



**South Carolina Association
Of Criminal Defense Lawyers**

February 21, 2014

The Honorable Alan M. Wilson
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211-1549

RE: Prosecutorial conduct in the 9th Circuit Solicitor's Office

Dear Attorney General Wilson:

I am writing you this letter in my capacity as president for the South Carolina Association of Criminal Defense Lawyers (SCACDL). SCACDL is a non-profit association made up of over 400 members of the private and public defense bars who defend those accused of criminal charges in South Carolina. Consistent with our mission statement, our objective is protecting the liberty of the citizens of South Carolina by fighting to ensure justice and due process for all persons accused of any criminal act. In carrying out our mission, SCACDL has a responsibility to bring to light actions and conduct which threaten to deny justice and due process to South Carolinians.

Recently, thirteen (13) of sixteen (16) circuit solicitors here in South Carolina sent you correspondence taking issue with remarks that were allegedly made by South Carolina Supreme Court Justice Donald W. Beatty at the 2013 Solicitor's Conference. Those solicitors asked that you seek recusal of Justice Beatty from any criminal appeals as well as any grievances filed against prosecutors as they believe Justice Beatty's comments show bias against prosecutors. In response to the Solicitors public statements about this issue, SCACDL released a statement in support of Justice Beatty. Our statement expressed the belief that a judge tasked with disciplining lawyers is well within his right to warn a room full of lawyers in a closed door meeting that if they broke the rules, there would be consequences.

Justice Beatty's remarks were not offered in a vacuum, rather they occur in a climate where recent court decisions have exposed troubling conduct by prosecutors in South Carolina. We believe that instead of using the remarks as a reason to attack the integrity of Justice Beatty, who has shown no record of bias, the citizens of South Carolina would be better served if their elected prosecutors use this opportunity to emphasize to their attorneys the extraordinary duty and grave responsibility they have to be "ministers of justice."

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Especially concerning to SCACDL is the origination of the complaints about Justice Beatty. Ninth Circuit Solicitor Scarlett A. Wilson sent the first letter to your office dated October 29, 2013. The fact that the complaints originated with Solicitor Wilson is troubling because we believe that the Ninth Circuit Solicitor's office has evinced a custom and practice of questionable conduct in prosecuting cases.

While we believe that the controversy surrounding Justice Beatty is contrived, we do feel that the entire bar stands to learn from this episode. Specifically, that as members of the bar, all of us -- as judges, defense lawyers and prosecutors -- have a duty to police our own profession. Questionable behavior in the system does nothing but undermine the public's faith in our system of justice. More pointedly, since Article V, Section 24 of South Carolina Constitution tasks the Attorney General of South Carolina with the authority to supervise all prosecutions in courts of record in this state, SCACDL feels you need to be made aware of this troubling conduct.

In early 2009, several examples of questionable conduct in prosecutions by the Ninth Circuit Solicitor's Office were brought to the attention of the SCACDL Board of Directors.

Case 1: State v. Gordon, 2003-GS-104981, 2005-GS-101478, 2005-GS-101333

Defense attorney, pursuant to Rule 5, requested therapist's records in a CSC case, assistant solicitor responded there were no "official reports." However, months later and only days before trial, assistant solicitor turned over therapist's records containing a diagnosis of PTSD, an expert opinion the solicitor intended to offer at trial. Solicitor opposed defense motion for a continuance and attempted to impeach defense expert over the expert's late involvement in the case.

Case 2: State v. Shumpert, 2004-GS-10-8579; 2005-GS-10-4335-4336

In a case involving Felony DUI Resulting in Death, Failure to Stop for a Blue Light and Reckless Homicide, the solicitor assigned to prosecute the case attempted to block the defendant from pleading guilty to the charges before the judge designated to hear pleas by the Ninth Circuit Solicitor's Office.

The solicitor went so far as to indicate he would dismiss the charges against the defendant with the intent to re-indict the defendant once the designated plea judge's term had ended. Only after defense counsel filed a motion concerning this conduct did the solicitor allow the plea to go forward as requested by the defense.

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Case 3: State v. Buncum, 2006-GS-10-11275-11279

In this case the solicitor assigned to prosecute the murder case withheld, and took affirmative steps to prevent the defense from learning, that a critical witness recanted her statement to police wherein she indicated she saw the shooting, a statement that led to the search of the defendant's residence and his arrest.

Upon the defense's request, the court inquired of the solicitor whether he learned of the recantation prior to being told by the court only moments earlier. The solicitor revealed he learned Monday evening that the witness had recanted her final statement and was again saying she did not see the shooting.

In response to a motion for a mistrial with prejudice, the solicitor indicated he did not believe the witness' recantation was exculpatory, and thus discoverable, because she had given so many different statements and he could not predict how she would ultimately testify.

The court revisited and granted the defense motion to suppress under *Franks* and declared a mistrial, without prejudice.

Case No. 4: State v. Wilson, 2007-GS-10-12312, -13 and -14

In a murder case involving a shooting, defense counsel requested the results of all forensic tests. The State, in response, turned over a one-page report showing that SLED test fired the weapon involved and found it to be "in working order." At trial, the solicitor called the SLED agent to testify specifically about a trigger-pull test he performed on the weapon, and the results of that test, in terms of pounds of pressure per square inch necessary to fire the weapon. Defense counsel objected and moved to strike the testimony pertaining to the trigger-pull test because the State had not turned over that evidence pursuant to Rule 5. During the argument, the witness produced several pages of an eleven-page, computer generated spread sheet, containing the data and specific results of the tests performed by SLED, including the results of the trigger-pull test. The State had not provided the defense this document before trial.

The solicitor maintained that she did not have to provide the results of the trigger-pull test because the document containing that information did not constitute a "report" under the rule and she had provided the only official report to the defense, the document showing the weapon was in working order. The judge agreed that the specific results of the tests, beyond that contained in the official report, did not fall under Rule 5. The defendant was convicted.

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Case No. 5: State v. Moultrie, 2008-GS-10-4135

In a preliminary hearing in a murder case, the lead investigator testified that footwear impressions taken from the crime scene did not match the defendant's shoes. Defense counsel provided the State a copy of the transcript from the hearing. Weeks prior to trial, defense counsel inquired of the solicitor assigned to prosecute the case whether he intended to offer any evidence concerning the footwear impressions. The solicitor told her he did not, because the impressions from the scene did not match the defendant's shoes.

Weeks later, in the middle of the trial, the solicitor qualified the arresting agency's crime scene investigator as an expert in footwear comparisons. When he began to elicit from the witness an opinion that the impressions from the scene were "consistent" with the defendant's shoes, defense counsel objected. At the bench she told the court she had not been given any notice of the State's intent to present any expert testimony relating to footwear impressions. The judge excused the jury.

The solicitor quickly defended his decision not to disclose this information because: making comparisons of this sort was not a "test or examination" under Rule 5; the witness, although qualified as an expert, was simply offering an opinion that any lay witness could offer and therefore it was not an expert opinion; similarly, the defense did not need an expert to review the evidence because a lay person could make the comparison; although he told the defense lawyer something different earlier, he since "changed his mind" and was not obligated to notify her of that fact; and, finally, because the defense possessed photographs of the evidence, it was free to hire its own expert. The judge did not allow the witness to testify as contemplated by the State.

With the evidence now an issue, defense counsel looked for the first time at the impressions and noticed they did not at all match the defendant's shoes. Nevertheless, the solicitor argued to the jury, in closing, that they did match. The defendant was convicted of murder.

At the time the cases above came to the attention of our board, Ninth Circuit Public Defender, D. Ashley Pennington, brought four (4) of the above examples to the attention of Solicitor Wilson via correspondence dated February 2, 2009.

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The conduct described in the cases above raised serious concern amongst our board. To that end, our board decided to have two representatives contact Solicitor Wilson. Attorneys C. Rauch Wise and Christopher A. Wellborn had a telephone conference with Solicitor Wilson to share some of our concerns. Attorneys Wise and Wellborn reported back to our board that the conversation with Solicitor Wilson had been very cordial and congenial. We had been notified by Public Defender Pennington that Solicitor Wilson had been receptive to his letter and there had been discussions about Solicitor Wilson using the above cases to help train her office in better practices. There was a hope at the time, with Solicitor Wilson being relatively new to her office, that the pattern of conduct as evidenced by the cases above would end. As such, our board took no further action.

Unfortunately, since that time, there has continued to be troubling conduct arising in the Ninth Circuit.

Case 6: State v. Winslow, 2011-GS-10-2923-2924

In this case, the Court directed a verdict of not guilty after finding that the State had failed to prove its case. Solicitor Wilson made comments in the press after this result, "Had we known the information presented in court, we would have made the same decision that the judge made, only much sooner."

Those comments by Solicitor Wilson not only disparaged defense counsel (by insinuating that the defense had somehow been responsible for the charges against Winslow being prosecuted by keeping information from the State), but they were misleading.

The State was aware before trial that the defense would focus on the fact that Winslow had been attacked and the State was in possession of statements given by two defense witnesses at the time of the incident supporting that defense. The State certainly knew everything the Court knew when the defense made the motion for directed verdict. In spite of that knowledge, Solicitor Wilson's office argued against the motion being granted.

Solicitor Wilson was present in the court room when her office objected to and argued against the very motion she subsequently claimed to agree with.

Case 6: State v. Carey, 2013A 10-10203071

In this case, the Court once again had to dispose of a murder charge brought by Solicitor Wilson's office. The Court dismissed the murder charge against Ms. Carey, finding Carey was "absolutely without a doubt" entitled to immunity under S.C. Code 16-11-440(c).

In a case the Court described as “appalling” on the record, Ms. Carey was charged with murder after she grabbed a knife and stabbed the deceased in self-defense while he was beating her in a room she could not escape from and with her 3 small children in the next room.

Case 7: State v. Collins.

In this case, there were allegations that the brother of defendant had shot up the home of a witness’ mother right before that witness was scheduled to testify. The witness testified.

While the trial was ongoing, Solicitor Wilson commented to the press for a story about the issue of witness intimidation, a story which gave details about the alleged the witness intimidation described above.

In the article, for The Post & Courier, *Solicitor: Targeting witnesses to kill cases ‘a huge problem’*, Solicitor Wilson provided the media with the following quotes:

-“It’s a huge problem, and it’s a very real issue we deal with...Fifteen to 20 years ago, I could tell witnesses that the chances of something like that happening in this area were really small. I can’t say that anymore.”

-“We encounter it routinely...and what we also encounter is the pure fear of it even if it doesn’t happen.”

-“I know it’s easy for me to say when I’m not the one who is in immediate danger that is real...but until those communities that are seeing this happen stand up and face it head on, it’s not going to get better.”

The defendant was convicted.

Oddly enough, the week after the above-described witness testified in this murder case, Solicitor Wilson’s office dropped reckless homicide charges against said witness. In another article from The Post & Courier, Solicitor Wilson’s office stated that the witness’ actions did not constitute a crime.

Case 8: State v. Rocquemore.

In this case, an assistant solicitor in the Ninth Circuit Solicitor’s office engaged in repeated ex parte contacts with a juror during a murder trial. The juror in question was the assistant solicitor’s cousin. The assistant solicitor did not handle the prosecution of the case.

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During voir dire, the juror did not inform the Court that his cousin was an assistant solicitor. After the State rested its case, defense counsel learned of the relationship between the juror and the assistant solicitor. The assistant solicitor was questioned on the record, as was the cousin, who was eventually dismissed from the jury. The defendant was convicted.

The assistant solicitor was suspended from the practice of law for six months (see In Re Nelson, 750 S.E.2d 85 (2013)).

During the disciplinary proceeding, the assistant solicitor stated that he told the deputy solicitor and assistant solicitor that handled the case about his relationship with the juror “before they went to jury qualifications.” The assistant solicitor also acknowledged that the number of actual contacts between himself and his cousin was greater than what he told the trial court when questioned on the record.

The ex parte communications occurred from July 8, 2007 through July 17, 2007, when the situation was brought out and the juror was excused. The assistant solicitor remained employed by Solicitor Wilson until he resigned in June 2013, when he learned the Supreme Court was taking up the matter.

The above examples have caused our board’s original concerns about conduct in the Ninth Circuit Solicitor’s office to reemerge. Prosecutors in South Carolina have great power and with that power comes great responsibility. In our appellate court rules, this responsibility is succinctly surmised as “A prosecutor has the responsibility to be a minister of justice and not simply that of an advocate.” SCACR 407, Rule 3.8, comment 1.

Public Defender Pennington’s February 2, 2009 correspondence to Solicitor Wilson highlights the authorities that support our board’s concerns. In addition to the authorities listed in that correspondence, there are obviously the authorities cited by the Supreme Court of South Carolina in their October 23, 2013 Order suspending the assistant solicitor, as well as Rule 3.6 of Rule 407 SCACR, Trial Publicity, State v. Inman, 395 S.C. 539 (2011) and the Lawyer’s Civility Oath.

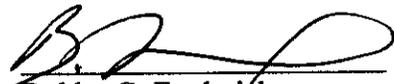
As South Carolina’s leading law enforcement officer, our state constitution tasks you with the authority to supervise all prosecutions in courts of record in this state. In your December 12, 2013 correspondence responding to the solicitors, you agree that prosecutorial abuse should not be tolerated. As such, we call on you to exercise that duty and protect the integrity of our criminal justice system by investigating the conduct of the Ninth Circuit Solicitor’s Office and informing us of your findings.

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Attached to this correspondence, you will find an index for supporting materials which can be found on the enclosed CD.

Thank you for your consideration of this matter.

With kind regards,



Bobby G. Frederick
President
South Carolina Association of
Criminal Defense Lawyers

INDEX FOR SUPPORTING MATERIALS

(The following items are included on the enclosed CD)

- 1) **State v. Gordon**
 - a. *Motion to Exclude Evidence Disclosed in Violation of Rule 5*, filed May 20, 2005 and accompanying attachments.
- 2) **State v. Shumpert**
 - a. *Memorandum in Support of Motion to be Allowed to Plead Guilty to All Charges Before the Plea Judge as Designated by the Solicitor: Detailed Factual Summary and Authority*, filed July 15, 2005;
- 3) **State v. Buncum**
 - a. Trial transcript;
 - b. *Motion to Assign Case to Original Trial Judge on Retrial*, filed November 30, 2010;
 - c. *Notice of Motion to Recuse Ninth Circuit Solicitor's Office from Further Prosecution of Defendant*, filed November 30, 2010 and attachments
- 4) **State v. Wilson**
 - a. SLED Report;
 - b. SLED "Firearm Worksheet;"
 - c. Email correspondence dated December 8, 2008 between Solicitor's office and Public Defender's office;
- 5) **State v. Moultrie**
 - a. *Excerpt of Transcript of Record of Testimony of Al Hallman*, December 1, 2008;
- 6) **State v. Winslow**
 - a. Trial Transcript;
 - b. Trial Transcript (Defense opening which was excerpted from other volume);
 - c. Copy of *Post & Courier* article dated December 9, 2012, "Trial Won, but 2 years are gone";
- 7) **State v. Carey**
 - a. Trial Transcript;
- 8) **State v. Collins**
 - a. Copy of *Post & Courier* article dated January 8, 2014, "Solicitor: Targeting witnesses to kill cases 'a huge problem'";
 - b. Copy of *Post & Courier* article dated January 9, 2014, "Guilty verdict in 2011 Mall Playground murder 'huge victory' for Charleston East Side, prosecutor says";
 - c. Copy of *Post & Courier* article dated January 14, 2014, "Solicitor drops reckless homicide charge for key witness in East Side murder trial";
- 9) **State v. Rocquemore**
 - a. In re Nelson, 750 S.E.2d 85 (2013)
 - b. Copy of *Post & Courier* article dated November 2, 2013, "Ex-Charleston County prosecutor suspended from practicing law";
- 10) **Correspondence from Chief Public Defender Pennington to Solicitor Wilson dated February 2, 2009**