STATE OF SOUTH CAROLINA

In the Supreme Court

IN RE: Proposed South Carolina Criminal Rules

Comments and Proposed Amendments to the Proposed South Carolina Criminal Rules Submitted by the South Carolina Association of Criminal Defense Lawyers

---

Respectfully submitted on behalf of the South Carolina Association of Criminal Defense Lawyers (SCACDL) by:

Heath P. Taylor
President-Elect
Post Office Box 8353
Columbia, South Carolina 29201

or

3618 Sunset Boulevard, Suite D
West Columbia, South Carolina 29169
Phone: (803) 926-2205
Fax: (803) 926-4966
Email: heath@taylorlawsc.com

I. GENERAL PROVISIONS

100. SCOPE AND APPLICABILITY

- *No comments or proposed changes.*

101. DOCKET MANAGEMENT

- *No comments or proposed changes.*

102. REVOCATION OF PREVIOUS ORDERS AND RULES

- *No comments or proposed changes.*

103. TITLE, FORMS, DEFINITIONS AND EFFECTIVE DATE

- *No comments or proposed changes.*

104. SIGNING OF DOCUMENTS; SANCTIONS

(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, if the violation is other than a *de minimus* infraction. If sanctions are requested, or intended to be imposed, the party against whom sanctions are requested shall have notice of a hearing, and the right to be present to address the court's concerns before a penalty imposed.

- *The proposed changes address concerns that the rule mandates that documents signed by pro se defendants include telephone numbers since some indigent clients cannot afford telephones. Further, substantial compliance should be a defense to sanctions, and if*

sanctions are to be imposed, a defendant has the right to notice and hearing. This rule does not address these important due process concerns.

II. PRE TRIAL MATTERS

105. CRIMINAL PROCESS

- *No comments or proposed changes.*

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, but in no event shall be delayed beyond seventy-two (72) hours.

* * * * * * * * * * * * * * * *

(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~~. Failure to do so could subject the defendant to additional bond requirements. If a defendant is screened for indigency at the bond hearing, the form used ~~shall be one promulgated by Court Administration.~~ will contain no language that could be construed as an invocation of the right to counsel under the United States or South Carolina Constitutions.

* * * * * * * * * * * * * * * *

(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)~~ fifteen (15) days after the defendant's arrest, unless such hearing is waived in writing by the defendant or defense counsel.

* * * * * * * * * * * * * * * * *

(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.~~

- *The proposed changes revise the time limits on bond hearings and delete provisions for the revocation of bond I the event the defendant does not timely apply for appointed counsel. Further, the proposed amendments delete provisions which permit a hearing to be held and bond to be revoked in the absence of the defendant or defense counsel.*

107. SURETIES ON BONDS

- *No comments or proposed changes.*

108. PRELIMINARY HEARINGS

- *No comments or proposed changes.*

109. DISPOSITION OF ARREST WARRANTS

- *No comments or proposed changes.*

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. All motions the grounds for which are known before the case is called for trial may be filed at any time. 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) 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. Any motion, with the exception of motions not requiring a hearing under (b)(1), shall be scheduled for a hearing 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 time shall be set aside by the solicitor 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) 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. 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) 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) 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 a request for a hearing pursuant to (b)(5) above, the court may take such action as is deemed appropriate to resolve the motion.

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

- *The proposed amendment revises Rule 110 in its entirety. The proposed version of Rule 110 requires all motions to be filed ten (10) days before trial. When read in conjunction with Rule 123 (Trial Rosters), the defense has only four (4) days to file motions after receiving notice a case may be called during a term of court. Second, while Rule 110(c)(1) requires the solicitor to schedule motions within thirty (30) days, Rule 110(c)(2) requires the moving party to wait thirty (30) days before applying for a hearing.*

- *The intent of the alternative rule is to allow for motions to be filed early in the case but at the same time to not require all motions to be filed prior to trial. There is a provision for scheduling orders, so the parties or the court can have flexibility to hear matters pre-trial. There is also an attempt to draw clear distinctions between contested and non-contested motions*

111. MENTAL EVALUATIONS

- *No comments or proposed changes.*

112. DISCOVERY & DISCLOSURE

- *SCACDL proposes the adoption of Attachment 2 – Defense Version of Discovery Rule.*

113. NOTICES AFFECTING TRIAL OR DEFENSE

- *No comments or proposed changes.*

114. CHEMICAL ANALYSIS AND CHAIN OF CUSTODY

(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 no event less than ten (10) days before trial.~~

The defendant or his attorney may demand appearance in court of the persons within the chain of custody in the same manner as provided in Section (a).

- *The proposed amendment to Rule 114 (b) revises the rule to conform with the present Rule 6, SCRCrimP. Rule 114(b), as drafted, denies a defendant the right to confront all the witnesses in the chain of custody and shifts the burden from the state to prove the chain of custody to the defendant to prove a defect in the chain of custody. This provision should be eliminated.*

115. CONTINUANCES

- *No comments or proposed changes.*

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. When the fee has not been collected prior to disposition of the case, the court may require payment as a condition of the sentence.

(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.

(h) Substitution of Retained Counsel for Appointed Counsel. Nothing in this order 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).

- *The proposed amendments to Rule 116 address the collection of the indigent defense application fee and permit the substitution of retained counsel for appointed counsel.*

117. DIVERSIONARY PROGRAMS

(c) Adult Drug Court. An adult Drug Court treatment program ~~may~~ must 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.

- *The proposed amendment to section (c) requires each circuit to create a Drug Court program. The original draft created a Drug Court program only at the request of the Solicitor. The proposed change creates statewide uniformity and eliminates potential equal protection issues.*

118. BENCH WARRANTS

(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) If the individual is represented by defense counsel, at least five (5) days prior to the delivery of the bench warrant to the appropriate law enforcement office(s), the Clerk of Court shall notify defense counsel in writing of the issuance of the bench warrant and provide a copy of the bench warrant to defense counsel.

(~~2~~3) The Clerk of Court shall deliver an original or certified copy of the bench warrant to the appropriate law enforcement office(s).

(~~3~~4) The Clerk of Court shall maintain each original bench warrant attached to the defendant's original arrest warrant or file.

(~~4~~5) 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.

- *The proposed amendment to section (c) requires the Clerk of Court to notify defense counsel if a bench warrant is issued prior to the bench warrant being served. This change may allow defense counsel and the defendant to remedy the circumstances resulting in the bench warrant and eliminate the need to conduct a hearing to have the bench warrant lifted thus reducing the burden on the courts.*

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 unless the defendant is represented by counsel and excused by the Solicitor or a designee of the Solicitor.

- *The proposed amendment allows defendants represented by counsel to be excused from the Initial Appearance in the discretion of the Solicitor.*

120. SECOND APPEARANCE

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

- *The proposed amendment allows defendants and defense counsel to be excused from the Second Appearance in the discretion of the Solicitor.*

121. TRACKING

- *No comments or proposed changes.*

122. STATUS CONFERENCES

- *No comments or proposed changes.*

123. TRIAL ROSTERS

(a) Preparation of Roster. At least twenty-one (21) ~~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 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 trial 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.~~

(b) Call of Cases. Cases shall be called for trial in the order in which they are placed on the trial docket, unless the court in a Scheduling Order has set a date certain for the trial, or, after the case has been set on the trial docket, the court, upon motion, grants a continuance as provided in Rule 115. The first 10 cases on the trial docket at the opening of court on the first day of a term, excluding those previously dismissed, continued or otherwise resolved before the opening of that term of court, may be called for trial. For each additional judge sitting during that term of court an additional 10 cases are subject to call. All other cases may be called for trial in that term only upon no less than 24 hours notice.

- *The proposed amendment to section (a) lengthens the time for publication of the docket. The 14 day time period, depending on the method of publication, may conflict with the motion filing period set forth in Rule 110. By extending the time, counsel should be allowed sufficient time to comply with Rule 110.*

- *The proposed amendment to section (b) deletes the entire language from the original draft and provides that case shall be called in a similar fashion to cases in the Court of Common Pleas. The proposed amendment is similar to the language found in Rule 40 (b), SCRCP.*

124. PRE TRIAL DETENTION

- *No comments or proposed changes.*

125. ARRAIGNMENT

- *No comments or proposed changes.*

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.~~

- *The proposed amendment deletes Rule 126 in its entirety. Rule 126 offends the chief purpose of the Sixth Amendment, the right to confront a witness, under oath, through cross examination and done in such a manner that the jury may observe the demeanor of the witness.*

- *Rule 126 does not take into account the intentional asymmetry drafted into the Sixth Amendment by the Framers who understood the daunting challenge the individual accused faces when the government brings its weight to bear through criminal allegations. Also, the rule ignores the basic premise that the burden of proof, in accord with the process required by the Fifth and Sixth Amendments, rests with the state. Considering this asymmetry, this rule takes more from the defense than it does from the State.*

- *Rule 126 also creates a practical nightmare for the practitioner who must predict the adversary's theory of the case before trial to conduct meaningful cross examination. Further, pursuant to part (a)(2), a litigant must also predict objections which experience suggests cannot be intelligently considered out of context.*

- *Finally, because the call of cases is statutorily vested with the state because of the weight of the burden of proof, the rationale behind the rule is already currently accommodated by the fact the state can adjust the call of any certain case to accommodate the concerns sought to be addressed by Rule 125.*

- *If this rule is still considered for adoption following consideration of the concerns expressed above, then part (a) should be amended to narrowly limit what is considered "good cause." Specifically, the rule should state that: "Good cause shall only be found in circumstances where imminent disability or death is reasonably certain to deprive a litigant of a material witness and whose testimony is not cumulative to other available evidence. Good cause shall not be based upon economic concerns or the concerns of a non-party witness."*

127. INTERPRETERS

- *No comments or proposed changes.*

128-130. RESERVED

III. TRIAL

131. SUBPOENA AND SUBPOENA *DUCES TECUM*

(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. Notwithstanding the provisions contained herein, a witness subject to a request by a subpoena *duces tecum* may consent to production of the items or information prior to a term of court or trial without the need for a motion or order of the court.

*** * * * * ** * * * * * * * ***

(e) Quashing or Modifying Subpoena. On motion made promptly and considering the materiality of the witness testimony based upon *ex parte* submission of the party seeking to compel the testimony, 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.

- *The proposed amendment to section (c) permits a witness subject to a subpoena to consent to production of the requested information prior to the term of court or trial thus decreasing the burden on the court.*

- *The proposed amendment to section (e) requires the court to balance the materiality of the witness' testimony or items sought to be produced against the reasons submitted to quash the subpoena. The ex parte submission permits the party to present justification for the subpoena without revealing trial strategy to opposing counsel.*

- *Further, based upon anecdotal experience, this rule should also address concerns about funding necessary to address the burden placed upon a material witnesses. Currently, the State routinely pays travel and lodging expenses for witnesses such as victims of crime and other material witnesses. However, it is unclear that a defendant is entitled to funding to lessen the burden which could lead to deprivation of an otherwise available witness.*

132. JURY OR NON-JURY TRIAL

(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.

*** * * * * * ** * * ** * * ** * ***

~~**(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.~~

- *The amendment to Rule 132 (a)(2)(B) is proposed in light of the severity and sensationalism which accompanies many non-capital proceedings as well as the skill and training of experienced defense counsel. The pursuit of justice may actually be furthered by attorney-conducted voir dire in occasions as the court deems necessary. Otherwise, the rule restricts the broad general discretion possessed by the trial court concerning the conduct of trial proceedings.*

- *Proposed Rule 132(4) violates S.C. Constitution, Article V, § 22: Petit juries shall consist of 12 members and should be deleted in its entirety.*

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 actual notice to the defendant of the trial date as well as previous 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. However, the court should only find such a waiver as a last resort after considering other alternatives.

- *The proposed amendments add additional protections to ensure a defendant's right to be present at trial is not violated.*

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. Nothing in this rule shall be construed to deprive the court of the discretion to allow the testimony of a previously undisclosed witness in the interests of justice and considering the totality of circumstances concerning the failure to provide this witness's name at the call of the case.

- *The proposed amendment permits undisclosed witnesses to testify in the discretion of the court.*

135. SEQUESTRATION

- *No comments or proposed changes.*

136. EVIDENCE

- *No proposed changes.*

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. This rule does not prohibit appellate courts from granting relief if an error is clear and the error affected substantial rights.

- *The proposed amendment establishes the plain error doctrine in South Carolina.*

138. ARGUMENT ON OBJECTIONS

(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.~~ Argument shall be made on objections to admissibility of evidence or conduct of trial at time the evidence is being offered or the conduct is occurring. 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.

- *This proposed amendment to section (b) conforms with current issue preservation rules set forth by South Carolina appellate courts.*

139. OPENING STATEMENTS

- *No comments or proposed changes.*

140. CLOSING ARGUMENTS

- *No comments or proposed changes.*

141. COMMUNICATIONS WITH JURORS

~~**(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~~.

- *The proposed amendment deletes subsection (c) and permits contact with jurors which can be beneficial in order to allow counsel to assess the effectiveness of trial strategies.*

142. INSTRUCTIONS

- *No comments or proposed changes.*

143. DIRECTED VERDICT

- *No comments or proposed changes.*

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, **upon a proper showing by the State,** the court ~~will ensure~~ **shall make a finding** 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.

(d) 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.

- *Rule 144 appears to disallow any further negotiations for a plea once a guilty plea hearing is called by the state. This would presumably apply to any case where a hearing is called at the Defendant's 3rd appearance. The vast majority of cases are resolved after the scheduled 3rd appearance precisely because negotiations are permitted to continue. Plea negotiations are what allow the docket to move, and they should be encouraged, not limited or suspended after a certain time.. In practice, the harsh application of this rule would be avoided by simply not calling a hearing in the case at the 3rd appearance date, thereby allowing continued negotiations. Therefore, the proposed amendment to subsection (b) deletes this provision.*

- *Proposed subsection (d) has been added to ensure a defendant is entitled to file a motion following a guilty plea.*

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.~~

- *This amendment proposes to delete Rule 150 in its entirety. Many cases are pled down due to weak evidence (CSC cases are often reduced to ABHAN, Murder cases are often reduced to voluntary manslaughter). This rule would disallow the submission of these issues to the court because as the issue would go to deny matters of fact.*

- *Further, if a defendenat enters a plea under Alford or nolo contendre, the rule would deny the defendant the right to present weaknesses in the case as grounds for mitigation which may likely be the most important points of mitigation in such cases.*

151. SENTENCING

(b) Correcting Clear Error. Within ten (10) days after sentencing, the court may correct a sentence that contained arithmetical, technical, or other clear error. Within thirty (30) days of notice from the Office of General Counsel for the Department of Corrections that an ambiguity exists in the terms of a sentence, the court may enter whatever order necessary to resolve the ambiguity so as to enforce the intention of the sentencing order.

(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~~ determination of the amount of restitution is deferred, the Department of Probation Parole and Pardon Services may, not more than ninety (90) days after the date of sentencing, file a motion to 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 by a preponderance of the evidence.

- *The amendments to subsection (b) contemplate resolving ambiguous terms in a sentence, which may not be discovered within 10 days. Many times, SCDC will write a letter to the judge and there should be a way to resolve these problems.*
- *The amendments to subsection (c) clarifies any potential ambiguity for the date by which SCDPPPS has to file a motion with the court.*

152. POST TRIAL MOTIONS

- *No comments or proposed changes.*

153. DISPOSITION OF CHARGES

(a) General. Once a ~~case~~ charge is indicted, the ~~case~~ charge may ~~be ended~~ reach a final disposition only by a verdict after trial, guilty plea, ~~or a~~ nolle prosequi ~~disposition~~ or judicial dismissal upon a finding of prosecutorial misconduct.

(b) Diversionary Programs.

(1) If an accused ~~is allowed by the Solicitor to enroll~~ enrolls in a diversionary program with the permission of the Solicitor prior to indictment and fails to satisfactorily complete the program, the case ~~will~~ shall ~~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~~ enrolls in a diversionary program with the permission of the Solicitor 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~~ remains unserved for at least ninety (90) days, the case may be removed from the active docket 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~~ bench warrant is thereafter served upon the defendant, the case ~~may~~ shall be restored to active status by the Solicitor completing ~~a "Notice to Restore"~~ and filing ~~it~~ a "Notice to Restore" with the Clerk of Court, which shall thereafter be served upon the defendant and counsel for the defendant, if known.

- *The amendments to this rule are based upon the fact that the rule as drafted makes it impossible for a judge to dismiss a case with prejudice for prosecutorial misconduct because that is not one of the exclusive and enumerated ways that a case may "be ended." Other amendments are technical in nature.*