STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

COMMENTS ON PROPOSED RULES OF CRIMINAL PROCEDURE

In Re: Proposed South Carolina Rules
of Criminal Procedure

Attached are comments regarding proposed South Carolina Rules of Criminal Procedure 136 and 144 filed pursuant to this Court's request for comments to the State Bar.

Respectfully submitted,

s/_____
E. WARREN MOÏSE/SC Bar. No. 11848
473 SAVANNAH HIGHWAY
CHARLESTON, SC 29407
(843) 722-0311
(843) 722-1374 fax
ewm@grimcab.com

Charleston, South Carolina

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Comments Regarding Proposed Rule of Criminal Procedure 136

The requirement that parties meet and try to get an accord as to as many exhibits as possible is a good rule. Parties want to do this. Mandatory marking of all exhibits, however, is different, might have Constitutional implications, and is rarely ordered in civil cases without causing any real delays. Disclosure of all exhibits frequently means disclosure of the theory of the case. My thought is that the requirement that lawyers meet and discuss exhibits should be mandatory or reserved to the court. I would not make the parties disclose all exhibits but instead would alter it as done below in brackets.

Moreover, I foresee a problem because of the special common law regarding disclosure of impeachment evidence. A number of South Carolina appellate cases have arisen from scenarios when trial judges required lawyers to mark all exhibits. This alone ought to show there's a problem.[1] One common-law rule provides that even if the trial judge orders parties to meet and mark exhibits, impeachment evidence need not be disclosed. *See Marshall & Williams Co. v. General Fibers and Fabrics, Inc.*, 270 S.C. 247, 241 S.E.2d 888 (1978). Impeachment evidence is sometimes the most important, hard-hitting, and prejudicial evidence in a trial. I foresee objections about impeachment evidence not being disclosed and thus argued to be inadmissible. When the district courts began requiring exhibits to be marked, they specifically adopted U.S. Dist. Ct. Local Rule 26.07(A) (D.S.C.) (documents to be used solely for impeachment need not be pre-marked, listed, and exchanged at pre-trial meeting) to deal with this problem.

I would suggest making the changes in brackets, or at the least to add the bracketed language in the notes after the rule.

136. EVIDENCE

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

(b) Exhibits. Prior to the time the jury is sworn or at such other time as may be designated by the court, counsel will meet and review [potential] exhibits [and try to reach an accord as to their admissibility. Disclosure of exhibits that a party desires to withhold until later in trial for strategic purposes is permitted]. [Evidence to be used partially or solely for impeachment, for use as prior-inconsistent statements, for contradiction, under the opened-door doctrine, or where otherwise proper under existing procedural law need not be disclosed.] If the parties agree or have no objection to the admissibility of an exhibit, it will be given to the court reporter and given an exhibit number. The exhibit is then in evidence and further authentication is unnecessary. If the parties do not agree on an exhibit, that exhibit

[1] Section 136(a) states that the existing common law of evidence applies. But a motion to exclude for this pretrial procedure will be based on section 136(b), not based on the South Carolina Rules of Evidence. Section 136(b), it would be argued, no longer exempts impeachment evidence, the South Carolina Rules of Evidence don't speak on the issue, so section 136(b) bars all evidence a party plans to be used for impeachment.

will be given to the court reporter and will be given an identification (ID) number and the court will rule upon its admissibility at the time that it is offered.
(c) Audio and Visual Exhibits. The party offering an audio or visual exhibit shall be responsible for ensuring that the proper equipment for hearing or viewing that exhibit is present and in working order and that the exhibit can be published without delaying the trial.

Notes: This is a new rule. The South Carolina Rules of Evidence do not apply in preliminary hearings, sentencing hearings (except in the penalty phase of capital trials), probation violation hearings, or bond hearings. *See* Rule 1101(d), SCRE. [Under the common law, exhibits need not be disclosed in certain circumstances, such as when they are to be used for impeachment, as prior inconsistent statements, for contradiction, when the opened-door doctrine applies, or for other proper reasons. S.C.R. Crim. P. 136 is not intended to change the rules of evidence in those regards.]

Comments Regarding Proposed Rule of Criminal Procedure 144

I would alter the language of the explanatory note slightly to read as changed by the brackets below. The defendant is not "permitted" or entitled to plead under Alford. The Supreme Court simply said that it was Constitutional. The plea judge has discretion to permit or not permit the defendant to plead under Alford. Some judges specifically do not permit a defendant to plead under Alford.

144. PLEAS

(a) General. The State shall schedule guilty pleas and shall furnish reasonable notice to defense counsel and *pro se* defendants of the date and time of the hearing.
(b) Negotiations. All plea negotiations must be completed before the proposed guilty plea is called for a hearing. At the call of the case, the State shall advise the court if the plea is with or without recommendations and the nature of any recommendations. If the State the plea is to be presented as negotiated or under *North Carolina v. Alford*, the parties shall discuss this procedure with the presiding judge before the case is called.
(c) Victims. At each guilty plea hearing, the court will ensure that the rights of any victim have been protected in accordance with the South Carolina Victims Rights Act, including giving the victim(s) an opportunity to address the court.

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