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December 29, 2009

Via Hand Delivery

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: Circuit Defenders Comments on the Proposed South Carolina Criminal Rules

Dear Mr. Shearouse:

Pursuant to the notice of December 2, 2009, this letter is to request the Court allow me to speak at the public hearing on January 5, 2010 on behalf of the Circuit Defenders.

Thank you for your attention to this matter.

With kindest regards, I am

Yours very truly,

Franklin Best for

E. Charles Grose, Jr.

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Re: Circuit Defenders Comments on the Proposed South Carolina Criminal Rules

Dear Mr. Shearouse:

Attached please find the Circuit Defender's comments on the proposed South Carolina Criminal Rules. Pursuant to the notice of December 2, 2009, I am filing the original and seven copies and e-mailing an electronic copy to CriminalRules@sccourts.org.

The Circuit Defenders thank the Court for considering these comments.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

Circuit Defenders Comments on the Proposed South Carolina Criminal Rules[1]

The Circuit Defenders commend this Court for creating a Task Force to Review the Rules of Criminal Procedure and thank the Task Force and Rules Advisory Committee for the hard work that went into creating the proposed South Carolina Criminal Rules. The proposed rules are a much needed advancement of criminal procedure in this state. The Circuit Defenders, however, have some concerns about the proposed rules and want to share those concerns with the Court.

The Circuit Defenders believe the guiding consideration should be the effective and efficient administration of the criminal justice system while also protecting the rights of defendants, victims, witnesses, and jurors. We hope everyone involved will consider these comments thoughtful and constructive suggestions for meeting this goal.

The Circuit Defender's comments are divided into six categories: (1) rules violating the United States Constitution, the South Carolina Constitution, or a statute, (2) rules impacting the right to counsel, (3) concerns about proposed Rule 112 (Disclosure & Discovery), (4) rules that implement inconsistent, unreasonable or excessively burdensome requirements, (5) rules pertaining to error preservation, and (6) the impact on public defender caseloads.

In some cases, the Circuit Defenders are proposing alternate rules for the Court to consider.

I. Rules violating the United States Constitution, the South Carolina Constitution, or a statute.

A. Rule 106. Bond Matters. Proposed Rule 106 poses two concerns.

1) Rule 106(a) requires bond hearings to be held within twenty-four (24) hours but allows the Summary Court Judge to delay the hearing upon a finding of exceptional circumstances. S.C. Code Section 22-5-510, however, requires, "A person charged with a bailable offense must have a bond hearing within twenty-four hours of his arrest."

   Rule 106(e) allows up to thirty (30) days for a bond hearing when the General Sessions Court has exclusive jurisdiction to set bond. Because all offenses are bailable,[2] this provision violates Section 22-5-510. Delaying a bond hearing for

[1] Fifteen of the Circuit Defenders reviewed the proposed rules to provide comments to the Supreme Court. Sixteenth Circuit Defender Harry Dest elected not to participate because of his participation on the Task Force that drafted the proposed rules.

[2] Rule 106 and Section 22-5-510 refer to "bailable" and "non-bailable" offenses. These terms more appropriately refer to the Summary Court Judge's jurisdiction to set bail. All offenses, including capital offenses, are bailable offences in South Carolina. S.C. Const. Article 1, Section 15 ("All persons shall be, before conviction, bailable by sufficient sureties, but bail may be denied to persons charged with capital offenses or offenses punishable by life

up to thirty (30) days would not be considered reasonable under the United States Constitution.[3] *See Gerstein v. Pugh*, 420 U.S. 103 (1975) (Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (following warrantless arrest, judicial probable cause determination should be within forty-eight hours); and *Corley v. U.S.*, ___U.S. ___, 129 S.Ct. 1558 (2009) (affirming the continued vitality of *County of Riverside*). Additionally, the Sixth Amendment is implicated when this provision is read in connection with proposed Rule 106(c)'s preference that an accused not invoke the right to counsel at a bond hearing. *See* Section II(A), *infra*.

2) Rule 106(c) provides that failure to apply for appointed counsel within fifteen (15) days "is a breach of a bond condition" and "bond may be revoked at the Initial Appearance." This provision violates a person's right to represent himself. *Faretta v. California*, 422 U.S. 806 (1975) (Sixth Amendment implies the right of self-representation). A better practice would be for the court to admonish a *pro se* person about the dangers of self-representation in connection with the Initial Appearance and to determine whether any waiver of counsel is voluntary. *Reed v. Ozmint*, 374 S.C. 19, 647 S.E.2d 209 (2007) (to be voluntary, waiver of right to counsel must be knowing and intelligent); *Bridwell v. State*, 306 S.C. 518, 413 S.E.2d 30 (1992) (To establish a valid waiver of counsel, *Faretta* requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation); and *State v. Bryant*, 383 S.C. 410, 680 S.E.2d 11 (Ct. App. 2009) (listing ten factors to determine if an accused has the sufficient background to understand the dangers of self-representation).

B. Rule 110(a)(2) Motions: Time of Filing. Rule 110(a)(2) requires all motions, including "motions *in limine* for the suppression or exclusion of evidence," to be filed ten (10) days prior to trial. This provision does not establish a remedy or sanction for non-compliance. If this provision is interpreted as a procedural bar, then the rule may be Constitutionally defective. "[A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). Likewise, if the rule is applied to prevent the presentation of a defense, then due process is violated. *Chambers v. Mississippi*, 410 U.S. 284 (1973) (state's voucher rule and hearsay unconstitutionally denied the

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imprisonment, or with violent offenses defined by the General Assembly.) and *State v. Hill*, 314 S.C. 330, 332, 444 S.E.2d 255, 256 (1994) (Circuit Court Judge has the discretion to grant bail to a capital defendant).

[3] The proposed rules impose deadlines for notification on law enforcement, Summary Courts, and Clerks of Court. *E.g.* Rule 105(b) (filing criminal process within five days), Rule 109(a) (Summary Courts must transmit documents to Clerk of Court within five business days), and Rule 109(b) (Clerk of Court must transmit documents to Solicitor within five business days). Accordingly, it is reasonable to require law enforcement to notify the solicitor of the arrest contemporaneously with the Rule 106(d) Summary Court appearance and for the solicitor to schedule a bond before a Circuit Court Judge with twenty-four (24) hours of the Summary Court appearance.

right to present a defense). The timetables imposed by Rule 110 are discussed in Section IV(A), *infra*.

C. Rule 114. Chemical Analysis and Chain of Custody. Proposed Rule 114(b) provides, "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." This provision raises two Constitutional concerns.

1) This provision is burden shifting. "[T]his Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007) (citing *Benton v. Pellum,* 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957)). The chain of custody can be so defective that suppression of the evidence is required. *E.g. Sweet* and *State v. Hatcher*, 384 S.C. 372, 681 S.E.2d 925 (Ct. App. 2009). "[W]here there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility." *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001) (state established sufficient chain of custody of saliva, making any discrepancy a factual issue for the jury) and *State v. Governor*, 362 S.C. 609, 608 S.E.2d 474 (Ct. App. 2005) (officer's failure to comply with department directives went to weight and not admissibility of drug evidence).

2) This provision violates the Confrontation Clause. Absent a stipulation, the state cannot meet the burden of proving the chain of custody without presenting live testimony. *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 2532 (2009) (fn. 1) ("It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live.").

D. Rule 132. Jury or Non-Jury Trial. Proposed Rule 132(a)(4) provides, "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." This provision violates S.C. Const. Article V, Section 22 which provides, "The petit jury of the Circuit Court shall consist of twelve members."

II. Rules pertaining to matters of representation. Consistent with the responsibility to provide representation to indigent persons, the Circuit Defenders have concerns with the following rules pertaining to matters of representation.

A. Rule 106: Bond Matters. Proposed Rule 106(b) provides a defendant "shall be advised of all rights pertaining to arrest or bond." Rule 106(c), however, provides, "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."

The rights pertaining to arrest include the right to counsel under the Sixth Amendment. Invocation of the Sixth Amendment right to counsel at the bond hearing provides an accused with certain protections. *Edwards v. Arizona*, 451 U.S. 477 (1981) (Once an accused has expressed his desire to deal with police only through counsel, he is not to be subjected to further interrogation until counsel has been made available to him unless the accused himself initiates further communications with police). Given the Constitutional considerations involved, this Court should not establish a preference through court rules that a defendant not invoke the right to counsel at an arraignment.[4]

B. Rule 116: Defendant's Right to Counsel.

1) Rule 116(a) provides, "A defendant indicted for a General Sessions offense or before the court on a probation violation warrant or citation has the right to be represented by counsel." Both the United States Supreme Court and this Court have recognized the right to counsel attaches at the initial appearance before a judicial officer.[5] This concern can be addressed by substituting "indicted" with "charged."

2) Rule 116(e) and (f) provide for relief and substitution of counsel. Substitution of counsel requires a court order. These rules would apply when a retained attorney is substituted for appointed counsel. Many of the Docket Management Orders allow for substitution of retained counsel for appointed counsel simply by retained counsel filing and serving a notice of appearance. Recognizing the legitimate concern that substitution of counsel not delay the proceedings, the Circuit Defenders suggest adding the following rule:

> **(g) Substitution of Retained Counsel for Appointed Counsel.** Nothing in this rule prohibits substitution of retained counsel for appointed counsel. A notice of representation pursuant to subsection (d) by retained counsel shall automatically relieve appointed counsel. Substitution of retained counsel for appointed counsel shall not be grounds for continuance except as provided by subsection (f).

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[4] Rule 106(c) seems intended to prevent reoccurrence of *State v. Anderson*, 357 S.C. 514, 593 S.E.2d 820 (Ct. App. 2004) (Cert. denied Sept. 8, 2005) (defendant's statement to police taken after arraignment where defendant signed a form requesting an public defender violated Sixth Amendment right to counsel).

[5] *Rothgery v. Gillespie County, Tex.*, ___ U.S. ___, 128 S.Ct. 2578 (2008) (a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel) and *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).

III. Concerns relating to Rule 112: Disclosure & Discovery.

A. Rule 112(a)(5). Notice of Prior Bad Acts. Rule 112(a)(5) requires the state to notice the intent to introduce evidence of prior bad acts "no later than ten (10) days prior to the trial date." While a notice provision is a significant improvement over current practice, responding to evidence of prior bad acts often requires a defense investigation. The state should be required to disclose evidence of prior bad acts by complying with Rule 112(d) (Time and Manner of Disclosure). Notice of intent to introduce this evidence should be not less than thirty (30) days before trial. *See* Proposed Rule 113 (b)(1), SCCR (Notice of Alibi by Defendant). The following is an alternate rule:

> **(5) Evidence of Prior Bad Acts.** The state shall disclose evidence of prior bad acts pursuant to *State v. Lyle* and/or Rule 404(b), SCRE in conformity with subsection (d). The state shall provide written notice of intent to introduce evidence of prior bad acts not less than thirty (30) days before trial.

B. Rule 112(b) (Disclosure of Evidence by Defendant) and Rule 112(c)(3) (Timing of Disclosure: Motions for Disclosure not Prohibited). Current Rule 5(b)(1), SCRCrimP does not require disclosure by the defendant unless the defendant first moves for the state to disclose evidence pursuant to Rule 5(a)(1), SCRCrimP. Proposed Rule 112(b), SCCR is a significant departure from current practice. The rules should not authorize the state to seek discovery from a defendant who has chosen to remain silent in the criminal justice process. If a defendant chooses to proactively avail himself of the provisions of proposed Rule 112(a), then, as in the case of the current Rule 5 and using the same language, he would be required to participate reciprocally pursuant to proposed Rule 112(b).

C. Rule 112(b)(3). Disclosure of Evidence by Defendant: Expert Witnesses. Rule 112(b)(3) requires a defendant to disclose an expert's written report "no later than thirty days prior to the expiration of the track or as otherwise ordered by the court." This provision raises three concerns.

1) In practice, the defense often retains experts late in the case. Disclosure of the expert should be in conformity with Rule 112(d). The Circuit Defenders find it odd Rule 112(a)(3)(C) does not link the state's disclosure to the track.

2) At a time when the Commission on Indigent Defense and the Circuit Defenders are trying to reduce expenses associated with experts, this provision could have the unintended consequence of increasing expert expenses. To the extent Rule 112 requires the defense to retain experts and disclose reports prior to the expiration of the track, the defense would be forced to retain numerous experts who must then generate a report. Often, the preparation of a report significantly increases the expert expense.

3) Death penalty cases should be exempted from Rule 112(b)(3). Many of the experts retained in death penalty cases are to prepare to present mitigation in the penalty phase. Proposed Rule 150 (Mitigation) already contemplates a separate procedure for the penalty phase of a death penalty case.

D. Rule 112(c)(2). Limits on Disclosure: Confidential Informants. Rule 112(c)(2) could be drafted more clearly. The following is an alternate rule:

> **(2) Confidential Informants.** The state shall disclose the identity of a confidential informant who is a material witness and/or a participant in the criminal activity which serves as the basis of the defendant's charge(s) in conformity with subsection (d), unless the court issues a protective order on the state's motion filed and served pursuant to Rule 110. The identity of a confidential informant who is a material witness and/or a participant in the criminal activity which serves as the basis of the defendant's charge(s) must be disclosed prior to a defendant entering a guilty plea, and the issuance of a protective order is grounds for reconsidering bond pursuant to Rule 106(f). All other confidential informants reasonably likely to testify at trial shall be disclosed no later than thirty (30) days prior to trial. Nothing in this rule shall prohibit a defendant for moving for disclosure of non-testifying informants, subject to the proper judicial showing. [6]

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[6] This alternate rule confirms to Constitutional requirements. Although the United States Supreme Court has recognized there is an informer's privilege, "[w]here the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Roviaro v. U.S.*, 353 U.S. 53, 61 (1957) (reversing conviction where the informant and defendant were the sole participants, and the government refused to reveal the informant's identity); *State v. Diamond*, 280 S.C. 296, 312 S.E.2d 550 (1984) (prosecution must reveal informant's identity when informant is a participant in the transaction and not "mere tipster"); *State v. Burns*, 294 S.C. 338, 364 S.E.2d 465 (1988) (defendant must be afforded reasonable opportunity to locate informant after identity is revealed); *State v. Hinson*, 293 S.C. 406, 361 S.E.2d 120 (1987) (prosecution must "reveal the deal" between the state and a witness before trial); and *State v. Blyther*, 287 S.C. 31, 336 S.E.2d 151 (Ct. App. 1985) (prosecution must reveal identity of informant when informant introduces undercover officer to defendant and was present and witnessed the transaction).

Identity of informant may be relevant to the validity of search warrant. *E.g. State v. Sampson*, 317 S.C. 423, 454 S.E.2d 721 (Ct. App. 1995). The identity of the informant may implicate other trial rights. *E.g. State v. Jenkins*, 322 S.C. 360, 474 S.E.2d 812 (Ct. App. 1996) (Prohibiting defendant, charged with possession with intent to distribute crack cocaine, from cross-examining police detective about identity of confidential informant that allegedly purchased cocaine from defendant's spouse was prejudicial error warranting new trial given that circumstances under which police sent informant into defendant's business to make drug purchase were relevant to claim that drugs were planted and solicitor exacerbated prejudice by repeatedly arguing there was no evidence that drugs could have been planted).

Disclosure of the identity of the confidential informant is not always required. *E.g. State v. Hayward*, 302 S.C. 75, 393 S.E.2d 918 (1990) ("no evidence that the [two female informants] were actively involved in the "sting," or that they witnessed the drug buy"); *State v. Burney*, 294 S.C. 61, 362 S.E.2d 635 (1987) (disclosure not required of informant who made controlled drug buy to establish probable cause for search warrant); *State v. Bernotas* 277 S.C. 106, 283 S.E.2d 580 (1981) (disclosure not required where confidential informant merely provided identifying

IV. **Rules that implement unreasonable or excessively burdensome timetables.** The Current South Carolina Rules of Criminal Procedure impose some timetables that are not practical in practice. The proposed rules establish a number of new timetables. Many of these timetables are inconsistent, unreasonable, or excessively burdensome. Some proposed rules impose unreasonable or burdensome requirements. These include:

A. **Rule 110. Motions.** Rule 110 is a significant advancement for motions practice in General Sessions Court because it will be easier for defendants to have motions ruled on by a judge. Rule 110, however, contains two timetables that are either inconsistent or excessively burdensome. The Circuit Defenders propose an alternate Rule 110 that would resolve these issues. *See* Appendix A.

1) Rule 110(a)(2) requires all motions, including "motions *in limine* for the suppression or exclusion of evidence," to be filed ten (10) days prior to trial.

When read in connection with Rule 124(a) (preparation of trial rosters), this provision creates an unreasonable and excessive burden by providing only four days for filing motions. This burden could be eased by the alternate Rule 110 that provides for motions to be filed prior to the call of the case. The alternate Rule 110 also recognizes some cases are more complex than others and provides the parties and the court a mechanism for scheduling, hearing, and resolving motions prior to trial.

2) Rule 110(c)(2) requires motions shall be scheduled for a hearing "within thirty (30) days of service," yet Rule 110(c)(2) requires a moving party to wait thirty (30) days before applying to the court for a hearing.

These time frames are inconsistent. This inconsistency could be resolved by the alternate Rule 110 which distinguishes between uncontested and contested motions, allows parties to request hearings on contested motions, and places discretion with the court to schedule and resolve motions.

B. **Rule 111. Mental Evaluations.** Rule 111 raises two issues.

1) Rule 111(d) requires hearings on competency to be held within thirty (30) days of receiving a report from the appropriate agency. This provision would apply in

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information that was corroborated by officers); *State v. Shupper*, 263 S.C. 53, 207 S.E.2d 799 (1974) (Where confidential informant merely told police that a quantity of hashish had been received at defendant's residence and where case rested on testimony of police officers that hashish and LSD was found in defendant's possession, defendant was not entitled to have identity of confidential informant revealed). *State v. Wright*, 322 S.C. 484, 472 S.E.2d 642 (Ct. App. 1996) (defendant was not entitled to disclosure of identity of confidential informant who was seated in automobile of undercover police officer while officer left automobile and purchased drugs from defendant); and *State v. Bultron*, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995) (disclosure of identity of informant who called police and claimed to have seen drugs in a hotel room was not required because "[t]here is no evidence in the record indicating the informant participated in or assisted with the actual delivery of the drugs or the subsequent arrests").

cases where the appropriate agency finds the defendant competent and neither party contests the report. The Circuit Defenders suggest an alternate provision:

> **(d) Hearing to Determine Competency.** If the appropriate agency finds the defendant competent, then a hearing to determine competency is not necessary, and the parties shall provide a copy of the report to the court before entering a guilty plea, before proceeding to trial, or at such other appropriate time. If the appropriate agency finds the defendant not competent and neither the state nor defense counsel contests the report, then the solicitor shall schedule and the court shall conduct a hearing within a reasonable time which shall not exceed thirty (30) days after receiving the report. If competency is contested, then the parties shall schedule a status conference pursuant to Rule 122, and the court shall schedule a hearing to resolve the issue. Any order finding a defendant not competent to stand trial shall be inconformity with the applicable order promulgated by court administration.

2) Rule 111(e) requires a defendant to notice an insanity defense "within thirty (30) days of receiving the report from a mental health professional." When read in connection with Rule 112(b)(3), this report "shall be provided no later than thirty (30) days prior to the expiration of the track or as otherwise ordered by the court."

   In practice, investigating a potential insanity defense can be lengthy and time consuming. A complete and accurate social history is often necessary for an expert to render a reliable opinion. A better practice would be to require the defense to notice an insanity defense not less than thirty (30) days before trial. *See* Proposed Rule 113 (b)(1), SCCR (Notice of Alibi by Defendant).

   In addition, because presenting an insanity defense involves admitting the conduct, a defendant could be prejudiced by early notice of an insanity defense that is later withdrawn, unless this Court provides appropriate protections. *See Williams v. Florida*, 399 U.S. 78, 85 (1970) (fn. 15) ("The mere requirement that petitioner disclose in advance his intent to rely on an alibi in no way 'fixed' his defense as of that point in time.") and *People v. Brown*, 98 N.Y.2d 226, 746 N.Y.S.2d 422 (2002) (Statements contained in a notice of alibi withdrawn before trial . . . . should not be treated as informal judicial admissions that the prosecution may use to impeach a defendant who gives inconsistent statements at trial).

C. **Rule 114(c). Chemical Analysis and Chain of Custody: Disclosure.** Rule 114(c) requires disclosure of reports pursuant to Rule 112 or "in no event later than twenty

(20) days prior to the trial of the case.[7] To be consistent with other time tables, the outside deadline should be not later than thirty (30) days before trial. *See* Proposed Rule 113 (b)(1), SCCR (Notice of Alibi by Defendant).

D. Rule 115(d). Continuances: Orders of Protection. Rule 115(d) should allow the court discretion to grant orders of protection after the trial docket has been published for exceptional circumstances such as illness, death in the family, or other appropriate emergency situation.

E. Rule 131. Subpoena and Subpoena Duces Tecum. A better rule for service of subpoenas is needed in General Sessions Court. Proposed Rule 141, however, places unnecessary burdens on both the prosecution and defense. At a time when this Court is trying to improve the efficiency of disposing of criminal cases, this rule very likely will delay investigations of cases. A rule more consistent with Rule 45, SCRCP (Subpoena) would better serve the interests of justice. Attorneys should be able to sign subpoenas as an officer of the court. *See* Rule 45(a)(3), SCRCP. A subpoena duces tecum should be returnable to the requesting party regardless of the dates of a term of court and without requiring a court order. *See* Proposed Rule 131(c), SCCR and Rule 45(c)(2), SCRCP. HIPPA and S.C. Code Section 19-11-95 (confidences of patients of mental illness or emotional conditions) adequately protect medical and mental health records, so proposed Rule 131(d) is not necessary for obtaining these records).

F. Rule 141(c). Communication with Jurors: After Trial. Rule 141(c) strictly forbids contact with jurors after a trial, except "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." Both the prosecution and defense have been able to investigate and show misconduct following a jury trial. *E.g. State v. Kennerly*, 337 S.C. 617, 524 S.E.2d 837 (1999) (on prosecutor's petition, trial court held juror in contempt of court for failing to disclose information during voir dire and for pre-mature deliberation about sentencing in capital case) and *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (2003) (new trial ordered after defense investigation discovered improper contact by state agent's with juror's family members and friends). While both *Kennerly* and *Bryant* are capital cases, potential juror misconduct issues arise in non-capital trials. *Eg. State v. Guillebeaux*, 362 S.C. 270, 607 S.E.2d 99 (2004) (juror's failure during voir dire to disclose alleged relationship with state witness was not intentional).

The proposed rule, therefore, unreasonably limits both parties from engaging in reasonable investigations. A better practice would be for the trial judge prior to

[7] Rule 114(c) highlights the disparate requirements imposed on the prosecution and defense. To be consistent with the expert disclosure requirements imposed on the defense by proposed Rule 112(b)(3), the state should be required to disclose these reports thirty (30) days prior to the expiration of the track. No doubt, the drafters of the proposed rules believed such a requirement would not be practicable in many cases. The rules should consistently consider the practical constraints of daily practice.

discharging the jury to instruct the jurors of their right not to discuss the case except as they may chose. The following alternate rule, based on S.C. Code Section 16-3-21 (jury instruction as to discussion of verdict in capital cases) is recommended: [8]

> **(c) After trial.** After a jury or juror has been discharged, the trial judge shall verbally instruct the jury or juror concerning the discussion of its verdict. The verbal instruction shall include: (1) the right of the juror to refuse to discuss the verdict; (2) the right of the juror to discuss the verdict to the extent that the juror so chooses; (3) the right of the juror to terminate any discussion pertaining to the verdict at any time the juror so chooses; (4) the right of the juror to report any person who continues to pursue a discussion of the verdict or who continues to harass the juror after the juror has refused to discuss the verdict or communicated a desire to terminate discussion of the verdict; and (5) the name, address, and phone number of the person or persons to whom the juror should report any harassment concerning the refusal to discuss the verdict or the juror's decision to terminate discussion of the verdict. The trial judge may also provide each juror with a written copy of the instruction if the court finds it is required for the interests of justice.

G. **Rule 151(b). Sentencing: Correcting Clear Error.** Rule 151(b) requires "arithmetical, technical, or other clear error" to be corrected "within ten (10) days after sentencing." In practice, such errors often are not detected until the Department of Corrections interprets the sentencing sheets. The sentencing judge should retain jurisdiction to correct these errors on the court's own motions or on the motion of either party filed and served pursuant to Rule 110.

H. **Rule 152(e). Post Trial Motions. Reducing a Sentence for Substantial Assistance.** Rule 152(e) allows the state to move to reduce a sentence. In order to be fair, both parties should be allowed to bring the motion. The rule should also be expanded to allow motions for "other good cause shown."

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[8] The Supreme Court has adopted the following instruction for capital cases, which is often given by trial judges in non-capital cases:

> After your service in this trial has ended, you have the right to either refuse to discuss the verdict you have rendered or to discuss the verdict as much as you want. If you choose to discuss the verdict, you are free to stop any discussion at any point. If the person with whom you are speaking tries to continue a discussion of the verdict after you have stated that you do not wish to discuss it any further, or continues to harass you after you have refused to discuss the verdict, you should report that person to [name, address, phone number].

V. **Rules pertaining to error preservation.** Proposed Rule 136(b) (Evidence: Exhibits) contemplates the court ruling on a contested exhibit "at the time it is offered." Proposed Rule 137, however, seems to relax South Carolina's strict error preservation rules, although that intent is not entirely clear. The Circuit Defenders propose clarifying Rule 137(a) and adding a section (c) regarding plain error:

> **(a) Reservations Unnecessary.** If an objection has once been made to the admission of evidence and ruled upon on the record, including pre-trial motions *in limine* or hearings during trial outside the presence of the jury, it shall not be necessary thereafter to renew the objection or to reserve rights concerning the objectionable evidence.
>
> **(c) Plain Error.** On its own motion, the court shall grant relief if an error is clear or obvious, and the error affects substantial rights. Nothing in this rule prohibits the appellate courts from granting relief if an error is clear or obvious, and the error affects substantial rights.

VI. The Impact on Public Defender Caseloads.

The docket management orders currently in place are purely administrative. Proposed Rule 121 (Tracking) changes that practice, mandates disposition of cases within a tracking system, and provides for "remedies or sanctions" for failure to comply. Section (a) requires General Session cases to be placed on a tracking system. Section (b) authorizes the judge to determine "remedies or sanctions," if a case is not disposed of by the expiration of the tract.[9]

This Court has consistently held that excessive public defender caseloads do not relieve the lawyer of the responsibilities of representation. *McKnight v. State* 378 S.C. 33, 661 S.E.2d 354 (2008) (held ineffective assistance of counsel when public defender's excessive caseload prevented counsel from retaining necessary expert); and *In re Sturkey* 376 S.C. 286, 657 S.E.2d 465 (2008) (public defender's excessive caseload does not relieve counsel of the obligations of representation). At a time when the Commission on Indigent Defense and the Circuit Defenders are trying to reduce the burden of appointed cases on the private bar, excessive caseloads in public defender offices could force Circuit Defender Offices to stop accepting cases once caseload limits are exceeded. *See* S.C. Bar Ethics Advisory Opinion 2004-12 (interpreting Rule 407, SCACR, Rules 1.1, 1.3, 1.4, 1.13(b), 1.16, and 5.1, SCRPC). *See State ex rel. Missouri Public Defender Com'n v. Pratte*, ___ S.W.3d ___, (2009) (2009 WL 4638864 Mo. 2009) (public defender office may not refuse to accept class of cases as a means to control caseload but, absent

[9] Proposed Rule 121 does not define "remedies." Dismissal of the case, however, is excluded as a possible remedy. Rule 106(g) allows for an additional bond hearing if the client's case is outside the track. Likewise, "sanctions" is not defined. Presumably, "sanctions" include contempt of court at the discretion of the judge. The rule does not specify who the court may sanction. Presumably, sanctions would apply to prosecutors, defense attorneys, pro se defendants, law enforcement and victims of crimes.

arrangement with prosecutors and judges, may make the office unavailable until caseload standards are met).

The Circuit Defenders cannot stress enough their commitment to providing representation to indigent defendants and to reducing the burden of appointed cases on the private bar. The proposed rules already contain several provisions that give deference to prosecutors' legitimate workload considerations. [10] As this Court continues to implement docket management, we hope the Court will consider the balance between public defender caseloads and the demands of the track system.

VII. Conclusion

Again, the Circuit Defenders commend this Court, the Task Force, and the Rules Advisory Committee for undertaking this process. We thank the Court for considering these comments.

[10] The Circuit Defenders recognize prosecutors face similar workload challenges for complying with the tracking system. Although discovery is provided at the initial appearance, some documentation takes more time to obtain, which include SLED laboratory reports, documentation of medical injuries, and victim documentation of restitution. The proposed rules contemplate these considerations. See Proposed Rules 112(d)(2) (continuing duty to disclose), 114(c) (disclosure of reports of chemical analysis), and 151(c) (timing of restitution hearings), SCCR.

Appendix 1

Alternate Proposed Rule 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.

(A) Motions May Be Filed at Any Time. ~~On a~~All motions the grounds for which are known before the case is called for trial may be filed at any time. ~~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) Trial Motions. Motions pertaining to the conduct of trial shall be filed and served prior to the call of the case unless otherwise ordered by the court. These include motions by the prosecution to introduce a defendant's statement when introduction of the statement requires a *Jackson v. Denno* hearing and motions *in limine* by either party for suppression or exclusion of evidence.

(C) Scheduling Orders. On the motion of either party or on its own motion, the court may require motions and responses to be filed prior to trial if the court determines it serves the interest of justice. The court may enter a scheduling order for the time of filing motions and responses.

(3) Uncontested Motions. Uncontested motions may be resolved by the opposing party complying with the motion, through stipulation signed by counsel for the parties or the *pro se* party, or by consent order signed by counsel for the parties or the *pro se* party. When the matter is resolved by consent order, the requirement the motion be in writing may satisfied by stating with particularity the request for relief in the text of the order. Consent orders shall be submitted to the chief judge if outside a term of court or the presiding judge if during a term of court.

(4) Response to Contested Motions. When a party opposes a written motion and desires the court to consider legal authority, the party shall file a written response in accordance with (a)(2) and serve a copy on opposing counsel or pro se party in

accordance with (a)(3). The written response shall state with particularity the grounds for opposing the motion.

(b) ~~(c)~~ **Scheduling of Motions.**

(1) Uncontested Motions. Uncontested motions, including motions for discovery under Rule 112 or in accordance with *Brady v. Maryland*, do not need to be scheduled for hearing, provided however that either party may request the court to convene a hearing if there is a contested issue related to discovery under Rule 112 or in accordance with *Brady v. Maryland.*

(2) Timing of Hearing. ~~**Solicitor's Responsibility.**~~ Any motion, with the exception of motions not requiring a hearing under (b)(1), ~~for discovery under Rule 112 or in accordance with *Brady v. Maryland*,~~ shall be scheduled for a hearing ~~by the solicitor~~ within thirty (30) days of service. All motions filed prior to the beginning of a term of court shall be heard during the next term of court.

(3) Solicitor's Responsibilities. Sufficient ~~T~~time shall ~~will~~ be set aside by the solicitor ~~and the court~~ during each term of court for hearing motions.

(4) Special Scheduling Considerations. For good cause, the court may schedule a special time and date to hear any motion regardless of the scheduled of the terms of court.

(5)~~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, or if during a term of court the presiding judge, for a hearing.

(6) Affirmation of Counsel. ~~Such~~ A request or application for a hearing 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. When movant's counsel or *pro se* party reasonably believes the matter contained in the motion will be contested, the affirmation may be contained in the written motion.

(c) ~~(3) Duty of the Court.~~ **Action by the Court.**

(1) Uncontested Motions. For uncontested motions, action is not required by the court except when the parties submit a consent order. The court may grant or deny a consent order.

(2) Contested Motions. The Court shall ensure that sufficient time is set aside during each court term for earing motions. ~~—~~Upon receipt of contested motions from the solicitor pursuant to (b)(3) or ~~of~~ a request for a hearing pursuant to (b)(5)~~(c)~~(~~2~~) above, the court may take such action as is deemed appropriate to resolve the motion.

(3) Motions Pertaining to the Admission or Exclusion of Evidence. For motions pertaining to the admission or exclusion of evidence during a trial, the court shall ensure each

party has a sufficient opportunity to develop the factual record for the court to resolve the matter and to make sufficient record for the court to resolve the matter and for potential appellate review.

(4) **Trial Motions.** When the motions are scheduled in connection with a trial, the court may schedule hearings prior to the commencement of the trial. If the court has entered a scheduling order pursuant to (a)(2)(C), the court may schedule hearings as is deemed necessary pursuant to (b)(4).

(d) **Rehearing or Reconsideration.** A motion for rehearing or reconsideration shall be made to the judge who ruled on the motion, shall be in accordance with subsection (a), and shall state with particularity the points supposed to have been overlooked or misapprehended by the court. Motions for rehearing or reconsideration shall be served within ten (10) days of the court's ruling if no written order or within ten (10) days of receipt of a written order. 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 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 hearing was held. The motion may, in the discretion of the court, be determined on briefs filed by the parties without oral argument. A motion for rehearing or reconsideration is not required to preserve the matter for appeal, provided the court's ruling or written order addresses the grounds raised in the motion and any response.

(e)~~(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.

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.~~ Under Subsection (a)(2)(A) motions, including motions in limine, may be filed at any time and scheduled pursuant to Section (c). Subsection (a)(2)(B) requires trial motions to be filed prior to the call of the case unless otherwise ordered by the court. Subsection (a)(2)(C) recognizes some cases require more time for hearing motions and provides the parties and the court with scheduling flexibility appropriate for the case. Subsection (a)(3) is new and provides for uncontested motions to be resolved by the parties through compliance, stipulation, or consent order. Subsection (a)(4) is new and requires a party opposes a written motion and desires for the court to consider legal authority to file and serve a response.

~~Section (b) is identical to former Rule 4(b), SCRCrimP.~~ Section (b)~~(c)~~ is new and provides a mechanism for scheduling and hearing motions. Subsection(b)(6)~~(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 excludes uncontested motions, including ~~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.

Section (c) is new and provides the court with necessary flexibility and discretion to hear and dispose of motions.

Section (d) is new and provides for parties to move for rehearing or reconsideration of rulings with the party believes the court has overlooked or misapprehended a point. The rule makes it clear that motions for rehearing ro reconsideration are not required to preserve a matter for appellate review provided the court addresses the grounds raised in the motions and response.

Section (e) is identical to former Rule 4(b), SCRCrimP.