THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN RE: THE PROPOSED SOUTH CAROLINA CRIMINAL RULES

WRITTEN COMMENTS OF
THE SOUTH CAROLINA PUBLIC DEFENDER ASSOCIATION

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INTRODUCTION

The South Carolina Public Defender Association (hereafter "SCPDA") is a non-profit association comprised of all the public defenders of the State of South Carolina. Our membership of more than two hundred attorneys includes assistant public defenders, contract public defenders, and Circuit Defenders who represent indigent people in the criminal courts of South Carolina. SCPDA's mission is to promote and support the advancement of indigent defense in South Carolina.

Public Defenders are stakeholders in the criminal justice system. We are invested in its success as professional participants and as citizens. As Public Defenders we are committed to using our education, training, and experience to provide the indigent community of South Carolina with the finest legal representation we can provide.

SCPDA submits these comments on the Proposed South Carolina Criminal Rules (hereafter the "Proposed Rules") with the goal of producing the best possible criminal justice system for South Carolina. We are committed to working with the solicitors, the legislature, and the Court to improve the Rules of Criminal Procedure. These comments are offered not to thwart improvement, but to constructively assist in the improvement of criminal procedure in South Carolina. To that end, we observe that the Proposed Rules make structural changes and substantive changes to the current criminal procedure rules in this state. We have therefore chosen not to address each proposed rule individually. Rather, we have organized our comments into two parts. Part I addresses the structural changes generally encompassed by the proposed rules; and Part II more specifically addresses the substantive changes proposed by certain rules.

Part I—The Proposed Structural Changes

SCPDA supports the overall structural changes offered in the Proposed Rules. A framework is created by the Proposed Rules in which a criminal case is managed in the course of the processing of it to disposition. That is a good thing. Our current rules do not provide an adequate framework for case processing to disposition. Clearly, improvement on our current rules is needed.

With the adoption of a docket management system by the solicitors pursuant to the Court's March 1, 2007 consent order, the current rules of criminal procedure have become outmoded. The current rules were not conceived in a time managed court system; they do not facilitate an orderly processing and tracking of cases. The Proposed Rules are intended to complement the case management systems that are in place in each circuit without being overly restrictive. Because the Proposed Rules create general guidelines on managing cases, the rules, in many cases, allow for flexibility. Flexibility in processing cases is a good thing.

Court Appearances

We believe, however, that slightly more flexibility is needed. Under the Proposed Rules, "initial" and "second" court appearances are used to move cases along in their respective tracks. Where *pro se* defendants are concerned, the use of these required appearances is likely to be an effective way to manage case processing. However, for those defendants who are represented, using the appearance procedures set up by Proposed Rules 119 and 120 imposes a procedure too rigid for a system that must handle large caseloads. SCPDA foresees a problem in this rigidity.

Tying court appearances so strictly to the dates of the track system will lead to rule required "cattle calls." Courtrooms will be filled with represented and *pro se* defendants alike who solicitors and the judge will be trying to sort through in an effort to triage a huge number of cases to ensure adherence to the strict requirements of Proposed Rules 119 and 120. That would not be an improvement. "Cattle-calls" thwart efforts toward efficient and effective processing of cases because in being focused mainly on deadline dates they are too disengaged from the substantive processing of the case. Bringing cases to court that are not ready to be processed does not increase efficiency.

SCPDA believes a greater level of flexibility is needed and can be obtained by following RECOMMENDATION 1.

RECOMMENDATION 1:

> Modify Proposed Rules 119 and 120 so that, short of the final deadline dates in a case track, "initial" and "second" court appearances are not necessary; they can be waived by the solicitor and reset in consultation with defense counsel.

Allowing for non-mandatory appearances would mean the only cases being brought to court are those that need to be brought to court: *pro se* defendants who must decide to obtain a lawyer, plead guilty, or go to trial; and represented defendants who, having had the necessary opportunity to consult with their lawyers, are prepared to plead guilty or obtain a trial date.

RECOMMENDATION 1 would allow the use of a simpler method of sorting those defendants who are represented and those who are not; it would streamline the ability of the solicitor to focus on bringing those people to court who need to come to court; it would recognize and allow for greater flexibility in the necessary process of negotiations that goes on in every criminal case. More importantly, it would allow an individual circuit to develop a process that works best for that circuit.

Notice of Representation

Another area where the Proposed Rules are too rigid is Proposed Rule 116(d). The requirement that a notice of representation be filed with the Clerk of Court is unnecessary and will increase costs in labor and resources for all involved, especially the Clerks of Court.

The goal of this subsection is to make clear to both parties and the court the attorney who is representing a defendant and the scope of that representation. This goal is achieved by requiring a notice be sent to the solicitor that is clear as to the scope of representation. Making the additional requirement that the notice be filed with the Clerk of Court will only increase the volume of paper that the Clerk of Court must maintain and will only increase the work load for the staff of the Clerk of Court (increasing filing and imaging duties). Public Defenders represent huge numbers of people. Proposed Rule 116(d) would force the Clerk of Court to accept thousands of unnecessary pages of notices that must be accepted, filed, and then maintained. SCPDA RECOMMENDATION 2 would alleviate this added work load and accomplish the same overall goal.

RECOMMENDATION 2:

> Modify Proposed Rule 116(d) to remove the requirement that a notice of representation be filed with the Clerk of Court.

Case Tracking

Proposed Rule 121 is intended to accomplish an important task: provide a mechanism for ensuring that cases adhere to the tracking system implemented by the docket managing orders in the various circuits. This is a necessary goal. However, the proposed rule is missing two crucial elements. It needs teeth and it needs to allow for extraordinary exceptions.

In order for Proposed Rule 121 to accomplish its task it needs to have teeth. Without a real mechanism for ensuring a case stays on track the rule will have no practical effect. SCPDA recommends the Court better define the "remedies" and "sanctions" that can be meted out in Proposed Rule 121(b). In order for the rule to work in practice, there needs to be a provision requiring notice to the defendant of the specific track in which their case has been placed. The adversary nature of the system will break down without proper notice to the defense. If the track for a case is unclear, then the role of safeguarding defendants' rights cannot be properly performed; nor can the defense attorney assist in the timely processing of the case to disposition.

The Court should also remove the proscription that dismissal is not a permissible remedy for violating Proposed Rule 121. While this remedy should not be easily obtained, it should not be eliminated altogether as an appropriate remedy. Solicitors control the calling of cases. The Proposed Rules seek to place that control into a framework. However, no rule can supersede the current law giving solicitors the power to control the criminal docket. Extraordinary circumstances will arise. We are not able to predict the exact circumstances but we do know they will arise. Extraordinary circumstances demand extraordinary remedies, even dismissal.

RECOMMENDATION 3:

> Define "remedies" and "sanctions" more explicitly; allow for dismissal to be included as a remedy.
>
> Add a subsection (c) that requires notice to the defendant and/or their attorney of the specific track in which a case has been placed.

Time Frames

The Proposed Rules create an overall framework for case management. A necessary requirement for case management is time frames. Clear and reasonable time frames should be defined. While the Proposed Rules clearly set forth time frames, the rules do not create consistently reasonable time frames. See chart below.

Criminal practice has two stages: negotiation and trial. What takes place during negotiation, while related to trial, is not necessarily essential to the actual conduct of the trial. For instance, a defendant may forgo their right to a 4th Amendment challenge to the state's evidence in exchange for a particular guilty plea; the state may make a particular offer so as to avoid such a challenge. This is classic plea bargaining. However, at a trial a defendant is not going to forgo a 4th Amendment challenge to the admissibility of the very evidence that would lead to a conviction.

In some instances, resolution of a legal issue may be necessary in order for both parties to properly evaluate the offer and acceptance issues involved in plea negotiations. The issue may be the suppression of evidence; or it may be the acquisition of evidence. In either case, one or both sides may decide that a motion is needed to resolve the issue in order to further negotiations.

Consequently, in order to have reasonable time frames it is necessary to know which stage a case is in: negotiation or trial. Strict time frames for a case that is not going to trial will not make for a more efficient system; in fact, it could cause the

attorneys for both sides to have to focus on adhering to time deadlines rather than actually resolving the case.

When a case is in the trial stage, it is important to have a relative starting point for those rules that facilitate carrying out the trial. SCPDA recommends that the notice date for trial be that starting point; and we further recommend that the notice for trial be provided at least 45 days prior to the term of court.

RECOMMENDATION 4:

> Change Proposed Rule 123(a) to require trial rosters be produced forty-five (45) days prior to the term of court.

Having a forty-five (45) day relative starting point will allow those rules that relate most directly to the conduct of the trial to, in practice, be more effective.

Rule 110(a)(2)—Motion Time Frames

When in the negotiation stage of a case, motions should be permitted at any time. Negotiations require maximum flexibility. If the system is too rigid during this stage, then the incentives for finding some resolution other than a trial will be undermined. If both sides agree that a legal issue needs to be resolved while still negotiating, then rigid time restrictions will hinder an agreement.

RECOMMENDATION 5:

> Proposed Rule 110(a)(2) should allow for the filing of motions at any time prior to the notice of trial being given; upon a proper notice for trial being given consistent with RECOMMENDATION 4, then all motions must be filed thirty (30) days prior to the noticed trial date.

Time frames for filing of notices and motions cannot be separated from the stage a case is in. Doing so leads to unreasonable time requirements. For instance, Proposed Rule 123(a) provides notice for trial of only 14 days. Any rule that requires notice or filing beyond 14 days could never be adhered to because the date requiring trial notice is less than the time fame for compliance.

When the time frame is within the 14 day notice, as Proposed Rule 110(a)(2) requirement that motions be filed not less than 10 days before trial is, the time frame is unreasonable. The Proposed Rules leaves 4 days to file pre-trial motions after notice of a trial date. That is an unworkable time frame for the court, the solicitor, and the defendant. The court will not be able to realistically schedule hearings in such a compressed time frame—thereby failing to accomplish what the rule was

drafted to accomplish: creating an "organized procedure for handling motions."[1] The solicitor and the defendant will not have the time to prepare all motions and properly respond. Moreover, the compressed time frame becomes an exponentially greater problem when you consider that public defenders will routinely have more than one case (and sometimes more than two cases) set for trial each term of court; and the problem is further compounded since, in many cases, terms of court are back-to-back, or only separated by a single week of non-court session. There would literally be no time to negotiate other cases or prepare other cases for trial.

In combination with the forty-five (45) day trial notice made in RECOMMENDATION 4, RECOMMENDATION 5 would, once a trial notice has been properly given, provide fifteen (15) days for preparation of pre-trial motions by the state and the defense, as well as allow thirty (30) days for the court to schedule a hearing. These recommendations further the goal of creating a more organized motions practice in General Sessions without undermining the substantive goal of the motions themselves. These recommendations also consider the practical needs and effect of the particular stage a case is at during its processing to disposition.

Rule 112(a)(5)—Prior Bad Act Evidence Time Frame

Proposed Rule 112(a)(5) appears at first glance to relate strictly to the conduct of trial. However, it clearly has implications during the negotiation stage. A fair evaluation of the case by the defendant and their attorney cannot be made if all of the information the state intends to present at trial is not known during the negotiation stage. This information should be provided within the time frame set forth in Proposed Rule 112(d)(1), "within thirty (30) days of the receipt of any motion or request for disclosure" and should be subject to Proposed Rule 112(d)(2)'s continuing duty to disclose.

Once in the trial stage, Proposed Rule 112(a)(5) is an unreasonable time frame. The State is required to provide ten (10) days notice of its intention to introduce evidence of prior bad acts. This leaves four (4) days for the defendant to investigate the evidence the State intends to present at trial. This is not a reasonable amount of time to perform a proper investigation. This kind of compressed time frame for investigation will lead to poorly investigated cases or no investigation. In the least, it will result in ineffective assistance of counsel claims; at worst unjust verdicts.

RECOMMENDATION 6:

[1] Comment to Proposed Rule 110-Motions, page 2.

> Notice of Prior Bad Act Evidence under Proposed Rule 112(a)(5) should be subject to the time requirements of Proposed Rule 112(d)(1), but in no case should be given less than thirty (30) days prior to a properly notified trial date under RECOMMENDATION 4.

Like RECOMMENDATION 5 above, building into the rules recognition of the different stages of a case increases the effectiveness of the rule.

Rule 112(b)(3)—Defense Expert Witnesses

Proposed Rule 112(b)(3) requires that the defendant provide a list of expert witnesses to the State no later than thirty (30) days prior to the expiration of the track. This time frame is completely separated from the trial of a case; and is consequently unreasonable.

To begin with, unless a case is going to trial the use of expert witnesses and their information is part of the defendant's and the attorney's work product; this information is necessary for evaluation of the case and for negotiating purposes. Requiring disclosure before the decision to go to trial has been made invades the defendant's right to keep work product confidential. It also undermines the defendant's ability to negotiate a fair resolution.

This proposed rule further ignores an important rule of law: the defendant has no burden of proof in a criminal case. As is discussed more fully in Part II of these comments, Proposed Rule 112 drastically changes the current practice found in Rule 5(a)(1). The current rule allows the defendant to choose to avail themselves of the discovery options found in Rule 5(a)(1) and incur the reciprocal discovery obligations of Rule 5(b).

RECOMMENDATION 7:

> Proposed Rule 112(b) should allow the defendant to invoke Rule 112 and thereby incur the responsibilities found in Rule 112(b).
>
> Consistent with that change, Proposed Rule 112(b)(3) should require notice thirty (30) days prior to a properly notified trial date under RECOMMENDATION 4.

Rule 151(b)—Correction of Sentencing Sheet

Proposed Rule 151, as a whole, provides structural guidance on the proper use of Sentencing Sheets in General Sessions court. This rule provides the necessary

procedures for using Sentencing Sheets, as these documents have become the standard for practice in criminal cases.

Proposed Rule 151(b), however, is too restrictive given the realities of S.C Department of Corrections (hereafter "SCDC") and the great task it has in processing inmates. Most inmates cannot be processed through SCDC in ten (10) days; therefore clear errors cannot be caught within the time frame required by the proposed rule. More importantly, errors related to probation and parole many times do not turn up until after the service of the active sentence—when probation and parole go into effect. That means that months and years may pass before the clear error becomes obvious. A better practice would be to eliminate the time frame altogether.

RECOMMENDATION 8:

> Proposed Rule 151(b) should be changed to read:
>
> **(b) Correcting Clear Error.** The court may correct a sentence that contained arithmetical, technical, or other clear error at any time upon showing good cause.

Chart of Actions and Corresponding Time Frames

Action	Time Frame	Rule
Filing of Motions	Not less than 10 days before trial	110(a)(2)
Scheduling of Motions	Within 30 days of service	110(c)(1)
Competency Hearing	Within 30 days of receipt of DMH report	111(d)
Notice Insanity Defense	Within 30 days of receipt of DMH report	111(e)
Notice of Lyle Evidence	No later than 10 days prior to trial	112(a)(5)
Defense Disclosure of Expert Witnesses	No later than 30 days prior to the expiration of the track	112(b)(3)
Confidential Informants	No later than 30 days prior to trial	112(c)(2)
Discovery Disclosure	Within 30 days of receipt of request or motion	112(d)(1)
Defense Alibi Notice	Not less than 30 days before trial	113(b)(1)
State Alibi Notice	Within 10 days after Defense notice, but not less than 10 days before trial	113(b)(2)
Defense Objection to Chemist's Report	Not later then 10 days prior to trial	114(a)
Disclosure of Chemist Reports	Within 15 days of receipt by State, but not later than 20 days prior to trial	114(b)
Trial Docket	At least 14 days prior to term of court	123
Correct Error on Sentencing Sheet	Within 10 days after sentencing	151(b)
Restitution Hearing	Not more than 90 days after sentencing	151(c)
Post trial Motions	Within 10 days after imposition of sentence	152(a)

Post Guilty Plea Motions	Within 10 days after imposition of sentence	152(b)

Part II—The Proposed Substantive Changes

SCPDA supports many of the substantive changes made by the Proposed Rules. What follows are proposed changes to certain of the Proposed Rules that SCPDA believes impinge on constitutional rights or are contrary to other statutory or case law. These proposed changes, however, are not intended to stop the revision of the criminal procedure rules in South Carolina. SCPDA believes changes are necessary to create a more efficient criminal procedure in this state. SCPDA believes there are workable changes that can be made to the Proposed Rules that will eliminate constitutional and legal errors, and that these changes will enhance the efficiency and workability of the Proposed Rules.

Defendant's Right to Counsel and to Proceed *Pro Se*

The right to counsel for indigent defendants is the bedrock principal for SCPDA, and for all public defenders. Any rule that hinders or denies this important constitutional right must be modified.

Rule 106(c)—Representation Matters at Bond Hearing

Proposed Rule 106(c) outlines a process to inform the defendant of his right to representation at a bond hearing. This is an important and necessary goal. The rule as proposed, however, does not address the actual request by the defendant. It directs that notice of the right to counsel be given and that the issue of obtaining appointed counsel be address. It does not, however, provide for notice by the defendant that they do, in fact, want appointed counsel. A defendant who signs a form requesting a public defender has asserted their 6th Amendment Right to counsel. State v. Anderson, 357 S.C. 514, 593 S.E.2d 820 (Ct. App. 2004). The rules must account for the defendant who asks for a lawyer.

RECOMMENDATION 9:

> Proposed Rule 106(c) should be modified. The last sentence of this subsection should read:
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> "If a defendant asserts his right to counsel by requesting to be screened for indigency at the bond hearing, the form used shall be one promulgated by Court Administration."

While a criminal defendant has a right to counsel, he has an equal right to represent himself. Faretta v. California, 422 U.S. 806 (1975). Proposed Rule 106(c) impinges upon this important right by ordering a defendant to obtain counsel within fifteen (15) days of the bond hearing or find themselves in violation of the bond terms and be subject to re-arrest. It is obvious that the goal of this subsection is to prevent delay in the system and to assist in the acquisition of legal counsel. Proposed Rule 106(c) does not include requirements for following the requirements of Farretta.

This will result in a practice where defendants are ordered to obtain attorneys or be in violation of the terms of their bonds without the option of proceeding *pro se* or a realistic opportunity to obtain counsel. The decision to obtain appointed counsel or hire private counsel cannot, in many cases, be made immediately at a bond hearing. SCPDA believes there is a better approach that does not impinge on defendants' constitutional rights and allows for a more reasonable time frame.

RECOMMENDATION 10:

> Require the judge to advise the defendant of his right to counsel (appointed and retained); also require the judge provide Farretta warnings for proceeding *pro se*. Require that the defendant be told that upon his Initial Appearance he will have to have applied for appointed counsel, retained private counsel, or be prepared to proceed *pro se*.

Delay in Bond Hearing

Proposed Rule 106(a) is inconsistent with S.C. Code § 22-5-510. The proposed rule allows the summary court judge to delay a bond hearing beyond twenty-four (24) hours. Section 22-5-510 specifically states: "A person charged with a bailable offense must have a bond hearing within twenty-four hours of his arrest."

RECOMMENDATION 11:

> Remove the last sentence of Proposed Rule 106(a).

Proposed Rule 106(e) is also inconsistent with S.C. Code § 22-5-510. The S.C. Constitution declares that all offenses are "bailable" but that a bond may be denied in certain circumstances (capital offense, offense punishable by life imprisonment, etc.). Section 22-5-510 requires the decision on "bailable" offenses be made within twenty-four (24) hours of arrest. There are important constitutional rights that are affected by the holding of a bond hearing (*e.g.*, right to counsel). Delaying a bond hearing for up to 30 days, especially in the case of serious crimes that have exclusive jurisdiction in General Sessions, cannot be established by a rule of procedure in violation of a defendant's constitutional and statutory rights.

RECOMMENDATION 12:

> The time frame in Proposed Rule 106(e) should be changed to seven (7) days.

Burden Shifting in Proposed Rule 114 (Chemical Analysis and Chain of Custody)

Proposed Rule 114 is intended to assist in the streamlining of cases. It is an important and necessary rule that, generally, will help in trying cases more efficiently. However, it contains sections that shift the burden from the state to the defendant.

To begin with, subsection (a) places the burden on the defendant to object to the use of affidavits in lieu of live testimony. This is an unusual practice. In the adversarial system, parties have a burden to marshal evidence to prove their claims. More specifically, in a criminal case, the state is the only party with an evidentiary burden. It is a shifting of the burden (not to mention a turning of the adversarial system on its head) to not require the party offering evidence to seek relief from that burden.

RECOMMENDATION 13:

> The last paragraph of Proposed Rule 114(a) should be changed to:
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> "The party seeking to introduce a chemist's or analyst's report must obtain consent by the opposing party or move the court for relief within thirty (30) days of trial."

This recommendation would correct the burden shifting problem in the proposed rule. It would also provide enough time for each party to properly prepare should a motion be filed concerning this rule.

SCPDA understands that as part of its holding in Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), the U.S. Supreme Court allowed for the individual states to develop procedures to govern waiver of the right to confrontation. Id. at 2534. However, the mechanism offered by Proposed Rule 114 ignores two important issues: (1) the use of affidavits is a benefit to the state that it should be required to request and (2) how the state, as a party in litigation, intends to utilize evidence and/or meet its evidentiary obligations is something for the state to decide and make known. The defendant may be able to make an educated guess as to the state's intentions, but the defendant should not be required to do so when it is so naturally a part of the adversarial process that the party offering evidence would request to avail itself of an exemption.

Trial By Jury of Less Than Twelve

Criminal defendants in South Carolina have a right to juries with twelve members in Circuit Court. S.C. Const. Article V, Section 22. Proposed Rule 132(a)(4) is contrary to this state constitutional right in that it allows for less than twelve members of a jury in Circuit Court.

RECOMMENDATION 14:

> Remove Proposed Rule 132(a)(4).

Waiver of Right to Jury Trial

Proposed Rule 132(b)(2) is at odds with a defendant's constitutional right to present a complete defense. By allowing the state, which is a party to the litigation, to prevent a defendant from pleading guilty deprives the defendant of his ability to acknowledge culpability and accept responsibility, both of which are necessary and important steps toward rehabilitation and relevant in sentencing. This is clearly an issue that is primarily relevant in capital cases. However, the constitutional rights are no different between capital and non-capital defendants.

RECOMMENDATION 15:

> Proposed Rule 132(b)(2) should be modified to remove the ability of the state to prevent a defendant from waiving the right to a jury trial.

Disclosure of Witness List

The defendant has no burden in a criminal case. Proposed Rule 134(a) attempts to require the defendant to provide evidence to the state without a reasonable time frame, thus making the rule a burden shifting rule. This rule should be modified to add a time frame that is relevant to the necessity for the witness list, which is so that the court can inquire with prospective jurors as to their knowledge of potential witnesses.

RECOMMENDATION 16:

> Proposed Rule 134(a) should be modified to restrict disclosure to prior to the court's voir dire of the jury.

Disclosure of Evidence

Proposed Rule 112 makes significant strides in helping to make clear what must be disclosed as discovery. However, there is an important deviation in practice from our current Rule 5. The reciprocal participation mechanism in our current Rule

5 has been removed in the Proposed Rule 112. This proposal ignores the unique nature of a criminal case.

Criminal trials are not civil trials. They are not intended to be fair across the board. In order to protect rights and limit the potential for abuse of governmental power, the U.S. and S.C. constitutions have created an uneven playing field: the state has the entire burden of proof and the defendant has no burden of proof. Where current Rule 5 recognized this unique characteristic of criminal trials in its reciprocal participation mechanism, Proposed Rule 112 fails.

Voluntary participation in the broadened rules of discovery under Rule 5 is consistent with the constitutional rights of a criminal defendant. A criminal defendant is not required under Rule 5 to participate; however, should he choose to participate he is obligated to meet his own set of required disclosures. Proposed Rule 112 should contain the same mechanism for participation.

RECOMMENDATION 17:

> Add a mechanism into Proposed Rule 112 that allows the defendant to choose to participate and that requires reciprocal disclosure upon the choice to participate.

CONCLUSION

The SCPDA commends the Court and the task force it assembled for beginning the process of improving the rules of criminal procedure. SCPDA offers the above recommendations with great respect and in an effort to work collaboratively to achieve the important goal the Court has set for itself and our state.

Respectfully submitted on behalf of SCPDA,

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