) (holding entire DA's office should be recused to avoid even the appearance of partiality because an assistant DA had previously served at the public defender's office defending the accused); *see also State v. Gonzalez*, 119 P.3d 151 (N.M. 2005) (affirming trial court's order recusing entire DA's office where the DA's prior personal and professional animosity toward the defendants gave rise to an appearance of impropriety); *State v. Tate*, 925 S.W.2d 548 (Tenn. Ct. App. 1995) (holding trial court should have recused entire DA's office in light of DA's prior involvement as the county criminal judge who signed the indictment and participated in pre-trial proceedings); *State v. Stenger*, 760 P.2d 357 (Wash. 1988) (holding entire DA's office should be recused from prosecution where DA had previously defended the accused); *Banton v. State*, 475 N.E.2d 1160 (Ind. Ct. App. 1985) (holding entire DA's office should have been recused from case in which the prosecutor had previously worked as a public defender defending a co-defendant); *State v. Tippecanoe Cnty. Ct.*, 432 N.E.2d 1377 (Ind. 1982) (holding entire DA's office should have been recused from case in which the DA had previously represented the accused as a public defender in two matters several years earlier).

prosecutor were warranted where employees of the DA's office were likely to be called as prosecution witnesses. *Thorpe v. Ancell*, 367 Fed. Appx. 914, 916 and n.5 (10th Cir. 2010) ("Special Prosecutor David Waite was assigned to the case" because defendants "had filed a motion to appoint a special prosecutor and to recuse the Mesa County District Attorney's Office because some of its employees were potential witnesses.").

Yet another jurisdiction has held that a so-called Chinese Wall such as that erected around Ms. Ashton in the case at bar is an insufficient safeguard, and that instead the entire solicitor's office should have been recused. *People v. Shinkle*, 415 N.E.2d 909 (N.Y. 1980) (holding the extensive "Chinese wall" erected around assistant DA who had previously assisted in the accused defense was insufficient to resolve the appearance of a conflict, and that instead the entire DA's office should have been recused).

The reasoning supporting the recusal of a solicitor's entire office when an employee and/or her spouse[9] are material witnesses to the alleged crime is that the recusal will "assure fairness to the accused and to sustain public confidence in the integrity and impartiality of the criminal justice system." *Conner*, 666 P.2d at 7 (citations omitted); *see also People v. Stevens*, 642 P.2d 39 (Colo. Ct. App. 1981) (holding entire DA's office should have been recused from case in which an assistant DA had formerly represented the defendant, noting "a defendant should not have to demonstrate prejudice or lack of integrity. The most compelling rationale for requiring appointment of a special prosecutor

[9] Recusal is warranted not only where a prosecutor herself has a real or perceived conflict or bias but also where the prosecutor's family members have a real or perceived conflict or bias. *See, e.g., State v. Wilson*, 387 S.C. 597, 693 S.E.2d 923 (2010) (noting the trial court had disqualified the assistant solicitor because her husband had previously represented the defendant in a Family Court matter and because her brother-in-law had represented the defendant at his bond hearing).

is avoidance of the appearance of impropriety."). In *Conner*, for example, the California Supreme Court held that recusal of an entire District Attorney's ("DA") office was proper where an assistant DA had witnessed the defendant's courtroom escape from custody and had narrowly avoided being shot by the defendant during the escape. *Conner*, 666 P.2d at 6–7. The court noted that because the assistant DA was a witness to, and arguably a victim of, the alleged crime, his recusal was required. *Id.* at 8 ("[A] conflict of interest disqualifies a DA from prosecuting a case if the conflict either affects or appears to affect his ability faithfully to perform the discretionary function of his office.") In addition, the *Conner* court held the disqualification extended to the *entire* DA's office in light of its modest size—the felony division was composed of "about 25 attorneys"—and the media coverage of the "dramatic and gripping nature" of the alleged crime. *Id.* at 9.

This reasoning applies to the case at bar with equal force. Here, the Fifth Circuit Solicitor's office's prosecution of a case involving one of their own was no mere harmless error. The appearance of partiality and bias and the resulting doubt cast over the fairness and integrity of the proceeding were a sufficient basis upon which the trial court should have recused the Solicitor's office.[10] Although South Carolina's courts have not previously considered a suit in which the prosecuting attorney's colleague or her spouse were witnesses to the alleged crime, they have in other contexts noted the vital

[10] The situation presented by this suit is distinguishable from precedent holding that prosecutorial *misconduct* does not warrant reversal absent a showing of resulting prejudice. *See State v. Chisolm*, 312 S.C. 235, 238, 439 S.E.2d 850, 852 (1994) (holding the assistant solicitor's improper private conversation with the accused did not warrant reversal because the defendant could not show actual prejudice resulting from that misconduct) (citing *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982)). Here, the need for recusal arose not from any misconduct but from the inescapable appearance of bias and the resulting diminution in the public's and Mr. Hawes' confidence in the impartiality of the judicial system.

importance of maintaining the parties' confidence and the public's confidence in the judicial process by avoiding even the appearance of partiality or bias. *See, e.g., Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 475 n.7, 609 S.E.2d 286, 296 n.7 (2005) (noting the reversal of the trial court's ruling was necessitated in part by the fact that "such rulings may undermine the public's confidence in our judicial system"); *In re Evans*, 390 S.C. 404, 405, 702 S.E.2d 557, 557 (2010) (noting that when municipal court judge shared hotel accommodations with a person facing charges in his jurisdiction, "he created an appearance of impropriety that could undermine public confidence in the judiciary"); *Christy v. Christy*, 317 S.C. 145, 149, 452 S.E.2d 1, 3 (Ct. App. 1994) (noting that because the judge's "impartiality might reasonably be questioned . . . he judiciously chose to avoid the appearance of impropriety" and recused himself).

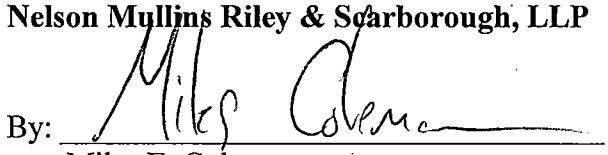
In sum, the appearance of partiality undercut the integrity of the proceeding and the public's confidence in the process. A simple preventative measure was available, namely transferring the case to the Attorney General's office. The trial court erred by failing to recuse the Fifth Circuit Solicitor's office and transfer the case, and this Court should reverse and remand for a new and fair trial.

CONCLUSION

In sum, the trial court erred by allowing the introduction of unnecessary and prejudicial photographs, by permitting the State to recall Mr. Hawes to the stand to elicit testimony that would permit the State to call witnesses to testify about prior acts that would otherwise be inadmissible, by permitting other testimony of purported prior bad acts, and by failing to recuse the Fifth Circuit Solicitor's office. For the foregoing reasons, Appellant requests this court reverse and remand for a new trial.

Respectfully submitted,

Nelson Mullins Riley & Scarborough, LLP

By: 

Miles E. Coleman
SC Bar No. 78264
E-Mail: miles.coleman@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
(803) 799-2000

South Carolina Commission on Indigent Defense
Robert M. Dudek
E-Mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, South Carolina 29201
(803) 734-1343

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
November 12, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

J.C. Nicholson, Jr., Circuit Court Judge

RECEIVED
NOV 12 2015
SC Court of Appeals

Case No. 2011-GS-32-1255
Appellate Case No. 2014-002288

The State of South Carolina,..... Respondent,

v.

Hank Eric Hawes, ... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and the Designation of Matter to be Included in the Record on Appeal in the above reference case has been served upon Donald J. Zelenka, Esquire, SC Attorney General's Office, P. O. Box 11549, Columbia, SC 29211-1549; Daniel Edward Johnson, Esquire and Luck Campbell, Esquire, Fifth Circuit Solicitor's Office, 1701 Main St., 3rd FL, Columbia, SC 29201 this 12th day of November, 2015.

Kelli D. Martin

Kelli Diamond Martin
Administrative Assistant

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.5908
www.nelsonmullins.com

Miles E. Coleman
Tel: 803.255.5549
Fax: 803.255.5908
miles.coleman@nelsonmullins.com

November 12, 2015

Hand Delivered
Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: State v. Hank E. Hawes
Appellate Case No. 2014-002288
Case No. 2011-GS-32-1255
Our File No. 38769/01526

Dear Ms. Kitchings:

Enclosed please find the originals and one copy each of the Initial Brief of Appellant and the Designation of Matter to be Included in the Record on Appeal in the above-referenced matter. We would ask that you file the originals and return a clocked copy of each to us via our courier. Also enclosed are proofs of service of these filings on opposing counsel. With warm regards, I remain

Very truly yours,

Miles E. Coleman

MEC:kdm
Enclosures
cc: Donald J. Zelenka, Esq.
Daniel Edward Johnson, Esq.
Luck Campbell, Esq.