South Carolina Criminal Rules

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I. GENERAL PROVISIONS

100. SCOPE AND APPLICABILITY

These rules govern the procedure in all actions preliminary to, during, or subsequent to proceedings in the Court of General Sessions. They shall also apply insofar as practicable in summary and family courts to the extent they are not inconsistent with the statutes and rules governing those courts. In any case where no provision is made by statute or these rules, the procedure shall be according to the practice as it has heretofore existed in the courts of this State.

Notes: This rule is based on former Rule 37, SCRCrimP and Rule 81, SCRCP.

101. DOCKET MANAGEMENT

All cases shall be governed by a docket management system pursuant to Supreme Court docket management orders that now exist or may be implemented or amended by the Supreme Court. Docket management shall include a tracking system.

Notes: This is a new rule.

All South Carolina circuit solicitors agreed to work with the Chief Justice to develop and implement criminal docket management systems in each county. Orders for each county were to be developed within 180 days of March 1, 2007 unless good cause shown. (Supreme Court Order, March 1, 2007, 2007-03-01-01). All counties are now under a docket management order and copies of the individual county orders and any amendments are available from the Clerk of Court of each county or the Office of Court Administration.

Cases being prosecuted by an entity other than the circuit solicitor are included in this requirement. The non-solicitor prosecutor and circuit solicitor are responsible for ensuring that the matter is entered on the county's docket management system.

102. REVOCATION OF PREVIOUS ORDERS AND RULES

All criminal practice rules (SCRCrimP) heretofore adopted are repealed as of the effective date of these South Carolina Criminal Rules. Circuit, family, and summary courts shall not implement standing administrative orders. Only those orders approved by the Supreme Court may be implemented.

Notes: This rule is based on former Rule 39, SCRCrimP. Further, the rule makes it clear that local or standing administrative orders may not be implemented without Supreme Court approval, but preserves administrative orders approved by the Supreme Court currently in place or hereinafter approved.

103. TITLE, FORMS, DEFINITIONS AND EFFECTIVE DATE

(a) Title. These rules shall be known as the South Carolina Criminal Rules and cited by rule number and the abbreviation SCCR, i.e. Rule __, SCCR.

(b) Forms. The Supreme Court shall prescribe the content and format of forms required by these rules. The use of the forms as prescribed is mandatory.

(c) Definitions. As used in these rules, the following words or phrases have the following meaning:

(1) "Chief Judge" means the Chief Judge for Administrative Purposes (General Sessions).
(2) "Docket Management Order" means an order approved by the Supreme Court that prescribes the procedures for criminal cases in place in each judicial circuit.
(3) "Presiding Judge" means the circuit court judge assigned to a particular term of court in a particular county, giving the judge jurisdiction during that assigned term.
(4) "Trial Judge" means the circuit court judge that has heard or will hear the trial of a particular case.
(5) "Summary Court" includes Magistrate's Court, Municipal Court, and City Recorder's Courts.
(6) "Summary Court Judge" means a magistrate, municipal judge, or city recorder.
(7) "Criminal Process" includes arrest warrants, indictments, subpoenas, search warrants, bench warrants, or other documents incident to the processing of cases in the Court of General Sessions.
(8) "Term of Court" means a week or partial week of jury or non-jury court. Each week of court is a separate term.

(d) Effective Date. These rules shall take effect on ____. They govern all proceedings in criminal actions brought after they take effect and also all further proceedings then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

Notes: Section (a) simplifies the abbreviation formerly codified by Rule 38, SCRCrimP. Paragraph (b) is identical to former Rule 36, SCRCrimP. Section (c) is to give uniform meaning to these terms throughout these rules. The substantive language of paragraph (d) conforms to former Rule 40, SCRCrimP except for the actual date of effectiveness.

104. SIGNING OF DOCUMENTS; SANCTIONS

(a) Form. Except for indictments, the mailing and street address, telephone number, facsimile number, and e-mail address of the attorney must be contained in every document. If filed by a *pro se* defendant, the document must contain the defendant's address and telephone number. All documents not typed shall be legible. All documents shall contain a caption setting forth the state and county, the name of court, the title of the action, the file number (indictment number if indicted or warrant number if unindicted), and a designation of the type of document including a description (i.e. Motion to Compel Discovery, Motion to Suppress, etc.). The Clerk of Court shall return any document not in conformity with this rule, advising the person requesting filing of the problem or nonconformity of the document.

(b) Signature. Every document, motion, or other paper, with the exception of indictments, filed with the court must be signed by an attorney licensed in South Carolina who represents a party or by a *pro se* defendant. The signature of the attorney or defendant constitutes a certificate that the document has been read, and that the information contained therein is true to the best of the party's knowledge, that there are good grounds to support it, and that it is not intended for the purpose of delay.

(c) Sanctions. If a document, motion or other paper is not signed or does not comply with this Rule, it shall be stricken unless the noncompliance is not corrected promptly upon being called to the attention of the party. If a document, motion, or paper is signed in violation of this Rule, upon motion or its own initiative, the court may impose an appropriate sanction upon the person who signed it, a represented or *pro se* party, or both.

(d) Affidavits. Affidavits or verifications authorized or permitted under these Rules shall be written statements or declarations by a party or the party's attorney of record or of a witness, sworn to or affirmed before an officer authorized to administer oaths, that the affiant knows the facts stated to be true of the affiant's own knowledge except as to those matters stated on information and belief and as to those matters that the affiant believes them to be true.

(e) Enforcement. The court shall have the power to enforce any of these rules by the imposition of appropriate sanctions within the court's discretion.

Notes: Rule 104(a) sets forth in detail what information a document must contain and gives the Clerk authority to return a nonconforming document. Also, the Supreme Court now requires that all practicing attorneys have an email address.

Sections (b) and (c) are patterned after SCRCP Rule 11(a), but changed to be relevant to criminal proceedings. The exception of indictments to the requirements of section (b) is in accordance with the general law that "[a]n indictment receives its legal efficacy from being found and returned into court by a grand jury, and in the absence of statute it does not have to be authenticated by the signature of the prosecuting officer in order to be valid…" 41 Am. Jur. 2d Indictments and Informations § 71.

Section (d) is patterned after SCRCP Rule 11(c). Section (e) is new and clearly gives the court the power to enforce all these rules.

II. PRE TRIAL MATTERS

105. CRIMINAL PROCESS

(a) Service. Criminal process may be served on any day of the week.

(b) Filing. A sheriff or other law enforcement officer shall file with the appropriate Summary Court the affidavit and/or proof of service on which an arrest is made within five (5) days after the arrest.

Notes: Section (a) incorporates provisions of S.C. Code Ann. §17-13-90. Section (b) replaces "magistrate" with "Summary Court," and is otherwise identical in substance to former Rule 1, SCRCrimP. “Criminal Process” is defined in Rule 103, SCCR.

106. BOND MATTERS

(a) Time of Bond Hearing. Within twenty-four (24) hours after arrest, including arrests arising out of direct presentments to the grand jury, all defendants charged with a bailable offense shall appear before a Summary Court Judge who shall consider bond on all charges except those for which life imprisonment or death is the possible punishment. The Summary Court Judge may deny bond or set bond as provided by statute. Upon a finding of exceptional circumstances the Summary Court Judge may delay the bond hearing beyond twenty-four (24) hours.

(b) Notices at Bond Hearing. At the bond hearing before the Summary Court Judge, the defendant will be given written notice of the conditions and requirements of the bond and shall be advised of all rights pertaining to the arrest and bond. The defendant shall also be given the date, time, and place of Initial Appearance in the Court of General Sessions and that this mandatory appearance is a condition of the bond.

(c) Representation Matters. At the bond hearing, the matter of representation will be addressed with the defendant. The Summary Court Judge shall follow the docket management order for appointment of counsel for that particular county. The defendant will be advised in writing of the right to counsel and the procedure for applying for appointed counsel. The defendant will further be advised that if appointed counsel is desired, application must be made within fifteen (15) days following the bond hearing, that failure to timely apply for appointed counsel is a breach of a bond condition, and that bond may be revoked at the Initial Appearance. If a defendant is screened for indigency at the bond hearing, the form used will contain no language that could be construed as an invocation of the right to counsel under the United States or South Carolina Constitutions.

(d) Summary Court Appearance on Non-Bailable Offenses. Defendants incarcerated on offenses in which the Court of General Sessions has exclusive jurisdiction for bond shall appear before a Summary Court Judge within twenty-four (24) hours after arrest, subject only to the same delays for exceptional circumstances as set forth in section (a) above. At this appearance, the Summary Court Judge shall advise the defendant of the right to a preliminary hearing pursuant to Rule 108. The Summary Court Judge shall also address the matter of representation and advise the defendant that if appointed counsel is desired, application must be made within fifteen (15) days following this appearance. The defendant shall also be given the date, time, and place of Initial Appearance in the Court of General Sessions.

(e) General Sessions Jurisdiction for Bond. On all cases in which the Court of General Sessions has exclusive jurisdiction for bond, the solicitor will schedule or notify the chief judge of the necessity of a bond hearing and the chief judge will ensure that a hearing is conducted in the Court of General Sessions as soon as practicable but not later than thirty (30) days after the defendant's arrest, unless such hearing is waived in writing by the defendant or defense counsel.

(f) Motions.

(1) Reconsideration. The Circuit Court shall consider motions regarding reconsideration of General Sessions offenses set by a Summary Court Judge upon a motion filed with the Clerk of Court in accordance with Rule 110. Hearing of these motions shall be scheduled by the solicitor.

(2) Subsequent Motions relating to Bond. Motions by the State to revoke or modify a defendant's bond must be made in writing and must state with particularity the grounds for revocation or modification and set forth the relief or order sought. The motion must be filed with the Clerk of Court and a copy served on the chief judge, defense counsel and the bond surety, if any.

Except as provided in subsection (b) below, these motions will be scheduled by the chief judge or a presiding judge.

> **(a)*Prima Facie* Showing.** After a Circuit Court Judge has heard and ruled upon a defendant's motion to reconsider a bond set by the Summary Court, further defense motions to reconsider will be heard by the Circuit Court only upon the defendant's *prima facie* showing of a material change in circumstance which relate to the factors set forth in S.C. Code Ann. §17-15-30 and which has arisen since the prior motion to reconsider. The chief judge will either schedule a hearing or if such showing is not set forth in the written motion, deny the motion for failure to make a *prima facie* showing of a material change in circumstance. Information regarding the defendant's guilt or innocence will not qualify as a change in circumstance for purposes of reconsidering bond absent consent of the solicitor.
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> **(b) Emergency Revocation Motions.** If the State's motion to revoke or modify bond includes a *prima facie* showing of imminent danger to the community, imminent danger to the defendant or flight by the defendant, the chief judge or presiding judge will conduct or order an emergency bond hearing to be conducted by the Circuit Court or designee including a Summary Court Judge within forty-eight (48) hours of receiving service of the State's motion. The chief judge will order the solicitor to notify defense counsel and bond surety of the time and date of the hearing and the solicitor must provide proof that reasonable efforts were made to effect such notice. Upon notice by the State, defense counsel and bond surety must make reasonable efforts to notify the defendant of the emergency hearing and secure the defendant's presence at the hearing. The court may, in its discretion, proceed with the hearing despite the absence of the defendant, defense counsel or bond surety. Upon receiving notice of the chief judge's order for an emergency hearing, the bond surety may surrender the defendant to the county of jurisdiction's detention center in accordance with S.C. Code Ann. §38-53-50(b). If an emergency bond hearing is held without the presence of the defendant or defense counsel, and bond is revoked, the judge having heard the matter, in his or her discretion, may conduct a hearing on a defendant's motion to reconsider the revocation. Such defense motions to reconsider revocation must be filed with the Clerk of Court and served on the solicitor and bond surety.

(g) Matters Outside Track. If a case is not disposed of by plea, trial, or dismissal within the track set for disposition, a motion to reconsider bond on a defendant in pre-trial detention may be made on this ground, and unreasonable delay may be considered by the court, along with other factors in deciding whether to modify the bond.

Notes: This is a new rule and conforms to the requirements of S.C. Code Ann. §17-13-10 which is the statutory authority on bond.

Section (a) clarifies that bond shall be set on all bailable offenses within twenty-four (24) hours absent a finding of exceptional circumstances. Those offenses for which life imprisonment or death is a possible punishment are considered non-bailable by the Summary Court.

Section (c) provides the procedure for instructing the defendant on the right to counsel and the defendant's requirements thereafter.

Section (d), when read in conjunction with section (a) and section (e) makes clear that a Summary Court Judge shall set bond on all charges over which the Summary Court has jurisdiction even if the defendant is charged with other non-bailable offenses (e.g. if a defendant is charged with three bailable offenses and one non-bailable offense, the Summary Court Judge shall consider bond on all the bailable offenses, thereby leaving for consideration by the Circuit Court only the bond on the latter offense).

Subsection (f)(2)(A) is meant to convey that one Circuit Court Judge should not reconsider the bond set by another Circuit Court Judge absent a change of circumstances.

The rules of evidence do not apply to bond hearings. *See* Rule 1101(d)(3), SCRE.

107. SURETIES ON BONDS

(a) No attorney or member of the attorney's immediate family (spouse, parent, sibling, or child) shall be on the bond of any defendant represented by that attorney.

(b) Court Approval. Any bondsman seeking to act on a surety bond must be approved by the Clerk of Court.

(c) Procedure for relief of bond.

(1) A surety desiring to be relieved on a bond for good cause may file with the court a motion to be relieved on the bond. A copy of the motion must be served upon the defendant, defense counsel, and the State. The Clerk of Court shall then schedule a hearing to determine if the surety should be relieved on the bond and notify all necessary parties of the hearing date.

(2) If the circumstances warrant immediate incarceration of the defendant to prevent imminent violation of any one of the specific terms of the bail bond, or if the defendant has violated any one of the specific terms of the bond, the surety may take the defendant to the appropriate detention facility for holding until the court orders that the surety be relieved. The surety must within three (3) business days file with the detention facility and the court an affidavit stating the facts to support the surrender of the defendant for good cause. When the affidavit is filed with the court, the surety must also file a motion to be relieved on the bond pursuant to subsection (1). A surety who surrenders a defendant and files an affidavit which does not show good cause is subject to penalties imposed for perjury. Nonpayment of fees alone is not sufficient cause to warrant immediate incarceration of the defendant or relief of the surety on the bond.

(3) The court in its discretion shall grant or deny relief on the bond on such terms and conditions as the court deems appropriate.

(4) After the surety has been relieved by order of the court, a new undertaking must be filed with the appropriate court in order to secure the re-release of the defendant. The undertaking must contain the same conditions included in the original bond unless the conditions have been changed by the court.

(d) Third Party Bonds. Individuals securing collateral for a surety bond are liable for the full amount of the bond plus fees, and can lose the collateral if the defendant fails to appear for court.

(e) Personal Recognizance Bonds. Any person charged with a noncapital offense triable in either the Summary Court or Circuit Court, shall, at his or her appearance before any of such courts, be ordered released pending trial on his or her own recognizance without surety in an amount specified by the court. However, if the court determines in its discretion that such a release will not reasonably assure the appearance of the person as required, or unreasonable danger to the community will result, the court may impose any one or more of the following conditions of release:

(1) Require the execution of an appearance bond in a specified amount with good and sufficient surety or sureties approved by the court;

(2) Place the person in the custody of a designated person or organization agreeing to supervise;

(3) Place restrictions on the travel, association, or place of abode of the person during the period of release;

(4) Impose any other conditions deemed reasonably necessary.

Notes: This is a new rule. Subsection (c) outlining the procedure for relief of bond is based on S.C. Code Ann. §38-53-50. Subsection (e) dealing with personal recognizance bonds is based on the language of S.C. Code Ann. §17-15-10.

108. PRELIMINARY HEARINGS

(a) Notice of Right. Any defendant charged with a crime not triable in Summary Court shall be brought before a Summary Court Judge as provided in Rule 106 and shall be given notice of the defendant's right to a preliminary hearing solely to determine whether sufficient evidence exists to warrant the defendant's detention and trial. In the case of bailable offenses, the notice shall be given at the bond hearing. In the case of non-bailable offenses, the notice shall be in accordance with Rule 106(d). Notice shall be given orally and also by means of a simple form providing the defendant an opportunity to request a preliminary hearing by signing the form and returning it to the advising Summary Court Judge. In all cases, the request for a preliminary hearing shall be made within ten (10) days after the notice.

(b) Time for Hearing. If the defendant requests a preliminary hearing, the hearing shall be scheduled within ten (10) days and held within thirty (30) days following the request. The hearing shall not be held, however, if the defendant is indicted by a grand jury or waives indictment before the preliminary hearing is held. The defendant may appear by counsel or in person or both.

(c) Probable Cause. Preliminary hearings are for the limited purpose of establishing probable cause for the offenses charged. If probable cause be found by the Summary Court, the defendant shall be bound over to the Court of General Sessions. If there be a lack of probable cause, the summary court shall issue an order of dismissal, the defendant shall be discharged and the bondsman released from liability on the bond. This dismissal is without prejudice and shall not prevent the State from instituting another prosecution for the same offense. The defendant's record shall not be expunged for sixty (60) days after dismissal without the consent of the Solicitor.

(d) Conclusion of Hearing. After concluding the hearing the summary court shall transmit its findings within ten (10) days to the Clerk of Court. If the case is dismissed, the Summary Court shall transmit a copy of the order of dismissal to the State, defendant, and defense counsel and bondsman, if any.

(e) Delays. Any delay in the holding of a preliminary hearing shall not be grounds for a delay in the prosecution of the case.

(f) Variance. Practice and procedure with regards to preliminary hearings may be altered by the terms of a local case management order approved by the Supreme Court.

Notes: This rule is in accordance with the applicable portions of the South Carolina Code of Laws including S.C. Code Ann. §§ 22-5-320 and 17-23-160.

Rule 108 (a) is identical to Rule 2, SCRCrimP except for changing "magistrate" to "Summary Court Judge" or "Summary Court" and setting the time when the notice shall be given in accordance with Rule 106. Rule 108 (b) continues the requirement of Rule 2, SCRCrimP that a preliminary hearing be scheduled within ten (10) days but gives the Summary Court Judge a window of thirty (30) days in which to hold the preliminary hearing. Language is added to Rule 108(c) to clarify that the Summary Court shall dismiss a charge if no probable cause is found.

Language is added to Rule 108(d) to require that notice of dismissal shall be given the defendant or defense counsel and bondsman, if any. Rule 108 (e) is in accordance with existing law.

The rules of evidence do not apply to preliminary hearings. *See* 1101 (d)(3), SCRE.

109. DISPOSITION OF ARREST WARRANTS

(a) Transmittal to Clerk. Summary Court Judges and other officials authorized to issue warrants shall, in all cases within the jurisdiction of the Court of General Sessions, forward to the Clerk of Court all documents pertaining to the case including, but not limited to, the arrest warrant and bond, within seven (7) business days from the date of the bond hearing in the case of an arrest warrant and date of issuance in the case of other documents. Transmittal shall be pursuant to procedures now or hereafter promulgated by Court Administration.

(b) Transmittal to Solicitor. The Clerk of Court shall forward a copy of any arrest warrant and related documents received pursuant to section (a) above to the solicitor within five (5) business days from the date of receipt from the issuing official.

(c) Action on Warrant. Within ninety (90) days after receipt of an arrest warrant from the Clerk of Court, the State shall take action on the warrant by (1) preparing an indictment; (2) assigning an indictment number; (3) presenting the indictment to the Grand Jury; and (4) filing the outcome of the presentment with the Clerk of Court within twenty-four (24) hours if the Grand Jury has not returned the indictment directly to the Clerk. If the State formally dismisses the warrant the prosecutor shall notify the Clerk of Court in writing. The solicitor may make referral to pre-trial intervention or other diversionary program, which would stay the requirements of this rule. If the solicitor makes any other affirmative disposition, it shall be in writing and filed with the Clerk of Court. The State shall notify the defendant or defense counsel of the action taken (e.g. True Bill, No Bill, Dismissal, or other).

(d) Extensions of Time. The Solicitor may petition the chief judge for an order delaying action on the warrant, as set forth above, for successive ninety (90) day periods if the court specifically finds good cause for such delay for each successive ninety (90) day period.

(e) Record of Proceedings. Any action taken pursuant to this rule, excluding the referral to a pre-trial intervention program, shall be entered in the records of the Clerk of Court pursuant to procedures now or hereafter promulgated by Court Administration.

Notes: Rule 109(a) changes "magistrate" to "Summary Court Judge" and shortens the time for transmittal from fifteen (15) days to seven (7) business days from the bond hearing. Otherwise, the language is substantially identical to the language of former Rule 3(a), SCRCrimP.

Section (b) changes the transmittal time from two (2) to five (5) business days. Section (c) continues the requirement that indictments be presented to the Grand Jury within ninety (90) days, but provides for action to be taken after presentment including notifying the defendant or defense counsel of the action taken. Section (d) changes "circuit court" to "chief judge". Section (e) is based on to former Rule 3(e), SCRCrimP.

110. MOTIONS

(a) In General

(1) Form. An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds thereof, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. The motion shall be filed with the Clerk of Court and a copy served on opposing counsel or *pro se* party.

(2) Time of Filing. On all motions the grounds for which are known before the case is called for trial must be filed not less than ten (10) days before trial in order to schedule adequate time for hearing the motion(s). If the grounds for the motion arise less than ten (10) days before trial, the motion shall be made within two (2) days from the time counsel or *pro se* party becomes aware of the grounds. These include motions *in limine* for suppression or exclusion of evidence.

(b) Subsequent Applications for Order After Refusal. If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same set of facts shall be made to any other judge in that action.

(c) Scheduling of Motions.

(1) Solicitor's Responsibility. Any motion, with the exception of motions for discovery under Rule 112 or in accordance with *Brady v. Maryland*, shall be scheduled by the solicitor within thirty (30) days of service. Time will be set aside by the solicitor and the court during each term of court for hearing motions. For good cause, the court may schedule a special time and date to hear any motion.

2) Moving Party's Responsibility. If the motion has not been resolved within thirty (30) days of filing, the moving party may apply to the chief judge for a hearing. Such request or application shall contain an affirmation that movant's counsel or *pro se* party has communicated, orally or in writing, with opposing counsel or *pro se* party and has attempted in good faith to resolve the matter contained in the motion. This affirmation is not necessary if movant's counsel or *pro se* party certifies that consultation would serve no useful purpose, or could not be timely held.

(3) Duty of the Court. Upon receipt of a request for a hearing pursuant to (c)(2) above, the court may take such action as is deemed appropriate to resolve the motion.

Notes: Subsection (a)(1) is the language of Rule 4(a), SCRCrimP, but adds the requirement that the motion be filed with the Clerk of Court and a copy served on opposing counsel or *pro se* party. Subsection (a)(2) is new and contains time requirements for filing of all motions. Section (b) is identical to former Rule 4(b), SCRCrimP. Section (c) is new and provides a mechanism for scheduling and hearing motions. Subsection(c)(2) also contains a requirement that on all motions where a hearing is requested, the moving party must certify that he has consulted

with the opposing party or counsel and has been unable to resolve the motion. This certification is patterned after Rule 11, SCRCP, except the certification is not required on all motions, but only those on which a hearing is needed. This eliminates routine Rule 112 and/or *Brady* motions, unless a subsequent motion to compel is made. *Brady v. Maryland***,** 373 U.S. 83, 83 S.Ct. 1194 (1963), requires the disclosure of exculpatory materials.

111. MENTAL EVALUATIONS

(a) Motions. Motions to have a defendant examined by either the Department of Mental Health or the Department of Disabilities and Special Needs shall be made in accordance with Rule 110(a) and shall not be granted by the court without a sufficient showing that the mental status of the defendant is an issue. The court shall set forth in its order the reasons for which such examination is necessary. In the event the court denies the motion, the court shall specify on the record its reasons for denial.

(b) Mental Competency. An order requiring an evaluation for competency to stand trial shall be in accordance with the form promulgated by Court Administration. Defendants suspected of having mental illness shall be examined by the Department of Mental Health. Defendants suspected of having mental retardation shall be examined by the Department Disabilities and Special Needs. The court shall not order examinations to both agencies simultaneously; in the event there is a suspicion of dual diagnosis, the defendant shall be examined first by the Department of Mental Health, and the examiners shall, pursuant to the terms of the order for examination, refer the defendant to the Department of Disabilities and Special Needs if necessary.

(c) Criminal Responsibility. An order to evaluate criminal responsibility pursuant to the *M'Naugten* standard shall be in accordance with the form promulgated by Court Administration. Because it has statutory responsibility for custody and control of individuals determined not guilty by reason of insanity, all orders to evaluate criminal responsibility shall be directed to the Department of Mental Health, regardless of the defendant's underlying condition.

(d) Hearing to Determine Competency. Within thirty (30) days of receiving the report from the appropriate agency, the solicitor shall schedule and the court shall conduct a hearing and issue orders in conformity with the applicable form promulgated by Court Administration.

(e) Determination of Criminal Responsibility. Lack of criminal responsibility is an affirmative defense, and unless a jury trial is waived, is an issue for the jury. Within thirty (30) days of receiving the report from a mental health professional, the defendant must give written notice to the State if the defendant intends to assert the defense of insanity at the time of the alleged crime. Failure to do so, if prejudice results to the State, may result in the exclusion of some or all witnesses offered by the defense on the issue of criminal responsibility. At the trial, if the defendant is found not criminally responsible, the court shall enter an order in conformity with the applicable form promulgated by Court Administration.

Notes: This is a new rule.

The leading case in S.C. regarding evaluations for competency to stand trial is *State v. Blair*, 275 S.C 529, 273S.E.2d536 (1981).

South Carolina follows the traditional test of *M'Naghten* to determine criminal responsibility (S.C. Code Ann. §17-24-10(a)). See *McNaghten's Case*, 8 Eng. Rep. 718 (1843) (holding that a defendant is insane if, at the time of the

crime, he suffered from a disease of the mind that caused a defect of reason such that he was unable to know the wrongfulness of his actions or to understand the nature of his acts.) For a defendant who has the capacity to distinguish moral or legal right from moral or legal wrong, but due to mental disease or defect lacks sufficient capacity to conform his conduct to the requirements of the law, see S.C. Code Ann. §17-24-20(a).

Section (b):The decision to order an evaluation for competency is within the trial court's discretion. *State v. Colden*, 372 S.C. 428, 641 S.E. 2d 912 (2007). The current form contemplated by this section is SCCR Form 13.

The current form referred to in section (c) is SCCR Form 14.

Section (d): When there is a dispute as to whether a defendant is competent to stand trial, the defendant bears the burden of proving his lack of competence by a preponderance of the evidence. *State v. Weik*, 356 S.C. 76, 587 S.E. 2d 683 (2002). The forms contemplated by section (d) are currently as follows:

SCCR 15: Defendant Found Competent
SCCR 16: Defendant Not Competent, But Likely to Restore
SCCR 17: Defendant Not Competent, Not Likely to Restore and Ordering Probate Commitment Proceedings

Section (e): S. C. Code Ann. §17-24-10(b) establishes the burden of proof for lack of criminal responsibility as being by a preponderance of the evidence. The forms contemplated by section (e) are currently as follows:

SCCR 18: Finding of Not Guilty by Reason of Insanity
SCCR 19: Not Guilty by Reason of Insanity, Final Order

112. DISCOVERY & DISCLOSURE

(a) Disclosure of Evidence by the State. Upon the motion or request of the defendant, the State shall disclose to the defendant the following information and material, whether in the possession, custody, or control of the prosecution or one of the prosecution's agents, and shall permit the inspection, copying, testing, and photographing of all items deemed discoverable under this rule which are known, or by the exercise of due diligence may become known to the attorney for the State.

(1) **Statements of Defendant.**

(A) **Definition of "Statement."** When used in this rule, the term "statement" shall include any statement in writing that is made, signed, or adopted by that person, or the substance of a statement of any kind made by that person that is embodied or summarized in any writing or recording, whether or not specifically signed or adopted by that person. The term is intended to include statements contained in police or investigative reports, but does not include attorney work product. When used in this rule, the term "oral statement" of a person shall mean the substance of any statement of any kind by that person, whether or not reflected in any existing writing or recording.

(B) **Disclosure.** The State shall disclose all written and all oral statements of the defendant or of any codefendant that relate to the subject matter of the case.

(2) **Defendant's Prior Record.** The State shall provide a copy of the defendant's prior criminal record, if any.

(3) **Statements of Witnesses.** The State shall furnish any and all written statements of any witness.

(A) The State shall disclose any verbal or written agreements with any witness it intends to call at trial which shall include the nature and circumstances of any agreement, understanding, or representation between the State and the witness that may constitute an inducement for the witness's testimony or cooperation with the prosecution.

(B) With respect to any expert associated with the investigation of the case, the State shall disclose any report or written statement created, to include the results of any physical or mental examinations, and any forensic or scientific tests, experiments, or comparisons. This obligation remains in effect regardless of whether the State intends to call to testify any parties, agencies, or laboratories associated with or who conducted the reports, tests, examinations, experiments, comparisons, or statements.

(C) For each expert witness that the State reasonably expects to call as a witness at trial, the prosecutor shall additionally furnish to the defense a written report of

the results of the examination or tests conducted, the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion.

(4) **Documents and Tangible Objects**. The State shall disclose the existence of, and shall allow the defense to review, inspect, and copy all documents and tangible objects associated with or related to the investigation of the case.

(5) **Evidence of Prior Bad Acts.** If the State intends to introduce evidence of prior bad acts pursuant to *State v. Lyle*, and/or Rule 404(b), SCRE, the State shall notify the defendant of that intention and of the witnesses and/or other evidence to be relied upon to prove such acts. Such disclosure shall be made no later than ten (10) days prior to the date of trial.

(b) Disclosure of Evidence by the Defendant. Upon the motion or request of the State, the defendant shall disclose the following material, and shall permit the State to inspect and copy or photograph said material.

(1) **Documents and Tangible Items.** The defendant shall disclose any documents or tangible items that are within the possession, custody, or control of the defense and that the defense intends to introduce as evidence at trial. The term "tangible object" shall include, but shall not be limited to, any books, papers, documents, photographs, physical items, telephone records or recordings, buildings or places, or any copies or portions thereof.

(2) **Reports of Examinations and Tests.** The defendant shall disclose any results, or copies thereof, of any physical or mental examinations, tests, measurements, or experiments made in connection with the case, that are within the possession and control of the defense and that the defense intends to introduce as evidence at trial, or that were prepared by a witness who the defense intends to call at trial, when the results or reports relate to the witness's testimony. Additionally, upon the motion or request of the State, the court shall require the defense to permit the prosecution to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it, that is available to the defense if the defense intends to offer such evidence.

(3) **Expert Witnesses.** Upon the motion or request of the State, the defendant shall provide the names and addresses of any witnesses who the defendant reasonably expects to call as an expert witness at trial. For each expert witness that the defendant reasonably expects to call as a witness at trial, the defendant shall additionally furnish to the State a written report of the results of the examination or tests conducted by the expert, the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. Such notice and materials shall be provided no later than thirty (30) days prior to the expiration of the track or as otherwise ordered by the court.

(c) Limitations on Disclosure.

(1) **Trial Preparation.** Neither the State nor the defendant shall be required to disclose any legal research, or any records, correspondence, reports, memoranda, or written documents created for the purpose of trial preparation, such as interview notes or witness examinations, that has been prepared by an attorney or by a member of the attorney's legal staff, to the extent that the written material contains the opinions, theories, strategies, or conclusions of the attorney or the member of the attorney's legal staff.

(2) **Confidential Informants.** The State may limit the disclosure of the identity of a confidential informant if disclosure would place the confidential informant at risk of harm. However, the identity of a confidential informant who is a material witness and/or a participant in the criminal activity which serves as the basis for the defendant's charge(s) shall be disclosed to the defendant unless the State seeks and obtains a court order limiting the same. All other confidential informants who are reasonably likely to testify at trial must be disclosed no later than thirty (30) days prior to the date of trial.

(3) **Motions for Disclosure not Prohibited.** Nothing in this section shall prohibit any party from moving for the disclosure of any evidence in the possession, custody, or control of another party, including any third party. The moving party shall state its basis for requesting the disclosure of the requested information or material. The court, upon finding that disclosure is appropriate, shall order disclosure and shall set the time and manner under which disclose shall be effected.

(d) Time and Manner of Disclosure.

(1) The State and defense shall disclose all discoverable material either in their possession or available to them within thirty (30) days of the receipt of any motion or request for disclosure.

(2) Any party subject to the disclosure of material under these provisions shall be under a continuing duty to disclose any and all discoverable material that is obtained during the entire course of proceedings associated with the particular case, which shall continue up to the point of, and throughout any trial.

(e) Failure to Disclose.

(1) Either party may, at any time during the course of proceedings, whether prior to or during any trial, may bring to the court's attention the failure of another party to comply with this rule. Upon the party's motion and upon a finding of non-compliance with this rule, the court may grant relief in one of the following ways:

(A) Grant a mistrial;
(B) Prohibit the introduction of any non-disclosed evidence; or
(C) Grant a continuance and order the non-complying party to disclose the information or permit inspection.
(D) Such other relief as the court may deem appropriate.

(2) The court shall make a finding on the record as to the reason for and the circumstances surrounding the non-compliance and the determination of the proper sanction pursuant to the subsection (e)(1) above.

(3) In determining the proper sanction, the court shall consider the following factors:

(A) The materiality of the non-disclosed evidence;
(B) The length of time the evidence was in the custody or control of the non-complying party;
(C) The stated reason for the non-compliance; and
(D)Any other circumstances or considerations that the court deems appropriate.

Notes: This rule rewrites and replaces Rule 5, SCRCrimP. It is intended to make disclosure and discovery more complete for both the State and the defense.

Section (a) expands and clarifies what the State must disclose. The statements of the defendant which must be disclosed are defined in subsection (a)(1). Subsection (a)(2) requires the disclosure of the defendant's criminal record and subsection (a)(3) requires the disclosure of witness statements.

Subsection (a)(4) requires disclosure of tangible objects. The term "documents" and "tangible objects" is intended to include, but shall not be limited to, any books, papers, documents, photographs, physical items, telephone or cell phone records or recordings, buildings or places, items obtained through any search or seizure, as well as any materials, documents, or statements relating to any searches or seizures conducted in connection with the investigation of the case, whether or not the search or seizure resulted in the seizure of any items, reports filed by the investigating officer or any officer associated with the case, including any notes, materials, documents, or information relating to lineups, showups, and picture or voice identifications conducted in relation to the case, and the identity of any witnesses to any lineups, showups, and picture or voice identifications, electronic monitoring, surveillance (including wiretapping), in connection with the investigation or prosecution of the case, the substance of any and all electronic media discovered during the investigation of the case, such evidence including but not limited to text messages, internet pages, message boards, online social networks, and e-mails, and the results of any tests or examinations, including physical or mental examinations or scientific tests, experiments, or comparisons, which were conducted during the course of the investigation.

Subsection (a)(5) requires disclosure of prior bad acts. This subsection refers to *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), which serves as the authority on prior bad acts in South Carolina.

Section (b) expands and clarifies what the defense must disclose. No longer is the State prevented from serving discovery requests until after the defendant has served requests. In section (b)(1) the defendant must disclose documents and tangible items, in (b)(2) reports of examinations and tests, and in (b)(3) expert witness names and reports. It is intended that the time frame in subsection (b)(3) should tie into the tracking requirements of the docket management orders.

Rule 5(e), SCRCrimP, regarding notice of alibi defense and Rule 5(f), SCRCrimP, regarding notice of insanity defense or plea of guilty but mentally ill are now covered in Rules 113 and 111, SCCR, respectively.

113. NOTICES AFFECTING TRIAL OR DEFENSE

The following motions and notices shall be given in writing to opposing counsel and the defendant if applicable. The original of such notice shall be filed with the Clerk of Court within five (5) days of the giving of notice

(a) Death Penalty or Mandatory Life without Parole. The State must give notice of its intention to seek the death penalty or a sentence of life without parole.

(b) Alibi

(1) Notice of Alibi by Defendant. Upon written request of the State stating the time, date and place at which the alleged offense occurred, the defendant shall, not less than thirty (30) days before trial, or at such time as the court may direct, serve upon the State a written notice of an intention to offer an alibi defense. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defense intends to rely to establish such alibi.

(2) Disclosure by the State. Within ten (10) days after the defendant serves notice of alibi, but in no event less than ten (10) days before trial, or as the court may otherwise direct, the State shall serve upon defense counsel or *pro se* defendant the names and addresses of witnesses upon whom the State intends to rely to establish the defendant's presence at the scene of the alleged crime.

(3) Continuing Duty to Disclose. Both parties shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses whose identity, if known, should have been included in the information furnished under subsections (b)(1) or (b)(2).

(4) Failure to Disclose. If either party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by either party. Nothing in this rule shall limit the right of the defendant to testify on his or her own behalf.

(c) Insanity Defense or Plea of Guilty but Mentally Ill. The defendant must notify the State of an intention to offer an insanity defense or a plea of guilty but mentally ill in accordance with Rule 111 (e).

(d) Waiver. The court may, for good cause shown, waive the requirements of this rule unless prohibited by statute.

Notes: The introductory paragraph and section (a) are new. S.C. Code Ann. §16-3-26 requires the State to give notice of its intention to seek the death penalty.

S.C. Code Ann. §17-25-45 requires the solicitor to seek life without parole on the second most serious offense. However, on a third serious offense, the decision to seek life without parole is in the discretion of the solicitor. Whether the solicitor is required to seek or determines to seek life without parole on the basis of a subsequent serious or most serious offense, S.C. Code Ann. §17-25-45 requires the solicitor to provide written notice to the defendant and defendant's counsel not less than ten (10) days before trial.

Subsections (b) (1), (2), (3), and (4) are taken from to Rule 5(e) (2), and (3) and (4), SCRCrimP. Section (c) departs from the former Rule 5 (f), SCRCrimP by giving defendants more time to provide notice to the State of an intention to assert an insanity defense. The new procedure is outlined in Rule 111 (e). S.C. Code Ann. §17-24-10 provides that an insanity defense is an affirmative defense and S.C. Code Ann. §17-24-20 sets forth the statutory requirements for a jury verdict or plea of guilty but mentally ill. Section (d) is similar to Rule 5 (g), SCRCrimP.

114. CHEMICAL ANALYSIS AND CHAIN OF CUSTODY

(a) Report of Chemical Analysis. For the purpose of establishing the physical evidence of a controlled substance or other substance regulated by Title 44, Chapter 53 of the Code of Laws or Rule 61-4 of the Department of Health and Environmental Control, a report signed by the chemist or analyst who performed the test or tests required concerning its nature shall be evidence that the material delivered to him or her was properly tested under procedures approved by the State Law Enforcement Division (SLED), that those procedures are legally reliable and that the material is or contains the substance or substances stated. The report shall be admitted without the necessity of the chemist or analyst personally being present or appearing in court provided:

> **(1)** the report, at a minimum, identifies each item tested, the kind of test or tests conducted on each item, and the chemist's or analyst's conclusion whether the item is or contains a controlled or other regulated substance (to include weight or quantity, if appropriate) in language which can be understood by a juror without the necessity for expert testimony; and,
>
> **(2)** the report is accompanied by an affidavit of the chemist or analyst who performed the test or tests that:
>
> > **(A)** the chemist or analyst is certified by SLED as qualified under standards approved by SLED to analyze those substances;
> >
> > **(B)** sets forth the chemist's or analyst's training and experience including the number of times he or she has been qualified as an expert witness; and,
> >
> > **(C)** the chemist or analyst conducted the test or tests shown on the report using procedures approved by SLED and that the report accurately reflects his or her opinion regarding the results of those tests.

The defendant or opposing party may object to the introduction of a chemist's or analyst's report not later than ten (10) days prior to the trial of the case. If such objection is made in writing, filed with the court, and served on the State, the trial judge shall require the chemist or analyst to be present at trial for the purpose of personally testifying.

(b) Certified or Sworn Statement. For the purpose of establishing a chain of physical custody or control of evidence entered under section (a) of this Rule, a certified or sworn statement signed by each successive person having custody of the evidence that he or she delivered it to the person stated is evidence that the person had custody and made delivery as stated without the necessity of the person who signed the statement being present in court provided: (1) the statement contains a sufficient description of the substance or its container to distinguish it; and (2) the statement says the substance was delivered in substantially the same condition as when received.

A defendant may object to the chain of custody in writing, setting forth with specificity what part of the sworn statement is challenged and the basis therefore. The challenge shall be filed with the court and served on the State within thirty (30) days of receipt of the sworn statement and in no event less than ten (10) days before trial.

(c) Disclosure. Any reports or statements subject to sections (a) or (b) shall be disclosed by the State in accordance with Rule 112, but in no event later than twenty (20) days prior to the trial of the case.

(d) Waiver of Rights. Nothing in this Rule shall preclude the right of any defendant to obtain an expert chemist or analyst to test a substance, provided it is tested under the supervision of the authority having custody of the substance or of SLED. Nothing in this Rule shall preclude the right of any party to introduce any evidence supporting or contradicting reports or papers entered into evidence under this Rule.

Notes: Rule 114 is substantially similar to Rule 6, SCRCrimP, but deletes the former language concerning a preliminary hearing as a trigger date for objection to the chemist's report. In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), the United States Supreme Court held that certificates or reports of analysis of drugs sworn by the analyst from the state laboratory required in court testimony by the analyst to meet the requirements of the Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, (2004). However, the Court went on to say that **"**[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections." *Melendez-Diaz* at 2534.

Section (a) of this rule safeguards the defendant's right to confrontation by giving the defendant the opportunity to object to the introduction of the chemist's or analyst's report, thereby requiring the witness's appearance in court. Section (b) gives the defendant the right to object to the chain of custody if the certified or sworn statement does not comply with this rule and provides a procedure for the objection. Section (c) requires disclosure in accordance with Rule 112 and further requires disclosure twenty (20) days prior to trial regardless of whether a Rule 112 request has been made.

115. CONTINUANCES

(a) Motions. Motions for continuance shall be made in accordance with Rule 110 and shall be filed as soon as the need and grounds for the continuance becomes known to the defense.

(b)Authority to Grant. The chief judge in each circuit shall have exclusive authority to grant continuances of cases scheduled for trial or expected to be called for trial. Continuances for a particular term or portion of a term may be granted by a presiding judge only upon written request of counsel or on the record. Any order granting a continuance shall be in writing, shall be made only upon a showing of good cause, and shall be filed forthwith with the Clerk of Court or the ruling made on the record. A continuance granted by a presiding judge cannot extend beyond the term of court over which the judge is presiding.

(c) Continuance Because of Absence of Witness. No motion for continuance shall be granted on account of the absence of a witness without the oath of the moving party or the party's counsel or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because the party cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that the motion is not intended for delay.

> **(1)** When a subpoena has been issued, the original shall be produced with proof of service or the reason why not served endorsed thereon or attached thereto; or if lost the same proof shall be offered with additional proof of the loss of the original subpoena.
>
> **(2)** A party applying for such postponement on account of the absence of a witness shall set forth under oath, in addition to the foregoing requirements, what fact(s) the party believes the witness if present would testify to and the grounds for such belief.

(d) Orders of Protection. Defense counsel seeking protection from appearance in all or part of any term of General Sessions shall confer with the solicitor, provide his or her reason for protection, and request consent. If the solicitor agrees not to call that attorney's case during the period for which the attorney seeks protection, an order is not necessary, but the parties may submit a consent order to the court if desired. If the solicitor objects, the court will conduct a hearing to determine if an order should be issued. After the trial roster has been published in accordance with Rule 123, orders of protection will not be granted. If circumstances change such that protection is unnecessary, defense counsel shall notify the court and the solicitor as soon as practicable.

Notes: The language is substantially the language of Rule 40(c), SCRCP, with additional language regulating the granting of continuances by the chief judge and presiding judges. Rule 115(a) is new. Rule 115 (b) and (c) are the same as Rule 7, SCRCrimP. Section (d) is new and is intended to promote communication between counsel and eliminate *ex parte* orders of protection.

116. DEFENDANT'S RIGHT TO COUNSEL

(a) Right. A defendant indicted for a General Sessions offense or before the court on a probation violation warrant or citation has a right to be represented by counsel. If the defendant cannot afford counsel according to the poverty guidelines established by the United States Department of Health and Human Services, one will be appointed.

(b) Affidavit of Indigency and Appointment of Counsel.

(1) Application for appointed counsel will be made in accordance with the form promulgated by Court Administration and filed with the Clerk of Court.

(2) The statutory fee must accompany the application unless the defendant is incarcerated. The fee may be waived only by order of the court.

(3) After screening, the Clerk of Court or Summary Court Judge will appoint the public defender or private counsel in accordance with the procedure set forth in the county docket management order.

(c) Juvenile Defendants. In all cases where a defendant is incarcerated in pretrial detention by the Department of Juvenile Justice on a charge where the defendant is automatically charged as an adult triable in General Sessions court, the Clerk of Court shall immediately appoint counsel to represent the juvenile without the necessity of an application for appointment of counsel and without payment of the required filing fee. A copy of the order of appointment shall be immediately forwarded to the appointed counsel with notice that the defendant is housed by the Department of Juvenile Justice.

(d) Notice of Representation. In all cases, retained or appointed counsel must file a notice of representation with the Clerk of Court and serve a copy on the State. If representation is limited to a bond hearing or preliminary hearing the notice must so specify. If the attorney does not specify the limited nature of representation, he or she shall be considered the attorney of record for the defendant through the conclusion of the proceedings at the trial level and may be relieved in accordance with this rule.

(e) Relief of Counsel. Counsel may be relieved for good cause only by motion pursuant to Rule 110. A copy of the motion must be served on the State and the non-moving defendant or attorney. At the hearing, the court shall ensure on the record that substitute counsel is appointed or retained or that the defendant has been advised of the dangers of self-representation and has decided to proceed *pro se* before counsel will be relieved.

(f) Substitution of Counsel. Defense counsel may be changed only by order of the court consented to by the defendant, former defense counsel, and current defense counsel. A copy of the order shall be furnished to the State within five (5) days. Substitution shall not be grounds for continuance unless opposing counsel has been given notice and an opportunity to be heard before the substitution is ordered.

(g) ***Pro se*** **Defendants.** Nothing in this rule shall prevent a defendant from appearing *pro se* in a General Sessions case or at a probation violation hearing. If the defendant is not indigent, the court may require the defendant to proceed when the case is called for trial.

Notes: This is a new rule. Section (a) ensures the defendant's right to counsel. Section (b) conforms to the requirements of S.C. Code §17-3-10 *et seq*. S.C. Code Ann. §17-3-30 provides for a fee to the Clerk of Court of $40.00.

Section (c) is new to ensure that juvenile defendants in the custody of the Department of Juvenile Justice receive early representation. Section (d) guarantees the State will be aware of the defendant's representation or lack thereof. Section (e) and (f) provide the procedure for relief or change of counsel and are based on Rule 11 (b), SCRCP with changes to make the procedure relevant to criminal proceedings. Section (g) clarifies that notwithstanding the other provisions of this rule, the defendant is entitled to proceed *pro se*.

117. DIVERSIONARY PROGRAMS

(a) Pretrial Intervention (PTI). Every Solicitor shall have a Pretrial Intervention (PTI) program as required by statute. Participation in the PTI program is discretionary with the Solicitor and there is no legal right to participate in a PTI program. The court cannot order a Solicitor to accept a defendant in a PTI program.

(b) Transfer Court System. Solicitors may set up a system to transfer cases to summary court in any or all counties within that solicitor's jurisdiction. The use of this transfer system will be discretionary with the Solicitor after indictment, but shall not be done until a written procedure has been approved and adopted by the Solicitor, chief Summary Court Judge, and the chief judge. Cases so transferred shall be shown on a separate docket known as "Transfer Court."

(c) Adult Drug Court. An adult Drug Court treatment program may be created in each circuit by Supreme Court Order at the request of the Solicitor. In designing the program, the Solicitor may use a pre-trial diversion model, a post-plea model, or a combination of both. The organizational structure, eligibility criteria, and program requirements may vary, so long as the program incorporates, at a minimum, a coordinated arrangement for long-term addiction treatment, random drug screens, and frequent monitoring by a Drug Court judge. The Solicitor has sole discretion over whether a person may enter a Drug Court program, provided that the person must be subject to the jurisdiction of the Court of General Sessions.

(d) Mental Health Court. A system for handling eligible defendants who suffer from a mental illness or personality disorder may be created pursuant to an ordinance, statute, or Supreme Court Order. This system shall be referred to as "Mental Health Court" and eligibility shall be determined by the terms of the ordinance, statute, or Supreme Court Order.

(e) Other Diversionary Programs. Other diversionary programs may be implemented only by statute or Supreme Court Order.

Notes: This is a new rule.

The rules governing PTI are set forth in S.C. Code Ann. §17-22-30, et. seq.

Transfer Court is provided for in S.C. Code Ann. §22-3-545.

Defendants have no legal right to participate in a pretrial intervention program. Instead, participation is at the discretion of the solicitor. *State v. Tootle*, 330 S.C. 512, 500 S.E.2d 481 (1998). This rule applies the same reasoning to Drug Court and Mental Health, leaving participation in the sole discretion of the Solicitor.

118. BENCH WARRANTS

(a) General. Bench warrants are issued by the court when an individual fails to comply with an order of the court. Issuance of a bench warrant is directed by the presiding judge who may sign the warrant or direct the Clerk of Court to do so. Bench warrants need not be issued on the record in open court.

(b) Form. Bench warrants shall be in accordance with the form promulgated by Court Administration and shall require either the signature of the presiding judge or the signature of the respective Clerk of Court at the direction of the presiding judge.

(c) Procedure.

(1) Upon direction of the court to issue and sign a bench warrant, the Clerk shall complete the form promulgated by Court Administration.

(2) The Clerk of Court shall deliver an original or a certified copy of the bench warrant to the appropriate law enforcement office(s).

(3) The Clerk of Court shall maintain each original bench warrant attached to the defendant's original arrest warrant or file.

(4) The Clerk of Court shall maintain a bench warrant list which contains data on every active bench warrant of the county. Each entry shall contain the name of the defendant, date of issue, and the status of the bench warrant. At the beginning of each term of court, the Clerk shall review the bench warrant list to determine the number and age of outstanding warrants and provide a report to the chief judge.

(d) Service. It is the continuing duty of the sheriff, and of other appropriate law enforcement agencies in the county, to make every reasonable effort to serve bench warrants and to make periodic reports to the Clerk of Court concerning the status of unserved warrants.

(e) Return of Bench Warrant. Upon return of the bench warrant, the Clerk shall update the bench warrant list with the date of service and by whom the bench warrant was served or the date of return without service and reason for return. The Clerk shall attach the served bench warrant to the case file.

(f) Dismissal. Upon motion made in writing or on the record by the Clerk of Court, solicitor, defendant or defense counsel, the court may lift or dismiss an outstanding bench warrant whether served or unserved. Such dismissal shall be noted on the sentencing sheet or by separate written order. The Clerk of Court shall file the sentencing sheet or order, make certified copies, and deliver them to the solicitor and all law enforcement agencies that received the bench warrant. The original sentencing sheet or order shall be retained in the Clerk's office and filed with the defendant's records. The Clerk shall note the dismissal on the bench warrant list.

Notes: This is an amendment to Rule 30, SCRCrimP. Section (a) is new. Section (b) is substantially the same as Rule 30(b), SCRCrimP. Section (c), (e), and (f) are based on current Court Administration policies and procedures. Section (d) is identical to Rule 30(c), SCRCrimP.

119. INITIAL APPEARANCE

The Initial Appearance is the time scheduled for a defendant to appear for the first time in the Court of General Sessions. The defendant's appearance is mandatory.

(a) All matters required by the docket management order will be addressed at the Initial Appearance, including representation, discovery, and plea offers.

(b) The date, time, and place of the Second Appearance will be given to the defendant, if not previously provided.

Notes: This is a new rule and conforms to the requirements of the docket management orders in place in all circuits.

The first appearance of an accused before a judicial officer after arrest should be prompt and without unnecessary delay and be for the purposes of: (a) advising the accused of the charges against him; (b) informing the accused of his constitutional and statutory rights; (c) appointing counsel for the accused when necessary; (d) making a preliminary pre-trial release determination; (e) docketing a probable cause hearing if such is required in the jurisdiction, and (f) taking a plea and docketing a date for trial and sentencing. National Prosecution Standards, NDAA (2nd ed. 1991).

Some docket management orders may refer to the Initial Appearance as the First Appearance.

120. SECOND APPEARANCE

(a) The defendant and, if represented, defense counsel must appear at the Second Appearance. At that time, the State and the court will be advised if the defendant wishes to enter a guilty plea or proceed to trial.

(b) If the defendant desires to plead guilty, a date and time will be given by the State to appear before the court for entry of the guilty plea and sentencing by the court.

(c) If the defendant desires a trial, the defendant's case will be placed on the trial roster to be published by the Solicitor in accordance with Rule 123.

Notes: This is a new rule and incorporates a provision of various administrative orders implementing docket management. Rule 123 requires trial rosters to be prepared fourteen (14) days before the term begins.

Some docket management orders may refer to the Second Appearance as the Docket Appearance.

121. TRACKING

(a) All cases in the Court of General Sessions shall be placed on a tracking system to ensure orderly disposition. The particular tracking system to be utilized by each county shall be as set forth by the docket management order of the Supreme Court.

(b) Cases should be disposed of within the track to which they are assigned. Failure to dispose of a case within a track is not grounds for dismissal but may be considered by the chief judge in determining remedies or sanctions.

Notes: This is a new rule.

122. STATUS CONFERENCES

The chief judge or presiding judge may hold an informal conference with the State and defense counsel or *pro se* defendant at any time after a case has been on its track more than half the length of the track for purposes of determining if there are any issues which need to be addressed in order for the case to be disposed of within its track. Status conferences may also be conducted as the court deems necessary. No pretrial brief or other formal procedures shall be required for such conferences, and the conferences need not be on the record. The judge may enter a written order or make a ruling on the record encompassing the matters addressed at the pretrial conference.

Notes: This is a new rule.

123. TRIAL ROSTERS

(a) Preparation of Roster. At least fourteen (14) days prior to each term of court, the Solicitor shall prepare and publish a docket of all cases for trial subject to call during the term. Making the docket available in the Solicitor's office shall effect publication. The Solicitor will also provide notice to *pro se* defendants, defense counsel, and surety on the bond, if any, by fax, U.S. mail, electronic delivery, or by hand delivery. The Solicitor shall further send a copy of the docket to the chief judge and the presiding judge. All attorneys having clients on the docket shall notify their client that the case is scheduled for disposition. Nothing herein shall prevent the scheduling of pleas or trials with the consent of the parties.

(b) Presence in Court. All defendants on the trial roster must be available and present in court for trial within two (2) hours of oral notification. The failure to be present as specified may result in the revocation of bond and the issuance of a bench warrant.

Notes: Section (a) encompasses similar provisions of the docket management orders and S.C. Code Ann. § 1-7-330, which provides the Solicitor shall publish a docket not less than seven (7) days prior to trial. Section (b) is new.

124. PRE TRIAL DETENTION

(a) Administrators of county detention centers shall furnish a report of all inmates being held in pretrial detention for General Sessions charges and probation violations. This report shall be furnished to the chief judge monthly and to the presiding judge at the beginning of each term. The report shall include the detainee's name, length of time in confinement, the charges against the detainee, if known, and the amount of the detainee's bond.

(b) The chief judge or presiding judge may conduct a status conference as provided in Rule 122 on any pretrial detainee whose case is outside the track on which it has been placed. This status conference shall be with the assigned solicitor and defense counsel. The defendant, unless *pro se*, has no right to be present, but may be present in the judge's discretion. The court may issue such orders as may result from the status conference as it deems appropriate or may make a ruling on the record.

Notes: This is a new rule. S.C. Code Ann. § 24-5-110 provides that the "sheriff shall make a return to every court of general sessions of his county on the first day of the term of the name of every prisoner and the time and cause of his confinement, whether civil or criminal." However, some jails are not under the control of the sheriff, and section (a) is designed to ensure that the requirements of the statute are met by requiring reports to the chief judge and additionally to the presiding judge. Section (b) is to provide judicial oversight and review of cases outside the assigned track to prevent unreasonable pretrial detention.

125. ARRAIGNMENT

(a) Definition. Arraignment is the process of calling a defendant to court, serving and reading the indictment to the defendant, and requesting the defendant to enter an initial plea of guilty or not guilty.

(b) Waiver. Except in death penalty cases, the necessity of formal arraignment is eliminated if waived by the defendant or defense counsel, either expressly or impliedly, and the defendant or defense counsel has a copy of the indictment. Appearance in court or filing documents shall constitute an implied waiver. If waived, defendant shall be given a bond hearing in accordance with Rule 106.

Notes: This is a new rule. Because the discovery rules ensure that a defendant has notice of the charge or charges and the docket management system insures proper notification of court appearances, the necessity for formal arraignment is obviated.

An arraignment consists of calling the defendant to court, reading the indictment to the defendant so that the defendant may understand the charge against the defendant, and requesting that the defendant enter an initial plea of guilty or not guilty. See *State v. Brock*, 61 S.C. 141, 39 S.E. 359 (1901).

Arraignment is neither a constitutional nor a statutory right, but merely a formality. Thus, arraignment is subject to waiver. *State v. Ariail*, 311 S.C. 35, 426 S.E.2d 751 (1993) (by proceeding to trial, defendant waived any objections to the lack of his arraignment).

"[T]he United States Supreme Court has held that arraignment is a "mere formality" so that the failure to arraign does not result in a due process violation "so long as it appears that the accused had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." *Garland v. Washington*, 232 U.S. 642, 645, 34 S.Ct. 456, 457, 58 L.Ed. 772, 775 (1913).

126. PRESERVATION OF TESTIMONY

(a) In any case where a witness may not be available at the time the case is called for trial, that witness's testimony may be preserved for use at trial by the following procedure:

(1) Motion Hearing. A motion pursuant to Rule 110 shall be made by the party desiring to preserve the testimony. The motion shall set forth the reasons such preservation is necessary. If the adverse party does not consent, a hearing shall be conducted on the record to determine whether the testimony should be preserved. All parties, including the defendant and defense counsel shall have the right to be present at this hearing, but the defendant may waive the right to be present.

(2) Preservation Hearing. If the court grants the motion for good cause shown, a hearing shall be scheduled at which time the witness shall be subpoenaed and brought before the court at a regular or specially scheduled term of court. The State, defense counsel, and the defendant must be present. At such hearing, the witness may be examined and cross-examined on any relevant issues in the case, and the witness's appearance is treated as if the witness were appearing and testifying at trial. All objections must be made as the witness testifies and need not be preserved when the testimony is used at trial. Any objection not made at the time of the testimony is waived and may not be made for the first time at trial. The court shall ensure that the defendant's constitutional rights to confrontation are protected.

(3) Video. All testimony taken in accordance with this rule must be video-recorded in its entirety and only this recording may be used at trial.

(A) Identification. Prior to the witness being sworn, the video operator shall record an identification sign. As the sign is being recorded, the operator shall, in addition, vocally record the information on the sign. The identification sign shall indicate the caption of the action, the docket number of the action, the name of the witness, the date, the time, and presiding judge. After the identification sign has been recorded, the judge, solicitor, defense counsel, and the defendant shall be identified on camera, stating clearly the person’s name and role.

(B) Swearing. After the identification required by subsection (A) above has been completed, the witness shall be put on oath as required; the swearing shall be on camera.

(C) Certification. The court and video operator shall cause to be attached to the original video recording a certification that the witness was sworn and that the video recording is a true record of the testimony given by the witness. The witness shall also sign the certification unless waived.

(D) Filing. The video testimony, together with the court’s certification and the certification of the video operator, shall be filed in the Clerk of Court’s office. Except upon order of the trial judge and upon such terms as he or she may

provide, the video recording on file with the Clerk of Court shall not be available for inspection or viewing after its filing and prior to its use at the trial of the case or its disposition in accordance with this rule.

(E) Use at Trial. The video testimony shall be admissible at the trial of the case in court in accordance with the South Carolina Rules of Evidence in the same manner as if the witness were appearing and testifying at trial.

(F) Responsibility and Costs. The party requesting preservation of testimony shall be responsible for assuring that the necessary equipment and certified operator for video recording is present at the time the testimony is taken, assuring that the necessary equipment for playing the video testimony is available at trial, and for the costs.

(4) Transcription. At the conclusion of the examination of the witness, the official state court reporter shall transcribe the witness's testimony at the expense of the party desiring to preserve the testimony. The original transcript shall be filed with the clerk of court.

(5) Copy to Adverse Counsel. The party preserving the testimony of a witness shall provide to adverse counsel a copy of the transcribed testimony at no expense to adverse counsel.

(6) Disposition. The Clerk of Court shall dispose of the video recording and original transcription in accordance with the rules governing the disposition of evidence.

(b) There are no additional rights for preservation of testimony in the Court of General Sessions except as set out in section (a) above.

Notes: This is a new rule and is designed to provide a procedure for the testimony of a witness who is or may be unavailable at trial for reasons such as military deployment, advanced age, illness, etc. The procedure required in Rule 126 (a)(3)(A), (B), and (C) is based on the procedure outlined for video depositions provided for in Rule 30(h), SCRCP.

127. INTERPRETERS

(a) Necessity. If the court determines that a party, witness, or victim does not sufficiently understand or speak the English language to comprehend the proceeding or to testify, the court must appoint a certified or otherwise qualified interpreter to interpret the proceedings to the party or victim or to interpret the testimony of the witness.

(b) Waiver by Court. The court may waive the use of a certified or otherwise qualified interpreter if the court finds that it is not necessary for the fulfillment of justice. The court must first make a finding on the record that the waiver of a certified or otherwise qualified interpreter is requested by a hearing-impaired or non-English speaking party, witness, or victim in a legal proceeding; that the waiver has been made knowingly, voluntarily, and intelligently; and that granting the waiver is in the best interest of justice.

(c) Persons Authorized. The Office of Court Administration must maintain a centralized list of certified or otherwise qualified interpreters to interpret the proceedings to a party and testimony of a witness. A party or a witness is not precluded from using a qualified interpreter who is not on the centralized list as long as the interpreter meets the statutory requirements and submits a sworn affidavit to the court specifying his qualifications or submits to a *voir dire* by the court.

Notes: This is a new rule and conforms to the requirements and procedure of SC Code Ann. §17-1-50. See also Rule 511, SCACR: Rules of Professional Conduct for Court Interpreters, Rule 1, et seq. This rule is broadly written to include hearing-impaired as well as non-English speaking individuals.

128-130. RESERVED

III. TRIAL

131. SUBPOENA AND SUBPOENA *DUCES TECUM*

(a) Issuance of Subpoenas. Upon request of any attorney licensed in this State, the Clerk of Court shall issue a blank subpoena, signed and sealed, to the attorney requesting it, and that attorney must fill in the blanks before the subpoena is served. The subpoena shall state the name of the court, the title of the action, warrant or indictment number and shall also set forth the name of the requesting party and its counsel. The subpoena shall command each person to whom it is directed to attend and give testimony, at the time and place therein specified. The time specified shall be limited to appearance at any term of court in any cause or matter in the Court of General Sessions.

(b) *Pro Se* Application. Upon a *pro se* defendant's *ex parte* application in writing to the court, the court must order that a subpoena be issued for a named witness if the defendant shows the necessity of the witness's presence for an adequate defense.

(c) Subpoena *Duces Tecum*: Producing Documents and Objects. A subpoena *duces tecum* may be issued in accordance with subsection (a) or (b) to any individual, corporation, partnership, proprietorship or other entity. A subpoena *duces tecum* may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. Upon motion of a party filed pursuant to these rules, the court in its discretion, may modify the specified time and/or place of production to direct the witness to produce designated items prior to a term of court or trial. The party requesting such a modification shall file and serve a copy of the motion upon opposing counsel as set forth in these rules.

(d) Protection of Personal Information.

(1) Subpoenas for Medical Records or Financial Information. After a warrant or indictment is filed, a subpoena requiring the production of medical records or financial information may be issued only upon court order. The court shall require notice to the individual whose information is the subject of the subpoena and to opposing counsel or *pro se* defendant.

(2) Notice Requirements. Notice pursuant to this section requires the party seeking medical records or financial information to serve a copy of the subpoena upon the individual whose information is the subject of the subpoena or mail a copy to the individual's last known address on or before the date of the motion seeking the subpoena. The party seeking the subpoena must complete and enclose the Notice of Subpoena form promulgated by Court Administration along with the copy of the proposed subpoena. The subpoena may be issued when ten (10) days have elapsed from the date of service of the notice or fourteen (14) days have elapsed from the date of mailing the notice to the individual whose information is the subject of the subpoena and the individual has not filed a sworn statement and motion to quash with the court.

(3) Notice Not Given. In the event no notice is provided pursuant to subsection(d)(2) above, the failure to comply completely with all applicable statutory law governing the production, use, and dissemination of information obtained pursuant to this rule shall make the information inadmissible for any purpose.

(e) Quashing or Modifying Subpoena. On motion made promptly, the court may quash or modify the subpoena if:

(1) the subpoena fails to allow reasonable time for compliance;
(2) the subpoena requires disclosure of privileged or otherwise protected matter and no exception, waiver or order of the court applies;
(3) the subpoena subjects the person or entity subpoenaed to undue burden or expense;
(4) the subpoena is vague, onerous, or overly broad; or
(5) the subpoena is unreasonable or oppressive.

(f) Service. A subpoena may be served by the sheriff of any county in which the subpoenaed party may be found, by a law enforcement officer or by any other person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon an individual may be made by delivering a copy to him or her personally, or by leaving copies thereof at his or her dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service.

(g) Rule 126 Subpoenas. Subpoenas may be issued pursuant to this rule to effectuate proceedings under Rule 126, SCCR.

(h) Contempt. The presiding judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena properly issued from that circuit. The presiding judge or chief judge may hold in contempt an attorney who fails to take reasonable steps to avoid imposing undue burden or expense on a person subject to a subpoena and may order an appropriate sanction.

(i) Information Not Subject to a Subpoena. No party may subpoena a statement of a witness or a prospective witness under this rule. No party may issue a subpoena under this rule prior to the filing of a warrant or indictment.

Notes: This rule rewrites and revises Rule 13, SCRCrimP. Of particular importance is the fact that subpoenas and subpoenas *duces tecum* can be issued by the Clerk of Court only after a warrant or indictment and requires presence or production at a term of court. There is no investigatory subpoena power in this rule and obtaining information prior to arrest or indictment should be by search warrant.

Section (d) sets forth the procedure for obtaining confidential or personal information and section (e) provides a procedure to modify or quash a subpoena. Section (f) is in accordance with current service procedures and section (h) sets forth enforcement procedure. Section (i) clearly states a subpoena is not proper prior to the filing of a warrant or indictment.

132. JURY OR NON-JURY TRIAL

(a) Jury Trial.

(1) Number of Jurors. A jury shall be composed of twelve members. At any time prior to deliberation, the parties may agree in writing or on the record with the approval of the court that the jury may consist of any number less than twelve. All verdicts must be unanimous unless the parties agree otherwise on the record.

(2) Jury Selection.

(A) General. The jury shall be selected randomly. Each name shall be individually called and the juror presented then seated or excused. Counsel is not entitled to know the name(s) of subsequent jurors to be called. The list, if any, generated by the Clerk of Court shall not be given to counsel.

(B) *Voir Dire*. Except in death penalty cases, *voir dire* of prospective jurors shall be conducted by the court. Proposed *voir dire* must be submitted in writing at or before the case is called for trial. Proposed *voir dire* properly submitted and not asked by the court shall be made a part of the record at the request of the party submitting the questions.

(C) Preemptory Challenges. Counsel shall have preemptory challenges as provided by statute.

(D) Alternate Jurors. The court may permit the selection of one or more alternate jurors. The number of alternates to be selected is discretionary with the court. If replacement of a juror becomes necessary and more than one alternate has been selected, the alternate to replace the excused juror shall be selected randomly. Alternates not seated as replacements shall be excused when the jury retires to deliberate.

(3) Surrender of Electronic Devices. The Clerk of Court or his or her designee shall take possession of all cell phones, computers, beepers, or other means of electronic communication from all jurors once they are sworn to serve on a particular case. If a juror is permitted to leave during a lunch or overnight recess, the device will be returned but possession again surrendered when the juror returns to the courthouse. Once the jury is discharged, all electronic devices shall be returned.

(4) Court Order for Jury of Eleven. After the jury has retired to deliberate, the court may permit a jury of eleven (11) persons to return a verdict, even without stipulation by the parties, if the court finds good cause to excuse a juror.

(5) Protection of Right. In all cases, the presiding judge shall ensure that the defendant's rights under the state and federal constitutions to a trial by jury are preserved.

(b) Non-Jury Trial

(1) General. In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.

(2) Waiver. A defendant may waive the right to a jury trial only with the approval of the State and presiding judge.

Notes: Subsection (a)(1)is similar to former Rule 14(a), SCRCrimP. It provides that the waiver may be on the record and also clearly provides that verdicts must be unanimous absent consent. Subsection (a)(2)(A) is new and clearly provides that counsel is not entitled to know the order in which the jurors are to be called by the Clerk of Court in a particular case.

Subsection (a)(2)(B) is new and makes it clear that proposed voir dire must be submitted in writing. Subsection (a)(2)(C) is new. S.C. Code Ann. §14-7-1110 provides for preemptory challenges. Subsection (a)(2)(D) is new and in accordance with existing practice. The replacement of an excused juror by selecting an alternate randomly is in accord with S.C. Code Ann. §14-7-320.

Subsection (a)(3) is new and is designed to keep cell phones, computers, and electronic devices out of the jury room. Subsection (a)(4) is new and is identical to Rule 23 (b)(3) of the Federal Rules of Criminal Procedure. Subsection (a)(5) is identical to former Rule 14 (c), SCRCrimP.

Subsection (b)(1) is new and identical to Rule 23(c) of the Federal Rules of Criminal Procedure and subsection (b)(2) is the same as Rule 14(b), SCRCrimP.

133. PRESENCE OF ACCUSED AT TRIAL

(a) Jury Selection. The defendant need not be present at jury selection if presence is waived on the record by defense counsel.

(b) Trial in Absence. Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive the right to be present and may be tried *in absentia* upon a finding by the court on the record that such person has received notice of the right to be present and that a warning was given that the trial would proceed in his or her absence upon a failure to be present in court.

(c) Misconduct. A defendant may waive the right to be present if, in the discretion of the court, the defendant's behavior during the trial causes an unreasonable disruption to the order of the court.

Notes: Paragraph (a) is new. Paragraph (b) is based upon Rule 16, SCRCrimP and in conformity with *State v. Castineira*, 341 S.C 619, 535 S.E.2nd 449 (Ct. App. 2000) and *State v. Jackson*, 288 S.C. 94, 341 S.E.2d 375 (1986). There is no statutory or case law requirement that a defendant's name be called outside the courtroom.

Section (c) is new and is consistent with current South Carolina law. *See State v. Bell*, 293 S.C. 391, 360 S.E.2d 706 (S.C. 1987) and *Ellis v. State*, 267 S.C. 257, 227 S.E.2d 304 (S.C. 1976).

134. WITNESSES

(a) Witness List. A list of all potential witnesses must be furnished by the State and each defendant at or before the time the case is called for trial. Each list shall contain the name of each witness and shall be given to the court, Clerk of Court, court reporter and opposing counsel at the time a case is called for trial. Additionally, the agency of law enforcement witnesses shall be noted.

(b) Voir Dire. The court shall include the name and law enforcement agency, if applicable, of the witnesses in its voir dire of the jury without identifying whether the individuals are prosecution or defense witnesses.

Notes: This is a new rule and clarifies the confusion that has arisen in the past as to the necessity of the defendant furnishing names of potential witnesses. All witnesses, both fact and potential impeachment witnesses, must be disclosed by all parties.

135. SEQUESTRATION

(a) Witnesses. Motions to sequester witnesses must be made before the jury is sworn and shall be automatically granted by the court. The victims and primary case officer, as designated by the State shall not be sequestered. All other witnesses, State and defense, shall be sequestered unless their presence is specifically allowed by the parties.

(b) Jury.

(1) During Trial. Sequestration of the jury at the beginning of trial or any time thereafter shall be a matter for determination by the court in its discretion and should only be granted when there is a substantial likelihood of juror contamination or intimidation from outside influences.

(2) After Deliberations Begin. The court in its discretion may recess a case and allow a jury to be separated and return later to resume their deliberations, provided the court gives appropriate cautionary instructions to ensure that there is no improper conduct or that jurors are not subjected to improper influence during the recess. If it appears that there is a substantial likelihood of juror contamination or intimidation from outside influences or other good cause, the court, in its discretion, may order that the jury be taken to suitable sleeping quarters; and at a time specified by the court they shall resume their deliberations. The court shall ensure that there is no unauthorized communication with any member of the jury by any third person and the jury shall be protected from outside influence. The court shall also give appropriate cautionary instructions.

Notes: This is a new rule and replaces Rule 23, SCRCrimP. Section (a) is based on the federal rule and makes sequestration automatic if requested except for the primary case officer and victims and those witnesses allowed by the parties. The Victims Rights Act prohibits the sequestration of victims. Subsection (b) (1) makes it clear that sequestration of the jury is not required even in death penalty cases. Subsection (b) (2) allows the judge to send a jury home or to sequester them in a hotel.

136. EVIDENCE

(a) Admissibility. The admissibility of evidence is governed by South Carolina Rules of Evidence, case law, and statutory law.

(b) Exhibits. Prior to the time the jury is sworn or at such other time as may be designated by the court, counsel will meet and review exhibits which each side plans to offer into evidence. If the parties agree or have no objection to the admissibility of an exhibit, it will be given to the court reporter and given an exhibit number. The exhibit is then in evidence and further authentication is unnecessary. If the parties do not agree on an exhibit, that exhibit will be given to the court reporter and will be given an identification (ID) number and the court will rule upon its admissibility at the time that it is offered.

(c) Audio and Visual Exhibits. The party offering an audio or visual exhibit shall be responsible for ensuring that the proper equipment for hearing or viewing that exhibit is present and in working order and that the exhibit can be published without delaying the trial.

Notes: This is a new rule. The South Carolina Rules of Evidence do not apply in preliminary hearings, sentencing hearings (except in the penalty phase of capital trials), probation violation hearings, or bond hearings. *See* Rule 1101(d), SCRE.

137. RESERVATION OF OBJECTIONS

(a) Reservations Unnecessary. If an objection has once been made to the admission of evidence and ruled upon on the record, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence.

(b) Formal Exceptions Eliminated. Formal exceptions to rulings or orders of the court are unnecessary, provided the party has advised the court on the record prior to the ruling or order of that party's grounds for the objection. If a party has had no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice that party.

Notes: Section (a) is based upon former Rule 17, SCRCrimP. Section (b) based upon Rule 46, SCRCP.

138. ARGUMENT ON OBJECTIONS

(a) Argument after Ruling. Counsel shall not attempt to further argue any matter after having been heard and the ruling of the court has been pronounced.

(b) Argument on Objection. No argument shall be made on objections to admissibility of evidence or conduct of trial unless specifically requested by the court. Counsel shall be given an opportunity to make a proffer upon request. This proffer may be by statement of counsel or evidence and shall be outside the presence of the jury.

Notes: This rule is similar to the former Rule 18, SCRCrimP except that subparagraph (b) gives counsel the right to make a proffer.

139. OPENING STATEMENTS

(a) **Matter of Right**. The State and defense counsel or *pro se* defendant shall have the right to make an opening statement to the jury.

(b) Content. The opening statement shall be a brief statement of what that individual believes the evidence will show and may also contain a brief explanation of legal terms and principles. Opening statements shall not be argumentative.

(c) Aids. Audio or visual aids shall not be used in opening statements unless they have been admitted into evidence or the court has approved them in advance.

Notes: This is a new rule. Sections (a) and (b) are in accordance with current practice. Rule 139 (c) refers to photographs, tape recordings, video recordings, maps, drawings, charts, etc.

140. CLOSING ARGUMENTS

(a) Matter of Right. All parties shall be permitted to make closing arguments to the jury. The time allotted for each argument shall be in the discretion of the court.

(b) Order of Arguments. The State shall have the right to open and close if the defense has introduced any evidence, but may waive opening. If the defense has not introduced any evidence, the State shall have only one argument and the defense shall have the right to present the last argument.

(c) Objections. Counsel shall not interrupt opposing counsel's closing argument except for a reason that the argument is legally objectionable. If such an objection is made, counsel shall clearly, concisely, and briefly state the legal grounds for such objection, and shall not make a factual argument on the objection unless requested by the court.

(d) Multiple Defendants. In a case where there are multiple defendants, if any defendant presents evidence, the State shall have the final argument.

(e) Aids. Any party shall have the right to supplement its argument with illustrative and demonstrative aids, provided such aids reasonably refer to the evidence or the law applicable to the case and are not unduly prejudicial or inflammatory. The court shall have the discretionary authority to limit or control the use of such demonstrative and illustrative aids.

Notes: This is a new rule but is in conformity with existing practice. However, the antiquated practice that gives the defense the option of requiring the State to open on the law is excluded.

141. COMMUNICATIONS WITH JURORS

(a) Before Trial. No person or entity, including but not limited to counsel, defendants, witnesses, victims, or anyone acting on their behalf shall have contact with, directly or indirectly, persons on the jury venire before trial.

(b) During Trial. In addressing a jury, counsel or *pro se* defendants shall not refer to a juror by name or otherwise make any personal reference to any or all members of the jury. Neither counsel nor *pro se* defendants shall make an appeal to the jury or any jurors to place themselves, himself, or herself in the position or place of any party, defendant, or victim.

(c) After Trial. After a jury or juror has been dismissed, no person or entity, including but not limited to counsel, defendants, witnesses, victims, or anyone acting on their behalf shall initiate contact with, directly or indirectly, any juror regarding that juror's service on any case. However, upon a motion and hearing showing the necessity of contacting or interviewing one or more jurors, the court may permit such contact upon specified terms and conditions.

Notes: Section (a) and (c) are new. Section (c) is included because of a growing concern regarding post trial contact with jurors. Section (b) is substantially the language of Rule 22, SCRCrimP, but clarifies that an attorney or *pro se* defendant will not make any personal reference or appeal to a jury at any time.

142. INSTRUCTIONS

(a) Requests. All requests for legal instructions to the jury shall be submitted in writing at the close of the evidence, or at such earlier time as the presiding judge shall reasonably direct. All requests must include accurate citation to authorities relied upon. The court shall inform counsel of its proposed action on each request prior to arguments to the jury, but the court shall instruct the jury after arguments are completed. Proposed instructions properly submitted and not used by the court shall be made a part of the record at the request of the party submitting the instructions.

(b) Objections to Charge. Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the presence of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection.

Notes: This rule is substantially similar to former Rule 20, SCRCrimP, but requires requests to be made in writing rather than verbally and permits proposed instructions denied by the court to be included in the record at the request of the submitting party. Language is taken from Rule 51, SCRCP to ensure that the court informs counsel of its actions before arguments are made to the jury.

143. DIRECTED VERDICT

(a) Grounds for Motion. On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of evidence in the record tending to prove the charge in the indictment. In ruling on the motion, the trial judge shall consider only the existence or non-existence of the evidence and not its weight.

(b) Defendant's Right to Present Evidence. If a defendant's motion for directed verdict at the close of the evidence offered by the State is not granted, the defendant may offer evidence without having reserved the right.

(c) Submission of Case to Jury. Submission of any charge to the jury shall constitute a denial of any motion for directed verdict previously made by the defendant and not ruled upon.

Notes: This rule is identical to former Rule 19, SCRCrimP, except this rule makes the standard "a failure of evidence in the record…"

A perfunctory motion for directed verdict to preserve appellant's rights is not required and a motion for directed verdict based on previous adverse rulings of the court is not necessary to preserve the objection to those previous rulings. See Rule 137.

144. PLEAS

(a) General. The State shall schedule guilty pleas and shall furnish reasonable notice to defense counsel and *pro se* defendants of the date and time of the hearing.

(b) Negotiations. All plea negotiations must be completed before the proposed guilty plea is called for a hearing. At the call of the case, the State shall advise the court if the plea is with or without recommendations and the nature of any recommendations. If the State the plea is to be presented as negotiated or under *North Carolina v. Alford*, the parties shall discuss this procedure with the presiding judge before the case is called.

(c) Victims. At each guilty plea hearing, the court will ensure that the rights of any victim have been protected in accordance with the South Carolina Victims Rights Act, including giving the victim(s) an opportunity to address the court.

Notes: This is a new rule. *North Carolina v. Alford*, 400 U.S. 25 (1970), permits a defendant to plead guilty without admitting culpability when he concludes it is in his best interest that he do so. S.C. Code Ann. §17-23-40 provides for a *nolo contendre* plea in misdemeanor cases. A negotiated plea under *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994), requires that every detail of the negotiated sentence be specified. The Victim's Bill of Rights is outlined in S.C. Const. Art. I, §24 and further detailed in S.C. Code Ann. §16-3-1505, et seq. Further, the victim of a crime does not have the right to veto a plea agreement. *Reed v. Becka*, 333 S.C. 676, 511 S.E.2d 396(S.C.App. 1999).

145-149. RESERVED

IV. POST TRIAL MATTERS

150. MITIGATION

After an adjudication of guilt, the defendant shall not be permitted to submit anything to the court which goes to deny matters of fact, but may submit or present anything in extenuation or mitigation. Copies of any documents to be submitted to the court shall be given to the State to allow the prosecution an opportunity to respond. This rule shall not apply in bifurcated trials.

Notes: This rule is based upon former Rule 28, SCRCrimP, but permits anything to be submitted to the court in addition to or in lieu of affidavits provided they are given to the prosecution. Further, it excepts bifurcated trials and is thus not applicable in capital cases.

151. SENTENCING

(a) Sentencing Sheets.

(1) All sentences shall be recorded on the form promulgated by Court Administration, known as the Sentencing Sheet. The State shall fully and accurately complete that portion above the signature lines for the State, defendant, and defense counsel, and furnish it, along with the indictment to the court at the calling of the case if a guilty plea, and after the verdict in the case of a trial.

(2) Multiple counts on the same indictment may be included on one Sentencing Sheet if they are for the same offense and have the same Criminal Docket Report (CDR) code.

(3) After sentencing, the Clerk of Court shall add all applicable costs and assessments, ensure that the Sentencing Sheet has been accurately and completely done, file, and forward copies as instructed by Court Administration.

(b) Correcting Clear Error. Within ten (10) days after sentencing, the court may correct a sentence that contained arithmetical, technical, or other clear error.

(c) Restitution. The court shall address the matter of restitution and if restitution is ordered, the amount and recipient shall be included on the Sentencing Sheet or attached as a separate order. If restitution is ordered but the amount of restitution is deferred, the sentencing sheet shall so reflect. If the amount of restitution is deferred, the Department of Probation Parole and Pardon Services may request the chief judge to schedule a hearing not more than ninety (90) days after sentencing to determine the amount of restitution to be paid. The State shall have the burden of proving the restitution amount.

Notes: This is a new rule. Section (a) makes it clear that the State shall have the responsibility of accurately completing the Sentencing Sheet. The form currently used by Court Administration for Sentencing Sheets is SCCR Form 25. Section (b) is similar to Rule 35(a), FRCRMP. Section (c) provides a procedure for the probation department to obtain a restitution hearing if necessary.

152. POST TRIAL MOTIONS

(a) Generally. Except for motions for new trials based on after-discovered evidence and motions for reduction of sentence for substantial assistance, all post trial motions shall be made within ten (10) days after the imposition of the sentence. These post trial motions are (1) New Trial and (2) Judgment in Arrest of Verdict. The time for appeal for all parties shall be stayed by a timely post trial motion and shall run from a ruling on the record or the receipt of written notice of entry of the order granting or denying such motion. The time within which to make the motion shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the presiding judge shall retain jurisdiction of the action for the purpose of hearing and disposing of the motion if not heard and disposed of during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where the trial or hearing was held. The motion may, in the discretion of the court, be determined without oral argument.

(b) Motions After Guilty Plea. All motions made after entry of a guilty plea shall be made within ten (10) days after the imposition of the sentence. These include motion for reconsideration of a sentence and withdrawal of a guilty plea.

(c) Procedure. All post trial or post guilty plea motions made in accordance with this rule must be made in open court on the record or in writing and filed with the Clerk of Court. If made in writing and filed with the Clerk of Court, a copy must be served on opposing counsel and sent to the presiding judge within five (5) days of filing.

(d) New Trials Based on After-Discovered Evidence. A motion for a new trial based on after-discovered evidence must be made within a reasonable period of time after the discovery of the evidence; provided, however, that a motion for a new trial based on after-discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion. Leave of the appellate court is not required if no appeal has been taken or if the appeal has been finally decided in the appellate court.

(e) Reducing a Sentence for Substantial Assistance.

> **(1) In General.** Upon the State's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.
>
> **(2) Later Motion.** Upon the State's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:
>
> > **(A)** information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the State within one year of sentencing but which did not become useful to the State until more than one year after sentencing; or

(C) information, the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the State after its usefulness was reasonably apparent to the defendant.

(3) Jurisdiction. A motion made pursuant to this rule shall be filed in the county where the defendant's case arose by that circuit's Solicitor. The State shall send a copy to the chief judge within five (5) days of filing. The chief judge or a Circuit Court Judge currently assigned to that county shall have jurisdiction to hear and resolve the motion. Jurisdiction to resolve the motion is not limited to the original sentencing judge.

Notes: This rule is patterned after former Rule 29, SCRCrimP. Language is inserted into paragraph (a) to clarify that in a criminal case, the only post-verdict fact-based remedy available is a motion for a new trial. A defendant cannot move for a JNOV (judgment notwithstanding the verdict) in a criminal case. *See State v. Taylor*, 585 S.E.2d 303 (2003). The statutory authority for granting new trials is S.C. Code Ann. §17-23-110.

Reference to summary courts is deleted. Appeals from summary court convictions are to the Court of Common Pleas. *See* S.C. Code Ann. § 18-3-10 [magistrate's courts] and S.C. Code Ann. §14-25-95 [municipal courts].

The rule allows the court to rule on a post trial motion without briefs or oral arguments.

Section (b) clarifies that motions made after a guilty plea must also be made within ten (10) days.

Section (c) is added to clarify the procedure for making post trial motions and post guilty plea motions and specifically to require that the trial judge receive a copy.

Section (d) is identical to former Rule 29(b), SCRCrimP.

Section (e) is new and is patterned after Rule 35, FRCRMP. Subsection (e)(3) is included to resolve any jurisdictional problems as a result of South Carolina's system of judicial rotation and requires the motion to be filed only by the Solicitor in the circuit in which the case originally arose.

153. DISPOSITION OF CHARGES

(a) General. Once a case is indicted, the case may be ended only by a verdict after trial, guilty plea, or a *nolle prosequi* disposition.

(b) Diversionary Programs.

(1) If an accused is allowed by the Solicitor to enroll in a diversionary program prior to indictment and fails to satisfactorily complete the program, the case will be presented to the Grand Jury within ninety (90) days of termination from the program and the case will proceed in the Court of General Sessions.

(2) If an accused is allowed by the Solicitor to enroll in a diversionary program after indictment and the accused fails to complete or is terminated from the program, the case shall proceed in the Court of General Sessions.

(c) Failure to Appear. If a defendant fails to appear in court and a bench warrant is issued and is outstanding for at least ninety (90) days, the case may be removed at the request of the Solicitor from the active docket with a "Failure to Appear" designation. If the defendant is thereafter brought before the court, the case may be restored to active status by the Solicitor completing a "Notice to Restore" and filing it with the Clerk or Court.

Notes: This is a new rule. Section (a) makes clear that except for indictments where the defendant fails to appear, there are only three ways a case can be ended. Some solicitors permit or require enrollment in diversionary programs only before presentment to the Grand Jury. Other solicitors allow enrollment after indictment. Section (b) provides a procedure for either scenario. Section (c) provides restoration to the active docket upon the filing of a Notice to Restore, SCCR Form 28. See also Rule 118 regarding Bench Warrants.

Appendix of Forms

SCCR Form	Description of Form	Coincides with SCCR Rule	Previously Known As
1.	**A Statement of the Rights of an Accused**		SCACRVIFORM01
2.	**Order Setting Bond**	106	
3.	**Order for Bond Reduction**	106	
4.	**Order Denying Bond**	106	
5.	**Motion to be Relieved on Bond**	106	SCCA635
6.	**Defendant's Waiver of Right to Attorney**	109	
7.	**Defendant's Waiver of Right to Attorney (Spanish)**	109	
8.	**Waiver of Attorney for Probation Violation Hearing**	109	
9.	**Certificate of Judge for Defendant's Refusal of Appointment**	109	SCACRVIFORM03
10.	**Affidavit of Indigency and Application for Counsel**	109	SCACRVIFORM02GS
11.	**Order of Appointment (General Session & Family Court)**	109	SCCA268
12.	**Notice of Appointment (General Sessions)**	109	SCCA266
13.	**Competency Order for Evaluation**	111	SCCA221
14.	**Criminal Responsibility Order for M'Naughtan Evaluation**	111	SCCA222
15.	**Competency—Defendant Found Competent**	111	SCCA221a
16.	**Competency—Defendant Not Competent, But Likely to Restore**	111	SCCA221b
17.	**Competency—Defendant Not Competent, Not Likely to Restore and Ordering Probate Commitment Proceedings**	111	SCCA221c
18.	**Criminal Responsibility—Finding of Not Guilty by Reason of Insanity**	111	SCCA222a
19.	**Criminal Responsibility—Not Guilty by Reason of Insanity, Final Order**	111	SCCA222b
20.	**Subpoena in a Criminal Case**	131	SCCA253
21.	**Notice of Subpoena Form**	131	
22.	**Affidavit of Defendant Pleading Guilty**	144	
23.	**Spanish Language Guilty Plea Form**	144	
24.	**Certificate of Counsel for Guilty Pleas**	144	
25.	**Sentencing Sheet**	151	SCCA217
26.	**Death Penalty Sentencing Report**	151	SCCA225
27.	**Grand Jury Report**	108 (c)	
28.	**Notice to Restore (Revised 4/05)**	162	SCCA224E
29.	**Order for the Destruction of Arrest Records**	158	SCCA223
30.	**Vehicle Immobilization**		SCCA220
31.	**Bench Warrant Form**	118	

Commentary

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Rule 101-Docket Management

The prosecutors felt that this rule was unnecessary and should be deleted because the docket management orders in place in all counties were sufficient. In general, throughout these rules, the prosecutors opposed incorporation of docket management orders and provisions which

refer to the requirements of the docket management orders. However, differentiated case management has now become an integral part of the procedure in General Sessions and needs to be included in the rules, but should be sufficiently broad to allow changes in the various docket management orders to meet the needs of the particular county without requiring amendments to the rule. These rules are, therefore, designed to allow those changes in the docket management orders.

Rule 103-Title, Form, Definitions, and Effective Date

The Task Force felt that the title to the current rules (South Carolina Rules of Criminal Procedure) and especially the citation abbreviation (SCRCrimP) were cumbersome and difficult to use. A simpler title and abbreviation is proposed. A new numbering system is also proposed to avoid confusion with the current rules.

Rule 104-Signing of Documents; Sanctions

The current rules (SCRCrimP) do not clearly provide enforcement mechanisms. This new proposed rule does.

Rule 108-Preliminary Hearings

The Task Force gave consideration to recommending that Preliminary Hearings be abolished. Neither the United States nor South Carolina Constitution requires that a defendant be afforded a preliminary hearing as long as a preliminary probable cause determination is made by the magistrate issuing the bench warrant or the grand jury by indicting the defendant. See *U.S. ex rel Hughes v. Gauet*, 271 U.S. 142 (1926).

The South Carolina Supreme Court held in ***State v. Keenan***, 278 S.C. 361, 296 S.E.2d 676 (S.C. 1982), that state statutes requiring a preliminary hearing were unconstitutional because they purported to take jurisdiction away from the Circuit Court in contravention of Article V, §§11 and 26 of the South Carolina Constitution. However, this rule, and its predecessor, Rule 2, SCRCrimP, do not *require* a preliminary hearing. Also, an indictment that is returned as a "True Bill" by the grand jury abolishes a defendant's right to a preliminary hearing.

Some members of the Task Force felt that preliminary hearings should be abolished in light of the modern practice providing for Discovery in a criminal case (Rule 5, SCRCrimP and Rule 112, SCCR) and that preliminary hearings were a waste of time and resources. However, after a thorough discussion, it became clear that some counties use preliminary hearings effectively. Additionally the defense attorneys advocated the retention of preliminary hearings.

The provision for preliminary hearings was therefore retained but the rule revised to improve the procedure.

Rule 110-Motions

The Court of General Sessions has never had an organized procedure for handling motions. Consideration was given to requiring the Clerks of Court to prepare motion rosters much like is done for the Court of Common Pleas Non Jury terms. The prosecutors preferred that scheduling motions hearings remain with them. Defense lawyers felt that some procedure for getting motions scheduled was needed and that judicial oversight was necessary. The clerks expressed some concern with the responsibility of preparing motion rosters, especially since numerous motions were routine and did not require a hearing (e.g. Discovery and *Brady* motions). Initially, the Clerks were also of the view that requiring them to prepare a motions

roster would be labor intensive because it would have to be done manually and could not be done on the Clerk's Case Management System (CMS). Court Administration's Information Technology Department has advised that this capability is now available on the CMS system.

The consensus is the compromised version set forth in Rule 110(c). Solicitors retain scheduling responsibility, but must schedule hearings within thirty (30) days. If the motion is not scheduled, the moving party may apply to the chief judge for a hearing. However, before requesting a hearing, the moving party must certify that the opposing party has been contacted and the parties are unable to resolve the issue. There is no responsibility placed on the clerks to maintain a General Sessions motion roster, but there is nothing to preclude the chief judge from utilizing the clerks to assist in setting up General Sessions Non Jury terms as is currently being done on a limited experimental basis.

Rule 111-Mental Evaluations

This proposed rule was drafted by Circuit Court Judge Mike Baxley and his committee to codify the procedures currently in place and being used for mental evaluations.

Rule 112-Discovery & Disclosure

One of the more difficult tasks was the revision of Rule 5, SCRCrimP, regarding discovery and disclosure. A subcommittee worked many hours on this proposed rule. The end result is the compromised version which was approved by the Task Force as Rule 112 and is recommended for approval.

The solicitors and defense counsel each have a preferred discovery rule and have asked that their preferred rules be submitted to the Rules Advisory Committee and the Supreme Court. Therefore the solicitors' preferred discovery rule is attached to this commentary as Attachment 1 and the defense lawyers' preferred discovery is attached to this commentary as Attachment 2.

Rule 113-Notices Affecting the Trial

A portion of Rule 5, SCRCrimP, regarding notices was carved out to create Rule 113, SCCR. This rule's requirement regarding alibi are the same as before. Consideration was given to a revision that would place the initial responsibility on the defense to provide notice of alibi without a request from the State. However, both the solicitors and then defense lawyers felt that the current rule is working and should not be changed. The insanity defense notice is slightly different and is tied to the rule on mental evaluations, Rule 111, SCCR.

The prosecution members of the task force have a "preferred" version which deletes the requirement for notice of intention to seek the death penalty and intention to seek life without parole, contending that these notices are statutory and need not be in the rules. Their version also adds a requirement that the defense give notice of other affirmative defenses. These were not approved by the Task Force, but the prosecutors' version of proposed Rule 113 is attached to this commentary as Attachment 3 and is submitted at their request.

Rule 117- Diversionary Programs

The original version of this proposed rule contained detailed requirements for each diversionary program. Specifically, at the request of the Task Force, Circuit Court Judge William (Billy) Keesley drafted a detailed rule on Adult Drug Court. After discussion with Judge Keesley, the Task Force agreed that a brief general rule was more appropriate. Thus Rule 117 is recommended for approval.

The prosecutors feel that no rule on diversionary programs is needed because most programs are statutory. Others are created by Supreme Court Rule. However, this rule is proposed and recommended by the Task Force to give the practitioner a guide to the most prevalent available programs.

Rule 119-Initial Appearance

The prosecutors wish to delete the rule regarding Initial Appearance because the matters are covered by county docket management orders. However, as proposed, Rule 119 is general enough to allow changes in individual county docket management orders yet specific enough to alert counsel and defendant of the requirements of an Initial Appearance and the matters that will be addressed.

Rule 120- Second Appearance

The prosecutors object to this rule as unnecessary because the matters are covered by county docket management orders. The rule as proposed is general enough to permit changes to county orders but specific enough to alert defendant and defense counsel of the requirements and procedures for a Second Appearance.

Rule 121-Tracking

The prosecutors object to this rule, contending that the matters are covered by county docket management orders. It is included and recommended to make differentiated case management a part of the court rules. There is nothing to prevent amendments to county docket management orders as needed.

Rule 122- Status Conferences

The prosecutors object to this rule, contending that the matters are fully covered by county docket management orders. This rule does not run afoul to any current orders but goes further by providing a procedure for status conferences.

Rule 123- Trial Rosters

The prosecutors object to this rule, contending that it is unnecessary because these matters are fully covered by the county docket management orders. However, this rule gives statewide uniformity to the requirement for trial rosters and the procedure to be used therein. Additionally, this rule alleviates the necessity of defendants sitting in the courthouse awaiting trial, provided they can be in court on two hours notice.

In the past, the statutory requirement that solicitors prepare a roster of cases for trial, S.C. Code Ann. § 1-7-330, has been either ignored or misused.

Rule 125-Arraignments

The Task Force felt that formal arraignment is an archaic and unnecessary procedure to ensure that the defendant has notice of the charge(s) against him/her. Formal arraignment has largely been ignored in actual practice except in capital cases. In order that there be no question regarding the procedure in current law, the Task Force is recommending the elimination of formal arraignment with certain safeguards.

Rule 131-Subpoeneas

Many abuses of current subpoena usage have been discovered. Notably, subpoenas have been used as an investigatory tool prior to arrest or indictment. The proposed rule clearly prohibits that practice. A Task Force subcommittee, with input from other defense lawyers and prosecutors, notably Solicitor Kevin Brackett of the 16th Circuit, gave serious consideration to a separate rule that would permit investigatory subpoenas, but concluded that there was no way to fashion a rule that would overcome Fourth and Fifth Amendment concerns. The use of a search warrant with its built in judicial oversight is the best way to ensure that constitutional protections are maintained, yet giving the State the necessary procedure to obtain evidence if probable cause is shown.

Other abuses are curtailed by this rule. Only Clerks of Court can issue subpoenas. They may be issued to licensed attorneys in blank and *pro se* defendant upon application to the court. Since attorneys are officers of the court and subject to sanctions for misuse, the rule is more liberal to attorneys than *pro se* defendants.

The presence of witnesses or the production of tangible objects pursuant to a subpoena must be tied to a term of court unless otherwise specifically permitted by the court. There are protections specified for personal information and a procedure for contesting or quashing a subpoena. Finally, there is an enforcement provision for witnesses not obeying a subpoena and attorneys who abuses subpoena usage.

Rule 132-Jury or Non Jury Trial

There is no United States Constitutional right to a twelve person jury. The Sixth and Fourteenth Amendments only guarantee a right to trial by jury and the number of jurors is left to the states to determine. *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893 (1970). Neither is there a state constitutional right to a twelve person jury. Only in capital cases is there a statutory right to a jury of twelve. A twelve person jury in criminal court in South Carolina was created by Rule 14, SCRCrimP, and its predecessors.

Some consideration was given by the Task Force to proposing a rule that would permit a verdict of less that unanimous (super majority of 75 or 80%) or providing for juries of less than 12 persons (6 or 8 person juries).

The first of these proposals (less than unanimity) has appeal to prevent juror nullification where one or two jurors refuses to vote with the majority not because of conviction on the merits of the case but to prevent a verdict and cause a mistrial for political or social reasons, or other improper motives.

The second proposal (less than 12 persons) has appeal by reducing the cost of conducting trials by reducing the number of jurors that must be summoned.

The Task Force decided against a recommendation of either of these proposals. It was felt that the defense bar, and likely, the legislature would not approve either of these proposals.

The proper procedure for handling alternate jurors when the jury retires to deliberate was the subject of much discussion. Some felt that a procedure for keeping alternate jurors in a separate room so that one or more alternates could replace a primary juror if such substitution became necessary should be included. However it was concluded that S.C. Code Ann. §14-7-1340 prohibited such a procedure, and inclusion of this alternative would require a statutory change.

A provision is also included to curtail a growing problem of electronic devices in the jury room. A continuing concern is the potential for jurors to obtain information on the law or the

facts of a case by research on the internet or other electronic means. The Task Force addressed the problem of jurors accessing prohibited media from within the courthouse through section (3) by requiring the surrender of electronic devices to the Clerk of Court while in the courthouse. However, the Task Force concluded jurors accessing media outside the courthouse could not be controlled by court rule but should be the subject of carefully crafted instructions by the court to the jury.

Rule 141-Juror Contact

It was brought to the attention of the Task Force that there have been an increasing number of complaints from jurors about post trial contact. The proposed rule prohibits counsel, defendants, witnesses, victims, or anyone acting on their behalf from initiating contact with jurors, but provides a procedure that will continue to permit inquiry into alleged juror misconduct.

Several members advocated permitting attorneys to send a written questionnaire to jurors seeking their voluntary response to questions concerning their jury experience. Others felt that this should be expanded to allow in person or electronic contact to help better evaluate the completed trial. It was suggested that surveys or other contact require prior approval of the court. The consensus, however, was that the purpose and effect of any contact was subjective with the juror, and that the better practice was to prohibit such contact to avoid the possibility of the juror feeling intimidated.

ATTACHMENT 1-SOLICITORS' VERSION OF DISCOVERY RULE

112. DISCLOSURE IN CRIMINAL CASES

(a) Disclosure of Evidence by the Prosecution.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request by a defendant, the prosecution shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution; the substance of any oral statement which the prosecution intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a prosecution agent.

(B) Defendant's Prior Record. Upon request of the defendant, the prosecution shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution.

(C) Documents and Tangible Objects. Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the prosecution shall permit the defendant to inspect and copy any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, , which are within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution, and ~~which are material to the preparation of the defense or~~ are intended for use by the prosecution as evidence in chief at the trial.

statement created, to include the results of any physical or mental examinations, and any forensic or scientific tests, experiments, or comparisons. This obligation remains in effect regardless of whether the prosecution intends to call to testify any parties, agencies, or laboratories associated with or who conducted the reports, tests, experiments, comparisons, or statements.

(F) Expert Witnesses for Trial. For each expert witness that the prosecution reasonably expects to call as a witness at trial, the prosecutor shall additionally furnish to the defense a written report of the results of the examination or tests conducted, the expert's curriculum vitae, the expert's opinion, and the underlying .

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case, or of statements made by prosecution witnesses or prospective prosecution witnesses provided that after a prosecution witness has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified; and provided further that the court may upon a sufficient showing require the production of any statement of any prospective witness prior to the time such witness testifies.

(3) Time for Disclosure. The prosecution shall respond to the defendant's request for disclosure no later then thirty (30) days after the request is made, or within such other time as may be ordered by the court.

(b)Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. ~~If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the prosecution, the defendant,~~ Upon request of the prosecution, the defendant shall permit the prosecution to inspect and copy books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. ~~If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the prosecution, the defendant,~~ Upon request of the prosecution, the defendant shall permit the prosecution to inspect and copy any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, together with conclusions gleaned there

from, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to his testimony.

(C) Expert Witnesses. With respect to any expert associated with the preparaton of the case, the defense shall disclose any report or written statement created, to include the results of any physical or mental examinations, and any forensic or scientific tests, experiments, or comparisons. This obligation remains in effect regardless of whether the defense intends to call to testify any parties, agencies, or laboratories associated with or who conducted the reports, tests, experiments,

(D) Expert Witnesses for Trial. For each expert witness that the defense reasonably expects to call as a witness at trial, the defense shall additionally furnish to the prosecution a written report of the results of the examination or tests conducted, the expert's curriculum vitae, the expert's opinion, and the underlying .

(2) Information Not Subject to Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution or defense witnesses, to the defendant, his agents or attorneys.

(3) Time for Disclosure. The defense shall respond to the prosecution's request for disclosure no later then thirty (30) days after the request is made, or within such other

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure to Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making discovery and inspection and may prescribe such terms and conditions as are just.

Notes: Rule 112 (a)-(d) is the language of former Rule 5, SCRCrimP. All other language of former Rule 5 is found in Rule 113.

ATTACHMENT 2-DEFENSE VERSION OF DISCOVERY RULE

112. Discovery and Disclosure

(a) Disclosure of Evidence by the Prosecution. Upon the motion or request of the defendant, the prosecution shall disclose to the defendant the following information and material, whether in the possession, custody, or control of the prosecution or one of the prosecution's agents, and shall permit the inspection, copying, testing, and photographing of all items deemed discoverable under this rule.

(1) Statements of Defendant.

(A) Definition of Statement. When used in this rule, the term "written statement" shall include any statement in writing that is made, signed, or adopted by that person, or the substance of a statement of any kind made by that person that is embodied or summarized in any writing or recording, whether or not specifically signed or adopted by that person. The term is intended to include statements contained in police or investigative reports~~, but does not include attorney work product~~. When used in this rule, the term "oral statement" of a person shall mean the substance of any statement of any kind by that person, whether or not reflected in any existing writing or recording.

(B) Disclosure of Statements. The prosecution shall disclose all written and all oral statements of the defendant or of any codefendant that relate to the subject matter of the case, as well as any documents relating to the acquisition of such statements.

(2) Defendant's Prior Record. The prosecution shall provide a copy of the defendant's prior criminal record, if any.

(3) Witness Information. The prosecution shall furnish the names and addresses of all persons known to the prosecution or its agents to have information concerning the case, as well as any and all statements of any witness.

(A) The prosecution shall also identify the persons it intends to call as witnesses at trial, including rebuttal and character witnesses.

(B) The prosecution shall disclose any relationship with any witness it intends to call at trial, which shall include the nature and circumstances of any agreement, anticipated agreement, understanding, or representation between the prosecution and the witness, and/or the attorney representing the witness that may constitute an inducement for the witness's testimony or cooperation with the prosecution.

(C) With respect to any expert associated with the investigation of the case, the prosecution shall disclose any report or written statement created, to include the results of any physical or mental examinations, and any forensic or scientific tests, experiments, or comparisons. This obligation remains in effect regardless of whether the prosecution intends to call to testify any parties, agencies, or laboratories associated with or who conducted the reports, tests, examinations, experiments, comparisons, or statements.

(D) For each expert witness that the prosecution reasonably expects to call as a witness at trial, the prosecutor shall additionally furnish to the defense a written

report of the results of the examination or tests conducted, the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion.

(4) Tangible Objects. The prosecution shall disclose the existence of, and shall allow the defense to review, inspect, and copy all tangible objects associated with or related to the investigation of the case. The term "tangible object" shall include, but shall not be limited to, any books, papers, documents, photographs, physical items, telephone or cell phone records or recordings in either electronic or written form, buildings or places, or any copies or portions thereof.

(A) The prosecution shall disclose all tangible objects intended for use by the prosecution as evidence in its case in chief at trial, and shall identify which of these objects it intends to offer as evidence at trial.

(B) The prosecution shall disclose any items obtained through any search or seizure, as well as any materials, documents, or statements relating to any searches or seizures conducted in connection with the investigation of the case, whether or not the search or seizure resulted in the seizure of any items.

(C) The prosecution shall disclose any report filed by the investigating officer or any officer associated with the case, including any notes.

(D)The prosecution shall disclose any materials, documents, or information relating to lineups, showups, and picture or voice identifications conducted in relation to the casee, and the identity of any witnesses to any lineups, showups, and picture or voice identifications.

(E) If the defendant's conversations or premises have been subjected to any electronic monitoring, surveillance (including wiretapping), or recording, which shall include but not be limited to monitoring or recording of any telephone conversations within any detention facility, in connection with the investigation or prosecution of the case, the prosecution shall inform the defense of that fact and shall provide the defense with a copy of all recordings the State intends to use at trial, including the date and time of the recording.

(F) The prosecution shall disclose to the defendant the substance of any and all electronic media discovered during the investigation of the case, such evidence including but not limited to text messages, internet pages, message boards, online social networks, and e-mails.

(G) The prosecution shall disclose the results of any tests or examinations, including physical or mental examinations or scientific tests, experiments, or comparisons, which were conducted during the course of the investigation. Disclosure shall be required regardless of whether the prosecution intends to call as a witness any party who conducted and was associated with the reports, tests, examinations, experiments, comparisons, or statements. Disclosure under this subsection shall include any tests, reports, or case notes prepared by any civilian or state agencies or laboratories, as well as any expert witness associated with the investigation.

(5) Character Evidence/Evidence of Other Bad Acts
If the prosecution intends to introduce evidence of character, reputation, or other acts, the prosecution shall notify the defendant of that intention and of the witnesses and/or other evidence to be relied upon to prove the acts. Such disclosure shall be made no later than thirty (30) days prior to the date of trial.

(b) Disclosure of Evidence by the Defendant. Upon the motion or request of the State, the defendant shall disclose the following material, and shall permit the State to inspect and copy or photograph said material.

(1) Documents and Tangible Items. The defendant shall disclose any documents or tangible items that are within the possession, custody, or control of the defense and that the defense intends to introduce as evidence at trial. The term "tangible object" shall include, but shall not be limited to, any books, papers, documents, photographs, physical items, telephone records or recordings, buildings or places, or any copies or portions thereof.

(2) Reports of Examinations and Tests. The defendant shall disclose any results, or copies thereof, of any physical or mental examinations, tests, measurements, or experiments made in connection with the case, that are within the possession and control of the defense and that the defense intends to introduce as evidence at trial, or that were prepared by a witness who the defense intends to call at trial, when the results or reports relate to the witness's testimony. Additionally, upon the motion or request of the prosecution, the court shall require the defense to permit the prosecution to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it, that is available to the defense if the defense intends to offer such evidence.

(3) Notice of Alibi. Upon the written request of the prosecution, the defendant shall give written notice of its intent to offer an alibi defense. The prosecution's request shall state the time, date, and place at which the alleged offense occurred. The defendant's notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. Such notice shall be given no later than thirty (30) days prior to the date of trial.

(4) Notice of Insanity Defense or Plea of Guilty but Mentally Ill. Upon the written request of the prosecution, the defendant shall give written notice of its intent to rely upon a defense of insanity and the time of the crime, or to enter a plea of guilty but mentally ill. Such notice shall be given no later than thirty (30) days prior to the trial date.

(5) Witnesses. Upon the motion or request of the prosecution, the defendant shall provide the names and addresses of any witnesses who the defendant reasonably expects to call as a witness at trial. For each expert witness that the defendant reasonably expects to call as a witness at trial, the defendant shall additionally furnish to the prosecution a written report of the results of the examination or tests conducted by the expert, the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. Such notice and materials shall be provided no later than thirty (30) days prior to the date of trial.

(c) Limitations on Disclosure.

(1) Trial Preparation. Neither the prosecution nor the defendant shall be required to disclose any legal research, or any records, correspondence, reports, memoranda, or written documents created for the purpose of trial preparation, such as interview notes or witness examinations, that has been prepared by an attorney or by a member of the attorney's legal staff, to the extent that the written material contains the opinions, theories, strategies, or conclusions of the attorney or the member of the attorney's legal staff unless exculpatory in nature.

(2)Witness Information. Neither the prosecution nor the defendant shall be required to disclose any personal identifying information of a witness beyond a witness's name, address, date of birth, and published phone number, unless the court determines, upon the motion of a party, that such additional information is necessary to accurately identify and locate the witness.

(3) Confidential Informants. The prosecution shall not be required to disclose the identity of a confidential informant or may limit the disclosure of the identity of a confidential informant if disclosure would place the confidential informant at risk of harm. However, the prosecution shall disclose the identity of a confidential informant, unless the confidential informant is a material witness as defined by Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639, (1957); State v. Burns, 294 S.C. 338, , who is reasonably likely to testify at trial no later than thirty (30) days prior to the date of trial.

(4) Voluntary Disclosure. Nothing in this section shall prohibit the prosecution from making any voluntary disclosure in the interest of justice, nor does it prohibit a court from finding that the protections of this section have been waived.

(5) Motions for Disclosure. Nothing in this section shall prohibit any party from moving for the disclosure of any evidence in the possession, custody, or control of another party, including any third party. The moving party shall state its basis for requesting the disclosure of the requested information or material. The court, upon finding that disclosure is appropriate, shall order disclosure and shall set the time and manner under which disclose shall be effected.

(d) Time and Manner of Disclosure.

(1) The prosecution shall disclose all discoverable material either in the possession of the prosecution or available to the prosecution, within thirty (30) days of the receipt of any motion or request for disclosure made by the defendant.

(2) Any party subject to the disclosure of material under these provisions shall be under a continuing duty to disclose any and all discoverable material that is obtained during the entire course of proceedings associated with the particular case, which shall continue up to the point of, and throughout any trial.

(3) Prior to the disposition of the case, the prosecution shall certify in writing that it has disclosed any and all discoverable information or material obtained subsequent to the prosecution's initial certification. Said certification shall include a statement that the prosecution is unaware of any other discoverable information or material. If the case is to be disposed of by trial, the prosecution shall provide this written certification no later than thirty (30) days prior to the date of trial, and all disclosure of all information and material subject to disclosure under this rule shall be concluded no later than thirty (30) days prior to the date of trial.

(e) Failure to Disclose.

(1) Either party may, at any time during the course of proceedings, whether prior to or during any trial, may bring to the court's attention the failure of another party to comply with this rule. Upon the party's motion and upon a finding of non-compliance with this rule, the court may grant relief in one of the following ways:

(A) Dismiss the charge(s), with or without prejudice;

(B) Grant a mistrial;

(C) Prohibit the introduction of any non-disclosed evidence; or

(D) Grant a continuance and order the non-complying party to disclose the information or permit inspection.

(2) The court shall make a finding on the record as to the reason for and the circumstances surrounding the non-compliance and the determination of the proper sanction pursuant to the above subsection.

(3) In determining the proper sanction, the court shall consider the following factors:

(A) The materiality of the non-disclosed evidence;

(B) The length of time the evidence was in the custody or control of the non-complying party;

(C) The stated reason for the non-compliance; and

(D) Any other circumstances or considerations that the court deems appropriate.

ATTACHMENT 3-SOLICITORS' VERSION OF NOTICE RULE

113. NOTICE AFFECTING TRIAL OR DEFENSE

~~The following motions and notices shall be given in writing to opposing counsel and the Defendant if applicable. The original of such notice shall be filed with the Clerk of Court within five (5) days of the giving of notice~~

~~(a) By solicitor of intention to seek death penalty. The Solicitor must give notice of intention to seek the death penalty in accordance with §16-3-26, Code of Laws of South Carolina.~~

~~(b) By solicitor of intention to seek mandatory life without parole. The Solicitor must give notice of intention to seek a sentence of life without parole in accordance with §17-25-45, Code of Laws of South Carolina.~~

(1) Notice of Alibi by Defendant. Upon written request of the prosecution stating the time, date and place at which the alleged offense occurred, the defendant shall serve within ten days, or at such time as the court may direct, upon the prosecution a written notice of his intention to offer an alibi defense. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

(2) Disclosure by Prosecution. Within ten days after defendant serves his notice, but in no event less than ten days before trial, or as the court may otherwise direct, the prosecution shall serve upon the defendant or his attorney the names and addresses of witnesses upon whom the State intends to rely to establish defendant's presence at the scene of the alleged crime.

(3) Continuing Duty to Disclose. Both parties shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses whose identity, if known, should have been included in the information furnished under subdivisions (1) or (2).

(4) Failure to Disclose. If either party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by either party. Nothing in this rule shall limit the right of the defendant to testify on his own behalf.

) Notice of Insanity Defense or Plea of Guilty but Mentally Ill. Upon written request of the prosecution, the defendant shall within ten days or at such time as the court may direct, notify the prosecution in writing of the defendant's intention to rely upon the defense of insanity at the time of the crime or to enter a plea of guilty but mentally ill. If the defendant fails to comply with the

requirements of the subdivision, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental state. The court may, for good cause shown, allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as is appropriate.

(c) Notice of Other Affirmative Defenses. Upon written request of the prosecution, the defendant shall serve within ten days, or at such time as the court may direct, upon the prosecution a written notice of his intention to offer the defense of necessity, duress, self defense, or battered spouse syndrome. If the defendant fails to comply with the requirements of this rule, the court may exclude the testimony of any witness offered for the purpose of establishing the

(d) Waiver. The court may, for good cause shown, waive the requirements of this rule.

Notes: The introductory paragraphs in subparagraphs (a) and (b) are new. Rule 113(c) and (d) are identical language to Rule 5(e)(1), (2), and (3) and (4), SCRCrimP. Rule 113(e) and (f) are identical to Rule 5(f) and (g), SCRCrimP.
SC Code Ann. §17-25-45 requires the solicitor to seek life without parole on the second most serious offense. However, on a third serious offense, the decision to seek life without parole is in the discretion of the solicitor. Whether the solicitor is required to seek or determines to seek life without parole on the basis of a subsequent serious or most serious offense, SC Code Ann. §17-25-45 requires the solicitor to provide written notice to the defendant and defendant's counsel not less than ten (10) days before trial.