Sumter County
Public Defender Office

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December 4, 2009

The Supreme Court of South Carolina
ATTN: Daniel Shearouse
PO Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

The following are my ***revised*** comments on the proposed South Carolina Criminal Rules. I would kindly ask that you disregard my letter dated December 3, 2009.

Rule 106. Bond Matters

I fully approve of Rule 106, particularly 106(e). I have had clients who have been incarcerated for well over a year without ever having had a bond hearing when a written bond motion was timely filed. I believe that a defendant should certainly have a bond hearing within 30 days of being arrested.

I fully approve of Rule 106(f)(2)(a). Probably the most common request that I receive from jail clients is for a bond reduction. There is a misconception at the Sumter Lee Regional Detention Center that there is a right to a bond reduction hearing every 90 days. I, along with my fellow public defenders in Sumter County, constantly have to deal with this issue of bond reductions and very much appreciate as much guidance as possible in this area.

I fully approve of Rule 106(g). If a defendant is left in jail for months or even years without the State taking action on their file I think that it is only fair that their bond amount be reconsidered. One danger in the State not taking any action on a file where the defendant is incarcerated is that the defendant could actually end up being in jail longer than the time they would receive were they sentenced to the maximum sentence under the charged statute.

I would appreciate some guidance, if possible, in this section which would address the unfortunate practice by a small number of law enforcement officers who engage in the tactic of only serving some warrants for an incident and, if the defendant is able to bond out, then serving additional warrants for the same incident to ensure that the defendant remains incarcerated. (I recognize that these rules may not be the best way to address

this issue).

Rule 107. Sureties on Bonds

I approve of this rule, including section 107(c) which provides that defense counsel be notified of a surety's motion to be relieved from a bond. However, it seems to me that this is a contractual issue between the defendant and the surety and not one that defense counsel (such as a public defender) should be concerned about. (Of course, a private attorney whose representation goes beyond criminal matters may have a dog in these fights). That being said, as a public defender I very much appreciate receiving notice of these hearings simply so that I am aware of the situation with my client's bond.

Rule 108. Preliminary Hearings

I approve of Rule 108, including section 108(b). I think that having up to 30 days to have a preliminary hearing is necessary given that public defenders may be expected at any time to try a case or to be present for a hearing during terms of general sessions court. We, as public defenders, are in sense "on standby" during general sessions terms and magistrates are aware that public defenders cannot be present for preliminary hearings during any general sessions term of court.

I staunchly disagree with eliminating preliminary hearings. Often, there is no probable cause to support an arrest/detention. And, though I understand that preliminary hearings are not discovery tools, they are often the only way for a defense attorney to know the State's allegations when months or even years pass before defense counsel is provided with discovery. (I am aware that the Solicitor's Office and even law enforcement is not always at fault for failing to provide discovery in a timely fashion. The reality is that law enforcement, including SLED, is understaffed and crime in our society seems to be on the rise). Personally, I try to balance not wasting the officer's or the magistrate's time against my need to know what is going on to begin "working" the file while, at the same time, gathering information to determine whether probable cause exists. Also, preliminary hearings are an excellent opportunity for defense counsel to be made aware of the details of the State's allegations before a bond hearing (on a charge where the circuit court must set bond).

Rule 109. Disposition of Arrest Warrants

I approve of this Rule, particularly section 109(c). Defense counsel needs to be made promptly aware, particularly of when a matter is dismissed, so that they do not continue to work on and investigate the case. I know that I and my coworkers in the public defenders office have all needlessly wasted time on a file because we had no idea that our client's charges had been dismissed or nulle prossed.

Rule 110. Motions

I approve of Rule 110 generally but am somewhat unclear as to the necessity for section 110(c)(2). If I understand this section correctly, the movant is not required in the affirmation to state that they have made an attempt to have the motion heard (i.e. reminding the assistant solicitor about the motion), but rather that the movant has made an effort to resolve the matter contained in the motion. I do understand the rationale behind the rule, but requiring the movant to submit an affirmation seems unnecessary. For instance, if I as a public defender move to have a bond set by a magistrate reconsidered and after 30 days the assistant solicitor never schedules the hearing, I would not approach a circuit court judge with my request unless I still need the hearing. If the issue is one that I can work out with the Solicitor's office, I would never have filed the motion. I simply cannot foresee many instances where the Solicitor's Office would willingly consent to a motion I would file. That being said, I very much appreciate knowing that I have some recourse if I have filed a written motion and the Solicitor's office will not schedule the hearing.

Rule 112. Discovery and Disclosure

I approve of this rule, particularly section 112(a)(3) which provides that "the State shall furnish any and all written statements of ***any*** witness. To the credit of many assistant solicitors in Sumter County, they often provide statements of witnesses with the discovery packet, presumably out of, not only concern that there may be exculpatory information in the witness' statement, but simply out of a sense of fairness. This is a very good rule. It is simply not reasonable to expect a defense attorney to be handed a witness' statement as that witness is taking the stand and expect them to read the statement and compare it against the witness' testimony simultaneously, having just received the statement.

I do NOT approve of section 112(c)(2) which provides that the State (if I understand the rule correctly) is not required to produce a confidential informant who is a material witness at trial if exposing their identify will subject them to harm. Whether receiving monetary payment or working off criminal charges, the CI is receiving something in return for their assistance to law enforcement and danger simply goes along with the territory. In my view, a defendant's right to confront his accuser is more important than confidential informant's safety.

Rule 115. Continuances

I, somewhat, disagree with the provision in section 115(b) which provides that a presiding judge may not issue a continuance beyond the term of court over which they are presiding. However, I think that circuit court judges likely understand the dynamics of this provision better than I. It just seems to me that there could be situations where it is clear to all parties that a case needs to be continued beyond that particular court term and unnecessary to require counsel to ask for continuances repeatedly.

Rule 118. Bench Warrants

Though most public defenders I know would disagree with me on this point, I do not believe that it is necessary for defense counsel to be heard on the issuance of a bench warrant before it is issued and I agree with this provision.

I would like to see a provision in this rule that would address the practice by some solicitors of issuing bench warrants for a defendant's failure to appear when the reason that the defendant didn't appear in court was that they were incarcerated, for instance, at the South Carolina Department of Corrections. It is my understanding that, in these cases, defendants are often served the bench warrant at SCDC. Thus, the solicitor is likely aware that there is a very good reason that they are not in court. I have been informed that the reason for this practice is to put some sort of a hold on the defendant. However, it is my understanding that when a defendant is at SCDC, for example, and has a pending charge that there is a hold (or a hold may be placed on them) simply by virtue of the fact that they have an outstanding arrest warrant. I find this practice particularly offensive because: 1) it prevents defendants from being able to bond out; and 2) they are being penalized for something over which they have no control.

Rule 122. Status Conferences

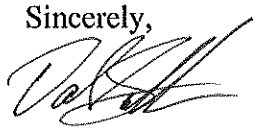
I think having a rule allowing for status conferences is an excellent idea. This rule would only serve to put the State and the defense on the same page as to when a case may be ready for trial

Rule 123. Trial Rosters

I very much like the idea of trial rosters. One of the potential problems with having solicitors publish trial rosters may become so lengthy that their purpose is essentially defeated. Another problem is ensuring that solicitors follow the order of the rosters. In my view, our trial rosters in Sumter County have contained far too many cases. However, part of the reason for lengthy trial rosters is that defendants often indicate that they would like a trial and actually intend to plead guilty when their case is called for trial. The result is that the trial roster is actually a mostly guilty plea roster. I know that in Sumter County both our office and the Solicitors Office struggle with this problem. I would assert that neither defense attorneys nor solicitors like investing substantial time into preparing for a trial to have the defendant plead guilty at the last minute. (I would note that I absolutely believe that every defendant has a right to a trial which I wholeheartedly support and that there is nothing wrong with a defendant changing their mind at the last minute. I am referring more to those defendants who never have any intention of having a trial). One possible way to resolve this problem is for both sides to agree to adhere to deadlines for plea offers.

Thank you so much for giving me the opportunity to comment on these proposed rules. I have attempted to be as diplomatic as I can while being as honest as I can. I would be very disingenuous if I said that I thought our criminal justice process in South Carolina is perfect. However, I strongly believe that there are wonderful people on both sides who comprise the system and I believe that these proposed rules will go a long way towards making our system much more efficient, equitable, and balanced.

Sincerely,



David Sullivan
Asst. Public Defender
Sumter County