THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM EDGEFIELD COUNTY

Court of General Sessions
William P. Keesley, Circuit Court Judge

The State of South Carolina,

Respondent-Petitioner,

v.

K.C. Langford, III,

Appellant-Respondent.

AMICUS CURIAE SOUTH CAROLINA SOLICITORS' ASSOCIATION PETITION FOR REHEARING

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Pursuant to Rule 221, SCACR, Amicus Curiae South Carolina Solicitors' Association (SCSA) petitions this Court to rehear that portion of this appeal concerning the constitutionality of S.C. Code Section 1-7-330 and issue an amended opinion holding that the statute is not unconstitutional. SCSA wishes to make clear that while all of the State's Solicitors have the utmost respect for the Court, the Association is compelled to file this Petition challenging the Court's decision because it is contrary to both the South Carolina Constitution and this Court's own precedent.

Specifically, SCSA asks for a rehearing because: (1) this Court's decision in *Langford*, Op. No. 27195 (S.C.S. Ct. November 21, 2012), conflicts with the South Carolina Constitution; (2) this Court's decision creates an ambiguity in that it never addresses the constitutionality of its prior cases as to the authority of the Solicitor and Courts; (3) the Court's Orders issued November 21, 2012, pursuant to *Langford* violate the South Carolina Constitution; and (4) this Court's Orders will not work regardless of who controls the docket.

I.

The Court's Decision Conflicts with the South Carolina Constitution.

A. It is the General Assembly's role to mandate the management of criminal dockets.

The plain and unambiguous language of the South Carolina Constitution mandates that it is the General Assembly's role to assign duties to the Solicitors and ultimately determine how the criminal docket is to be managed. The legislature is given the authority to provide for the duties of the state's prosecutors in Article V, §24 of the South Carolina Constitution. Even the Supreme Court's authority to make rules governing the practice and procedure in all courts is subject to the legislature's authority. See S.C. Const. Art V, §4. Simply put, it is the South Carolina General Assembly's job, not the Courts', to determine how the docket in the first

instance is to be managed.

Our legislature decided in 1980 to codify the solicitor's duties to prepare the dockets of general sessions courts and determine the order in which cases are called for trial. S.C. Code Section 1-7-330. This was certainly not a novel idea for our state since the case law for years held "that the solicitor has authority to call cases in such order and in such a manner as will facilitate the efficient administration of his official duties, subject to the overall broad supervision of the trial judge." *State v. Mikell*, 257 S.C. 315, 322, 185 S.E.2d 814, 816-817 (1971).

As the majority in *Langford* acknowledged, through its quotation of its earlier decision in *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 536 (1982), "the legislative department makes the laws...." *Langford, supra,* at 7. However, this Court failed to follow or explicitly reverse its line of cases recognizing that the legislature is constitutionally authorized to make any law that is not prohibited by the state or federal constitution. See *Moseley v. Welch,* 209 S.C. 19, 26-27, 39 S.E.2d 133, 137 (1946) (holding that the supreme legislative power of the State is vested in the General Assembly and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates the constitution.). There is no state or federal constitutional provision prohibiting the General Assembly from enacting a statute giving the Solicitors the authority to prepare and control the criminal docket. Further, it appears to be common practice in both the federal court system and in many states that the legislative branch determines how criminal dockets are to be managed.

B. Preparation of criminal court dockets is not an inherent judicial function.

The majority opinion claims that the preparation of the dockets is "an inherently judicial function." *Langford, supra*, at 8. However, the Court did not cite a case that stands for such a

broad assertion of law. Instead, the Court cites *Williams v. Bordon's, Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980), which, in turn, cites a Texas case, *Waites v. Sondock*, 561 S.W.2d 772 (TX 1997). Both *Williams* and *Waites* address the authority of the legislature to enact laws requiring mandatory continuances for legislator-lawyers. The *Williams* case had nothing to do with the court's authority to control a criminal docket. Moreover, neither this Court nor the Texas court ruled that the state legislatures could not enact laws governing practice and procedure in the trial courts, only that they could not enact statutes removing the ability of the trial courts to exercise discretion in ruling upon such motions.[1] Even a court's inherent powers are curtailed by the constitution, such as by the limitations placed upon this Court by the South Carolina Constitution discussed above. A Court's inherent authority is also limited by the separation of powers between the branches of government. *Matter of Alamance County Court Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991).

The Court in Langford stated that South Carolina is "alone amongst our sister states in permitting the prosecutor to control the docket." *Langford, supra,* at 11. This statement is not accurate. The SCSA looked to our "sister state", North Carolina, and found that they too have a prosecution controlled docket. N.C. Gen. Stat. §7A-49.4. In fact, the district attorney for each district in North Carolina is statutorily assigned the duty to develop a criminal case docketing plan for their court districts after consulting with their judges and local bar members. *Id.* Moreover, the North Carolina Supreme Court has previously addressed the issue of legislation that provides authority of the criminal docket to the prosecutor in *Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994). The North Carolina Supreme Court held in *Simeon* that the

[1] Both courts interpreted the respective statutes in such a manner as to render them constitutional – *i.e.*, by allowing the trial court to pass upon such motions in the exercise of its discretion under all or certain circumstances despite the use of language that seemed to remove any discretion from the trial court.

authority given to prosecutors to prepare the docket and call cases for trial did not infringe upon the inherent authority of the courts to manage the docket because the ultimate authority over managing the trial docket is retained by the court. *Id.*, 339 N.C. at 375-376, 451 S.E.2d at 870. The Court also held that it was not a violation of separation of powers to vest an executive officer with this function. *Id.* The North Carolina Court reasoned that the statute giving its district attorneys the authority to set the trial calendar was constitutional because on its face the statute did not deprive "criminal defendants of their right to a fair and speedy trial, an impartial tribunal, access to the courts, or a trial by jury." *Id.*, 339 N.C. at 377, 451 S.E.2d at 871. It is very important to note that North Carolina's Constitution has similarities to ours and that its Court in *Simeon* addressed the same issues this Court did in *Langford.* In upholding a prosecutor's authority to set the docket given to it by its General Assembly, the *Simeon* Court reasoned:

> The Constitution also mandates that the district attorney perform such other duties as the General Assembly may prescribe. The General Assembly has chosen to include among the district attorney's duties the responsibility of setting the superior court criminal trial calendar. We do not believe that this grant of authority, on its face, violates separation of powers or infringes upon the superior court's inherent judicial power.

Id., 339 N.C. at 375, 451 S.E.2d at 870.

The South Carolina Constitution contains a similar mandate for our legislature by way of Art. V, Section 24. For the same reasons the North Carolina Supreme Court upheld the constitutionality of its General Assembly's statute dealing with management of the criminal docket, this Court should uphold the constitutionality of Section 1-7-330.

C. S.C. Code Section 1-7-330 has not been proven repugnant to the South Carolina Constitution beyond a reasonable doubt.

Reasonable doubt has been defined by this Court as "the kind of doubt that would cause a

reasonable person to hesitate to act," *State v. Manning*, 305 S.C. 413, 417, 409 S.E.2d 372, 375 (1991), *overruled on other grounds*, *State v. Alesky*, 343 S.C. 20, 538 S.E.2d 248 (2000), or proof that will leave a person "firmly convinced." *State v. McHoney,* 344 S.C. 85, 98, 544 S.E.2d 30, 36–37 (2001).

Our Constitution's clear and unambiguous language and our sister state's persuasive case law in *Simeon* cannot leave a reasonable person firmly convinced that Section 1-7-330 is unconstitutional. If that is not enough to cause someone to hesitate in finding Section 1-7-330 unconstitutional, this Courts' own prior words[2] and precedent certainly should cause great hesitation.

Interpreting the statute as urged by SCSA and in accordance with post-1980 appellate decisions of this Court and our Court of Appeals[3] – *i.e.*, to mean that the Solicitor has the authority to call cases in the order and manner as will facilitate the efficient administration of his official duties, subject to the overall broad supervision of the trial judge – avoids a result not intended by the legislature. Moreover, it leads to a reasonable and rational construction that

[2] In point of proof, the Chief Justice's own words establish that reasonable jurists have not hesitated in supporting the constitutionality of solicitor controlled dockets. A review of past statements by Chief Justice Toal in her State of the Judiciary Addresses to the General Assembly never indicate that exclusive control of the docket is an inherent power of the judiciary. See, *e.g.*, Chief Justice Jean H. Toal, State of the Judiciary 2006, 2006 South Carolina House Journal at 1375 (March 1, 2006) ("Our Solicitors control the docket in this state and I support the continuation of this system . . .."); Chief Justice Jean H. Toal, State of the Judiciary 2003, 2003 South Carolina House Journal at 1103 (February 26, 2003) ("I strongly support the control of the docket by our circuit solicitor."); Chief Justice Jean H. Toal, state of the Judiciary 2002, 2002 South Carolina House Journal at 1323 (March 6, 2002) ("I support continued control by the solicitors of South Carolina of the management of criminal dockets in our state.").

[3] This interpretation is supported by this Court's opinions addressing the propriety of the trial courts' rulings on continuances – which relate to final control of the criminal trial docket – which implicitly recognize the Solicitors' control of the docket is subject to the overall broad supervision of the trial courts. See, *e.g.*, *State v. McMillian*, 349 S.C. 17, 561 S.E.2d 602 (2002); *State v. Meggett*, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012); *State v. Galimore*, 396 S.C. 471, 721 S.E.2d 475 (Ct. App. 2012).

would not result in the unconstitutionality of the statute.[4]

II.

The Court's decision creates an ambiguity because it failed to address the constitutionality of its precedent addressing the authority of the Solicitor and Court over the docket.

Justice Pleicones notes in his dissent that, "[i]f the Court is nonetheless determined to declare Section 1-7-330 unconstitutional, then we must both deal with our precedents and describe the new system. . .." *Langford, supra*, at 18.

Therefore, if this Court upholds its determination that Section 1-7-330 is unconstitutional, the common law as it existed prior to the 1980 Amendment of Section 1-7-330 would control the criminal docket in this State. The common law prior to 1980, as established by this Court, was that the Solicitor has the authority to prepare the General Sessions docket and determine the order in which cases are called subject to the overall broad discretion of the trial court.

Section 1-7-330 was a codification of the common law. Prior to 1980, this Court, on at least three (3) different opportunities, addressed the Solicitor's authority over the criminal docket. This Court held as follows:

> We hold that the solicitor has authority to call cases in such order and in such manner as will facilitate the efficient administration of his official duties, subject to the overall broad supervision of the trial judge. If a defendant feels that his rights are prejudiced by reason of the calling of his case at any particular time, he may apply to the judge for a continuance beyond the term or for postponement to a date later within the term. In the calling of cases for trial the solicitor has a broad discretion in the first instance, and the trial judge has a board [sic] discretion in the final analysis. A

[4] Although the constitutionality of the statute is addressed in the next argument, it should be noted at this juncture that this Court has declared that statutes are *not* to be construed to do that which is unconstitutional. *Ward v. State*, 343 S.C. 14, 19, 538 S.E.2d 245, 247 (2000). This Court's decision that Section 1-7-330 is unconstitutional is based upon its summary conclusion that the statute gives Solicitors absolute and total authority over the docket because of the term "exclusive" without any thought to the legislative intent or recognition of and deference to its own judicial decisions.

> prosecuting attorney normally has many cases for disposition. He must plan ahead to expedite the work of the court, and should the day come when he is required to call cases in the order entered on the docket, the administration of justice will bog down.

State v. Mikell,[5] 257 S.C. at 322, 185 S.E.2d at 816-817 (1971). See also *State v. Ridge*,[6] 269 S.C. 61, 64, 236 S.E.2d 401, 402 (1977); *State v. Flood*,[7] 257 S.C. 141, 146, 184 S.E.2d 549, 552 (1971). In these cases, this Court recognized that both preparing and controlling the criminal docket, in the first instance, are part of the prosecution function because the prosecutor prosecutes all of the General Sessions criminal cases and must plan in order to effectively and efficiently dispose of them.[8] Prior to the enactment of the amendment to Section 1-7-330, it is

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[5] The issue in *State v. Mikell, supra*, was whether the trial court erred in denying the defense motion for a continuance, which was based on the fact that Ridge's case was being called "out of order" and that there were at least 70 older cases. The Supreme Court upheld the trial court's denial of the continuance for the reasons set forth in the above-quoted excerpt from the opinion.

[6] In *State v. Ridge, supra*, the Solicitor called one indictment against Ridge for trial. The defense motion to consolidate the called indictment and another for trial was granted. Because one of the State's important witnesses was unavailable for the trial, the Solicitor informed the court, before jeopardy had attached, that the case would not go forward to trial. The court gave the prosecution the choice of going to trial or having the case dismissed. The Solicitor offered to *nol pros* the indictments, pointing out that only one had been called for trial. The court refused the Solicitor's offer and dismissed the indictments. This Court, holding that trial courts do not have the authority to dismiss indictments pre-trial in the absence of a statute allowing such, found the trial court erred and reversed.

[7] In *State v. Flood, supra*, the defendant argued that it was error for his case to have been called for trial approximately one month after the offense had taken place because there were much older cases on the docket. Noting that there was no showing the defense had inadequate time to prepare and acknowledging the Solicitors' authority to determine the order in which cases are called for trial, the Court rejected Flood's challenge.

[8] In *Mikell*, this Court stated very clearly that "[a] prosecuting attorney normally has many cases for disposition. He must plan ahead to expedite the work of the court, and should the day come when he is required to call cases in the order entered on the docket, the administration of justice will bog down." These statements clearly, if implicitly, recognize – as pointed out by Justice Pleicones in his dissent in *State v. Langford, supra*, -- the specialized knowledge and resources of the Solicitor's office. The Solicitor prosecutes *all* of the General Sessions cases, bears the burden of proof, and is in the best position to know the investigative status of each case, the status of any forensic testing in each case, whether there are co-defendants, and whether there are

clear that the common law established by this Court held that the Solicitor has the authority to prepare the General Sessions docket and determine the order in which cases are called subject to the overall broad discretion of the trial court.

III.

The Administrative Orders pursuant to *Langford* violate the South Carolina Constitution.

On November 21, 2012, this Court issued three Administrative Orders as a result of the *Langford* case. These orders will substantially change both practice and procedure in the Court of General Sessions. Included in these orders are provisions about when judges may continue preliminary hearings,[9] new duties imposed on the solicitors, mandates for law enforcement, new rules on the dismissal of cases, and much more. The Administrative Orders violate the South Carolina Constitution.

A. The Court is without authority to issue the Administrative Orders.

The Supreme Court is required under Article V, Section 4A of the South Carolina Constitution to submit all rules governing practice and procedure to the South Carolina General Assembly. This constitutional mandate cannot be circumvented through the issuance of administrative orders dictating practice and procedure in the courts of this state.

As previously stated, the Judicial Branch of our state government is established in Article V of the South Carolina Constitution which provides:

> **Subject to the statutory law**, the Supreme Court shall make rules governing the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

(Emphasis added.) S.C. Const. Art V, §4. As this Court itself has held, the language highlighted

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other charges against the defendant.

[9] These provisions appear to set forth procedure different than contained in Rule 2, SCRCrimP.

above **"establishes the intent to *subordinate* to the General Assembly the Court's rulemaking power in regard to practice and procedure."** (Emphasis added.) *Stokes v. Denmark Emergency Medical Services*, 315 S.C. 263, 267, 433 S.E.2d 850, 852 (1993).

The Court's Administrative Orders violate both Article V, Section 4 and Article I, Section 8 in that they usurp power from the legislative branch. The clear and specific language of Article V, Section 4A requires that any rules and amendments to rules governing procedure and practice in the state courts must be submitted by the Court to the General Assembly so that it may, if it so chooses, disapprove of them.[10] *Id.* Inasmuch as the Orders clearly cover practice and procedure in the Court of General Sessions, the Court exceeded its constitutional authority in issuing them and they are void. *See Responsible Economic Development v. South Carolina Dept. of Health and Environmental Control*, 371 S.C. 547, 641 S.E.2d 425 (2007) (action taken by state agency outside of its statutory and regulatory authority is null and void); *Triska v. Dep't of Health & Envtl. Control,* 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987) (same).

B. The Administrative Orders violate the Separation of Powers by imposing new duties on the Solicitors thereby dictating the use of Solicitors' resources.

This Court also overlooked or misapprehended the Constitutional provisions, discussed more fully above, setting out the authority of this Court and authority of the legislature to define or impose duties of the Solicitor. *Compare* S.C. Const. art. V, §§ 4 and 4A with S.C. Const. art. V, §24. Inasmuch as the Constitution only imbues the legislature with the authority to define and impose duties on the Solicitors, the Court's action in doing so constituted an assumption of the legislature's power in direct contravention of the Separation of Powers clause. *See* S.C. Const. art. I, §8 ("no person or persons exercising the functions of one of said departments shall assume

[10] This mandate has been followed by the Court in promulgating rules governing the creation and management of the civil trial docket. See, *e.g.*, Rule 40, SCRCP (general docket, trial rosters, and call of cases for trial).

or discharge the duties of any other").

The Orders also violate the separation of powers doctrine with respect to the executive branch. Specifically, the Order captioned "Re: Reconciliation of General Sessions Cases Statewide" violates the doctrine. This directive has nothing to do with the task of managing the general sessions court docket. Through this edict, the judicial branch of government is directing the executive branch as to how to use its resources and maintain its internal records by having the Solicitors "reconcile" their records with those kept by the clerks of court. The Solicitors' records are work product and are not the official public record. While SCSA concedes it is strongly advisable for Solicitors to reconcile their case management records with their clerks, this task cannot be mandated or required by the judicial branch. The Solicitors' records are kept to help them in analyzing and managing their caseload. Each Solicitor has the inherit authority to keep their records in any manner they see fit and answers to the citizenry if a record keeping failure affects criminal prosecutions. The Clerks of Court maintain the official record of the General Sessions Court and are within the domain of the judicial branch.

Anecdotally, SCSA submits that many Solicitors already regularly compare their records with their clerks. Many have had great success in reconciling data with their clerks, but it is disappointing for clerks and Solicitors to continually watch previously corrected and transmitted information mysteriously re-appear as an open, aging case with Court Administration. These discrepancies have given the courts and the public an inaccurate account of the actual productivity and status of the court system.

IV.

The Administrative Orders should be withdrawn because they are unworkable in the current system.

The general sessions docket has always been a shared responsibility between the courts and the Solicitors. After *Langford*, this Court now wants exclusive control of the criminal docket. This is not practical in our State. As noted by former Solicitor Trey Gowdy in an article written for the South Carolina Bar magazine, there are four principal reasons that the Solicitors have been given the responsibility of preparing the court dockets:

> (1) neither circuit court judges nor clerks of court have the personnel, time or infrastructure to organize, publish and administer a criminal docket; (2) solicitors are elected to represent a hybrid of public safety and justice balanced with efficiency within their circuits; (3) prosecutors are uniquely well suited to know the nuances of individual cases and the availability of lay witnesses, law enforcement witnesses, as well as expert witnesses they routinely share with other circuits; and (4) since prosecutors are the ones called upon to provide an explanation for the current state of the criminal justice system, the muses thought it only fair to provide them with a few tools to actually impact the administration of the justice.

Trey Gowdy, *Criminal Dockets Administered by Prosecutors*, South Carolina Lawyer, Apr. 2010, at 26.

SCSA is not only open to change in how the criminal dockets are managed, but we would like to see the Court, Solicitors, defense bar and legislators work together to come up with a system that will work in all of the 16 circuits and that takes into account the resources that must be brought to bear to implement such a system.

One over-arching concern that all stakeholders in the criminal justice system should have is a reliable, fair and efficient process for resolving criminal cases. The underlying management flaws in our system have very little to do with the constitutionality of the statute at hand. Understandably, the *Langford* decision does not delve into the real-world, practical reasons our system needs a change. In addition to curing alleged constitutional problems of Section 1-7-330, the Order ostensibly attempts to remedy a problem perceived as a management failure instead of

the resource failure that it is.

The simple math regarding the volume of cases juxtaposed upon the attendant terms of court shows very clearly that it is impossible to resolve the pending and forthcoming criminal cases within the Order's rubric. The Order simply will not work, regardless of who controls docketing.

One troublesome aspect of the Order is that it only vaguely addresses the plea docketing system which controls the vast majority of cases. If *Langford* is to be applied consistently, in addition to trials, Solicitors also are prohibited from scheduling pleas. This Court reiterated the principle that a defendant "has the right to have a judge assigned to his case in a manner free from bias or desire to influence the outcome of the proceedings." The court went further adding that, "without a doubt, permitting solicitors—who represent a party in the case—to select the judge raises the specter of partiality and calls the validity of the entire system into question." The Court's belief in the "very troubling examples of abuses" outlined in the Public Defender Association's brief coupled with the assertion that these wrongs "inevitably stem from nature of a system that allows the prosecution to control the criminal docket" clearly means the Solicitor may not docket *pleas or trials*. The Solicitors across the state literally have hundreds of assistant solicitors who, in managing the prosecution of their assigned cases, naturally assist in managing the docket. While this may be a relatively small part of the work each individual assistant solicitor performs, when this portion of the workload is relinquished, the relatively few members of the judiciary must absorb it. This will mean an exponential increase in the duties of the Judiciary. The work of a few hundred must now be performed by a few dozen.

The current resources of the Judiciary (including the Clerks of Court) are insufficient to meet the demands imposed on the system by the Orders. Without the addition of a new layer of

bureaucracy, the courts and the clerks cannot manage the many new obligations imposed by the Orders. Smaller, poorer counties cannot comply with the onslaught of new requirements while continuing to process their existing caseloads that have steadily increased over the past five years due to severe budget cuts necessitated by the recession. Even the larger counties with substantial tax bases will struggle. Furthermore, the Solicitors, under *Langford*, are barred from assisting in this "inherently judicial function."

Another concern from the Orders is the promise of dismissal after an arbitrarily set time period. This incentivizes an already motivated defendant to slow down the system in an effort to pressure the prosecution into unreasonable compromises to avoid sanctions. The arbitrary dismissal "trigger" wrongly places a burden of justifying the age of a case on the prosecutors who, under this system, have far less control over the age of the case than both the Chief Judge for Administrative Purposes[11] and the defendant.[12] This plan for the judicial dismissal improperly encroaches upon (if not violates) the Victim's Bill of Rights. Victims should not be denied justice when the court has failed to process their case in a timely fashion.[13] This dismissal plan also contradicts years of this Court's precedent. This Court has held on several occasions that "a trial court generally has no power to dismiss a properly drawn indictment issued by a properly constituted grand jury before trial unless a statute grants that power to the court." *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998) *citing State v. Ridge*, 269 S.C. 61,

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[11] This is assuming, of course, that the CJAP who managed the case for years has not been rotated to some other circuit by the time of the hearing. The Order, by failing to require old cases managed by the CJAP to remain assigned leaves no accountability for the existence of old cases, except by the Solicitor whose hands for forcing an early resolution of the case are tied.

[12] The Order does not contemplate a single sanction for defense attorneys who do not comply with the mandates of the Order.

[13] This is especially true when defendants have made no effort to avail themselves of a Speedy Trial as contemplated by our legislature.

236 S.E.2d 401 (1977); *Ex Parte State*, 263 S.C. 363, 210 S.E.2d 600 (1974).

Finally, the Order dilutes responsibility for the criminal case docket making it virtually impossible for the public to discern who is ultimately accountable for unreasonable and unnecessary delay. In every state we have studied that has a judicially run docket, the cases are permanently assigned to one judge and responsibility for the success or failure of the docket is easily discerned. In many of those states, the judges also are accountable at the ballot box through popular election. It is only the pressure of accountability that forces a well-maintained docket. If responsibility is diffused over several parties, then ultimately no one is going to drive the system forward.

The Chief Justice organized a task force to study improving South Carolina's court system. A subcommittee was formed to study South Carolina's General Sessions docketing practices. This Court appointed three Solicitors as well as a group comprised of defense attorneys, clerks of court and judges to the sub-committee. There were no legislators on the committee. The sub-committee met once, on the date of its inception in February of 2011. Later, Solicitors on the sub-committee submitted 44 suggestions for a more efficient docket. *See* Appendix A (consisting of two documents submitted to the sub-committee chair by Ninth Judicial Circuit Solicitor Scarlett A. Wilson and Sixteenth Judicial Circuit Solicitor Kevin S. Brackett). Those suggestions were never discussed with the entire sub-committee nor were members allowed to see or discuss the suggestions of others. Of the Solicitors' suggestions for changes, only a few were included in the proposed "Draft Administrative Order" (which presumably was the precursor of the Uniform Differentiated Case Management Order[14]). The Solicitors were asked <u>not</u> to consult with their colleagues (including fellow prosecutors, members of the private bar,

[14] The "Draft Administrative Order" and the Uniform Differentiated Case Management Order are not identical, but certainly are very similar.

public defenders or judges) about the "Draft Administrative Order".

When the details of what came to be the Uniform Differentiated Case Management Order were made known to the three Solicitors, they responded with a five page letter detailing their concerns about the plan. Copies of their letters are attached in Appendix B. While the new Order has been modified to some extent from the draft order proposed last spring, the fundamentals remain the same and the concerns expressed in the letters remain valid. The lack of meaningful benchmarks is a problem for anyone charged with managing the docket in the criminal justice system. Arbitrary benchmarks and the lack of performance measures for the real stakeholders invite failure for those responsible for the docket. We urge the Court to consider a true, comprehensive study of these issues.

Our criminal justice system is teetering due to years of fiscal neglect as well as a failure to update processes and methods to account for growth. The State agrees an overhaul is overdue and remains committed to working with all stakeholders to implement the change needed to ensure swift, consistent and fair justice for the citizens of this state. Such an overhaul must be all-encompassing in order to succeed. It is not sufficient to have an Order that is at once overbroad in concept and too specific in execution to effect a real change. In its current form, the Order will mean an exercise in micro-management futility that already has proven itself a long-term failure in circuits that have attempted similar feats.

WHEREFORE, SCSA requests this Court to rehear this matter, issue an amended opinion affirming upholding the constitutionality of Section 1-7-330, withdraw the three (3) November 21, 2012 administrative orders, and grant such other and further relief as may be appropriate.

Respectfully submitted,

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BY: _____
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Columbia, South Carolina

December 6, 2012

Judge,

Below are my thoughts on how we can improve the docketing process/general efficiency of General Sessions court. They are in no particular order of importance.

1. Utilize plea affidavits to reduce the time spent on guilty pleas

    a. Used in Utah and California among other states
    b. Complies with Boykin v. Alabama
    c. More reliable than an oral colloquy, less likely to forget something

2. Establish a method of rewarding early acceptance of responsibility

    a. Delay should never be a viable defense option
    b. Currently no incentive to plead early
    c. Serves the Federal system well

3. Use non-jury weeks in large multi-county circuits

    a. Experiment with this first in one circuit
    b. Small counties may not need full terms every time
    c. Give resident judges power to schedule on fly (Common Pleas breakdowns)
4. More judicial involvement in plea bargains

    a. Don't accept them after case reaches certain age or scheduled for trial
    b. Straight up pleas on the day of trial waste judicial resources
    c. Plea offers need to be made and rejected in writing or on the record
5. Allow for judicial review and dismissal or remand to law enforcement of warrants
6. Reform PCR to allow for screening of cases at filing using affidavits

    a. Too many frivolous applications
    b. North Carolina resolves 95% at filing, no hearing needed
    c. Frees resources up for other matters
7. Power to summon defendants to court on off court weeks with court approval

    a. Defendants can sign up to plea
    b. Sometimes defendants do not come to meet with attorneys, they have no time to meet when court is in session
8. Defendants use ODC complaints as a mechanism to obtain new counsel and delay

    a. Allow local court to screen complaint and decide if meritorious or dilatory if complaint happens within 30 days of trial
9. Establish clear guidelines approved by Supreme Court for Pro Se litigants

Suggestions for More Efficient Docket Management submitted by 16th Circuit Solicitor Kevin S. Brackett

a. Standardized *Faretta* warnings
b. Clear stand by counsel rule disallowing hybrid representation
c. Clear policy for abusive Pro Se litigants with consequences laid out

10. Judges, elected Solicitors and Circuit Defenders need to have meaningful discussions to improve relationships and docketing policies between offices

    a. Mistrust leads to poor communication and inefficiency
    b. Leaders need to lead by example
    c. Identifying the needs and goals of each party and committing to working together to accomplish them

11. Discuss with counties the possibility of reducing jail populations by increasing resources to PD's and prosecutors

    a. Typical response to overcrowded jails is to build, cost of operations exceeds cost of increasing court staff

12. Using video conferencing to allow SLED forensic witnesses and other distant witnesses to testify

    a. Keeps SLED agents at the Lab working instead of traveling
    b. Saves on state travel costs
    c. Especially useful for chain witnesses, etc.

Ideas costing money we might not have right now:

1. Expand magistrate jurisdiction to three years and mandate that they be lawyers

    a. Implement as we replace retiring magistrates

2. Replace conflict system with regional contract attorneys to handle conflicts

    a. May be affordable now, inexperienced civil attorneys slow things down

3. Establish a reasonable ratio of cases per asst. solicitor and PD. Also, establish a reasonable ratio of terms of court for a county per number of criminal filings.

    a. It is impossible to really know how efficient or inefficient we are without some standard measuring tool
    b. Needed to assist in making our case for additional resources
    c. ABA did a study years ago and I am trying to track it down

Suggestions for More Efficient Docket Management submitted by 16th Circuit Solicitor Kevin S. Brackett

4. Work with Solicitor's, Indigent Defense and AG to establish a unit that can travel to jurisdictions as needed or desired to help reduce backlogs and implement case management practices

    a. Might be possible in a limited fashion with existing resources

5. Hire more judges, clerks, PD's and prosecutors

Suggestions for More Efficient Docket Management submitted by 16th Circuit Solicitor Kevin S. Brackett

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SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

TO: The Honorable Lawton McIntosh

FROM: Solicitor Scarlett Wilson / Solicitor David Pascoe

RE: Request for Suggestions for More Efficient Docket Management

DATE: March 9, 2011

The following are items that Solicitor Pascoe and I have agreed upon in response to your request. Solicitor Pascoe may submit additional items, as well.

ACHIEVABLE GOALS WHICH DO NOT REQUIRE SUBSTANTIAL ADDITIONAL RESOURCES

1. DEFINE THE PROBLEM in more objective terms: What is a backlog? What makes an "old case" old?

2. Develop realistic benchmarks/measurements for success for Solicitors
    a. Include benchmarks for individual prosecutors
    b. Include benchmarks for single terms of court
    c. Develop criteria for individual *counties* based on the number of court weeks they have

3. Develop realistic goals for public defenders
    a. Include realistic benchmarks for caseloads
    b. Decide whether they are a "law firm" or not
    c. If a law firm, consider listing duties which can or should be rotated or shared across the office (prelim duty, etc.)

4. Develop realistic benchmarks/goals for judges
    a. Include how many pleas a judge should be able to move in one day, on average
    b. Include how many bond settings or other hearings a judge should be able to hear in a morning or afternoon session of court, on average
    c. Include how many probation revocations a judge should be able to hear in a session of court, on average
    d. Establish hours for trials—judges are not supposed to give jury instructions after 3:00pm (*allegedly* per edict of the Chief Justice).

5. Avoid statewide judges meetings during scheduled terms of court. Typically, we lose almost one full week of court due to mandatory conferences for judges. These conferences usually are scheduled during the last two days of a court week but travel time and a reluctance to start something that cannot be finished. Across the state, this must have a measurable effect on the number of cases moved annually.

6. Encourage meaningful preliminary hearings and allow the prelim judge the option of binding a case over or dismissing for lack of merit for prosecution or dismissal for judicial economy. As always, the Solicitor would have the option of directly indicting after a dismissal. Allow for some guilty pleas at prelim court (just like transfer court).

7. Provide for Criminal Non-Jury days during "Admin" or "In Chambers" weeks so that non-dispositive motions affecting criminal cases can be heard.

8. Meaningful Bond Revocation and Reconsideration hearings upon a defendant's re-arrest. When a defendant continually gets arrested, defense attorneys understandably can't evaluate their client's plea offers because they don't have all the information. This puts the case in an ever-aging cycle that continually delays justice.

9. Continued "PR Campaign" by all invested in the program that the criminal justice system, including the courts, the prosecutors and public defenders are a part of the "core function of government".

10. Allow the plea colloquy to be reduced to an affidavit of the defendant waiving his rights (*Boykin* form).

11. No Common Pleas hearings during GS terms unless all cases on the week's docket are resolved. No interrupting plea court or a trial for a CP hearing.

12. Requiring defense and state motions to be filed with the court and served upon the opposing party at least five days before the term of court. Efficiency is increased because courts can research the framework for the anticipated motion prior to hearing testimony or argument and can limit the motion hearing to those issues central to the law of the motion. Efficiency is increased when both sides have had the opportunity to hone their respective arguments prior to a hearing. There is no "right" to "sandbagging" or "trial by ambush" and no justice interest is served by allowing either side to file or early argue substantive motions as trial is beginning. States with codes of criminal procedure have such requirements and allow filing later motions at the discretion of the court as circumstances require. Prepared attorneys will always be at an advantage.

13. Utilize video conferencing. Some courthouses and public defenders have this capability but do not use it.

14. Utilize sanctions for defense attorneys not appearing in court for cases docketed and posted unless the attorney has notified the Court and/or the Solicitor.

15. Utilize the inherent authority of the trial judge. *State v. Ridge*, 269 S.C. 61 (1977); *State v. Mikell*, 257 S.C. 315 (1971); *State v. Charles*, 183 S.C. 188 (1937). While the Solicitor has the authority to call cases in such order and in such manner as will facilitate the efficient administration of his official duties, this is subject to the overall broad supervision of the trial judge. If our local judges want to play a more active role in docketing, encourage them to meet with their Solicitors to work together toward a more efficient system that works for their individual and perhaps unique locale.

DESIREABLE GOALS WHICH MAY REQUIRE ADDITIONAL RESOURCES OR LEGISLATION

1. Provide an incentive for defendants to plead guilty early. Recognize that providing defendants certain benefits for early acceptance of responsibility does not mean that defendants who plead guilty later or go to trial are being punished. Waive or cut the fees that defendants have to pay if they plead guilty before a certain date. Undo this: State v. Brouwer, 346 S.C. 375, 550 S.E.2d 915 (2001). Get in-sync with the federal courts. If we want our numbers to look like the federal numbers, we need the tools that the feds have.

2. Increase the number of judges, *per capita* by circuit

3. "Truth in Sentencing" so that public confidence in what we do is restored

4. Allow for detaining suspects for investigative detention for up to 72 hours

5. Post-Conviction Relief Reform

6. Push for Solicitors' Warrant Approval for felonies (except in exigent circumstances) and creating a mechanism for remanding cases back to law enforcement for further investigation.

7. Go "paperless" in the courtroom.

8. Allow for some guilty pleas at prelim court (just like transfer court).

9. Allow all drug *possession* charges to be handled in magistrate's court.

10. Supervisory review of trial court rulings in pre-trial motions and rulings during trial for issues not currently considered a "final judgment" in a case. This may seem to increase inefficiency at first, however, studies have shown that increased scrutiny from higher courts increases judicial efficiency. The practical effect is: more appellate review means more decisions that clear up gray areas in South Carolina jurisprudence, which in turn, gives trial courts more practical guidance on issues that will mean fewer and shorter motion hearing, thereby speeding trial terms.

11. If we are to move to a more involved judiciary or judicial control of the docket move to a District Court system. No off weeks (two weeks for General Sessions, two weeks for Common Pleas). No travel. Cases assigned to specific judges. Motions can be heard well before trial (gives both sides advantages). The efficiency of certain judges will be apparent immediately.

Dockets could then be mixed: containing pleas, trials and probation revocations (PCR's if necessary) allowing greater flexibility.

12. If we are to move to a judicially controlled docket, fully staff the clerk's office or the judge's office so that all scheduling is handled by the court.

KEVIN S. BRACKETT
SOLICITOR

April 17, 2012

The Honorable Costa Pleicones
Supreme Court Justice
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Final Draft Report and Amended Administrative Order

Dear Justice Pleicones:

Thank you for the opportunity to give our constructive comments regarding the proposed Amended Administrative Order included in your email of March 12. We believe the proposed order sets forth some interesting concepts that will prove worthwhile. We also believe another roundtable discussion would help improve the order. While we met once in February of 2011 and later submitted our suggestions for a more efficient docket a few weeks later, we have not had any further meetings to discuss our own suggestions or to see or discuss the suggestions of others. Of the 15 suggestions for changes that would require few additional resources made by Solicitors Pascoe and Wilson, only three were included. Of the 7 additional suggestions for changes that would require few additional resources made by Solicitor Brackett, only 1 was included. Significantly, we have not specifically defined the problems or created performance measures for Solicitors, Public Defenders or Judges. For these reasons, we request a meeting to discuss the proposed order and to review all of the suggestions made by members of the General Sessions Subcommittee. We also find it necessary to discuss these proposals with our colleagues.

In the meantime, we offer the following observations regarding the Amended Administrative Order and the Preliminary Draft Report of the General Sessions Subcommittee of the Chief Justice's Docket Management Task Force. Remember that because we were asked not to consult with our colleagues (neither fellow prosecutors nor public defenders) these are the views of only 3 of 16 Solicitors.

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1675 - 1A YORK HIGHWAY • YORK, SOUTH CAROLINA 29745 - 7422
(803) - 628 - 3020 • FAX: (803) - 628 - 3025

1. The Draft Report

The first concern is that the "backlog" has not been properly defined. The inclusion of statistics regarding the ages and numbers of cases across the 16 judicial circuits are flawed if these numbers are from Court Administration. Many Solicitors have expressed repeated concerns about the inaccuracies in the Court Administration statistics. The general trends of Court Administration statistics may or may not be accurate but until we all can have confidence in the numbers, it is more difficult to assess the situation and to make recommendations to improve it. Flawed statistics not only distort our track records and any existing problems, they also set the stage for the failure of whatever new system is employed.

Certain aspects of the report seem to suggest that Solicitors have not worked hard enough and need the supervision of the judiciary to help dispose of cases. While we welcome more judicial manpower, dispatching a judicial task force to "assist the solicitors in reducing the backlog of older criminal cases" will not work without more court terms, more assistant solicitors and more public defenders. The claim that Solicitors should simply "bite the bullet" and *nolle prosequi* those cases that clearly lack virtue highlights the misunderstanding of most of the cases that actually make up the so-called backlog. (And again, we still need to develop a rational definition of what should be considered a backlog.)

While defense attorneys might consider being more aggressive with speedy trial motions, our speedy trial statute is archaic. One answer to inefficiencies in our system is to propose a real "Speedy Trial Act" much like that in the federal system. To make compliance with such an act feasible, however, more judges, assistant solicitors and public defenders are a must. The truth, however, is that the vast majority of defense attorneys do not want a speedy trial.

DCMS can work but to be successful it must have increased judicial involvement. If it is to work as proposed, then the judiciary must be responsible for the results.[1] It is only the heat of accountability that keeps the pot boiling and if responsibility is diffused over several parties then ultimately no one is going to drive the system forward. Additionally, without significantly more judges, court terms, assistant solicitors and public defenders, it is not feasible to attain remarkably improved results. A "new and improved" DCMS with the same number of judges, the same number of court terms coupled with the same number of assistant solicitors and the same number of public defenders will lead to the same results (if not worse).[2]

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[1] The suggestions regarding judicial rotation, transfer court, diversionary programs and videoconferencing are good ideas that should be relatively easy to accomplish. In the event, however, that the proposed Amended Order is enacted, judicial rotation should cease and each judge should have their own "judicial docket." Each case should remain assigned to the specific judge until the case is resolved unless there is consent of all parties. The observation made in the draft report regarding solicitor turnover resulting in inconsistency of application is magnified when you factor in "judicial turnover" in the form of rotation. If one of the goals is to avoid the Solicitor choosing presiding judges, then creating a "judicial docket" as we suggest serves that purpose.

[2] A system similar to the proposed Amended Order has been in effect in the Seventh Judicial Circuit since 2008. Modest additional resources were provided to the Court and Clerk of Court to manage the massive administrative responsibilities of managing the General Sessions docket. Depending on the time frame of preparing statistics to

The idea of General Sessions Motions, Non-Jury and Plea weeks is a good one that will work in some counties but not in others. Again, creating more court obligations without more solicitors and more public defenders will not necessarily have an effect on the efficiency of docketing, especially since motions are rarely required of the parties in criminal cases. In any event, these weeks should be seriously considered as a method to dispose of pleas (especially in smaller counties) thus leaving the full week of jury terms available for trials.

1. The Amended Order

The framework for most of the Order is very similar to what already is in effect. We have no objection to the general concept though the track times and deadline periods must be very different than those proposed. The volume of cases in many counties cannot be resolved in the number of court sessions traditionally scheduled during the first 180 days of "case-life." Likewise, the one year track for Murder and CSC cases is unworkable for the great majority of these cases. These arbitrary numbers invite failure for whoever ultimately is responsible for the docket. Every case waiting for DNA results from SLED will certainly violate the deadline before results are returned. Similarly, last minute conflicts of interest and other unforeseen issues will guarantee non-compliance with the track deadline for many cases.

Section A.2 should be amended to reflect that it is not intended that the screening should be construed as an invocation of the right to counsel. The screening form currently used appears to function that way and the order and form used should be drafted to make clear that this is an administrative function only and does not prevent further police questioning absent a clear invocation of the right to counsel by the defendant.

Section B.6 needs to be amended to allow for the changes in plea practice necessitated by the recent Supreme Court decision *Missouri v. Frye*. The time is ripe for addressing this issue from the top down in order to prevent a deluge of PCR applications second guessing plea rejections. At a minimum, written rejections of plea offers signed by counsel and defendant should be filed with the court. This idea calls for considerable further discussion.

The provisions for dismissal and warrant approval in section "B. 8." likely violates the Victim's Bill of Rights which guarantees due process and fairness to victims. We suggest a remedy of contempt or some sort of sanction for law enforcement instead of punishing the victim by dismissal. Unless the defendant can show prejudice, dismissal is an excessively penalty and should not be employed.

The Order should provide for a bond revocation procedure. The Order also should include strong encouragement of *trials in absentia* and procedures to see that the constitutional requirements are

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measure the effectiveness of this system, the results are the same or worse than when the docket was managed exclusively by the Solicitor. This is a shining example of our position that regardless of who has the ultimate responsibility for the docket, without more judges, more court terms, more assistant solicitors and more public defenders, the results will not show a marked improvement in efficiency.

met so *TIAs* are possible. Courts are often reluctant to grant requests for TIA's and this often works to the detriment of the victim.

An explicit formula for sentence consideration and/or fee reduction should be devised to reward defendants for their early acceptance of responsibility. As this proposed Order is written, there is practically nothing to motivate a defendant to resolve his case early in the process. Likewise, there are no consequences for a defendant's refusal to participate in our efforts toward a more efficient process. Defense attorneys openly admit that chaos is their friend. While the Solicitor has a great impact on the age of cases and their timely disposition, judicial and public defender performances also have *tremendous* effects. One major difference between the three parties, however, is that the elected Solicitor is held accountable by the electorate. Moreover, there **is no single change that could have a greater impact on securing efficiency in General Sessions court than deterring the defense from employing delay as a strategy.**

Each County's DCM Order should be tailored to the specific needs and resources of that county. Court Administration, the Prosecution Commission and the Commission on Indigent Defense should establish quantifiable benchmarks for judges, prosecutors and defenders. As for the prosecution, our effectiveness is measured only in part by pending caseloads and age of cases. Other measurements are more demonstrative of the overall performance of any given Solicitor's Office and the adequacy of its resources. These measurements include, but are not limited to, the following:

- Caseload Composition: Heinous Crimes or Complex Cases
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Before establishing a "magic track" for each County, an in-depth analysis of the resources and abilities must be completed. For example, a Court Production Rate could help determine how many cases a particular judge is capable of hearing within a court day or week. Using that information, as well as judicial benchmarks established by Court Administration, a target number of pleas per term could be established. Working from that number, the number of days it takes to dispose of cases in a particular county could be estimated and considered together with dismissal rates and jury trial estimations. Without meaningful tracks, the reality is that the date set per section "B.10." will have hundreds of pleas and trials set which everyone will realize is impossible.

Section B.11 is somewhat confusing unless it requires the CJAP to hear any plea taken off the trial docket to prevent "judge shopping." A meeting to discuss the proposed Amended Order would shed light on the necessity for this requirement and allow for clarification to accomplish this purpose.

The Case Disposition requirements of "D.2." are a great way to begin the discussion regarding managing the docket. We have concerns of Separation of Powers violations and the inherent, though unintended, invitation for *ex parte* communications this draft provides. We would appreciate the opportunity to discuss these concerns with the Committee.

In summary, if there were only three things we could add or change about the proposals forwarded they would be:

1. Conduct a comprehensive resource and workload analysis and work together to address the issues identified before implementing any form of change.

2. Revise the proposed order to establish quantifiable benchmarks for the defense bar that allow the court to monitor their compliance and sanction non-compliance in the same manner as the state. Everyone must feel the heat.

3. Provide tangible and significant incentives that reward defendants for the early acceptance of responsibility. Delays and backlogs are a defendant's friends and until they perceive delay to be a dangerous strategy the system will always be dragging them along and efforts at reform will fail.

The criminal justice system in South Carolina is teetering due to years of fiscal neglect as well as a failure to update processes and methods to account for growth. An overhaul is overdue and the Solicitors are committed to working with all stakeholders to implement the change needed to ensure swift, consistent and fair justice for the citizen's of this state. Such an overhaul must be comprehensive in order to work. Effecting comprehensive procedural changes without addressing resource issues is simply placing our old tired engine in a new car's body. It will look nice but we won't go any faster. In fact, it might not even work in the new body. We will be assuming all the risks that come with comprehensive change for no real benefit.

Who controls the docket is not our concern as long as that party assumes *full responsibility* and is ultimately accountable for the results. On the whole, we have done an excellent job given our resources. We are also the only party to this conversation that is directly accountable at the ballot box. If other states have better statistics than we have in South Carolina, there is little doubt that those states more adequately fund their criminal justice system.

In conclusion, it is the opinion of the Solicitors that implementation of this order without additional resources will create the very real possibility of a state-wide failure of the criminal justice system in South Carolina resulting in a denial of justice for victims and defendants alike. While we are totally committed to working together to improve the system we strongly urge the court to consider these issues very carefully before proceeding.

Sincerely,

Kevin S. Brackett
Sixteenth Circuit Solicitor

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First Judicial Circuit

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DAVID M. PASCOE
Solicitor

April 17, 2012

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South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Final Draft Report and Amended Administrative Order

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The criminal justice system in South Carolina is teetering due to years of fiscal neglect as well as a failure to update processes and methods to account for growth. An overhaul is overdue and the Solicitors are committed to working with all stakeholders to implement the change needed to ensure swift, consistent and fair justice for the citizen's of this state. Such an overhaul must be comprehensive in order to work. Effecting comprehensive procedural changes without addressing resource issues is simply placing our old tired engine in a new car's body. It will look nice but we won't go any faster. In fact, it might not even work in the new body. We will be assuming all the risks that come with comprehensive change for no real benefit.

Who controls the docket is not our concern as long as that party assumes *full responsibility* and is ultimately accountable for the results. On the whole, we have done an excellent job given our resources. We are also the only party to this conversation that is directly accountable at the ballot box. If other states have better statistics than we have in South Carolina, there is little doubt that those states more adequately fund their criminal justice system.

In conclusion, it is the opinion of the Solicitors that implementation of this order without additional resources will create the very real possibility of a state-wide failure of the criminal justice system in South Carolina resulting in a denial of justice for victims and defendants alike. While we are totally committed to working together to improve the system we strongly urge the court to consider these issues very carefully before proceeding.

Sincerely,

David M. Pascoe, Jr.
First Circuit Solicitor

State of South Carolina

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SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

April 17, 2012

The Honorable Costa Pleicones
Supreme Court Justice
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Final Draft Report and Amended Administrative Order

Dear Justice Pleicones:

Thank you for the opportunity to give our constructive comments regarding the proposed Amended Administrative Order included in your email of March 12. We believe the proposed order sets forth some interesting concepts that will prove worthwhile. We also believe another roundtable discussion would help improve the order. While we met once in February of 2011 and later submitted our suggestions for a more efficient docket a few weeks later, we have not had any further meetings to discuss our own suggestions or to see or discuss the suggestions of others. Of the 15 suggestions for changes that would require few additional resources made by Solicitors Pascoe and Wilson, only three were included. Of the 7 additional suggestions for changes that would require few additional resources made by Solicitor Brackett, only 1 was included. Significantly, we have not specifically defined the problems or created performance measures for Solicitors, Public Defenders or Judges. For these reasons, we request a meeting to discuss the proposed order and to review all of the suggestions made by members of the General Sessions Subcommittee. We also find it necessary to discuss these proposals with our colleagues.

In the meantime, we offer the following observations regarding the Amended Administrative Order and the Preliminary Draft Report of the General Sessions Subcommittee of the Chief Justice's Docket Management Task Force. Remember that because we were asked not to consult with our colleagues (neither fellow prosecutors nor public defenders) these are the views of only 3 of 16 Solicitors.

1. The Draft Report

The first concern is that the "backlog" has not been properly defined. The inclusion of statistics regarding the ages and numbers of cases across the 16 judicial circuits are flawed if these numbers are from Court Administration. Many Solicitors have expressed repeated concerns about the inaccuracies in the Court Administration statistics. The general trends of Court Administration statistics may or may not be accurate but until we all can have confidence in the numbers, it is more difficult to assess the situation and to make recommendations to improve it. Flawed statistics not only distort our track records and any existing problems, they also set the stage for the failure of whatever new system is employed.

Certain aspects of the report seem to suggest that Solicitors have not worked hard enough and need the supervision of the judiciary to help dispose of cases. While we welcome more judicial manpower, dispatching a judicial task force to "assist the solicitors in reducing the backlog of older criminal cases" will not work without more court terms, more assistant solicitors and more public defenders. The claim that Solicitors should simply "bite the bullet" and *nolle prosequi* those cases that clearly lack virtue highlights the misunderstanding of most of the cases that actually make up the so-called backlog. (And again, we still need to develop a rational definition of what should be considered a backlog.)

While defense attorneys might consider being more aggressive with speedy trial motions, our speedy trial statute is archaic. One answer to inefficiencies in our system is to propose a real "Speedy Trial Act" much like that in the federal system. To make compliance with such an act feasible, however, more judges, assistant solicitors and public defenders are a must. The truth, however, is that the vast majority of defense attorneys do not want a speedy trial.

DCMS can work but to be successful it must have increased judicial involvement. If it is to work as proposed, then the judiciary must be responsible for the results.[1] It is only the heat of accountability that keeps the pot boiling and if responsibility is diffused over several parties then ultimately no one is going to drive the system forward. Additionally, without significantly more judges, court terms, assistant solicitors and public defenders, it is not feasible to attain remarkably improved results. A "new and improved" DCMS with the same number of judges, the same number of court terms coupled with the same number of assistant solicitors and the same number of public defenders will lead to the same results (if not worse).[2]

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[1] The suggestions regarding judicial rotation, transfer court, diversionary programs and videoconferencing are good ideas that should be relatively easy to accomplish. In the event, however, that the proposed Amended Order is enacted, judicial rotation should cease and each judge should have their own "judicial docket." Each case should remain assigned to the specific judge until the case is resolved unless there is consent of all parties. The observation made in the draft report regarding solicitor turnover resulting in inconsistency of application is magnified when you factor in "judicial turnover" in the form of rotation. If one of the goals is to avoid the Solicitor choosing presiding judges, then creating a "judicial docket" as we suggest serves that purpose.

[2] A system similar to the proposed Amended Order has been in effect in the Seventh Judicial Circuit since 2008. Modest additional resources were provided to the Court and Clerk of Court to manage the massive administrative responsibilities of managing the General Sessions docket. Depending on the time frame of preparing statistics to

The idea of General Sessions Motions, Non-Jury and Plea weeks is a good one that will work in some counties but not in others. Again, creating more court obligations without more solicitors and more public defenders will not necessarily have an effect on the efficiency of docketing, especially since motions are rarely required of the parties in criminal cases. In any event, these weeks should be seriously considered as a method to dispose of pleas (especially in smaller counties) thus leaving the full week of jury terms available for trials.

1. The Amended Order

The framework for most of the Order is very similar to what already is in effect. We have no objection to the general concept though the track times and deadline periods must be very different than those proposed. The volume of cases in many counties cannot be resolved in the number of court sessions traditionally scheduled during the first 180 days of "case-life." Likewise, the one year track for Murder and CSC cases is unworkable for the great majority of these cases. These arbitrary numbers invite failure for whoever ultimately is responsible for the docket. Every case waiting for DNA results from SLED will certainly violate the deadline before results are returned. Similarly, last minute conflicts of interest and other unforeseen issues will guarantee non-compliance with the track deadline for many cases.

Section A.2 should be amended to reflect that it is not intended that the screening should be construed as an invocation of the right to counsel. The screening form currently used appears to function that way and the order and form used should be drafted to make clear that this is an administrative function only and does not prevent further police questioning absent a clear invocation of the right to counsel by the defendant.

Section B.6 needs to be amended to allow for the changes in plea practice necessitated by the recent Supreme Court decision *Missouri v. Frye*. The time is ripe for addressing this issue from the top down in order to prevent a deluge of PCR applications second guessing plea rejections. At a minimum, written rejections of plea offers signed by counsel and defendant should be filed with the court. This idea calls for considerable further discussion.

The provisions for dismissal and warrant approval in section "B. 8." likely violates the Victim's Bill of Rights which guarantees due process and fairness to victims. We suggest a remedy of contempt or some sort of sanction for law enforcement instead of punishing the victim by dismissal. Unless the defendant can show prejudice, dismissal is an excessively penalty and should not be employed.

The Order should provide for a bond revocation procedure. The Order also should include strong encouragement of *trials in absentia* and procedures to see that the constitutional requirements are

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measure the effectiveness of this system, the results are the same or worse than when the docket was managed exclusively by the Solicitor. This is a shining example of our position that regardless of who has the ultimate responsibility for the docket, without more judges, more court terms, more assistant solicitors and more public defenders, the results will not show a marked improvement in efficiency.

met so *TIAs* are possible. Courts are often reluctant to grant requests for TIA's and this often works to the detriment of the victim.

An explicit formula for sentence consideration and/or fee reduction should be devised to reward defendants for their early acceptance of responsibility. As this proposed Order is written, there is practically nothing to motivate a defendant to resolve his case early in the process. Likewise, there are no consequences for a defendant's refusal to participate in our efforts toward a more efficient process. Defense attorneys openly admit that chaos is their friend. While the Solicitor has a great impact on the age of cases and their timely disposition, judicial and public defender performances also have *tremendous* effects. One major difference between the three parties, however, is that the elected Solicitor is held accountable by the electorate. Moreover, there **is no single change that could have a greater impact on securing efficiency in General Sessions court than deterring the defense from employing delay as a strategy.**

Each County's DCM Order should be tailored to the specific needs and resources of that county. Court Administration, the Prosecution Commission and the Commission on Indigent Defense should establish quantifiable benchmarks for judges, prosecutors and defenders. As for the prosecution, our effectiveness is measured only in part by pending caseloads and age of cases. Other measurements are more demonstrative of the overall performance of any given Solicitor's Office and the adequacy of its resources. These measurements include, but are not limited to, the following:

- Caseload Composition: Heinous Crimes or Complex Cases
- Warrants In vs. Warrants Out
- Prosecutable Case Dispositions
- Workdays Per Case
- Court Production Rate – this analysis can be performed for each judge
- General Sessions Jail Inmate Population

Before establishing a "magic track" for each County, an in-depth analysis of the resources and abilities must be completed. For example, a Court Production Rate could help determine how many cases a particular judge is capable of hearing within a court day or week. Using that information, as well as judicial benchmarks established by Court Administration, a target number of pleas per term could be established. Working from that number, the number of days it takes to dispose of cases in a particular county could be estimated and considered together with dismissal rates and jury trial estimations. Without meaningful tracks, the reality is that the date set per section "B.10." will have hundreds of pleas and trials set which everyone will realize is impossible.

Section B.11 is somewhat confusing unless it requires the CJAP to hear any plea taken off the trial docket to prevent "judge shopping." A meeting to discuss the proposed Amended Order would shed light on the necessity for this requirement and allow for clarification to accomplish this purpose.

The Case Disposition requirements of "D.2." are a great way to begin the discussion regarding managing the docket. We have concerns of Separation of Powers violations and the inherent, though unintended, invitation for *ex parte* communications this draft provides. We would appreciate the opportunity to discuss these concerns with the Committee.

In summary, if there were only three things we could add or change about the proposals forwarded they would be:

1. Conduct a comprehensive resource and workload analysis and work together to address the issues identified before implementing any form of change.

2. Revise the proposed order to establish quantifiable benchmarks for the defense bar that allow the court to monitor their compliance and sanction non-compliance in the same manner as the state. Everyone must feel the heat.

3. Provide tangible and significant incentives that reward defendants for the early acceptance of responsibility. Delays and backlogs are a defendant's friends and until they perceive delay to be a dangerous strategy the system will always be dragging them along and efforts at reform will fail.

The criminal justice system in South Carolina is teetering due to years of fiscal neglect as well as a failure to update processes and methods to account for growth. An overhaul is overdue and the Solicitors are committed to working with all stakeholders to implement the change needed to ensure swift, consistent and fair justice for the citizen's of this state. Such an overhaul must be comprehensive in order to work. Effecting comprehensive procedural changes without addressing resource issues is simply placing our old tired engine in a new car's body. It will look nice but we won't go any faster. In fact, it might not even work in the new body. We will be assuming all the risks that come with comprehensive change for no real benefit.

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In conclusion, it is the opinion of the Solicitors that implementation of this order without additional resources will create the very real possibility of a state-wide failure of the criminal justice system in South Carolina resulting in a denial of justice for victims and defendants alike. While we are totally committed to working together to improve the system we strongly urge the court to consider these issues very carefully before proceeding.

Sincerely,

Scarlett A. Wilson

Scarlett A. Wilson
Ninth Circuit Solicitor

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM EDGEFIELD COUNTY

Court of General Sessions
William P. Keesley, Circuit Court Judge

The State of South Carolina,

Respondent-Petitioner,

v.

K.C. Langford, III,

Appellant-Respondent.

PROOF OF SERVICE

I certify that I have served the *Amicus Curaie* Brief of the South Carolina Solicitors' Association on both Appellant-Respondent K.C. Langford, III, Respondent-Petitioner State of South Carolina, and Amicus Curaie South Carolina Public Defenders' Association by depositing one copy of each in the United States Mail, first class postage prepaid, on December 6, 2012, addressed to each of their counsel of record:

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S.C. Commission on Indigent Defense
Division of Appellate Defense
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December 6, 2012
Columbia, South Carolina

Solicitors' Association of South Carolina

Post Office Box 11251
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December 6, 2012

The Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: State v. K.C. Langford

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of the *Amicus Curiae* South Carolina Solicitors' Association Petition for Rehearing. The Petition has been served on Petitioners, Respondent, and the *Amicus Curiae* South Carolina Public Defenders' Association in the above-referenced appeal. I have enclosed the original Proof of Service indicating service of the Petition by first-class, U.S. Mail on today's date.

Thank you for your attention to this matter. If you have any questions or any further guidance in this matter, please do not hesitate to contact me (in Orangeburg at 843-871-2640).

Sincerely,

David M. Pascoe, Jr.
President, Solicitors' Association of South Carolina

Enclosures (as stated)

cc: Elizabeth A. Franklin-Best, Counsel for K.C. Langford
Honorable David Spencer, Counsel for the State)
E. Charles Grose, Jr., Counsel for *Amicus Curiae* South Carolina Public Defenders' Association