South Carolina Bench Book
for
Magistrates and Municipal Court Judges

Criminal

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A.
Introduction to Criminal Law

1. Distinctions Between Civil and Criminal Law

There are a number of distinctions between civil and criminal cases. First, a criminal case involves an offense against the state, county, municipality, the people in general, or the community. A civil case, on the other hand, involves a dispute between private parties concerning wrongful conduct which is not a crime. In some situations the same facts may create both a criminal action and a civil suit. For instance, a person may intentionally and unjustifiably strike another person and cause injury. A criminal charge for assault and battery may be initiated and also a civil suit for damages may be brought.

A criminal action can begin in two ways. First, either the victim of the crime or a law enforcement officer files a complaint under oath, asking that a magistrate issue an arrest warrant. The warrant may then be served and the defendant brought before the magistrate or municipal judge. A civil suit is begun with the filing of a complaint which is served upon the opposing side.

2. Substantive and Procedural Law

Procedural law is the means or method of enforcing legal rights and obtaining relief or redress. It is the machinery which a court uses to administer legal proceedings.

Substantive law is composed of the law which is applied by the system of procedural law. Substantive law consists of the elements of the crimes (See the CRIMES and OFFENSES Section of this manual) or cause of action, the statute of limitations, and the rules of evidence.

The statute of limitations is an affirmative defense. This means that the defendant must bring this defense to the attention of the magistrate or municipal judge. The statute of limitations provides for a certain time in which a criminal proceeding may begin. If the criminal action is not begun within the specified time, the defendant can never be prosecuted for the crime. South Carolina does not have a general statute of limitations for criminal actions; however, in a few very rare instances, a period of limitations is incorporated in specific criminal statutes.

Substantive law includes the rules of evidence. The South Carolina Supreme Court has adopted the South Carolina Rules of Evidence. The Rules of Evidence are those rules by which matters of fact or allegation are established in all legal proceedings. The Rules of Evidence for courts in South Carolina are supplemented by the provisions found in Title 19 beginning with section 19-1-10. These rules and sections designate the accepted types of evidence, such as oral testimony, evidence in the form of documents, public or private records or writings, and certain types of exhibits. The rules control the development of evidence from the various possible sources, including pretrial statements or admissions, oral or written testimony or other admissible evidence, as well as any inferences or presumptions permitted to be drawn from that developed at trial.

B.
Jurisdiction and Venue in Criminal Matters

1. Jurisdiction

In South Carolina, jurisdiction, the basic authority of a court to hear and exercise judgment over a criminal matter, is based upon two considerations; territorial jurisdiction, and subject matter jurisdiction.

a. Territorial Jurisdiction

(1) Magistrates

A magistrate is limited as to the territorial area in which he may exercise his authority. This is known as "territorial jurisdiction" in contrast to "subject matter jurisdiction" which will be discussed at a later point.
The S.C. Supreme Court stated in State ex rel. McLeod v. Crowe, 272 S.C. 41, 47, 249 S.E.2d 772, 776 (1978) that:

> Sections 1 and 23 of Article V (of the S.C. Const.) require that the jurisdiction of magistrates must be uniform throughout the State. Such uniformity can only be accomplished through legislation which grants all magistrates uniform countywide jurisdiction.

All magistrates, therefore, now constitutionally possess county wide territorial jurisdiction in both criminal and civil cases. Opinion of the Attorney General dated November 18, 1978.

(2) Municipal Judges

The territorial jurisdiction of a municipal court is limited to the boundaries of the municipality.

b. Subject Matter Jurisdiction

The general jurisdictional statute for the magistrates is S.C. Code Ann. §22-3-550. This section provides that magistrates shall have jurisdiction "of all offenses which may be subject to the penalties of a fine or forfeiture not exceeding five hundred dollars, or imprisonment not exceeding thirty days, or both." In addition to the criminal penalties, this section allows a magistrate to order restitution in an amount not to exceed five thousand ($5,000) dollars. "In determining the amount of restitution, the judge shall determine and itemize the actual amount of damage or loss in the order. In addition, the judge may set an appropriate payment schedule." Section 22-3-550 (A). Subsection (A) also provides that "a magistrate may hold a party in contempt for failure to pay the restitution ordered if the judge finds the party has the ability to pay."

Subsection (B) prohibits a magistrate from sentencing any person to consecutive terms of imprisonment totaling more than ninety days (except for convictions resulting from violations of Chapter 11 of Title 34, pertaining to fraudulent checks, or violations of §16-13-110(B)(1), relating to shoplifting). "Further, a magistrate must specify an amount of restitution in damages at the time of sentencing as an alternative to any imprisonment of

more than ninety days which is lawfully imposed." Section 22-3-1000 provides that "[a] magistrate's order of restitution may be appealed within thirty days. The order of restitution may be appealed separately from an appeal, if any, relating to the conviction." If there is no limit to the punishment of an offense in a particular criminal statute or in the relevant general penalty statute, then a magistrate does not have jurisdiction over the matter.

The general jurisdictional statute for municipal courts is §14-25-65. This section provides that municipal judges shall also have jurisdiction of all offenses which may be subject to the penalties of a fine or forfeiture not exceeding five hundred dollars or imprisonment not exceeding 30 days, or both. "In addition, a municipal judge may order restitution in an amount not to exceed five thousand ($5,000) dollars. In determining the amount of restitution, the judge shall determine and itemize the actual amount of damage or loss in the order. In addition, the judge may set an appropriate payment schedule." This section further provides, "a municipal judge may hold a party in contempt for failure to pay the restitution ordered if the judge finds the party has the ability to pay." An order of restitution issued by a municipal judge may be appealed within thirty days. "The order of restitution may be appealed separately from an appeal, if any, to the conviction." Section 22-3-1000.

Under section 14-25-45 each municipal court has jurisdiction to try all cases arising under the ordinances of the municipality in which it is located.

c. Transfer Cases

Section 22-3-545 provides for the transfer of certain criminal cases from general sessions court.

". . . a criminal case, the penalty for which the crime in the case does not exceed five thousand five hundred dollars ($5,500.00) or one year imprisonment, or both, may be transferred from general sessions court if the provisions of this section are followed." Section 22-3-545(A).

The statute requires consent of both the solicitor and the defendant prior to transferring jurisdiction of a case from general sessions court to magistrates' court. See Section 22-3-545(B)(1).

Under subsection (B)(3), any case which is transferred from general sessions court to a magistrate's court which is not "disposed of in one hundred eighty days from the date of transfer automatically reverts to the docket of the general sessions court."

Section 22-3-545(C) provides that: "All cases transferred to the magistrate's or municipal court must be prosecuted by the solicitor's office. The Chief judge for administrative purposes for the court of general sessions shall retain administrative supervision of cases transferred pursuant to this section. The chief magistrate of the county or the chief municipal judge of the municipality upon petition of the solicitor, and approval of the chief judge for administrative purposes for the court of general sessions, shall set the terms of court and order the magistrates and municipal judges to hold terms of court on specific times and dates for the disposition of these cases." In cases transferred from general sessions court that the state may only be represented by a solicitor or an assistant solicitor even during plea negotiations and guilty plea proceedings. In the Matter of Lexington County Transfer Court, 334 S.C. 47, 512 S.E.2d 791 (S.C. 1999). Refer also to Memorandum of March 11, 1999, regarding Transfer Court. Magistrates and municipal

judges whose counties or municipalities utilize transfer court should contact the Chief Administrative Criminal Court Judge for coordination purposes.

Under subsection (D), the solicitor's office must make the provision for an adequate record. Subsection (E) provides that "all fines and assessments imposed by a magistrate. . . presiding pursuant to this section must be distributed as if the fine and assessment were imposed by a circuit court pursuant to Sections 14-1-205 and 14-1-206. This section must not result in increased compensation to a magistrate presiding over a trial or hearing pursuant to this section or in other additional or increased costs to the county."

The Supreme Court ruled in State v. Rushton, 322 S.C. 188, 470 S.E.2d 847 (S. C. 1993), "[s]ection 22-3-545 makes no provision for direct appeals to this court. Accordingly, S. C. Code Ann. Section 18-3-10, which states that anyone convicted before a magistrate 'of any offense whatever' may appeal to the court of common pleas, would apply, and cases transferred pursuant to Section 22-3-545 must be appealed to the court of common pleas."

d. Exclusive Versus Concurrent Jurisdiction

The Code provides that the magistrate's jurisdiction shall be "exclusive" in some areas. That is, in these areas, only the magistrate (and, by implication the municipal judge) has jurisdiction. State v. Brown, 201 S.C. 417, 23 S.E.2d 381 (1942). In other cases, the magistrate and municipal judge will have "concurrent" jurisdiction -- he or she shares jurisdiction over these cases with the circuit court or municipal court.

Section 22-3-540 provides that magistrates (and by implication, municipal judges) have exclusive jurisdiction over all criminal cases in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days. The section also creates exceptions to this exclusive magisterial jurisdiction.

When a person is charged with having committed an offense within the jurisdiction of a magistrate or municipal judge and having committed an offense within the jurisdiction of the court of general sessions, the magistrate or municipal judge and court of general sessions have concurrent jurisdiction over the lesser charge. The court of general sessions can hear both the greater and the lesser offenses together, or it can hear only the greater and send the lesser offense to the magistrate or municipal judge.

When an offense within the jurisdiction of the court of general sessions is reduced to a lesser included offense within the jurisdiction of the magistrate or municipal court, such as with a negotiated guilty plea, the court of general sessions may dispose of the case itself or send the case to the magistrate or municipal judge. State v. McClenton, 59 S.C. 226, 37 S.E. 819 (1901).

Apart from the exception discussed above, §22-3-540 provides for the exclusive jurisdiction of the magistrate (and, by implication, municipal) courts over criminal cases in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days.

Magistrates and municipal judges have concurrent jurisdiction over state criminal offenses which occur within a municipality. Jurisdiction vests in the court which the matter is properly brought without regard to the law enforcement agency which seeks a warrant.

The court in which the action is initiated should perform all necessary functions regarding the case (e.g. holding preliminary examinations or conducting trial). There should be no transferal of cases between magistrate court and municipal court. A transfer of a case should occur only when a municipal court is presented with a valid request for a change of venue.

The only exception to this rule that all judicial functions be performed by the court in which the action is initiated, is the setting of bail. In those unusual instances in which a judge of the initiating court is unavailable, and unreasonable delay in presenting defendants to a judicial officer will occur, it would be proper for a judge of the non-initiating court to set bail. This should only be done upon request of the initiating court, and with careful coordination between the two courts. (Order of Chief Justice J. Woodrow, Lewis, October 31, 1979).

2. Venue

a. Magistrate

Venue differs from jurisdiction in that jurisdiction refers to the court's power to hear and determine a case, whereas venue designates the place where a case should be heard. For venue to be proper in a criminal case, the action must be brought before the magistrate with territorial jurisdiction over the area where the offense was committed.

The change of venue statute, §22-3-920, provides the means by which the prosecutor or the accused in a criminal case, believing for a substantial reason that he would be unable to secure a fair trial from the magistrate before whom the matter is to be heard, may have his case moved to the nearest magistrate not disqualified.

The party seeking the change of venue must file an affidavit with the magistrate before whom the case was to be heard stating the applicant's belief that he cannot get a fair trial before that magistrate and setting forth sufficient reasons for such a belief. To satisfy this requirement, the reasons must be set forth with definiteness and certainty - a mere opinion is not sufficient. If the affidavit contains sufficient fact to justify the belief that a fair trial cannot be had, a change of venue is mandatory. Brown and Parker v. Kalb, 92 S.C. 309, 75 S.E. 529 (1912). The papers should then be turned over to the nearest magistrate who is not disqualified from hearing the case, so that he may proceed as if the case had been originally filed with him. Section 22-3-920 points out specifically that "one such transfer only shall be allowed each party in any case."

Changes of venue may be sought for a variety of reasons, from emotional factors preventing the drawing of an impartial jury to the personal knowledge or involvement of the magistrate before whom the action was brought; but in every case, the change should only be granted where reasons sufficient to justify a belief that a fair trial is not possible are alleged in the affidavit.

In addition, it should be noted that the Code of Judicial Conduct enumerates a number of instances in which the magistrate must disqualify himself/herself even if no motion for a change of venue has been made. (See GENERAL, Provisions applicable to both civil and criminal cases, change of venue and disqualification).

b. Municipal Judge

If a municipal judge must disqualify himself/herself, either under the change of venue statute (which may be applicable to municipal courts by §14-25-45) or under the Code of Judicial Conduct (which is certainly applicable to municipal judges), an interim judge may be appointed in place of the disqualified judge. (See §14-25-25 for specific mechanics of this appointment). If the actual place of trial must be changed because of prejudicial pre-trial publicity, for example, there are no statutory provisions for change of venue of this sort. Since it would be rare that the place of trial would have to be changed for a municipal court trial, the problem would best be approached with the cooperation of the parties.

C.
Warrants

1. Arrest Warrants

a. Generally

"Arrest" may be generally defined as a deprivation of personal liberty resulting from a restriction on an individual's right to movement, against his will and by force, threat, or assertion of authority.

Recognizing the seriousness of an interference with an individual's right of liberty, the U.S. Constitution and the S.C. Constitution have placed restrictions on the power of arrest.

> "No person shall be . . . deprived of life, liberty, or property without due process of law . . ." (U. S. Const., Fifth Amendment; see S. C. Const. Art. I, Section 3, for similar language).

and

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U. S. Const., Fourth Amendment; see S. C. Const., Art. I, Section 10 for similar language).

General statutory provisions relating to arrest warrants may be found in S.C. Code Ann. §§17-13-10 through 17-13-160. Reference should also be made to section 22-3-710 which provides: "All proceedings before magistrates in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon, and only which, shall a warrant of arrest issue." This section is made applicable to municipal judges by section 14-25-45 which states: "Each municipal court shall have jurisdiction to try all cases arising under the ordinances of the municipality for which established. The court shall also have all such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates. . . ." Town of Honea Path v. Wright, 194 S.C. 461, 9 S.E.2d 924 (1940); State v. Fennel, 263 S.C. 216, 209 S.E2d 433 (1974).

b. Arrest Without Warrant

From the language of the Fourth Amendment, it is clear that there is a constitutional preference for arrests made with rather than without warrants. However, certain exceptions to the general rule requiring a warrant are still recognized.

> Felony Arrests: An officer may arrest without a warrant if he has probable cause to believe that the person has committed a crime classified as a felony. (§17-13-10). Nevertheless, in order to protect the rights of the defendant and the interest of the arresting officer, a warrant should be obtained prior to arrest unless it appears the alleged felon may escape or further violate the law.

Misdemeanor Arrests: An officer may arrest without a warrant a person who has allegedly committed a crime classified as a misdemeanor **only if the crime was committed in the officer's view. (§ 17-13-30).** Off-duty police officer may not arrest as private citizen for misdemeanor committed outside his jurisdictional limits. See State v. McAteer, 340 S.C. 644, 532 S.E. 2d 65 (S.C. 2000).

Uniform Traffic Tickets: If an offense is committed in the presence of a law enforcement officer and the punishment is within the jurisdiction of magistrate's or municipal court, the officer may use a Uniform Traffic Ticket to arrest the person (§56-7-15). Subsection (B) of § 56-7-15 requires that an officer who uses a uniform traffic ticket to make an arrest in a criminal domestic violence matter (for a violation of Chapter 25 of Title 16) must complete and file an incident report immediately after the issuance of the ticket.

If an arrest has been made without a warrant, the arresting officer should take the person to a magistrate or municipal judge without unreasonable delay so that the judge may investigate the circumstances of the arrest and if proper, issue an arrest warrant. The issuance of an arrest warrant after arrest serves informational and administrative purposes. It protects the police officer from prosecution under §17-13-50 which provides that it is a criminal offense for an arresting officer not to inform the arrested person of the grounds of the arrest. It constitutes the charging paper in a magistrate or municipal court and informs the defendant of the charges against him. Finally in cases beyond the trial jurisdiction of the magistrate or municipal judge, it provides the necessary information to the solicitor from which the indictment may be drawn.

c. Arrest With a Warrant

(1) The Complaint

A person, whether police officer or private citizen, may appear before a magistrate or municipal judge and "swear out a warrant" seeking the arrest of another person. This complaint must be in writing and under oath. The magistrate or municipal judge should remind the complaining party the penalty for perjury attaches to all facts alleged in the affidavit and then administer an oath. For example:

"Do you swear or affirm that the information contained in this complaint is true, so help you God?"

The affidavit should then be completed by either the complaining party or by the magistrate or municipal judge from the information given to him by the complaining party. The affidavit itself must be signed by the complaining party and the magistrate or municipal judge. Note that the affidavit is part of the arrest warrant and that §17-13-160 requires that all arrest warrants must be completed on forms prescribed and approved by the State Attorney General. All arrest warrants issued by magistrates and municipal judges must be on numbered forms distributed by S.C. Court Administration. They are generally disclosable to the public upon service of the warrant, because of requirements of the state Freedom of Information Act. (See 8-1-89 Op. Atty. Gen).

(2) Probable Cause Requirement

Before the magistrate or municipal judge may issue the arrest warrant for execution, he must determine whether or not there is probable cause to believe that the named defendant committed the alleged offense. It is at this stage that the magistrate or municipal judge must not only insure that the execution of the law is in proper form, but he must also exercise his independent judgment. The arrest warrant process should not be treated as a bureaucratic process in which the magistrate or municipal judge becomes merely a rubber stamp for the police. The magistrate or municipal judge should not allow himself to become an agent of the police. The primary purpose of the arrest warrant is to provide for an independent judicial officer. It is the judge, not the police officer or citizen, who decides whether the prosecutorial power of the state should be brought to bear against a person.

Both the Fourth Amendment of the U.S. Constitution and Article I, Section 10 of the S.C. Constitution protects every person from "unreasonable seizures." An arrest must be based on probable cause, otherwise it is an "unreasonable seizure." "Probable cause" may be defined as a substantial and objective belief that the person to be arrested committed the alleged offense. Probable cause does not mean an absolute certainty, but it is more than a mere suspicion.

Therefore, the magistrate or municipal judge must find within the complainant's affidavit enough information that will justify a reasonable belief that (1) a crime has been committed and (2) the person to be arrested committed the offense. The information in the affidavit must be such that the magistrate can make the determination of probable cause. That is, the affidavit must contain facts, not conclusions. For example, if the complainant merely says, "I swear under oath that Brian Smith stole an automobile," it is conclusory and insufficient.

In many instances where the affiant is a police officer, the complaint may rely on facts provided by an informant. Generally the magistrate or municipal judge should encourage the informant to appear and swear to the alleged facts under oath. If this is not feasible, the magistrate or municipal judge may accept the hearsay information if the complainant can show in the affidavit that the informant is reliable. Here again, the magistrate or municipal judge may not rely on a conclusory statement e.g., "I received information from an informant who is reliable." The complainant must provide the magistrate with facts upon which the magistrate may decide if the informant is reliable or not. (See Search Warrants for further discussion on hearsay affidavits).

Finally, probable cause must exist at the time the warrant is issued, i.e. ultimate proof of guilt will not cure the lack of probable cause at the time of issuance. See Prosser v. Parsons, 245 S.C. 493, 141 S.E.2d 342 (1965). Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officers disposal. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), cert. Denied, 520 U.S. 1123 (1997).

d. Drafting the Warrant

(1) Generally

If the magistrate or municipal judge determines that there is probable cause to believe the named defendant committed the alleged offense, then he may issue the warrant for execution.

In filling out the arrest warrant, the magistrate or municipal judge need not use precise legal language in describing the alleged offense. However, the description of the offense must be stated clearly so that the defendant will be informed of the charge(s) against him. Every element of the offense should be cited.

To avoid confusion, the magistrate or municipal judge should issue separate warrants for each defendant and for each offense. Also, the arrested person should be furnished a copy of the warrant and affidavit. (§22-5-210).

(2) Legal Principles

(a) Duplicity

"Duplicity" in a warrant is the technical fault of uniting two or more offenses in the same count, or alleging that the accused has committed a crime in two or more inconsistent ways. The accused may make a motion before the magistrate to quash the warrant before entering his plea. Drunk driving cases in which the warrant follows the words of the statute would be a classic example of duplicity. To allege that the accused was "under the influence of intoxicating liquors, narcotic drugs, barbiturates," does not inform the accused as to which impairing substance the State is really intending to base its charge. Where the prosecution has evidence that the accused was under the influence of both liquor and another impairing agent, the charge must reflect this. It would be best to charge the use of each inhibiting agent in a separate count. W. Ledbetter on Magistrates (1976).

(b) Traffic Offenses

"Some offenses are without lesser included degrees, such as are found in certain common law crimes like assault and battery where the offenses may range from bodily violence with intent to kill to menacing gestures. On the other hand, traffic offenses do not have degrees of severity. For example, the magistrate or municipal judge begins trial with the accused charged on the warrant with drunk driving. Should the State introduce conclusive evidence that the accused was speeding, the drunk driving charge would not support it. Speeding is not a lesser included offense. To convict the accused of speeding would amount to a

substitution of charges which is prohibited by law. 1966-67 Op. Atty. Gen. No. 2327, p. 151." Ledbetter on Magistrates, Id.

(c) Description of the Person

The arrest warrant must be in a form "particularly describing . . . the person . . . to be seized." (U. S. Const., Fourth Amendment; S. C. Const., Art. I, Section 10). Therefore, positive identification of the accused is necessary in the warrant. "John Doe Warrants" are not legally sufficient. However, the name of the accused is not required if he may be particularly described in such a way that he may be positively identified; leaving to the arresting officer no discretion to arrest more than one person. For example a warrant for the arrest of "a short man named 'Shorty'" would be too vague and therefore legally unacceptable.

The person accused must be identified to a moral certainty as the perpetrator of the criminal act. For example, a law enforcement officer observes an unidentified motorist driving in a reckless manner and gives pursuit. The motorist evades the officer but not until the officer has jotted down the car's license number. The law enforcement officer now comes to the magistrate or municipal judge seeking an arrest warrant for the owner of the car. Should it be issued? Has the driver's identification been established to a moral certainty? The magistrate has been made aware that a certain car was driven in a reckless manner, but what has been alleged which factually links the owner to the observed violation? Was the owner seen by a credible witness driving his car in the vicinity a short time before the officer gave chase? In short, other information is needed. The judge asked to issue the arrest warrant needs ownership plus some other relevant information. 1965-66 Op. Atty. Gen. No. 1969-A, p.360. Ledbetter on Magistrates, Id.

(d) Service of Arrest Warrant

Arrest warrants should be served within a reasonable time. Nevertheless, there is no statute of limitations on an arrest warrant. The Attorney General issued an opinion on August 5, 1996, which confirmed earlier opinions regarding the timeliness of an arrest warrant. The opinion stated:

> [t]his office in a previous opinion . . . dated October 26, 1978, stated in part that ". . .once an arrest warrant is issued, such warrant does not 'grow stale' by virtue of an inability to immediately execute it." Therefore, all reasonable attempts should be made to serve any arrest warrant previously issued. However, of course, if it appears that upon the face of the warrant that

service is no longer justified or if any additional facts are brought to your attention which would indicate that service is no longer proper, service should not be made. This is a determination that would have to be made as to each individual arrest warrant."

(e) Countersigning Warrant Issued by Magistrate from other County

Magistrates are at times requested to countersign a warrant issued by a magistrate from another county. When this situation arises, section 22-5-190 should be consulted. This section provides in subsection (A) "[a] magistrate may endorse a warrant issued by a magistrate of another county when the person charged with a crime in the warrant resides in or is in the county of the endorsing magistrate. When a warrant is presented to a magistrate for endorsement, as provided in this section, the magistrate shall authorize the person presenting it or any special constable to execute it within his county." Endorsement is discretionary. ". . . [w]hether or not such warrants shall be endorsed is entirely within the discretion of the magistrate, and he may not be required to do so." 1966-67 Ops. Att'y Gen., No. 2339, p.170.

The proper procedure to be used when a warrant is sent from one county to another for countersigning is as follows:

1. The warrant is sent to the magistrate having jurisdiction over the area in which the person may be found;

2. The warrant may be countersigned by the magistrate; See Atty. Gen. Op. cited above.

3. The warrant is then sent to the sheriff of the county of the countersigning magistrate for service on the person named in the warrant;

4. The warrant is served on the person;

5. The person named in the warrant is brought before the magistrate who countersigned the warrant. The magistrate should then contact the issuing magistrate to determine what action he or she wants done on the warrant. Depending on what action the issuing magistrates prefers, the countersigning magistrate may do either of the following:

(a) The magistrate may hold a bond hearing and release the person upon

the condition he or she appear before the magistrate who originally issued the warrant to answer the charges in the warrant; or

(b) The person arrested shall be turned over to law enforcement officers of the county from which the warrant was originally issued who are empowered to return the person to the county involved.

(c) The countersigning magistrate has no jurisdiction to accept a plea on the offense or collect a fine/restitution.

The matter of countersigning a faxed copy or a certified copy of an arrest warrant is left to the discretion of the individual judge. An opinion of the Attorney General in 1991 addressed this matter. "There appears to be no authority which would absolutely prohibit countersigning of faxed copy of arrest warrant; such would remain matter for individual magisterial discretion. Although one disadvantage to endorsement of certified or faxed copy is that original warrant remains in circulation, giving potential for erroneous utilization at later time, in absence of any absolute prohibition against use of copies, it remains matter for individual discretion." 1991 Op Atty Gen, No 91-2, p-19.

(f) The Warrant at Trial

In a magistrate or municipal court, the arrest warrant constitutes the charging paper or trial document. The warrant is the formal document which informs the defendant of the charges. Honea Path v. Wright, 194 S.C. 461, 9 S.E.2d 924 (1940). While the warrant may not be amended after the trial has begun, it may be amended at any time prior to trial. (§22-3-720). However, if the warrant is amended prior to trial, the defendant must be given enough time in which to prepare a new defense, i.e. the magistrate or municipal judge must continue the case if the defendant is surprised by the amendment.

At trial the magistrate or municipal judge must find that the warrant charges an offense that is within his criminal trial jurisdiction, i.e. offenses punishable by imprisonment of not more than 30 days or by fine not exceeding $500, or both. In addition, at trial or preliminary examination, the magistrate or municipal judge must find that the violation was committed within his territorial jurisdiction.

2. Bench Warrants

A bench warrant is a form of process issued "from the bench" for the attachment or arrest of a person. Section 17-13-160 requires that all arrest and search warrants be in a form prescribed by the Attorney General. It is the opinion of the Attorney General that bench warrants ". . . not being arrest warrants per se, are not required to be in such form." (1978-79 Op. Atty. Gen. No. 78-179, October 31, 1978).

A bench warrant, regardless of its form, however, may not be used to initiate a criminal action. It is a form of process to be used to bring a defendant back before a particular court on a particular charge for a specific purpose after the court has acquired jurisdiction over the defendant on that particular charge by virtue of a previously served proper charging paper.

Common examples of instances where bench warrants might be issued are: 1) where the defendant, under recognizance, fails to appear; 2) where the defendant, under sentence, fails to properly pay a fine or otherwise comply with the sentence; 3) where the defendant, tried in his/her absence, must now be brought before the court to comply with the sentence and, 4) where a witness, having failed to respond to a subpoena, must now be brought before the court.

It should be noted that §38-53-70 provides that "[i]f a defendant fails to appear at a court proceeding to which he has been summoned, the court must issue a bench warrant for the defendant." Thus, while a bench warrant might be issued to bring the individual back into court to dispose of the original charge, it would be necessary to execute and issue a regular arrest warrant before a bench warrant could be issued for the defendant.

Bench warrants are generally disclosable to the public upon service of the warrant, unless issued in open court, when they should be disclosed upon issuance. (See 8-1-89 Op. Atty. Gen.).

3. Fugitive Warrants

The right of one state to demand of another state the return of a fugitive from its justice is controlled by Article IV, Section 2, Clause 2 of the U.S. Constitution and effectuating statutes. The Constitution provides:

> A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

In order for a state to invoke its constitutional right of extradition, all of the criteria in this provision must be present. The person sought must be formally charged with a crime in the demanding state. It is immaterial that the crime with which he is charged is not an offense in the state from which extradition is sought. (35 C.J.S. Extradition, §7). Also, he must have fled from the demanding state and be a fugitive from justice.

> To constitute one a fugitive from justice from a given state, it is essential to show that at the time of the commission of the alleged crime in the demanding state he was bodily present, or incurred guilt therein and that he left it and is within the jurisdiction of the state from which his return is demanded, and that he refuses to return voluntarily to the former state. King v. Noe, 244 S.C. 344, 348, 137 S.E.2d 102 (1964).

In addition, the fugitive must be found in the state from which his extradition is sought.

To facilitate the apprehension of fugitives from other states, South Carolina has provided for the issuance of fugitive arrest warrants pursuant to §17-9-10.

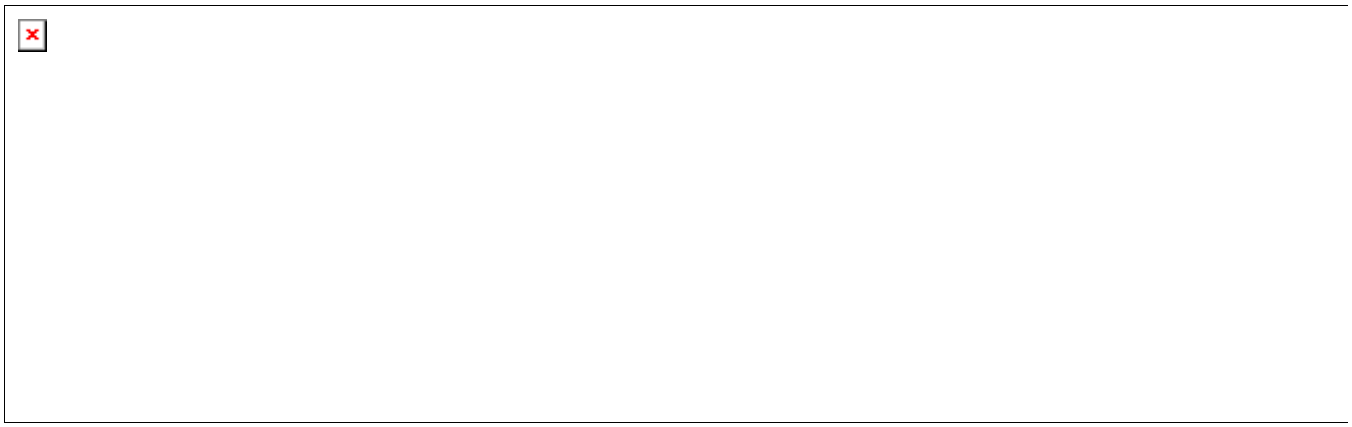
It provides:

> Any officer in the state authorized by law to issue warrants for the arrest of any person charged with crime shall, on satisfactory information laid before him under the oath of any credible person that any fugitive in the state has committed, out of the state and within any other state, any offense which by the law of the state in which the offense was committed is punishable either capitally or by imprisonment for one year or upwards in any state prison, issue a warrant for such fugitives and commit him to jail within the state . .

The warrant must be "based upon an affidavit sworn to, setting forth the facts as of the personal knowledge of the affiant." (1940-41 Op. Atty. Gen. 171). A warrant issued upon an affidavit made "upon information and belief" cannot be honored (Ex Parte Murray and Harris, 112 S.C. 342, 99 S.E. 798) unless the source of the information is revealed "so that if the things recited were not true, the person making the affidavit would be guilty of perjury." (1940-41 Op. Atty. Gen. 171). The warrant "may also be based upon certified copy of Indictment, upon which a 'True Bill' has been returned by a grand jury." (1940-41 Op. Atty. Gen. 170).

Section 17-9-10 requires that the alleged crime be punishable by imprisonment for at least one year in the state in which it was committed. (1967-68 Op. Atty. Gen. No. 2524, p.214). If the offense is not punishable by imprisonment for one year, the warrant should not be issued and it is the duty of the issuing judge to ascertain the punishment. "It is suggested that you might be well advised to require a certified copy of the law of the state demanding the fugitive in every case so that you can make a determination as to whether or not a fugitive warrant can be issued." (1967-68 Op. Atty. Gen., Id.). Section 17-9-15 provides that upon demand of the executive authority of another state, the Governor of South Carolina may extradite a person in this state who is charged in another state with committing an act in this state or a third state which intentionally resulted in committing an offense in the requesting state. This section closes a loophole in South Carolina's Extradition Laws. Before this section was added, there was no authority for the state to extradite a person who solicited another person to commit a crime in another state since the South Carolina resident was not present in the other state at the time of the crime.

Any person arrested on a fugitive warrant has the right to be released "on bail as in cases of similar character of offenses against the laws of this state." (§17-9-10). When setting bail, the judge must compare the crime to a similar crime in South Carolina, and make the same considerations he would have made if that offense has been committed in this state. (See BAIL PROCEEDINGS). Any fugitive granted bail should be ordered to appear at the place and time specified in a notice from either the Governor's or Attorney General's office. Usually, the extradition hearing will be conducted in the Attorney General's Columbia office. Notice of the hearing will be by mail. Please see example of the applicable portion of the bond form as it should appear when completed as shown below.



If the fugitive is not entitled to bail, he may be committed to jail for twenty days unless the state seeking his return makes a demand before the expiration of the twenty days. If no demand is made within the twenty days, "the fugitive shall be liberated, unless sufficient cause be shown to the contrary." Section 17-9-10. Liberation does not mean that he is released absolutely and that the demanding state has abandoned its extradition efforts. It merely means that the fugitive is released from jail so as to prevent unreasonably long confinements pending receipt of the demand. Bolton v. Timmerman, 233 S.C. 429, 105 S.E.2d 518 (1958).

When a warrant issued pursuant to §17-9-10 is returned to the issuing judge upon the fugitive's arrest, the magistrate or municipal judge must "keep a record of the whole proceedings before him and immediately transmit a copy thereof to the Governor of this State." (§17-9-20). This requires that the magistrate or municipal judge file the original warrant and all other papers pertaining to the case in his office. The warrant and papers are not transmitted to the clerk of court because these cases cannot be disposed of in general sessions court and are not within that court's jurisdiction. Extradition cases are handled through the Governor's Office, with the assistance of the Office of the Attorney General, and it is the Governor who declares if the person will be extradited. Send copy of fugitive warrant and all related paperwork to: Governor's Office, Office of Executive Policy & Programs, Attention: Leah Moody, 1205 Pendleton Street, Room 308, Columbia, SC 29201. Telephone number: (803) 734-9405.

4. Search Warrants

a. Generally

The laws of search and seizure are aimed at protecting a basic American right: the right to be left alone. The power of the state to interfere with a person's privacy was restricted by the framers of the Constitution. The most specific restriction is found in the Fourth Amendment of the U.S. Constitution which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." (See Article I, Section 10, S. C. Constitution for similar language).

Time and time again, the U.S. Supreme Court has stated that a warrantless search is per se "unreasonable." While there are certain narrowly defined exceptions to the search warrant requirement (infra), it is the general rule that a search warrant must

be justifiably issued by a "neutral and detached" judicial officer. The purpose of the warrant requirement was enunciated in McDonald v. United States, 335 U.S. 451, at 455-456, 69 S.Ct. 191, 93 L.Ed. 153 (1948).

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was not done to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."

The initial question to be answered in a Fourth Amendment problem is:

"Is the Fourth Amendment applicable?" Generally, the Fourth Amendment is intended to protect a person's expectation of privacy from government intrusion. Therefore, the Fourth Amendment does not bar a search and seizure, even an arbitrary one, effected by private party on his own initiative. It does, however, bar evidence resulting from such intrusions if the private party acted as an instrument or agent of the government. State v. Cohen, 305 S.C. 432, 409 S.E.2d 383 (1991). In addition, it has been found not to apply to open fields (Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 [1984]), or to abandoned property or abandoned places (Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 688 [1960]). The United States Supreme Court gave explicit approval to warrantless aerial surveillance of areas exposed to observation from above: 1) Fixed Wing Aircraft (Calif. v. Ciraolo, 476 U.S. 207 (1986), 2) Helicopters Fla. v. Riley, 499 U.S. 445 (1989).

The right to be secure against government intrusion is thought to be so essential that the U.S. Supreme Court has held that if government agents intrude upon a person or his property in an unreasonable manner, it is better to let that person go without being convicted (unless he can or could have been convicted with evidence other than that evidence which was unreasonably obtained) than it is to condone the intrusion by permitting the use of the evidence so obtained. This is known as the exclusionary rule. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); State v. Hill, 245 S.C. 76, 138 S.E.2d 829 (1964); State v. Baker, 251 S.C. 108, 160 S.E.2d 556 (1968).
There are exceptions to the exclusionary rule, however, among them:

> (1) "Good Faith" exception. The Fourth Amendment exclusionary rule does not apply where evidence is seized in reasonable, good-faith reliance on a search warrant issued by a detached and neutral judge, and based on an affidavit which provides the magistrate with a substantial basis for determining the existence of probable cause. United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Suppression of the evidence remains an appropriate remedy if:
>
> > (a) the judge issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for the affiant's reckless disregard of the truth; or,

(b) the judge wholly abandoned his judicial role so that no well-trained officer would rely on the warrant; or,

(c) the affidavit was so lacking in probable cause that belief in its truth was entirely unreasonable; or,

(d) the warrant was so deficient on its face (failing to particularize the place to be searched or things to be seized) that the police officers executing the warrant could not reasonably presume it to be valid. United States v. Leon, Id.

(2) "Independent Source" exception. This exception to the exclusionary rule allows the prosecution to use evidence that has been obtained by lawful means through an independent source, even though the same evidence was also discovered through unlawful means. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920), cited in Nix v. Williams, 104 S.Ct. 2501 (1984) at p.2508.

(3) "Inevitable or Ultimate Discovery" exception. If the prosecution can establish by a preponderance of the evidence that the information obtained by illegal means ultimately or inevitably would have been discovered by lawful means, then the evidence may be admitted. Nix v. Williams, Id.

b. Search With a Warrant

(1) Generally

S.C. Code Ann. §17-13-160 requires that all search warrants be on a form prescribed by the Attorney General's office. As in the case of arrest warrants (supra), the affidavit is completed from information provided by the affiant. From this information, the magistrate or municipal judge must determine if there is probable cause to believe that particularly described seizable evidence is presently located at the particularly described location. A search warrant may issue only upon a finding of probable cause. State v. Bellamy, 336 S.C. 143, 519 S.E.2d 347 (1999). Search warrants may be issued “only upon affidavit sworn before the magistrate…establishing the grounds for the warrant.” § 17-13-140.

The initial step in the procedure is to place the affiant, usually a police officer, under oath. For example:

Do you swear or affirm that the information contained in this affidavit is true, so help you God?

The affiant should be reminded that the penalty for perjury will attach to all statements of fact found in the affidavit.

Upon an objective determination by the magistrate or municipal judge that there is probable cause, the warrant should be issued to any bonded law enforcement officer for execution. The warrant must be executed and an inventory of all seized items returned to the judge

within 10 days from the date of issuance. (§17-13-140). Every effort should be made to comply with the ten day return requirement. However, precedent exists that indicates the return requirement is ministerial and, absent a showing of prejudice, will not result in suppression of obtained evidence. (The failure to observe the 10 day requirement for the execution and return of a warrant, a ministerial requirement, does not necessarily void the warrant. State v. Wise, 272 S.C. 384, 252 S.E.2d 294 (1994). The warrant will be invalidated only if the defendant can show that he was prejudiced by the failure. *Id.* Where the defendant fails to argue he was prejudiced by the State's failure to comply with the return requirement, the warrant will not be voided and evidence cannot be excluded on that ground. State v. Weaver, Op. No. 26366 (S.C. Sup. Ct. filed July 30, 2007)).

When served, a copy of the warrant must be delivered to the person in charge of the premises by the officer and, if requested, a copy of the inventory must also be provided to the person. (§17-13-150).

Section §17-13-141 provides:

> (a) Every judiciary official authorized to issue search warrants in this State shall keep a record along with a copy of the returned search warrant and supporting affidavit and documents for a period of three years from the date of issuance of each warrant. The records shall be on a form prescribed by the Attorney General and reflect as to each warrant:
>
> (1) Date and exact time of issuance.
>
> (2) Name of person to whom warrant issued.
>
> (3) Name of person whose property is to be searched or, if unknown, description of person and address of property to be seized.
>
> (4) Reason for issuing warrant.
>
> (5) Description of article sought in search.
>
> (6) Date and time of return.
>
> (b) Any person who alters or fails to keep for the prescribed period of time the records, warrants and documents as provided for in subsection (a) shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine not to exceed $100 or by imprisonment not to exceed 30 days. (See Forms)
>
> The presumption of the Freedom of Information Act (FOIA) that disclosure of documents should be permitted does not apply to records of criminal investigations, of which search warrants are an integral part. The FOIA would legally permit

> a public official, who is custodian of the document or a copy of it, to refrain from disclosing search warrants, based upon his or her evaluation of the particular document or material. This decision is subject to judicial scrutiny by the circuit court. The custodian may disclose search warrants to the public if he or she deems it would not harm law enforcement or a criminal investigation. Law enforcement officials would be in the best position to assess any harm to a investigation. Op. Atty. Gen. dated August 1, 1989.

(2) Probable Cause Requirement

Many of the same points of law discussed under the Arrest Warrant section are applicable to search warrants. A search warrant may issue only upon a finding of probable cause. State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997). A search is not reasonable unless there was probable cause to believe that the search would produce evidence of a crime or contraband. Probable cause is defined as a state of facts which would lead a man of ordinary care and prudence to believe that the object sought is presently located at the designated place. The standard is the same whether the search is with or without a warrant, but the constitutional provision and court decisions make it clear that a warrant is preferred, unless there is good reason for not taking the time to obtain the warrant.

A mere hunch, suspicion, guess or unfounded opinion that evidence or contraband will be produced by the search is not probable cause. The person seeking the search warrant must reasonably believe that the evidence or contraband is there, and must be able to point to facts which would create in any prudent and careful man a similar belief. However, if the affidavit standing alone is insufficient to establish probable cause, it may be supplemented by sworn oral testimony. State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (1994). State v. Weston,329 S.C. 287 at 290, 494 S.E.2d 801 at 802 (1997). State v. Robinson, 335 S.C 620, 518 S.E. 2d 269 (Ct. App. 1999). State v. Rutledge, Op. No. 4230 (S.C. Ct. App. Filed April 9, 2007).

Probable cause as defined above must exist at the time of the search. Thus, a popular belief that seizable items were in a building sometime in the past does not constitute probable cause for a search unless there is a reasonable belief that the items are still there. Staleness of information establishing probable cause cannot be defined by arbitrary time limits. The question of staleness must be reviewed in light of all the circumstances. See State v. Baker, 251 S.C. 108, 160 S.E.2d 556 (1968). In other words, the observations upon which probable cause is based must have been made relatively recently in light of all the circumstances. In order for affidavit in support of search warrant to show probable cause, it must state facts so closely related to time of issuance of warrant as to justify finding of probable cause at such time; affidavit which fails altogether to state time of occurrence of facts alleged therein is insufficient. State v. Winborne, 273 S.C. 62, 254 S.E.2d 297 (1979).

The primary purpose of the search warrant is to provide for an

independent judicial officer to objectively determine whether a search and seizure is justifiable.

The task of a magistrate when determining whether to issue a search warrant is to make a practical, common sense decision as to whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular place. State v. Williams, 297 S.C. 404, 377 S.E.2d 308 (1989). The affidavit constitutes a permanent record of the facts upon which the magistrate bases his finding of probable cause, and thus all pertinent information should be contained on this form.

The magistrate or municipal judge, just as in the case of an arrest warrant, must insist that he be provided with the facts and not just the conclusions which the officer believes establishes probable cause. Regardless of the credibility of the officer, if the affidavit contains only conclusions, then the search warrant will be found to be invalid on its face and consequently all evidence seized on its authority may be excluded and the defendant may well go free regardless of his actual guilt.

Generally, personal knowledge and observations cannot be used as a basis for a search warrant when the facts were gained in violation of the Constitution (See Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. [1920]). For instance, an officer secretly enters the basement of a man reported to be a bootlegger, and while there he discovers several cases of moonshine. He cannot then obtain a warrant to seize the liquor on the grounds that he has seen it, because he knows of the liquor only through an unconstitutional intrusion. There are exceptions to the exclusionary rule, however, as noted previously.

In many situations, the officer seeking the search warrant will provide the magistrate or municipal judge with second-hand information, i.e., information provided by an informant. There is no prohibition against a magistrate or municipal judge using hearsay information in determining probable cause. However, it is generally recognized that anonymous informants are, for the most part, associated with the criminal sector of society. Consequently, they may not be the most trustworthy persons. Therefore, when dealing with a request for a search warrant involving the anonymous informant the magistrate or municipal judge must be very careful in reviewing the information and distinguishing between facts and conclusions. The purpose is to insure that the informant has provided you with facts, which if true, establish probable cause, rather than reciting to you conclusions which may be no more than "vicious rumors of the underworld."

An officer can rely on an informant's tip if the totality of the circumstances appears to verify the accuracy of the information. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The test which the judge must apply in determining whether probable cause exists to issue a warrant based on an informant's tip is whether the circumstances taken as a whole (the "totality of the circumstances"),

provide a "substantial basis" for a finding of probable cause. Massachusetts v. Upton, 104 S.Ct. 2085 (1984). The "totality of the circumstances" test, is based upon "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Massachusetts v. Upton, supra, citing Brinegar v. United States, a 1949 U.S. Supreme Court case.

In conclusion, the magistrate or municipal judge must insist that the affiant provide him or her with all available facts and not merely recite all the facts from which the judge draws his conclusions. Most importantly, the judge, not the police officer, must make the determination of whether or not the sanctity of the threshold and the citizen's right to privacy must yield to the power of the state. The magistrate or municipal judge serves a high function, that of the independent judicial officer, and not that of mere bureaucrat rubber stamping the actions of law enforcement.

(3) The Particularity Requirement

Both the affidavit and the search warrant must particularly describe the place to be searched and the objects to be seized. It is inadequate if the descriptions are so general that the executing officer has discretion to search more than one place or seize more than that specifically intended. For example, if the place to be searched is an apartment, the apartment number as well as the address should be specified. Or for example, if the item to be seized is a gun, it must be described so as to distinguish it from other firearms that may be found.

The purpose of the particularity requirement is to prevent the issuance of general warrants which could be used for general exploratory searches. A search warrant cannot be issued for "the search and seizure of evidence of a crime." A search warrant cannot authorize a fishing expedition.

The search itself must be limited in its scope and intensity. That is, the search must be limited to those items specified in the warrant. If the warrant is for the search and seizure of "one Brand Y 25 inch color TV, serial #2541," the police must search only in those places of the specified location where such an item could be hidden, i.e., they could not search in desk drawers for a 25 inch TV set.

c. Exceptions to the Search Warrant Requirement

While the general rule is that a search warrant is necessary, there are certain strictly defined exceptions to the warrant requirement. They are: (1) The Automobile Exception, (2) Search Incident to a Lawful Arrest, (3) Consent Searches, (4) The Plain View Doctrine, (5) "Stop and Frisk" and (6) In a few other exceptional cases, e.g., "hot pursuit," border searches, and road blocks in kidnapping cases.

(1) The Automobile Exception

The automobile exception to the Fourth Amendment warrant

requirement was first recognized in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 260, 69 L.Ed. 543 (1925). This exception allows law enforcement officers to conduct a search of an automobile based on probable cause alone due to the lessened expectation of privacy in motor vehicles traveling on the public highways. State v. Cox, 290 S.C. 489, 351 S.E.2d 570 (1986). Law enforcement agents' warrantless search, based on probable cause, of a fully mobile home located in a public parking lot, was proper under the "automobile exception" to the Fourth Amendment's warrant requirement. California v. Carney, 471 U.S. 386 (1985).

A recent case decided by the United States Supreme Court makes it clear that there is no separate exigency requirement for conducting a warrantless search of a vehicle based on probable cause. Maryland v. Dyson, 527 U.S. 465 (1999). In its ruling, the Court repeated that the automobile exception does not have a separate exigency requirement: "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment. . . permits police to search the vehicle without more." Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) (per curiam).

Nevertheless, where the police officer has knowledge of the automobile's location and there is no basis for believing it will be removed from that jurisdiction, it cannot be contended that it was impractical to obtain a search warrant prior to the search. The police may not deliberately create a situation in which fear of the automobile's removal is aroused so as to avoid the warrant requirement. When faced with a warrantless automobile search, the primary questions to be answered are:

> (1) Was there opportunity to obtain a search warrant before the automobile was likely to disappear?
>
> (2) Was there an opportunity and a basis on which to obtain a search warrant before the confrontation that led to the search of the automobile?

If the answer to either of these questions is "yes," or if the trial judge determines that the police officer did not have probable cause to believe the automobile contained evidence of a crime, then no evidence seized as a result of the search is admissible.

What if it is determined that a search of an automobile without a warrant is proper, under the Carroll, rule, and a search is made, but the contraband is not found in plain view (such as marijuana in clear, plastic bags, or uncased illegal weapons)? Suppose that there are closed containers located within the automobile which could contain the suspected contraband. Is search into the closed containers proper? The U. S. Supreme Court addressed this question in California v. Acevedo, 500 U.S.565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991). It held that containers within vehicles are subject to warrantless searches if police have probable cause to believe the container holds contraband. See State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1992).

There are, of course, limitations on the type of containers which might be searched, depending upon the type of contraband. No one would expect to find a stolen lawnmower in a briefcase, for example, so a search of a briefcase within an automobile in which a stolen lawnmower is probably located would not be proper. Similarly, a police officer should not search a suitcase looking for illegal aliens, and expect the fruits of his search into the suitcase to be admissible in evidence.

In addition, if there is probable cause to believe that contraband is located within a specific container, other containers within the automobile may not be searched. For example, if a police officer knew that counterfeit money was located in a leather briefcase, which had recently been delivered to the driver of the automobile after a "drop" at an airport, a search of a suitcase in the car would not be permissible.

The "Automobile Exception" to the search warrant requirement rule should not be confused with the "Search Incident to a Lawful Arrest Exception." Once a person has been lawfully arrested and taken under custody, the police may conduct a full search of the arrested person and the area within his immediate control, which may include portions of the automobile he is driving at the time of the arrest. For a discussion of the "Search Incident to a Lawful Arrest Exception" to the search warrant requirement rule, please read the following section.

(2) Search Incident to a Lawful Arrest

In Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the U.S. Supreme Court prescribed the permissible scope of a search after the individual has been lawfully arrested and taken into custody. Under such circumstance, the officer may conduct a full search of the person and the area within his immediate control. The object of such a search is to discover weapons that could be used against the officer and to discover evidence of a crime so as to prevent its concealment or destruction. The permissible area of search is the area from which the individual arrested might gain possession of a weapon or destructible evidence.

If the person arrested happens to be driving an automobile at the time of the arrest, the officer who makes the arrest may search the passenger compartment of the car. Closed containers within the arrested person's control may also be searched. This exception to the search warrant exists to protect the lives and safety of law enforcement officers, since the arrested person might reach for a weapon in that area within his control. It is important to note however, that the area which may be searched is limited to the space within the control of the arrested person. Therefore, an automobile trunk may not be searched under this exception to the requirement that a search warrant be obtained before a search is made. Neither may a locked glove compartment be searched under this exception. A search may be conducted incident to a lawful arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986). Furthermore, the United Supreme Court decided that in a situation where an officer issues a citation rather than

makes a custodial arrest, the officer does not have the legal authority to conduct a full search of the vehicle. There is no recognized exception to the Fourth Amendment for "search incident to citation." Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484 (1998).

(3) Consent Searches

In Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), the U.S. Supreme Court held that a warrantless search is legal where the police were voluntarily given consent to do so. The Court stated that the test to be followed to determine the voluntariness of the consent is the "totality of the circumstances" test. All the factors surrounding the consent and search should be examined. Among the factors to be considered are the defendant's conduct, police coerciveness, and the setting in which the consent was given. Usually, consent to search without a warrant must be given by the person against whom the search is directed. However, a third party may consent to the search under any of the following circumstances: (1) where there is no reasonable expectation of privacy between the defendant and the third party; (2) where the third party consents to a search of his own property or that which he jointly owns, uses, or possesses; or (3) if the police act reasonably pursuant to consent given by a third party with apparent authority to give consent. However, there are two related areas of Fourth Amendment protection where consent is not needed for a warrantless search: (A) Supervisory Searches - The warrantless search of an employee's desk or file cabinet by a supervisor is reasonable if made for noninvestigatory, work-related purposes or to investigate work-related misconduct. O'Connor v. Ortega, 480 U.S. 709 (1987); (B) School Searches - the U. S. Supreme Court approved a warrantless search of a public school student by school authorities, by balancing the school's need to maintain safety, order, and discipline against the student's right of privacy. New Jersey v. T.L.O., 469 U.S. 325 (1985). School administrators and officials may conduct reasonable searches on school property of lockers, desks, vehicles, and personal belongings such as purses, bookbags, wallets, and satchels with or without probable cause. School principals or their designees may conduct reasonable searches of the person and property of visitors on school premises. Notice must be conspicuously posted on school property, at all regular entrances and any other access point to the school grounds. Searches conducted under provisions of these statutes must be reasonable as set forth in New Jersey v. T.L.O. S.C. Code §59-63-1120 through §59-63-1160.

Despite these exceptions to the consent rules, it has been held that a hotel clerk cannot consent to a search of a guest's room, Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); a landlord cannot consent to a search of his tenant's property, State v. Loftin, 276 S.C. 526, 275 S.E.2d 575 (1981); and a child may not consent to a search of his parent's home, People v. Jennings, 142 Cal. App. 2d 160, 298 P.2d 56 (1956).

(4) The Plain View Doctrine

The plain view doctrine is another exception to the warrant requirement of the Fourth Amendment. Evidence which is discovered while in plain view is admissible. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The plain view doctrine is applicable where a police officer is not searching for evidence against the accused but inadvertently comes across an incriminating object. State v. Culbreath, 300 S.C. 232, 387 S.E.2d 255 (1990). The plain view doctrine may operate in conjunction with other exceptions to the Fourth Amendment warrant requirement. For instance, the police may seize inadvertently discovered evidence while they are in "hot pursuit" of a fleeing suspect, or where the evidence was found during a limited search incident to an arrest. The police may not use the plain view doctrine to bypass the warrant requirement when they have prior knowledge that the evidence is located in a certain place. To be valid, the discovery must be truly accidental. Also, the police may not seize an object which is not incriminating on its face simply because they are suspicious of its legality. There must be some reasonable basis for their beliefs before such an object may be seized. Viewing court decisions, it appears that probable cause is the standard to be used in this situation. If the officer has a reasonable basis for believing the object is illegal, then it may be seized under the plain view doctrine if the other two conditions are met.

A motorist has no reasonable expectation of privacy in the vehicle identification number (VIN) located on his car's dashboard, even if objects on the dashboard prevent the VIN from being observed from outside he car. Where a car has been lawfully stopped, a police officer may reach into the car to remove papers that prevented the officer from viewing the VIN. In doing so, the officer was positioned so as to make a lawful "plain view" seizure of a gun protruding from underneath the driver's seat. New York v. Class, 475 U.S. 106 (1986).

(5) The "Stop and Frisk" Exception

The "Stop and Frisk" exception to the Fourth Amendment warrant requirement is discussed in the U.S. Supreme Court decision of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). This exception is based on the police officer's need for self-protection. A police officer may stop and briefly detain a person for investigative purposes when the officer has a reasonable suspicion supported by articulable facts that the person stopped may be armed and dangerous. The officer must be able to point to specific reasonable inferences justifying the frisk. If these conditions are met, the officer may "pat down" the individual so as to discover and remove weapons. The pat down search is limited to the outer garments of the person unless the officer feels an object which might be a weapon, in which case he may reach into the garment and retrieve the object. The officer may not, under any circumstances, use this exception as a pretense for a general exploratory search of the individual. This exception is only to be used as a means of protecting the officer from possible harm.

(6) The Plain-Touch Doctrine

A case decided in 1998 by the South Carolina Court of Appeals, State v. Smith, 329 S.C. 550, 495 S.E.2d 798, (S.C. App. 1998), held that a police officer's warrantless seizure of a baggy containing crack cocaine from the defendant's jacket pocket, made during the initial pat-down search for weapons following a valid Terry stop for a traffic violation, was justified under the "plain-feel" doctrine. The officer, who had 11 years of law enforcement experience, observed a bulge in the defendant's jacket pocket and squeezed the outside of his jacket and determined immediately, without additional squeezing or manipulation, that the object was a baggy containing contraband. When the officer questioned the defendant about the object, the defendant responded that it was "his reefer."

The Court of Appeals upheld the trial judge's denial of Smith's Motion to Suppress the evidence found in the search of Smith. The trial judge found the weapons pat-down was proper under Terry. The trial judge also concluded that the officer "lawfully seized the drugs--a marijuana cigarette which contained crack cocaine rolled up in it and a bag containing 4.72 grams of crack cocaine-- in accordance with the 'plain touch' doctrine and Smith's admission that he possessed illegal drugs."

The court determined that the officer detected the drugs during the initial pat-down search for weapons and did not have to conduct a further search. Because of the officer's years of experience in law enforcement, he knew by the touch and feel that it was some kind of narcotic, and the defendant, Smith, also admitted to the officer that the object in his pocket was contraband.

(7) "Hot Pursuit" or Exigent Circumstances

The exigent circumstances doctrine is an exception to the Fourth Amendment's protection against searches conducted without prior approval by a judge or magistrate. The doctrine recognizes that warrantless entry by criminal law enforcement officials may be legal when there is a compelling need for official action and no time to secure a warrant. State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986) quoting Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978). Thus, where officers are in "hot pursuit" of a suspect and that suspect hides behind closed doors, the police are justified in entering the premises and making as extensive a warrantless search as is required to insure their safety and the safety of others involved. This exception would, of course, apply where the safety of a kidnap victim is at stake.

"Exigent circumstances" were found where officers entered a laundromat with the expectation of discovering illegal drug activity. A person placed a small plastic bag in his pocket and run to the rear door; however, the door was locked. The person appeared to remove something from his pocket and place it in his mouth. The officers seized him and searched his mouth. During the search, the suspect threw the plastic bag on the floor. The court found "exigent circumstances" make it probable that unless the search had been made, the evidence would have been destroyed. For "exigent circumstances" to exist the officers must have probable cause to believe that evidence was being disposed

of, and a clear indication that the evidence will be found. State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995).

d. Motions to Supress Evidence Obtained Through Search and Seizure

(1) Generally

The defendant may, at any time prior to or during trial, object to the introduction of evidence which he alleges resulted from an unconstitutional search and seizure. When a defendant moves to suppress evidence on constitutional grounds, the magistrate should hear the issue outside the presence of the jury if there is one. The jury should never know of the existence of the evidence if the magistrate determines that it should be suppressed. If there is no jury, and the magistrate or municipal judge suppresses the evidence, then he is obligated not to consider the evidence in determining the issue of the defendant's guilt. Jackson v. Denno, 378 U.S. 368, 84 S.Ct., 1774, 12 L.Ed.2d 908 (1964). The primary principle is that if evidence is unconstitutionally obtained, it may not be used against the defendant. This is the so-called exclusionary rule. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

(2) Standing

The defendant's first hurdle in an effort to suppress evidence is to establish his standing to object. One who seeks to have evidence suppressed on this basis must establish that his own Fourth Amendment rights were violated. United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980). These are personal rights which may not be asserted vicariously. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). The defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate a legitimate expectation of privacy in connection with the searched premises in order to have standing to challenge the search.
In Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed.2d 1247 (1968), it was recognized that the defendant may be faced with an unfair constitutional dilemma. That is, the defendant may have a valid objection to the search and seizure, but will be forced to admit his possessory interest in the evidence so as to have standing. The defendant should not be forced to incriminate himself so as object to an illegal search and seizure. Therefore, it was held in Simmons that the defendant's testimony at the suppression hearing may not be used against him at trial on the issue of guilt. Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L Ed.2d (1960), provided that an accused has automatic standing to object to the constitutionality of a search and move for suppression when charged with an offense in which the possession of the evidence to be introduced is an essential element of the crime. The U.S. Supreme Court in United State v. Salvucci, supra., overruled the automatic standing rule of Jones. Justice Rehnquist, writing for the majority, reasoned that an automatic standing rule would permit a defendant to assert a Fourth Amendment claim to which he is not entitled.

(3) Burden of Proof

The burden of proving that the evidence was or was not legally seized will rest on the prosecution or defendant depending upon whether or not there was a warrant. If there was no warrant, the prosecution must show by a preponderance of the evidence that the search and seizure falls within one of the recognized exceptions to the warrant requirement. If there was a warrant, the defendant must show by a preponderance of the evidence that the search and seizure were conducted under an invalid search warrant or that the valid warrant was improperly executed by the police officer.

D.
Victims' Rights

In recent years, the legislature has heard the pleas of victims and enacted laws to protect victims' rights. Under the new laws, "a victim is entitled to a free copy of the initial incident report and a document describing the victim's rights and eligibility for services and benefits. S. C. Code Ann. § 16-3-1520." State v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999). In § 16-3-1510(1) a victim is defined as "any individual who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a criminal offense, as defined in this section. 'Victim also includes any individual's spouse, parent, child or the lawful representative of a victim who is : (a) deceased; (b) a minor; (c) incompetent; or (d) physically or psychologically incapacitated.'"

Victims' rights is a matter with which all courts and law enforcement must be concerned. This section will focus on those rights for which the summary court judge is responsible. For a victim or prosecution witness to exercise his or her rights under the "Victim and Witness Service" article, the victim or witness must provide a summary court judge with his or her legal name, current mailing address, and current telephone number upon which the summary court must rely in discharging its duties under the law.

1. Written or Oral Victim Impact Statement

§ 16-3-1515(C) provides "[a] victim who wishes to be present for any plea, trial, or sentencing must notify the prosecuting agency or summary court judge of his desire to be present. This notification may be included in a written victim impact statement."
If the victim wishes to submit a written victim impact statement to the summary court judge, he or she must provide it within appropriate time limits set by the summary court judge. § 16-3-1515 (D). If the victim wishes to make an oral victim impact statement to the court at the time of sentencing, the victim must notify the summary court judge of this desire in advance of the sentencing. § 16-3-1515 (E).

2. Bond Hearings

§ 16-3-1525(H) pertains to cases in which a defendant has bond set by a summary court judge. § 16-3-1525(H) (2) and (3) apply to summary court judges. Under subsection (2), "the summary court judge, before proceeding with a bond hearing in a case involving a victim, must ask the representative of the facility having custody of the defendant to verify that a REASONABLE attempt was made to notify the victim sufficiently in advance to attend the proceeding. § 16-3-1525 (N) requires that notification may not be only be electronic or other automated communication or recording. After three such unsuccessful attempts, personal contact with the victim should be attempted. If notice was not given in a timely manner, the hearing must be delayed for a reasonable time to allow notice."

Subsection (3) requires the summary court judge to "impose bond conditions which are sufficient to protect a victim from harassment or intimidation by the defendant or persons acting on the defendant's behalf." For further discussion of victims' rights at bond hearings, refer to "Bond Hearing Procedures" in the CRIMINAL Section of this book.

3. Preliminary Hearings

When a summary court judge schedules a preliminary hearing in a case which involves a victim, the

judge must follow § 16-3-1525(K) which states: "[u]pon scheduling a preliminary hearing in a case involving a victim, the summary court judge reasonably must attempt to notify each victim of each case for which the defendant has a hearing of his right to attend." § 16-3-1525 (N) requires that notification may not be only by electronic or other automated communication or recording. After three such unsuccessful attempts, personal contact with the victim should be attempted.

4. Summary Court's Duty to Notify Victim of Victims' Rights

§ 16-3-1535 addresses the Summary Court's duty to notify a victim of his or her rights under this section.

> (A) The summary court, upon retaining jurisdiction of an offense involving one or more victims, reasonably must attempt to notify each victim of his right to:
>
> > (1) be present and participate in all hearings;
> >
> > (2) be represented by counsel;
> >
> > (3) pursue civil remedies; and
> >
> > (4) submit an oral or written victim impact statement, or both, for consideration by the summary court judge at the disposition proceedings.
>
> (B) The summary court must provide to each victim who wishes to make a written victim impact statement a form that solicits pertinent information regarding the offense, including:
>
> > (1) the victim's personal information and supplementary contact information;
> >
> > (2) an itemized list of the victim's economic loss and recovery from any insurance policy or any other source;
> >
> > (3) details of physical or psychological injuries, or both, including their seriousness and permanence;
> >
> > (4) identification of psychological services requested or obtained by the victim;
> >
> > (5) a description of any changes in the victim's personal welfare or family relationships; and
> >
> > (6) any other information the victim believes to be important and pertinent.
>
> (C) The summary court judge must inform a victim of the applicable procedures and practices of the court.
>
> (D) The summary court judge reasonably must attempt to notify each victim related to the case of each hearing, trial, or other proceeding.
>
> (E) A law enforcement agency and the summary court must return to a victim personal property recovered or taken as evidence as expeditiously as possible, substituting photographs of the property and itemized lists of the property including serial numbers and unique identifying characteristics for use as evidence when possible.

(F) The summary court judge must recognize and protect the rights of victims and witnesses as diligently as those of the defendant.

(G) In cases in which a summary court judge sentences a defendant to more than ninety days, the summary court judge must forward, within fifteen days, a copy of each victim's impact statement or the name, mailing address, and telephone number of each victim, or both, to the Department of Corrections, the Department of Probation, Parole, and Pardon Services, or the Board of Juvenile Parole, the Department of Juvenile Justice, and a diversion program. This information must remain confidential and shall not be disclosed directly or indirectly, except by order of a court of competent jurisdiction or as necessary to provide notifications, or services, or both, between these agencies, these agencies and the prosecuting agency, or these agencies and the Attorney General.

5. Forms Victims Should Be Provided by Summary Court

The following three (3) forms should be provided to all victims of criminal offenses as defined in S.C. Code Ann. Section 16-3-1510(3). Copies of the forms are included for your use. SEE FORMS.

1. Victim Notification Form - SCCA/560

2. Victim Impact Statement - SCCA/561

3. Victim's Rights Information Sheet - SCCA/562

6. Pretrial Intervention Program (PTI)

Another law which concerns a victim's rights is § 17-22-80 which provides:

Prior to any person being admitted to a pretrial intervention program the victim, if any, of the crime for which the applicant is charged and the law enforcement agency employing the arresting officer shall be asked to comment in writing as to whether or not the applicant should be allowed to enter an intervention program. In each case involving admission to an intervention program, the solicitor or judge, if application is made to the court pursuant to § 17-22-100, shall consider the recommendation of the law enforcement agency and the victim, if any, in making a decision.

E.
Bail Proceedings

The right to bail pending trial is guaranteed to all persons by Article I, Section 15 of the S.C. Constitution in all instances except in capital cases or offenses punishable by life imprisonment. The Constitution further provides that excessive bail cannot be charged. A magistrate or municipal judge cannot, therefore, set bail at a figure higher than an amount reasonably calculated to insure the presence of the accused at trial. See Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed.3 (1961).

1. Authority of Magistrates and MunicipalJudges to Set Bail

S.C. Code Ann. §22-5-510(A) provides that, " [m]agistrates may admit to bail a person charged with an offense, the punishment of which is not death or imprisonment for life; provided, however, with respect to violent offenses as defined by the General Assembly. . ., magistrates may deny bail giving due weight to the evidence and to the nature and circumstances of the event. 'Violent offenses' as used in this section means the offenses contained in § 16-1-60. If a person under lawful arrest on a charge not bailable is brought before a magistrate, the magistrate shall commit the person to jail. If the offense charged is bailable, the magistrate shall take recognizance with sufficient surety, if it is offered, in default whereof the person must be incarcerated." § 22-5-510(B) provides that "[a] person charged with a bailable offense must have a bond hearing within twenty-four hours of his arrest and must be released within a reasonable time, not to exceed four hours, after the bond is delivered to the incarcerating facility." § 22-5-510 does not apply to persons arrested on a bench warrant or arrested for a parole violation. The judge who issues the bench warrant should be the one to release the prisoner and only a circuit judge can grant bond for a person arrested for a parole violation. (§24-21-680).

Municipal judges have the same authority to set bail by virtue of §14-25-45. The magistrates and municipal judges are the judicial officers who normally and most frequently set bail in South Carolina. Jailors, law enforcement officers, and solicitors have no authority to set bail. There are certain limited exceptions to this rule. For example, in traffic cases a highway patrolman may accept a sum of money as bail in lieu of immediately taking the defendant before a judicial officer. (§56-25-30). In cases of litter control, any officer authorized to enforce such law may accept a cash bond in lieu of requiring an immediate court appearance. (§16-11-710). In cases of fish and game law violations, a game warden may accept a sum of money as bail in lieu of immediately taking the defendant before a judicial officer. (§50-3-410).

Usually, the admitting magistrate or municipal judge is the judge in whose territorial jurisdiction, the crime has been committed. However, if the arrest is made in a county other than that in which the offense is charged, the magistrate or municipal judge at the place of arrest may set bail. See State v. Rabens, 79 S.C. 542, 60 S.E. 442 (1908). Once bail is set by a magistrate or municipal judge, absent "compelling circumstances", no other magistrate or municipal judge is authorized to amend the original order setting bail. (Op. Atty. Gen. No. 80-39, 1980). The judge who originally set the amount of bail, when presented with new information, might reconsider the bail which he had set earlier, provided the case has not been transferred to general sessions court. It would be inappropriate for a magistrate or municipal judge to hear the facts and change the bond set by another magistrate or municipal judge, unless there are compelling circumstances which prevent the first judge from hearing the motion.

By Order of the Chief Justice dated November 28, 2000 (See Orders Section), bond proceedings must be conducted twice daily, once in the morning and once in the evening, at specific times as arranged by the Chief Magistrate in each county. Any deviation from this requirement must be

approved in writing by the Chief Justice. If, under extraordinary circumstances, the on-call magistrate is requested to conduct a bond hearing at a time other than specified, hearings shall be held for the entire jail population eligible for release. The on-call magistrate shall immediately inform the Chief Magistrate that a special bond proceeding was conducted. Preferential bond hearings are strictly prohibited and are considered a violation of the Rules of Judicial Conduct, Rule 502, SCACR. The Order also clarifies that bond hearings shall not be conducted over the telephone and Orders of release shall not be transmitted by facsimile from remote locations. The only exception to those requirements is in counties where videoconferencing of bond hearings is approved by Order of the Supreme Court dated August 6, 2003 (See Orders Section).

2. Victims' Rights at Bond Proceedings

A matter with which magistrates and municipal judges must be concerned is the rights of victims. In recent years, the General Assembly has enacted laws to protect the rights of victims. § 16-3-1525(H)(2) concerns bond hearings in which bond is set by a summary court judge. Under this subsection, "the summary court judge, before proceeding with a bond hearing in a case involving a victim, must ask the representative of the facility having custody of the defendant to verify that a REASONABLE attempt was made to notify the victim sufficiently in advance to attend the proceeding." § 16-3-1525(N) requires that notification may not be only by electronic or other automated communication or recording. After three such unsuccessful attempts, personal contact with the victim should be attempted. If notice was not given in a timely manner, the hearing must be delayed for a reasonable time to allow notice.

Subsection (3) of § 16-3-1525(H) requires the summary court judge to "impose bond conditions which are sufficient to protect a victim from harassment or intimidation by the defendant or persons acting on the defendant's behalf." A victim of a crime has rights which must be recognized and protected by the magistrate or municipal judge. These rights are demanded by society and mandated by the law. § 16-3-1505 through § 16-3-1565 of the South Carolina Code of Laws contains the law concerning victims' rights. For a detailed outline of victims and witnesses' rights as pertaining to summary court judges, see Section D. entitled Victims' Rights in the Introduction to Criminal Law.

3. Conduct of Bail Proceedings

The bail proceeding is frequently the first contact between the accused and a judicial officer, with respect to the particular offense(s). For this reason, the bond proceeding is a very important phase of the criminal process, though it has never been held to be a stage at which the accused has the right to be represented by counsel. The accused may have his attorney present, but he has no absolute right to be represented.

At the time of the bail proceeding, the accused should be given certain information and be informed of certain rights. The judge should explain the nature of the charge(s) against the accused, being certain that he fully understands the charges, and the possible penalties involved.
The accused should be informed that he has the right to remain silent, and that anything he says can be used against him in a court of law. He has the right to talk to a lawyer, and have a lawyer present at any time during interrogation or questioning by law enforcement officers. He should be informed that if he would like to be represented by a lawyer, but cannot afford one, a lawyer will be appointed to represent him. He need not talk to any law enforcement officers after he says that he would like to have a lawyer present, or that he does not wish to say any more.

Pursuant to South Carolina Rules of Criminal Procedure Rule 2, when a magistrate or municipal judge conducts a bail proceeding for an accused who is to be tried in general sessions court, that

judge must inform the accused of his right to request a preliminary hearing. The notice must be provided both orally and in writing. The judge must also provide the accused with a simple form for requesting a preliminary hearing, which the accused need only sign and return to the judge. See Section F in the CRIMINAL Section for a detailed discussion of notification at bond hearing of defendant?s right to preliminary hearing. Other rights of the defendant are set out in the CRIMINAL Section, Subsection G.

The judge should notify the defendant that he has a right to be present at his trial, and that the trial will proceed in his absence should he fail to attend the court. (Rule 16, South Carolina Rules of Criminal Procedure). The defendant acknowledges in writing that he has received such notice when he signs the bond form. If he fails to so acknowledge receipt of the notice, the judge should file a statement, in writing, that he has so notified the defendant of these rights.

4. Factors to Consider and Forms of Release

§ 17-15-10 et seq. requires that certain findings and inquires be made. § 17-15-30(A) provides that in determining which conditions of release to impose, the magistrate or municipal judge may take into account the nature and circumstances of the offense charged, family ties of the accused, employment, financial resources, character, mental condition, the length of his residence in the community, his record of convictions, and any record of flight to avoid prosecution or failure to appear at other court proceedings. § 17-15-30(B) requires that the court consider the accused's criminal record, if any. The court shall consider, if available, all incident reports generated as a result of the offense charged.

When considering the release of a person on bond who is charged with a violent offense as defined in § 16-1-60, and the person is a household member as defined in § 16-25-10, and the person: (1) is subject to the terms of a valid Order of Protection or Restraining Order of this State or another state; or (2) has a previous conviction involving the violation of a valid Order of Protection or Restraining Order of this State or another state, § 16-25-120 requires that the court consider the following factors for release of that person on bond: (1) whether the person has a history of criminal domestic violence or a history of other violent offenses; (2) the mental health of the person; (3) whether the person has a history of violating Orders of a court or other governmental agency; and (4) whether the person poses a potential threat to another person. Additionally, when considering release of a person on bond under this section, the court must consider whether to issue a Restraining Order or Order of Protection against the person, using the criteria described above. If the court determines that such an Order is appropriate, it should issue the Order or forward the matter to the appropriate court.

In the cases of bonding individuals charged with harassment or stalking, a magistrate or municipal judge may order a defendant to undergo a mental health evaluation, performed by the mental health department, to determine if the defendant needs mental health treatment or counseling as a condition of bond. The evaluation must be scheduled within ten days of the Order of issuance. Upon completion of the evaluation, the examiner must report his findings, within forty-eight hours, to the local solicitor's office or summary court judge, for consideration by the bonding judge.

Under §17-15-10, any person charged with a non-capital crime must be released pending trial on his own recognizance without surety, unless the judge determines that such release (1) would not reasonably assure the appearance of the accused at trial, or (2) would result in an unreasonable danger to the community. "Release on his own recognizance" means that the accused does not have to have sureties, but must be released if he signs an unsecured bond in the amount specified by the magistrate. The accused does not have to be actually worth the amount which the judge sets in cash or property, nor does he have to get a surety who is worth that amount in order to obtain his release.

The amount set in the recognizance is simply an acknowledgment of an indebtedness to the state in the amount specified, which becomes absolute if the accused fails to comply with the conditions imposed.

Unless the magistrate or municipal judge can make a determination that the defendant falls within one of the two exceptions: (1) there is reason to believe that the defendant will not appear at his trial, or (2) he would create an unreasonable risk to the community, no conditions can be imposed on his release except that he should personally appear at subsequent proceedings in the case, should remain on good behavior, and should not depart the state. § 17-15-20.

If the magistrate or municipal judge determines in a noncapital case that the defendant's release on his own recognizance would not reasonably assure his appearance, or would result in unreasonable danger to the community, the defendant still has a constitutional right to bail, but the judge may impose any one or more of the conditions listed in §17-15-10:

> (a) require the execution of a bond with good and sufficient sureties;
>
> (b) place the accused in the custody of a designated person or organization agreeing to supervise him;
>
> (c) place restrictions on the travel, association or place of abode of the accused during the period of release; and
>
> (d) impose any other condition deemed reasonably necessary to assure appearance, including a condition that the person return to custody after specified hours.

If the magistrate or municipal judge finds that an unconditional release would create an unreasonable risk of flight or would create a risk to the community, and also finds that a secured bond is the best condition suited for the case, the defendant may come up with one of several kinds of security which the judge must accept. The defendant may obtain a commercial security, or he may find friends or relatives who can act as surety for him.

A magistrate or municipal judge may accept a real property interest as security for a bail bond. The defendant may be permitted to deposit cash or negotiable securities, such as a certified check, equal to the amount of the bond. State v. Harrelson, 211 S.C. 11, 43 S.E.2d 593 (1947). "South Carolina does not permit any judge to require that bond be in cash." 1973 S. C. Op. Atty. Gen. 55. In cases of state or municipal motor vehicle violations, §17-15-230 requires that a magistrate or municipal judge accept, in lieu of cash bail or bond, guaranteed arrest bond certificates, in an amount not to exceed $1,500, issued by an automobile club or association. However, these certificates are unacceptable when the offense is driving under the influence of intoxicating liquors or drugs or for a felony.

§14-1-214 authorizes the payment of fines, fees, assessments, court costs, and surcharges by credit card or debit card. This authority would include bond payments. That statute authorizes the imposition of a fee, which may be retained by the County, for processing payment by credit card. The fee should not exceed the amount to wholly offset the cost of processing the credit card payment.

§22-5-530 provides that a person charged with an offense triable in magistrate or municipal court is entitled to deposit with the magistrate or municipal court a sum of money not to exceed the maximum fine in the court for which the person is to be tried. In a jurisdiction in which the governing body has established a system for receipt of deposits in lieu of recognizance, a person held or incarcerated in a jail or detention center who is entitled to deposit a sum of money in lieu of entering into a

recognizance under §22-5-530 may secure his immediate release from custody by paying to or depositing the sum of money with the jail or detention facility in which he is being held. The provisions of §22-5-530 do not extend to those individuals charged with crimes involving victims. Those individuals must appear before a judge for a bond hearing. That statute specifically provides that an individualized hearing must be held when the defendant is charged with a violation of Chapter 25, Title 16 as it relates to criminal domestic violence. Additionally, the Chief Justice, by Order dated December 11, 2003 (See ORDERS Section), confirmed that the ability to immediately release persons pursuant to this statute is limited by §16-3-1525(H), which requires that the victim of any crime be notified of the defendant's bond hearing. If notification is not given in a timely manner, the bond hearing must be delayed, for a reasonable time, to allow notice. The December 11, 2003, Order requires that prior approval of the Chief Justice is required to implement a procedure allowing the deposit in lieu of recognizance pursuant to § 22-5-530.

The magistrate or municipal judge, or jailor in the situation cited above, should give a receipt for all cash or items deposited as security and should put them in safekeeping. If the case is beyond the trial jurisdiction of the magistrate or municipal judge, the money should be turned over to the clerk of court. (§17-15-200). If the defendant appears at the trial and otherwise complies with the conditions of the bond, he does not forfeit the bail, and is entitled to a return of the items. (§17-15-220). An attorney cannot be taken as bail. (§38-53-190).

§ 17-15-15(a) provides that:

> In lieu of requiring actual posting of bonds as provided in item (a) of § 17-15-10, the court setting bond may permit the defendant to deposit in cash with the clerk of court an amount not to exceed ten percent of the amount of bond set . . .

Therefore, a judge is given an alternative to the requirement of surety, even when he has made the determination that a personal recognizance bond would not be appropriate under the circumstances. The judge has the option of permitting the defendant to deposit cash with the clerk of court, in an amount designated by the judge. The defendant is still obligated in the full amount of bond upon breach of condition. This option is available to the judge in offenses which will be tried in magistrate court, as well as those which will be tried in general sessions court.

5. Procedure for Posting Bail

Unless the magistrate or municipal judge determines that a release on recognizance will not reasonably assure the appearance of the defendant or will result in an unreasonable danger to the community, the defendant must be released on his own recognizance without security. In such cases, the court sets the amount of the recognizance bond, and the defendant "posts bail" by:

> (1) signing the appearance recognizance (Bond Form 1) whereby he acknowledges an indebtedness to the state which would become absolute upon his failure to comply with the conditions, and
>
> (2) acknowledging his understanding of the items and conditions of his release.

Where the magistrate or municipal judge determines that the case is within one of the two exceptions, but decides the surety is not needed, and imposes one or more of the conditions listed in §17-15-10 (b) through (d), the defendant "posts bail" by signing the proper forms (Bond Form 1), including an acknowledgment of his understanding of the terms and conditions of release.

If the magistrate or municipal judge determines that the case falls within one of the two exceptions, and he thinks that security for the bond is needed, the defendant must be given some reasonable way to raise the bail. If the defendant wants to deposit cash or securities (§17-15-190), the magistrate or municipal judge should give the defendant a receipt and have the defendant sign a bond. If the defendant has a surety for the bond (§17-15-10(a)), the defendant and his surety should sign the bond. If the magistrate or municipal judge has authorized the defendant to deposit an amount in cash of up to ten percent of the amount of bond (§17-15-15), the defendant should still sign a bond acknowledging the conditions of such bond. It would be proper for the magistrate or municipal judge to accept such cash deposit from the defendant, and immediately transmit such money to the clerk of court, to be held pending disposition of the defendant's case. Note, however that cash should not be transmitted to the clerk of court under such circumstances; the money should be deposited in the magistrate's office account, and disbursement made to the clerk of court by check, as soon as possible. (Bond Form 2 includes sections to be used if the security is 1) cash in lieu of bond, 2) cash percentage in lieu of bond or 3) other sufficient surety.

Once the release procedures have been made, the magistrate or municipal judge should see that the defendant is promptly discharged from custody. This can be done by a discharge order to the jailer when he admits the defendant to bail.

§ 17-15-40 provides that the order of the court releasing the defendant pursuant to §17-15-10 shall be " . . . on a form to be prescribed by the Attorney General." The Attorney General has prescribed a Form 1 (dealing with the release of a defendant on his own recognizance) and a Form 2. The magistrates and municipal judges should see that the appropriate forms are completed each time that a defendant is admitted to bail. (See FORMS)

6. Duration of Bail

Release on bail by the magistrate or municipal judge obligates the defendant to appear at the trial, whether the trial is to be in the admitting judge's court or in a higher court. If his case is not determined at the first term after he is admitted to bail, he is obligated to attend further terms of court until there is a final disposition of his case. State v. Johnson, 213 S.C. 241, 49 S.E.2d 6 (1948). If the defendant is released on a surety bond, his surety is indebted to the state in the amount of bond set, should the defendant fail to appear at any hearing or trial date, or should the defendant breach any conditions of his bond. The surety is so obligated until final disposition of the defendant's case, due to the terms of the bond form which the surety signs with the defendant. A final disposition is not actually rendered until an order of discharge is issued by the court at which the defendant is bound to appear. Thus a finding of no bill by the grand jury or a nolle prosequi by the solicitor does not discharge the obligation. (A nolle prosequi is a formal entry on the record by the prosecution that they "will no further prosecute" the case). State v. Williams, 84 S.C. 21, 65 S.E. 982 (1909), Whaley v. Lawton, 57 S.C. 256, 35 S.E. 558 (1900).

7. Bond Estreatment

If the defendant defaults on his bond by failing to appear at trial after proper notice or otherwise violates the terms or conditions of his release, there is a "forfeiture" and the bond may be estreated in circuit court by the solicitor for general sessions offenses. [§17-15-170, State v. Bailey, 248 S.C. 438, 151 S.E.2d 87 (1966)]. Magistrates and municipal judges may estreat bonds, upon default by defendant, on cases within their jurisdiction in an amount of not more than the maximum fine allowable under §22-3-550 and §14-25-45, in addition to assessments. §17-15-170.

§38-53-70 provides a required procedure to be utilized by all courts when a defendant is released on

bond and fails to appear at trial. After a defendant fails to appear at trial, the court must issue a bench warrant for the defendant. If a bondsman is obligated on the defendant's bond, the court should notify that bondsman of the issuance of the bench warrant by providing the surety a copy. The statute prohibits the court from estreating the bond for a thirty day period after the issuance of the bench warrant. If the bondsman fails to surrender the defendant or place a hold on the defendant's release from incarceration, commitment, or institutionalization within thirty days of the issuance of the bench warrant, the bond shall be forfeited. §17-15-170 requires the court to issue a summons to everyone bound on the forfeited bond, including the bondsman and insurance company in the case of a surety bondsman, to appear and show cause why judgment/estreatment should not be confirmed. Anderson County v. Indiana Lumbermens Mutual Insurance Company, 304 S.C. 363, 404 S.E.2d 718 (S.C. App. 1991). If the parties fail to appear at the show cause hearing, or fail to provide sufficient justification to the court for noncompliance, the judgment on the bond shall be confirmed. §38-53-70 allows the court to "permit the surety to pay the estreatment in installments for a period of up to six months; however, the surety must pay a handling fee to the court in an amount equal to four percent of the value of the bond. If at any time during the period in which installments are to be paid the defendant is surrendered to the appropriate detention facility and the surety complies with the recommitment procedures, the surety is relieved of any further liability."
If any bondsman fails to satisfy a properly estreated bond after receiving the proper notice, immediately notify the clerk of the circuit court in your county or in the county where the bondsman normally operates business. Also, notification must be made to the SC Department of Insurance, who is responsible for oversight of bondsmen, and has the authority to suspend bondsmen for failure to comply with a properly estreated bond.

In State v. McClinton, 369 S.C. 167, 631 S.E.2d 895 (2006) the South Carolina Supreme Court held that the three-year statute of limitations for contract actions applies to actions by the State for the forfeiture of a bail bond in a criminal case. The statute begins to run 30 days after issuance of a bench warrant for a defendant's failure to appear pursuant to the process established in §38-53-70.

8. Surety Relieved From Bond Obligation

§ 38-53-50 provides a procedure whereby a bondsman who is obligated on a defendant's bond may request to be relieved of that obligation or "taken off of the bond" under specific circumstances. § 38-53-50(A) provides that a surety may file a motion with the court with jurisdiction over the defendant requesting to be relieved on the bond obligation for "good cause" or the nonpayment of fees. "Good cause" means the violation of a specific term of the bail bond not to include the nonpayment of fees. § 38-53-10(14). A copy of the motion must be served upon the defendant, his attorney, and the solicitor's office. The court shall then schedule a hearing to determine if the surety should be relieved on the bond. All parties should be advised of the hearing date.

§ 38-53-50(B) provides an alternative procedure for the surety to follow if the circumstances warrant immediate incarceration of the defendant to prevent imminent violation of any one of the specific terms of the bail bond, or if the defendant has violated any one of the specific terms of the bond. In those circumstances, the surety may take the defendant to the appropriate detention facility for holding until the court determines whether the surety should be relieved of the bond obligation. The surety must immediately file with the detention facility and the court an affidavit stating the facts to support the surrender of the defendant. When the affidavit is filed with the detention facility and the court with jurisdiction over the defendant, the surety must file a motion with the court, serving the defendant, his attorney, and the solicitor's office. The court shall then schedule a hearing, as expeditiously as possible, to determine if the surety should be relieved. All parties should be notified of the hearing date. A surety who surrenders a defendant and files an affidavit which does not show good cause or the nonpayment of fees is subject to the penalty of perjury.

At the hearing, the court must decide whether to relieve the surety of the obligation or whether the surety should remain on the bond. If the court determines that the surety should be relieved, a new undertaking must be filed with the court in order to secure the re-release of the defendant. The bonding court should use all information at its disposal to determine the appropriate bond for the re-release of the defendant in any conditions deemed appropriate. If the court requires that the surety stay on the bond, the defendant should be released under the original bond obligation.

F.
Preliminary Examinations

Rule 2, South Carolina Rules of Criminal Procedure (SCRCrimP) gives defendants charged with offenses beyond the jurisdiction of magistrate and municipal courts certain rights to preliminary hearings, but differs from the statutory procedure in several important respects. The requirements of the rule are briefly summarized as follows:

1. Notice of Right to Preliminary Hearing

The rule requires that the defendant be informed of his right to a preliminary hearing both orally and in writing. If the offense is bailable, the notice must be given at the bond hearing. If the offense is non-bailable, the notice must be given him no later than would be required if the offense were bailable. S.C. Court Administration Form SCCA/512 must be given the defendant at the bond hearing, or, in the case of non-bailable offenses, no later than would be required if the offense were bailable. This form provides both the required written notice, and the simple form upon which the defendant may request the preliminary examination, as required by the rule. You should note at Item 3 of the Checklist for Magistrates and Municipal Judges that the defendant was given a copy of Form SCCA/512. This is the only means you have of checking yourself to see that proper notice was given the defendant. In addition, oral notice of rights to a preliminary hearing must be given the defendant at this time. So that you can be assured that the proper written and oral notices are given all defendants charged with general sessions court offenses, you should instruct the jailer to bring all such defendants before you when you appear to hold bond hearings. The defendants charged with non-bailable offenses would not be given bond hearings, of course, but could be given notice of their rights to preliminary examinations at what many magistrates and municipal judges call "first appearance hearings". Since a magistrate is required to be physically present at a detention facility at least twice in a twenty-four hour period, every defendant entitled to notice of a preliminary hearing would be informed of his rights within a day of his arrest, if incarcerated in a county detention facility.

Section 17-23-162 provides that "The affiant listed on an arrest warrant or the chief investigating officer for the case must be present to testify at the preliminary hearing of the person arrested pursuant to the warrant."

2. Effect of Indictment on Request for Preliminary Examination

Rule 2(b), SCRCrimP states that the preliminary examination shall not be held if the defendant is indicted by a grand jury or waives indictment before the preliminary hearing is held.

3. Waiver of Right to Preliminary Examination

If the defendant fails to make a timely request for a preliminary examination, (see paragraph 4, below) he is deemed to have waived his right to request such hearing. Previously, if the defendant failed to appear at the hearing, the defendant's right to the preliminary examination was deemed to have been waived. Rule 2(b), SCRCrimP now provides, however, that: "The defendant may appear [either] by counsel or in person or both."

4. Time in Which Request for Preliminary Examination Must Be Made

The request for a preliminary hearing must be made within ten (10) days after the defendant is given notice of his right to a preliminary hearing. The request need not be on the form (SCCA/512) provided, but it must be in writing. Failure of the defendant to make a timely request will result in a

waiver of his right to request such a hearing.

5. Time When the Preliminary Hearing Must Be Held

The preliminary hearing must be held within ten (10) days following the request. The statutes establishing the preliminary hearing procedure, which were ruled unconstitutional by the S.C. Supreme Court in State v. Keenan, 278 S.C. 361, 296 S.E.2d 676 (1982), gave the defendant twenty (20) days, or up to ten (10) days before the commencement of the next term of General Sessions Court, to make his request. Rule 2(b), SCRCrimP, established a much less confusing method of computing the time within which to hold the preliminary hearing, and must be followed, instead of the statutory procedure. "Any delay in the holding of a preliminary hearing shall not be grounds for delay in the prosecution of the case in the Court of General Sessions." Rule 2(e), SCRCrimP.

6. Purpose and Scope of Preliminary Examination

The purpose of a preliminary examination is to determine if the State can show that there is probable cause to believe that the defendant committed the crime with which he has been charged, to warrant the defendant's detention and trial. In order to show probable cause, the State's case must be based on something more than the honest suspicions of law enforcement officers. The State must present reasonable grounds for showing the crime was committed and that the defendant committed it. The facts presented must be sufficient to persuade a reasonable man that the accused committed the crime charged. The rule does not provide for the preliminary examination as a discovery tool or "fishing expedition" for the defendant to learn the State's evidence. The defendant is given discovery opportunities in criminal cases by Rule 5, SCRCrimP, which allows the defendant to inspect and copy certain information held by the prosecution, and vice versa.

7. Right to Counsel at Preliminary Examination

A preliminary examination is a critical state in a criminal proceeding. Thus the defendant should have the opportunity to obtain counsel or have such appointed before the examination. State v. Taylor, 255 S.C. 268, 178 S.E.2d 244 (1970). However, the failure of a defendant to obtain or be given counsel in time to request a preliminary examination does not necessarily bar a higher court from obtaining jurisdiction or prejudice the defendant. Sanders v. South Carolina, 296 F Supp. 563 (D.S.C. 1969).

8. Notice to Victim to Attend

Upon scheduling a preliminary hearing in a case involving a victim, §16-3-1525(K) requires that the summary court judge reasonably must attempt to notify each victim of each case for which the defendant has a hearing of his right to attend. § 16-3-1525 (N) requires that notification may not be only by electronic or other automated communication or recording. After three such unsuccessful attempts, personal contact with the victim should be attempted.

9. Procedure in a Preliminary Examination

A preliminary examination is an administrative inquiry and not an adversary hearing. Rules of evidence are to be followed, although strict adherence is not required. For example, hearsay may be admitted at the examination. State v. Conyers, 268 S.C. 276, 233 S.E.2d 95 (1977). See also 1976-77 Op. Atty. Gen. No. 77-53. It would appear that the issue of whether or not the hearsay evidence is trustworthy and accurate enough to establish probable cause is an issue to be determined by the judge in light of all the circumstances. It is solely within the discretion of the magistrate or municipal judge as to whether or not to allow the prosecution to introduce hearsay evidence at the preliminary

examination.

The State must show probable cause as to each element of the crime charged. Any valid objection by the defense may be raised. Other than the discovery rights given defendants by Rule 5, SCRCrimP, the defendant may not inspect the State's evidence. [See also State v. Flood, 257, S.C. 141, 184 S.C.2d 549 (1971), and State v. Miller, 289 S.C. 316, 345 S.E.2d 489 (1986).]

The magistrate or municipal judge begins a preliminary examination with the reading of the charge against the defendant. The defendant does not plead to the charge nor does he make a sworn statement at this proceeding. The defendant may, however, make an unsworn statement but this may not be used against him at trial. The defendant is not allowed to offer evidence on his behalf since the examination is used only to determine if the State can show probable cause. At the beginning of the preliminary examination or at any time prior to it, the defendant may demand a change of venue or make a motion that the judge disqualify himself.

After the charges have been read, the State presents its evidence of probable cause. The State's evidence is presented by a law enforcement officer or the solicitor. The magistrate or municipal judge does not present the State's case or give the appearance of prosecuting the defendant. The magistrate or municipal court judge may not examine the accused during this proceeding. The state may present physical evidence and witnesses. The State has the burden of proving probable cause, but it is not required to call all of its witnesses or produce all of its evidence. See State v. Cunningham, 275 S.C. 189, 268 S.E.2d 289 (1980). The defendant has the right to cross-examine any of the State's witnesses. If he chooses to cross-examine a witness, his voice may be used by the witness to identify him. State v. White, 243 S.C. 238, 133 S.E.2d 320 (1963). The testimony of the State's witnesses on cross-examination is not admissible in subsequent proceedings but may be used at trial to impeach that witness on prior inconsistent statements. Again, the defendant is not allowed to offer evidence or make any sworn statements at the preliminary examination. The only procedure to taking testimony at a preliminary examination is for the magistrate to write down the statements of the witnesses. The defendant has the right to request that such a transcript be kept. The magistrate or municipal judge should have all witnesses sign this record and he may not supplement or change the testimony after it has been signed.

After the state's evidence has been presented, the defendant argues to the magistrate or municipal judge that probable cause does not exist. The state may then argue that there is probable cause and if such an argument is made, the defendant may reply to it. If the magistrate or municipal judge is not satisfied that probable cause has been shown, he must discharge the defendant from custody. Although the magistrate or municipal judge can discharge the defendant from custody, this is not a final determination of the charge. Such a discharge is not an acquittal and jeopardy does not attach. The charge may still be submitted for grand jury consideration and the defendant indicted after such consideration. The defendant is bound by the terms of his bond, including appearance at trial, unless the case is dismissed at general sessions court.

If the magistrate or municipal judge is satisfied as to the state's showing of probable cause, the defendant is bound over for trial and is either released on bail if the offense is bailable, or committed to jail to await trial. After the preliminary examination has been held, the magistrate or municipal judge should forward all papers relating to the case immediately to the clerk of court. These papers (endorsed legibly with the title of the case, nature of the offense, kind of proceeding, and magistrate's name) shall include a report of the case with the names and addresses of all material witnesses and a synopsis of all testimony. The magistrate or municipal judge should complete and attach to these papers a "Certificate of Transmittal" (Form SCCA-215) and forward the appropriate copy of this form to Court Administration upon receipt by the clerk of court.

10. Closure of the Preliminary Examination

Judicial proceedings are presumed to be open to the public. Public policy considerations supporting this position include the need to insure public confidence in judicial proceedings. However the U.S. Supreme Court held that the Sixth Amendment right of a defendant to a speedy and public trial does not give the public a right of access to pretrial proceedings in all cases. Gannett Co., Inc. v. Depasquale, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d (1979).

As a general matter, pretrial proceedings should be open to the public. Only in extremely rare cases should the pretrial proceeding be closed. Upon a motion to close the pretrial proceeding, the defendant must show: (1) that he will be denied a fair trial if the public or press is allowed access to the proceeding; and, (2) no other method of protecting the defendant's right to a fair trial is available. Persons with a legitimate interest in the proceedings (e.g. representatives of the news media) should be allowed to present reasons why the pretrial proceeding should remain open to the public, and why the defendant's right to a fair trial will not be jeopardized by an open hearing. After hearing the arguments both for and against closure of the proceeding, the judge must determine whether closure of the proceeding is necessary to protect the defendant's rights. Even in those instances where the prosecutor consents to the closing of the pretrial proceeding, the judge must make an inquiry and determine that no other alternative action will protect the defendant's right to a fair trial.

In most cases, alternative methods of protecting the defendant's right to a fair trial will be appropriate. In many cases the defendant may argue that prejudicial hearsay information (not admissible at trial) will be introduced at the preliminary and may be subsequently reported by the press. Rather than denying public access to the preliminary in such instances, the judge should consider alternative methods for preserving the defendant's right to a fair trial. For example, the witnesses may be sequestered at the preliminary as well as at the trial itself. Also, at trial more extensive voir dire of prospective jurors could eliminate those jurors who have prejudged the case based on news media accounts of the preliminary. Additionally, in highly publicized cases, the circuit court may permit a change of venue to another county less likely to receive the local news coverage received in the county of the alleged offense. Finally, a combination of these methods and others might be highly effective in assuring the defendant's right to a fair trial, while not denying public access to a pretrial proceeding.

If the judge finds that these alternatives will not adequately protect the defendant's right to a fair trial, then the pretrial proceeding may be closed. An express finding must be made, however, that the exclusion of the press is required to protect the defendant's right to a fair trial and that no other method of protecting this right is available, and this finding must be made a part of the record. (See Steinle, et al v. Lollis, 279 S.C. 375, 307 S.E.2d 230 (1983). One example where a potential proceeding may be closed is when a confession by the defendant is to be introduced in a highly publicized case. Such a confession if made public prior to trial may be so prejudicial that the defendant would be unable to strike a jury that has not prejudged the case due to pretrial publicity. However, the judge should enter into the record of such proceeding, the fact that no other less intrusive means of protecting the defendant's right exist and the reasons for reaching such a conclusion.

G.
Rights of the Defendant

1. Outline

While it is not possible to discuss all of the procedural rights of the defendant, the following outline may be of some use to magistrates and municipal judges.

a. Right To Be Informed Of The Nature Of The Complaint (infra)

b. Right To Counsel (infra)

c. Right Against Self-Incrimination (infra)

d. Right Of Confrontation (infra)

e. Right To Due Process (infra)

f. Right To Speedy And Public Trial (infra)

g. Right To Bail (see Article I, Section 15, S. C. Constitution; and BAIL)

h. Right To Preliminary Examination (see PRELIMINARY EXAMINATION)

I. Right To Unanimous Verdict (See S.C. Const. Art. V, §18)

j. Right To Compel The Attendance Of Witnesses (See S.C. Const. Art. I, §14 and TRIAL PROCEDURE, Witnesses)

k. Right To Trial By Impartial Jury (See S.C. Const. Art. I, §13, ; and TRIAL PROCEDURE, Selection of the Jury, and The Voir Dire)

l. Right To Reasonable Time To Prepare A Defense

m. Right Against Double Jeopardy (See S.C. Const. Art. I, §12)

n. Right To Be Present At Trial (Rule 16 South Carolina Rules of Criminal Procedure)

2. Checklist for Magistrates and Municipal Judges

By Order of the Chief Justice, all magistrates and municipal judges are required to use the "Checklist for Magistrates and Municipal Judges" (Form SCCA-507) in all criminal cases in which an arrest warrant has been issued. (see FORMS)

Magistrates and municipal judges are required to attach the Checklist for Magistrates and Municipal Judges to the arrest warrant at the time of the return of the warrant with the arrested person or at the bail proceeding. If the case is transmitted to the Court of General Sessions, or the case is appealed, the Checklist is to be sent to the clerk of court with the warrant and other papers pertaining to the case. If the case is within the trial jurisdiction of the magistrate, the Checklist is to be attached to the warrant and kept as a part of the case in magistrate or municipal court for a period of three years. At the end of that period, the Checklist may be destroyed, however the warrant and other related papers

should be retained indefinitely.

The purpose of the Checklist is to provide the magistrate or municipal judge with a checklist of procedural rights, so as to assure that these rights of the defendant are not inadvertently overlooked. It also documents the actions of the magistrate and the defendant for the Circuit Court in cases either beyond the trial jurisdiction of the magistrate or in cases appealed from the magistrate.

3. Defense of Indigents Act

Pursuant to the authority of S.C. Code Ann. §17-3-110, the S.C. Supreme Court has established rules regarding the administration of the Defense of Indigents Act, §§17-3-10 - 17-3-110. These rules are found in Volume 22, of the Code, and in the annual cumulative supplement.

S.C. Appellate Court Rule 602(a) provides, in part, that in all cases within the trial jurisdiction of magistrates or municipal judges, if a prison sentence is likely to be imposed upon conviction, the presiding judge must inform the accused as provided in S.C. Appellate Court Rule 602(b). In these cases therefore, the magistrate or municipal judge should:

> (1) Inform the accused of the charges against him and of the nature of the charges.
>
> (2) Advise the accused of his right to counsel and of his right to the appointment of counsel by the court, if the accused is financially unable to employ counsel.

Additionally, S.C. Appellate Court Rule 602(b) provides that the magistrate should,

> (3) If the accused represents that he is financially unable to employ counsel, take his application for appointment of counsel or for the services of the Public Defender where the latter is available in the county.

The Chief Circuit Court Judge for Administrative Purposes has, in each county, designated the Clerk of Court or other officer(s) with the responsibility of securing counsel for the alleged indigent defendant. This designated officer should be immediately notified of the request for counsel.

Magistrate and municipal judges should also note the provisions of S.C. Appellate Court Rule 602(c).

> The initial designation of the Public Defender or appointment of counsel to represent an accused shall be subject to review by the court if it subsequently appears that the accused is in fact financially able to employ counsel, has obtained counsel of his own, or for other good cause shown.

4. Informing the Defendant of the Nature of the Complaint

When the accused person is first brought before the magistrate or municipal judge after his arrest, he should be informed of the nature of the complaint against him. This explanation should be given in simple terms so that the defendant will be sure to understand the charges against him. For example, in many instances the defendant may not understand the following charge:

> The complaint alleges that you made an unlawful offer of corporal injury to John Doe, under circumstances as created well-founded fear of imminent peril, coupled with apparent present ability to execute corporal injury. The complaint further alleges that you did do wrongful physical violence against John Doe without his consent.

A more simple explanation is advisable. For example:

> You are charged with assault and battery. The complaint says that you went up to John Doe and threatened to strike him. After that the complaint says you struck John Doe with your fists without his consent. Do you understand the crime with which you are charged?

The magistrate or municipal judge should also inform the defendant of the possible penalty which faces him should he be convicted of the crime with which has been charged.

For example, if the defendant has been charged with a simple assault and battery, the magistrate or municipal judge should inform the defendant as follows:

> Do you understand that if you plead guilty or are found guilty, I may either 1) order you to pay a fine of up to $500 or 2) order you imprisoned for up to 30 days? Do you also understand that I may not give you the choice of a fine or imprisonment, but may simply order your imprisonment for up to 30 days?

These explanations should be continued until the magistrate or municipal judge is convinced that the defendant understands both the charge(s) and the possible penalty(s).

5. Right to Counsel

§ 17-3-10 provides, in part,

> Any person entitled to counsel under the Constitution of the United States shall be so advised and if it is determined that the person is financially unable to retain counsel then counsel shall be provided upon order of the appropriate judge unless such person voluntarily and intelligently waives his right thereto. (See Defense of Indigents, supra.)

The U.S. Supreme Court in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), and Alabama v. Shelton, 535 U.S. 654, 122 S.Ct. 1764 (2002) held that, absent a knowing and intelligent waiver, no person may be imprisoned for any offense, regardless of whether it is classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial.

The right to counsel has been held to extend to every "critical stage" in the criminal process, including for example, the preliminary examination. Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999, 26 L.Ed.2d 387 (1970); State v. Taylor, 255 S.C. 268, 178 S.E.2d 244 (1970).
The magistrate or municipal judge, as a judicial officer, must insure that a defendant has proper counsel at a criminal proceeding. In order to carry out this responsibility, the magistrate or municipal judge must inform the accused person of his two possible alternatives for representation:

> 1) The defendant may be represented by an attorney. If the defendant cannot afford an attorney but wishes to retain one, counsel may be appointed for him. [See Defense of Indigents Rule 602 South Carolina Appellate Court Rules (SCACR), § 17-3-10 et. seq.].
>
> 2) The defendant may represent himself. § 40-5-80.

In all cases, the defendant has the right to introduce evidence, examine and cross-examine witnesses, make closing arguments, and otherwise present a defense to the charges.

If the counsel has been retained by the defendant, but the attorney is not present when the time for trial arrives, the magistrate or municipal court judge should use his own judgment in each case as to how to handle the situation. The magistrate or municipal court judge should be responsible to the defendant in the matter; the defendant should not be rebuked or made to suffer because of the tardiness or ineptness of his attorney.

If the defendant does not have counsel, the defendant himself must be given ample opportunity to be fully heard. This is, of course, one of the fundamental safeguards in a criminal trial and is deeply rooted in Anglo-American tradition as well as in Article I, Section 14, of the S.C. Constitution. He should be permitted to confront and examine witnesses (including law enforcement officers), to introduce evidence on his own behalf, and to make whatever other reasonable presentations that he considers necessary to his defense.

Where it appears in the process of the trial that the defendant is unable to handle his defense in an expeditious manner, it is only fair and proper that the magistrate or municipal judge guide him by at least telling him what he might do on his behalf. For example, after a law enforcement officer has completed testimony on behalf of the State, the magistrate or municipal judge might suggest to an unrepresented defendant that he may cross-examine the officer on matters concerning the alleged offense to which the officer has testified. And, after the State has rested its case, the magistrate or municipal judge might inform the defendant that he has the right to call his own witnesses (and to have compulsory process for obtaining material witnesses under S.C. Constitution, Art. I, Section 14) and to introduce whatever evidence he desires. At the conclusion of all the evidence, the magistrate or municipal judge might explain to the defendant that he may make whatever closing arguments he desires on his behalf. While the defendant is making such an argument, the magistrate or municipal judge should be reasonably patient while the defendant attempts to explain himself, and should stop the defendant only when the monologue wanders into the realm of irrelevance or repetition. Ledbetter on Magistrates.

6. Self-Incrimination/Right of Confrontation

The Fifth Amendment of the U.S. Constitution states that no person "shall be compelled in a criminal case to be a witness against himself". This right is also insured by Article 1, Section 12 in the S.C. Constitution. A judge's responsibility is to protect this right for the defendant. He may do this in two ways:

1) Question the accused to make sure that he understands his right not to say anything that might incriminate him.

> (a) "Do you understand that under the Constitution of the United States and the Constitution and statutes of South Carolina, you do not have to say anything to me that might tend to incriminate you regarding this charge?"
>
> (b) "Do you understand that the phrase 'might tend to incriminate you' means that anything you say or write may be used in a trial to prove you are guilty?"
>
> (c) "Do you understand that you do not have to say anything to any law enforcement officer that might tend to incriminate you?"
>
> (d) "Do you understand that you do not have to say anything to any judge in court that might tend to incriminate you?"

(e) "Do you understand that you do not have to sign or write anything concerning this alleged crime that might tend to incriminate you?"

(f) "Do you understand that if you do say, write or sign anything, a law enforcement officer or prosecuting attorney may introduce that statement or writing into evidence at trial in order to convict you?"

2) Review the evidence presented by the state at each stage of the trial and determine if the evidence may be properly submitted without violating the self-incrimination law. South Carolina courts have held that compelling a defendant to stand for purposes of identification, State v. O'Neal, 210 S.C. 305, 42 S.E.2d 523 (1974), and requiring the defendant to show his physical characteristics, State v. Hart, 304 S.C. 99, 403 S.E.2d 144 (1991), do not violate the self-incrimination clause. On the other hand, Miranda requirements which state that identification of rights must be given to accused persons at the time of their arrest or interrogation, put restrictions upon the admissibility of confessions by the defendant. To accept a confession, the judge must carefully determine that the accused both knowingly and voluntarily confessed his guilt to the alleged crime.

Under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed.2d 694 (1966), the accused must be aware of his basic rights before he may knowingly waive such rights and offer a confession. Miranda requires that the accused be informed:

1) in clear and unequivocal terms that he has the right to remain silent;

2) that anything said can and will be used against him in court;

3) that he has the right to consult with a lawyer and to have the lawyer with him during any interrogation;

4) that if he is indigent, a lawyer will be appointed to represent him;

5) that if he "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease";

6) that if he "states that he wants an attorney, the interrogation must cease until an attorney is present."

If a statement (either confession or merely admission) is obtained in violation of these rules, Miranda prohibits admitting such a statement into evidence. Finally, Miranda prohibits the prosecution from using at trial, the fact that the accused remained silent or exercised any of his rights in the face of accusation.

With regards to self-incrimination, it should be noted that at trial, the prosecution commenting on or making any reference to the fact that the accused failed to testify at trial is constitutionally impermissible. State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10 (1987).

A second right of the accused, guaranteed by the Sixth Amendment of the U.S. Constitution and Art. 1, Section 14 of the S.C. Constitution and S.C. Code Ann. §17-23-60 is the right "to be confronted with the witnesses against him." The constitutional right to confront and cross examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. State v. Martin, 292 S.C.437, 357 S.E.2d 21 (1987).

An accused has the right to be present at every stage of his trial. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). This right, however, may be waived. Ellis v. State, 267 S.C. 257, 227 S.E. 2d 304 (1976). A defendant may properly be excluded when his conduct is disruptive or is interfering with the progress of the trial. In re: Dwayne M., 287 S.C. 413, 339 S.E.2d 130 (1986). Although the right to be present is a substantial one, no presumption of prejudice arises from a defendant's exclusion. State v. Whaley, 290 S.C. 463, 351 S.E.2d 340 (1986); State v. Smart, 278 S.C. 515, 299 S.E. 2d 686 (1982).

Magistrates and municipal judges are cautioned to give the defendant every opportunity to return to the courtroom so as to preserve his right to confront his accusers in an orderly manner.

7. Right to Due Process

The Fourteenth Amendment to the U.S. Constitution provides, in part, that no state may "deprive any person of life, liberty, or property, without due process of law." This provision has been interpreted as requiring the states to assure that the defendant is receiving "that fundamental fairness essential to the very concept of justice." Lisenba v. California., 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941). This fundamental concept of fairness should be dominant in every proceeding before the magistrate or municipal judge.

8. Right to a Speedy and Public Trial

Article I, Section 14 of the S.C. Constitution, and the Sixth Amendment to the U.S. Constitution provide that the accused in a criminal trial shall have the right to a speedy and public trial. The right to a speedy trial is a right which can be waived. Waiver of such right is generally inferred where (1) the accused failed to make timely demand that he be either tried or discharged, (2) the court grants a continuance on motion of the accused or with his consent, or (3) the accused voluntarily entered a plea of guilty without raising the question of denial of a speedy trial. Wheeler v. State, 247 S.C. 393, 401, 147 S.E.2d 627, 630 (1966).

The constitutional guarantee of a speedy trial affords protection only against unnecessary or unreasonable delay. State v. Chapman, 289 S.C. 42, 344 S.E.2d 611 (1986). The determination of whether or not an accused has been denied his constitutional right to a speedy trial depends on the circumstances of each case. State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64,70 (1997). For the defendant to establish the fact that he has been denied a speedy trial, he must demonstrate the delay was attributable to the neglect and willfulness of the State. State v. Dukes, 256 S.C. 218, 222, 182 S.E.2d 286, 288 (1971). Certain factors which must be considered in determining whether the defendant has been denied a speedy trial are: (1) the length of the delay, (2) the government's reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant. This four part balancing test was adopted by the United States Supreme Court in Barker v. Wingo, 407 U.S.514 (1972). "South Carolina has also adopted this approach to the speedy trial analysis." See Brazell, supra, State v. Smith, 307 S.C. 376, 415 S.E.2d 409 (Ct. App. 1992); State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999).

In Richmond Newspapers, Inc., v. Commonwealth of Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), the U.S. Supreme Court determined that, based upon the First Amendment rights of press and speech, the public has a right to attend trials. The court held that while the Constitution provides a defendant with the right to a public trial, there is no absolute right to a private trial. Nevertheless, the defendant may move for closure of the trial. At a hearing on the issue, the defendant must show: (1) that he will be denied a fair trial if the public or press is allowed access to the proceeding and (2) no other method of protecting the defendant's right to a fair trial is available.

Persons with a legitimate interest in the proceedings (e.g. representatives of the news media) should be allowed to present reasons why the pretrial proceeding should remain open to the public, and why the defendant's right to a fair trial will not be jeopardized by an open hearing. After hearing the arguments both for and against closure of the proceedings, the judge must determine whether closure of the proceeding is the least drastic means of preserving the defendant's right to a fair trial and must make his findings a part of the record. (See Steinle, et al. v. Lollis, supra. Even in those instances where the prosecutor consents to the closing of the pretrial proceeding, the judge must make an inquiry and determine that no other alternative action will protect the defendant's right.

Possible alternatives to closure which might prove equally effective in protecting the defendant's rights under the particular circumstances might be (1) questioning prospective jurors on their voir dire in order to eliminate those who have prejudged the case, (2) sequestering the jury during the entire trial, (3) sequestering the witnesses, (4) permitting a change of venue, or (5) if appropriate, declaring a mistrial. These are only some of the possible methods of protecting the defendant's rights, without closing the trial to the public.

A combination of these or other appropriate alternatives should assure that the defendant receives a fair trial without the necessity of excluding the public from the trial. In all cases, it should be kept in mind that public access to judicial proceedings is an important aspect of our system of justice. (See also "Closure of the Preliminary Examination").

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H.
Trial Procedure

1. Different Types of Procedure

In every state there are two or more distinct sets of procedures used in criminal matters. The dividing line between the types of procedures is usually the misdemeanor/felony distinction: one set of procedures is used for misdemeanor trials and another set issued for felony trials.

South Carolina has two distinct sets of procedures, but the dividing line is not the traditional misdemeanor/felony distinction. In this State, the difference is based on the jurisdictional line between courts of limited jurisdiction (magistrate's court) and the courts of general jurisdiction (circuit court). This jurisdictional line is the provision in S.C. Code Ann. §22-3-550 -- the $500 or 30 days, or both clause. All offenses falling below this line are within the jurisdiction of the magistrates (and by implication, municipal courts), where one distinct set of procedures is used, and all offenses above this line are within the jurisdiction of the circuit courts where another set of procedures is used. The procedure used in the courts higher than magistrates' courts and municipal courts is not discussed in this book.

The procedure which magistrates use is a "summary procedure." The General Assembly has adopted this definition of magistrate court procedure in §22-3-730:

> All proceedings before magistrates shall be summary or with only such delay as a fair and just examination of the case requires.

Summary procedure shall also be used in municipal courts, by virtue of §14-25-45, as amended.

In brief, summary procedure means that the process is not elaborate, that the time between arrest and sentencing is relatively short. Of course, the fact that the proceedings lack many of the formalities required in the higher courts does not mean that various fundamental safeguards can be ignored in the magistrates' courts. (See Rights of the Defendant).

2. Commencement of Proceedings - Warrant and Information

Cases within the jurisdiction of the magistrate or municipal judge ordinarily begin with the filing of a complaint against a designated person before a magistrate. The complaining party, who may be a private citizen or a law enforcement officer, appears ex parte (by himself, without the presence of the accused) before the magistrate or municipal judge, and signs under oath a written document which describes the crime alleged to have been committed. If the magistrate or municipal judge is satisfied that a crime is legally stated, and there is probable cause to believe the person committed the crime, then he issues an arrest warrant for the apprehension of the accused person. This procedure is commonly called "swearing out a warrant."

It should be noted that the magistrate or municipal judge is expected to make an independent determination as to whether the facts stated by the complaining party allege an offense in the proper manner. The fact that a law enforcement officer is the complaining party does not mean that the judge should take for granted that the offense is legally stated. The magistrates and municipal judges are not "rubber stamps." They are to examine the accusations on their own merits. It is the duty of the judge to protect citizens against improper and unwarranted arrests, and to assist law enforcement officers in drafting an adequate warrant when the facts indicate that there are reasonable grounds to believe that the accused has committed the offense with which he is charged by the complaining party. (See ARREST WARRANTS).

The warrant must be in writing; therefore, a magistrate or municipal judge cannot orally charge a person with an offense and try him on the oral accusation. The requirement of a written warrant cannot be waived.

The arrest warrant, when signed by the magistrate or municipal judge, constitutes the charging paper upon which a person is tried for a criminal offense before a judge. There is no indictment when the offense is within the jurisdiction of the magistrate or municipal judge. Proceedings commenced without a proper charging paper are illegal, and a conviction under such a procedure would be void. Thus, a valid charging paper is essential to a lawful proceeding before a magistrate or municipal judge in a criminal case. In addition to the arrest warrant there are seven (7) other charging papers recognized in magistrate and municipal courts. They are: 1) the Uniform Traffic Ticket, §56-7-10; 2) the Official Summons of the Department of Natural Resources § 50-3-410; 3) the Official Summons of the S.C. Department of Revenue, Regulation of Alcoholic Liquors, Beer & Wine §61-2-210; 4) Environmental Control Citations, §44-67-50 (usually issued by employees of the Department of Health and Environmental Control); 5) the official summons of the S.C. Forestry Commission, §48-23-95; 6) county or municipal uniform ordinance summons, §56-7-80; and 7) courtesy summons, § 22-5-115.

The warrant must be supported by a written document which the complaining citizen or the law enforcement officer signs and swears to. This document is sometimes called a "complaint." In South Carolina, it is actually an affidavit incorporated into the arrest warrant.

The accusations in the affidavit which support the arrest warrant must be more than simple designations of offenses by name; such a complaint would be no more than a legal conclusion, and inadequate to support the warrant. State v. Randolph, 239 S.C. 79, 121 S.E.2d 349 (1961). While the affidavit need not conform to technical precision, the information in the affidavit must be such as to fully advise the accused of the nature and cause of the accusation, in order that he may be prepared to meet the charge at the proper time.

§ 22-3-710 provides as follows: "All proceedings before magistrates [or municipal judges] in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue."

The warrant may be amended at any time before trial. (§22-3-720). If the magistrate or municipal judge amends the warrant, he must grant a continuance of the case for a reasonable time in order for the defendant to meet the change where the defendant is

surprised by the amendment and would be prejudiced by an immediate trial. Town of Ridgeland v. Gens, 83 S.C. 562, 65 S.E. 828 (1909). A warrant cannot be amended after the trial has begun.

When the warrant accuses a person of committing an act which is susceptible of being designated as several different offenses, the magistrate or municipal judge must elect which charge to favor. Once the charge has been elected, a conviction or an acquittal of that elected charge is a complete bar to further prosecution for the alleged act. (§22-3-740).

The slight extra effort that it takes to draft a warrant and an affidavit with clarity and precision is fully justified. The State should be spared the expense of having to correct sloppy and inadequate processes. Further, it is the right of every citizen charged with a criminal offense to be fully informed of the nature and cause of the accusation. The language used in the warrant and supporting affidavit should be simple enough to be understood by any person of normal intelligence. (See CRIMINAL, Warrants, Arrest Warrants).

3. Pre-Trial Intervention (PTI)

Between the time of arrest and the trial date, certain defendants may apply and be accepted to participate in a Pre-Trial Intervention Program. The program is authorized and discussed in §§17-22-10 through 170. If a judge is notified that a defendant has been accepted into PTI, the trial must be continued or postponed until the defendant either successfully completes or fails to complete the program.

Certain persons are not eligible for consideration for PTI. § 17-22-50 provides:

> "A person may not be considered for intervention if he has previously been accepted into an intervention program nor may intervention be considered for those individuals charged with blackmail, driving under the influence of intoxicating liquor or drugs, any traffic-related offense which is punishable only by fine or loss of points, or any fish, game, wildlife, or commercial fishery-related offense which is punishable by a loss of eighteen points as provided in § 50-9-1120, any crime of violence as defined in § 16-1-60, or an offense contained in Chapter 25 of Title 16 (Criminal Domestic Violence offenses) if the offender has been convicted previously of a violation of that chapter or a similar offense in another jurisdiction."

A person charged with the first offense of possession of marijuana or hashish under § 44-53-370(d)(3) may be permitted to enter PTI if he or she meets the standards of eligibility for the intervention program. Summary court judges may also consider a conditional discharge for individuals charged with a first offense of possession of marijuana or hashish. See § 44-53-450 for details concerning conditional discharges.

There are 7 standards of eligibility for a pretrial intervention program. These standards are set out in § 17-22-60, which provides:

Intervention is appropriate only where:

(1) there is substantial likelihood that justice will be served if the offender is placed in an intervention program;

(2) it is determined that the needs of the offender and the State can better be met outside the traditional criminal justice process;

(3) it is apparent that the offender poses no threat to the community;

(4) it appears that the offender is unlikely to be involved in further criminal activity;

(5) the offender, in those cases where it is required, is likely to respond quickly to rehabilitative treatment;

(6) the offender has no significant history of prior delinquency or criminal activity;

(7) the offender has not previously be accepted in a pretrial intervention program.

For persons charged with fish, game, wildlife, or commercial fishery-related offenses, there are additional conditions for admission to PTI. These conditions are set out in § 17-22-55 which provides:

> As a condition of admission to the pretrial intervention program of a person charged with a fish, game, wildlife, or commercial fisher-related offense which does not disqualify him for intervention, this person shall pay an additional administrative charge equal to the maximum monetary fine, not to exceed five hundred dollars, which could be imposed for the offense. The administrative charge must be deposited in the game and fish fund of the county where the offense was committed. Also, if any property was seized and confiscated at the time of the arrest for the offense, as a condition of admission to the pretrial intervention program, the offender must agree to the retention and sale of that property as provided by law by the law enforcement agency making the seizure. The proceeds from the sale also must be deposited in the game and fish fund of the county wherein the offense was committed.

If the defendant successfully completes the PTI program, the solicitor's office (which is responsible for the PTI program) effects a non-criminal disposition of the charge, usually a nolle prosequi. The solicitor's office must dispose of the charge even if the offense is one that the solicitor normally does not prosecute, e.g., simple assaults or petit larcenies. If the defendant fails to complete the program, the trial court is informed and a trial date is set. If the status of a defendant's participation in PTI is not reported to the trial court within six (6) months of his entry into the program, the trial court should inquire to the PTI office regarding the case.

Participation in PTI is entirely between the defendant and the solicitor, i.e., a judge does not send or refer a defendant to PTI. Since the solicitor's office may not approach a defendant about PTI and most defendants without attorneys are unaware of PTI, a judge at a defendant's bond proceeding may give the defendant a brochure or otherwise inform

him of PTI and that he, the defendant, should inquire further at the solicitor's office. For complete information regarding PTI, please consult §§ 17-22-10 through 17-22-170.

PTI and conditional discharges are the only two diversionary programs available to magistrates and municipal judges, unless the solicitor in each jurisdiction has established and made available for summary court use other diversionary programs. County and municipal governments and/or their summary courts are prohibited from creating independent diversionary programs. See Order of the Chief Justice dated September 12, 2003, in Orders Section.

4. Trial in Absentia

The Sixth Amendment of the Constitution guarantees the right of an accused to insist that he be present at all stages of the proceedings in a criminal case. The accused may elect not to be present in trials before magistrate or municipal courts without the consent of the court. Rule 16 of the South Carolina Rules of Criminal Procedure provides:

> [A] person indicted for misdemeanors and/or felonies, may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.

In such a circumstance, an accused may be tried in absentia. However, a waiver of such an important right is permitted only in limited circumstances. The proper course of action if this occurs is for the trial judge, before the start of defendant's trial in absentia, to make findings of fact on the record that the defendant 1) received notice of his right to be present, and 2) the defendant was warned that the trial would proceed in his absence upon a failure to attend court. State v. Jackson, 288 S.C. 94, 341 S.E.2d 375 (1986). See City of Aiken v. Koontz, 368 S.C. 542, 629 S.E.2d 685 (2006), where municipal trial court correctly proceeded with a trial in defendant’s absence, after making appropriate factual findings on the issue of whether defendant had notice of trial and whether he was warned the trial would proceed in his absence. Koontz held that notice of the term of court for which the case is set constitutes sufficient notice to enable a criminal defendant to make an effective waiver of his right to be present. Further, Koontz held that a defendant’s acknowledgment on a properly completed bond form provides the requisite notice that a defendant can be tried in his absence upon failure to appear. Also see State v. Fairey, Op. No. 4233 (S.C. Ct. App. Filed April 16, 2007).

When a defendant who has been properly notified does not appear when the trial is scheduled, the magistrate or municipal judge should call his name, or direct that the constable call his name, three times from the courthouse door. After waiting a reasonable time, the magistrate or municipal judge may proceed.

A trial in absentia, as a procedural matter, is only slightly different from a trial at which the defendant appears. The complaining citizen or law enforcement officer is placed under oath and allowed to present his evidence. Other witnesses, if any, are permitted to testify under oath. Additionally, the constable is summoned to testify that he called the defendant's name from the courthouse door and that there was no response. In those cases where the magistrate or municipal judge himself called the defendant's name, he lets the record show that the defendant's name was called and that he did not respond.

When the evidence is complete, the magistrate or municipal judge makes his findings. If the defendant is acquitted, the proceedings are terminated. If the defendant is found guilty, the magistrate or municipal judge imposes sentence, according to the penalty allowed for the offense by law. He may use the testimony presented, and any other facts at his disposal, in determining the sentence to be imposed. If the sentence is a fine, the judge may (but does not have to) apply the forfeited bond to the sentence; if the sentence is a jail term, a bench warrant is issued for the arrest of the defendant.

Although a trial in absentia is more complicated and more time-consuming than a simple declaration that the defendant's bond is forfeited for failure to appear, it is preferred to a forfeiture because the trial in absentia is a final determination of the matter. Where there is a forfeiture of bond and nothing more, demand by the defendant entitles him to a trial at a later date.

5. Entering the Plea

The first act of a defendant which a magistrate must require in a criminal proceeding is the entering of a plea. The process which a magistrate must follow in the plea procedure is threefold:

a) Jurisdiction - determine if the court has jurisdiction over both the defendant and his alleged offense.
b) Counsel - insure that the defendant is represented by proper legal counsel, or obtain waiver of counsel from the defendant.
c) Pleading - obtain one of five possible pleas from the defendant -- guilty, not guilty, nolo contendere, double jeopardy or no plea.

This section will examine each of these areas.

a. Jurisdiction

(See "Jurisdiction")

b. Counsel

Once the magistrate or municipal judge has determined that he has jurisdiction over a criminal offense, he must then insure that the defendant has access to proper legal representation. Article I, Section 14 of the S.C. Constitution grants to the accused the right to be "fully heard in his defense by himself or by his counsel or both." Since the law and its application is often a very complex process, the magistrate or municipal judge should encourage the defendant to obtain an attorney. The judge should also inform the defendant that if the accused cannot afford an attorney, the state will provide one. (See Defense of Indigents Act, §17-3-10, et. seq.) Should the defendant decide to use counsel, the judge should not accept any plea until the defendant has had an opportunity to consult with his lawyer. If, on the other hand, the defendant should decide not to make use of an attorney's services, the judge should carefully examine the accused to determine if he is fully aware of his rights. A waiver of right to counsel should be signed by the defendant.

This examination is a very important step in the plea process. To be lawful, the defendant's decision to waive counsel must be made both voluntarily and with an understanding of his rights. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). Though an absence of counsel does not invalidate a plea, it does greatly increase the burden put upon the judge to make sure that the defendant is aware of his rights.

The waiver of the right to have a lawyer becomes especially critical when the defendant decides to plead guilty. In such instances, the judge must explain to the defendant that he is giving up the following rights:

1) the right to a trial by jury,

2) the right to confront his accusers, and

3) the privilege against compulsory self-incrimination.

The defendant must have an understanding of these rights, and realize how they relate to the facts of his case. Further, the court must be able to show in the court record that the accused both understood his offense and its possible consequences, and that he was not led into this decision by false promises or threats. Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). Some examples of the type of questions the judge should ask the defendant are:

- "Do you understand the rights you have given up by pleading guilty?

- "Do you understand that you have the right to:

    1) a speedy trial by an impartial jury?
    2) a public trial by jury?
    3) testify in your own behalf?
    4) present witness and evidence in your own behalf?
    5) cross-examine the State's witness?"

- "Do you understand that the State must prove beyond a reasonable doubt that you are guilty of this offense?"

- "Do you understand that a jury verdict must be unanimous?" (Explain if necessary)

- "Do you understand that by pleading guilty, you are admitting all matters of fact in the accusation? Do you further understand that by pleading guilty, you give up any objections you may have to this charge?"

- "Do you understand the possible punishments I can impose upon you for committing this crime?" [Cite the maximum penalty(s)].

- "Are you making this decision to plead guilty of your own free will? Have you in any way been threatened or forced to accept a guilty plea?"

The judge should always ask the defendant, as well as the state, whether the defendant has decided to plead guilty as the result of a plea bargain with the state. The judge must then inform both parties that the agreement must be outlined in the record in order to be enforced by the appellate court. The judge should also ask these further questions:

- "Have you agreed to plead guilty as a result of a bargain with the prosecutor? What is your understanding of this bargain?"

- "Do you understand that this bargain is not a guarantee and that I may impose one of the punishments I told you about regardless of the bargain?"

With regards to plea bargaining, the judge must remain isolated and detached from the negotiations. In State v. Cross, 270 S.C. 44, 240 S.E.2d 514, at 516-517, (1977), the S. C. Supreme Court stated:

> While we acquiesce in the tendency of the courts to allow plea bargaining, we are of the opinion that the judge should not initiate or influence the agreement, nor be a party to the negotiations. A plea induced by the influence of the judge cannot be said to have been voluntarily entered. The solicitor is the adversary of the defendant and his counsel. The negotiations should be between the adversaries. The judge is not the adversary of either. An agreement reached between the solicitor and his adversary can never be more than a recommendation. The judge must remain in a position of complete neutrality such that he may, in the last analysis, exercise freedom of sentencing judgment based on all of the facts.

As a final step, the judge should in a step-by-step process, review the evidence that the prosecutor would have introduced if the case had been tried. He should ask the defendant if he committed the alleged acts. He should also obtain a full statement from investigating officers. State v. DeAngelis, 256 S.C. 364, 182 S.E.2d 732 (1971). Then, and only then, if the judge believes that all parties involved in the proceeding are telling the truth and are not under the influence of any drugs or alcohol, should he accept the guilty plea.

c. Pleading

After the judge has determined his jurisdiction and determined whether or not the defendant wants counsel, he should ask for the defendant's plea. One of the following pleas may be entered by the defendant or his attorney:

(1) Guilty - an admission or confession of guilt to the crime. If a

written confession accompanies the defendant, make sure that the confession is accurate and not made under duress. A guilty plea or confession is not extracted under duress if the defendant makes it from fear of the possible penalty the court might impose. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

A judge's acceptance of a guilty plea is subject to the same requirement of voluntariness and understanding outlined in the previous section. (See questions).

(2) Not Guilty - a denial of guilt which calls upon the prosecution to prove its case. When the defendant pleads not guilty, the judge should set a court date, and ask the accused if he is prepared to go to court on that date.

(3) Nolo Contendere - a defendant's assertion that "I do not wish to contend" the charge. The court should explain that the plea of nolo contendere has the same legal effect as a plea of guilty, except that such a plea may not be used against the defendant as an admission of guilt to the alleged act in a civil proceeding. Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976). The judge should treat a plea of nolo contendere as a guilty plea. (§17-23-40).

(4) Double Jeopardy - a special plea where the defendant asserts that he has already been prosecuted for the same or a different offense that arises out of the same criminal transaction. Section 17-23-20 prohibits double prosecution for a criminal act that constitutes two or more offenses.

(5) No Plea - a refusal by the defendant to enter a plea. In such cases, the judge should enter a plea of not guilty and set a trial date.

6. Selection of the Jury

There are several sections of the S.C. Constitution which concern the jury trial. Article I, Section 14 guarantees a "speedy and public trial by an impartial jury." Article I, Section 14 states that the right to a jury trial is "preserved inviolate." In addition, the right to a trial by jury, provided in the Sixth Amendment to the U.S. Constitution, has been made applicable to the states through the Fourteenth Amendment to the U.S. Constitution. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968).

a. Magistrate

The general statutes of South Carolina provide:

"Every person arrested and brought before a magistrate, charged with an offense within his jurisdiction, shall be entitled on demand to a trial by jury which shall be selected as provided in this

chapter." (§22-2-150).

Preparation of the jury box and the selection of jurors for trial in the magistrate's court is provided for in §22-2-50 et. seq. The chief summary court judge of the county is required to forward to each magistrate a list of qualified electors in the district or vicinity of each magistrate's court. Within the first thirty (30) days of each calendar year, these names must be placed in the jury box prepared as provided in §22-2-60. § 22-2-80 provides a manner of selection of the jury list for a single trial. Subsection (A) provides "A person appointed by the magistrate who is not connected with the case for either party must draw at least thirty (30) names, but not more than 100 names, from the jury box, and this list of names must be delivered to each party or to the attorney for each party. " § 22-2-80 (B) provides that "if a court has experienced difficulty in drawing a sufficient number of jurors from the qualified electors of the area, and, prior to implementing a process pursuant to this subsection, seeks and receives approval of South Carolina Court Administration, the person selected by the presiding magistrate may draw at least one hundred (100) names, but not more than a number determined sufficient by court administration for the jury list, and shall deliver this list to each party or the attorney for each party." Request for prior approval must be in writing. The South Carolina Supreme Court has held that nothing in § 22-2-80 required that jurors be brought face-to-face with the accused prior to the exercise of peremptory challenges. State v. Potts, 347 S.C. 126, 554 S.E.2d 38 (2001). § 22-2-80 governs the selection of juries for single trials in magistrates court. § 22-2-90 governs the selection of juries for terms of court in magistrates court, and does not similarly provide for the selection of jurors from a list.

§ 22-2-90 provides the procedure for drawing jury list for courts having scheduled terms of court. Under this section, "[n]ot less than ten nor more than forty-five days before to a scheduled term of jury trials, a person selected by the presiding magistrate must draw at least forty (40) jurors, but not more than one hundred (100) jurors, to serve one week only. " § 22-2-90 provides that the courts which schedule terms for jury trials may receive prior approval from South Carolina Court Administration to "draw at least one hundred (100) names but not more than a number determined sufficient by Court Administration to serve one week only" if the court has experienced difficulty in drawing a sufficient number of jurors. § 22-2-90(C). Request for prior approval must be in writing.

Immediately after such jurors are drawn the magistrate shall issue his writ of venire facias for such jurors requiring their attendance on the first day of the week for which they have been drawn and such writ shall be forthwith delivered to the magistrate's constable or the sheriff of the county concerned."

Prior to the trial date, the names drawn should be placed in a hat or box and randomly drawn out one at a time with each party or his attorney present. Each party has a maximum of six (6) peremptory challenges as to primary jurors and four (4) peremptory challenges as to alternate jurors, and other challenges for cause. The names are drawn and challenged until six (6) jurors and four (4) alternate jurors are selected. If it is not possible to select the

jurors and alternates from the names drawn, names shall be randomly drawn from the jury box until a sufficient number is selected. Finally, the ten (10) prospective jurors are summoned for the trial date. §22-2-110 provides: [p] arties shall exercise peremptory challenges in advance of the trial date, and only persons selected to serve and alternates shall be summoned for the trial."

"If, at the time set for trial, there are not sufficient jurors to proceed because one or more have failed to attend, have not been summoned, or have been excused or disqualified by the court, additional jurors must be selected from the remaining names or in the manner provided in § 22-2-80 or § 22-2-100. " (§ 22-2-120.)

§ 22-2-130 provides in part, "No person shall serve on a jury in a magistrate's court more than once every calendar year."

Jurors in magistrates' courts may be drawn by computer. § 22-2-195 provides, "[i]n lieu of the manner required by this chapter, jurors for magistrates' courts in a county, at the discretion of the governing body of the county, may be drawn and summoned by computer in the manner the Supreme Court by order directs."

A juror should not be chosen if he is known to be closely related to either side of the case, or if he is a county official, or court employee, or if he has been convicted of a crime punishable by imprisonment of more than one year, or if he is incapable by reason of mental or physical infirmity to render efficient jury services, or if he is incapable of reading or writing (or understanding) the English language, or if he has less than a 6th grade (or equivalent) education.

§ 14-7-840 provides:

> No person is exempt from service as a juror in any court of this State except men and women over sixty-five years of age. A person exempt under this section may be excused upon telephone confirmation of date of birth and age to the clerk of court or chief magistrate. Notaries public are not considered state officers and are not exempt under this section.

Please note that this is an "exemption, " not a "disqualification, " from jury service. Many individuals over the age of 65 wish to serve on a jury and are constitutionally entitled to that duty. These individuals are entitled to serve and must be issued a juror summons if a court draws their name.

A student or school employee selected for jury service during the school term may request a postponement to a date that does not conflict with the school term. (§§22-2-85 and 14-7-845). § 22-2-135 provides that a person who performs such essential services to a business, commercial, or agricultural enterprise that it would cease to function if the person was required to perform jury duty may be excused or transferred to another term of court by the magistrate. The person must furnish an affidavit to the clerk of the court

requesting to be excused from jury duty. § 14-7-860 was amended to provide that a person who is the primary caretaker of a person 65 years of age or older or a severely disabled person who cannot care for himself or cannot be left unattended may be excused from jury duty by the presiding judge.

If a juror who has been summoned for jury duty in a magistrate's court should fail to appear at the designated time and place and fail to supply to the magistrate within forty-eight (48) hours sufficient reason for such failure to appear in obedience to the venire issued, the magistrate holding such court may order the delinquent juror to pay a civil penalty not exceeding $100.00. Failure to pay the fine constitutes contempt of court. (§22-2-130).

After the jury is selected and before it is sworn, the defendant or the prosecution may ask the court to hold a hearing, charging that the other side was purposeful and discriminatory in their use of peremptory strikes in selecting the jury. The magistrate must then hold a Batson (Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)) hearing to determine if the charges are legitimate. State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995). The South Carolina Supreme Court in State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999), discussed at length as to how a Batson hearing must be conducted. The court stated:

> A Batson hearing is conducted in the following manner. First, the trial judge must hold a Batson hearing when members of a cognizable racial group or gender are struck and the opposing party requests a hearing. Second, the proponent of the strike must present a race-or gender-neutral explanation. At this second step, the proponent of the strike no longer is required to offer a reason that is race or gender-neutral and clear, reasonable specific, and legitimate. The reason must only be race-or gender neutral. Third, the opponent of the strike must show that the race-or gender-neutral explanation given was mere pretext. State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996) [adopting the Batson procedure set forth in Purkett v. Elem, 513 U.S.765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)]. The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike. Id.
>
> The court went on to say that,"[p]retext generally will be established by showing that similarly situated members of another race were seated on the jury. Under some circumstances, the race-neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine, at the third step of the analysis, that the explanation was mere pretext even without a showing of disparate treatment." Payton v. Kearse, 329 S.C. at 55, 495 S.E.2d at 207; accord State v. Adams, supra; State v. Casey, 325 S.C. 447, 481 S.E.2d 169 (Ct. App. 1987).

In Payton v. Kearse, the court adopted a '"tainted' approach in which a fundamentally implausible or pretextual reason for a strike taints any other legitimate reason for the strike. 'Once a discriminatory reason has been

uncovered--either inherent or pretextual--this reason taints the entire jury selection procedure.'" The court went on to say that the purpose of Batson "is to ensure peremptory strikes are executed in a nondiscriminatory manner." Id., 329 S.C. at 59, 495 S.E.2d at 210.

Therefore, if the party accused of using peremptory strikes in a discriminatory manner fails to show a valid race or gender neutral reason for the strikes, a new jury must be selected from the jury box; otherwise, the original jury panel selected may be sworn and the case may proceed. Under the guidelines as set forth by the U.S. Supreme Court, any person regardless of race or gender may set forth a valid Batson claim. Likewise, the striking of any juror can raise the inference of race and/or gender based discrimination.

b. Municipal Court

The general statutes of South Carolina provide:

> Any person to be tried in a municipal court may, prior to trial, demand a jury trial, and such jury when demanded, shall be composed of six persons drawn from the qualified electors of the municipality in the manner prescribed herein. The right to a jury trial shall be deemed to have been waived unless demand is made prior to trial. (§14-25-125).

The jury list is composed of all names on the official list of qualified voters of the municipality, which list is furnished to the municipality by the State Election Commission each year, or is copied from the official voter registration list of the municipality. (§14-25-155). Within the first thirty (30) days of each calendar year, these names are placed in a jury box prepared as provided in §14-25-145. The procedure for drawing a jury for a single trial is found in § 14-25-165(a)(2), which provides "[a] person appointed by the municipal judge who is not connected with the trial of the case for either party must draw out of compartment 'A' of the jury box at least thirty (30) names, but not more than one hundred (100) names, and the list of names must be delivered to each party or to the attorney for each party.

§ 14-25-165 provides that if a municipal court has experienced difficulty in drawing a sufficient number of jurors, the court may receive prior approval from South Carolina Court Administration to draw "at least one hundred (100) names, but not more than a number determined sufficient by Court Administration to serve one week only. " (§ 14-25-165(b)(3).) § 14-25-165(b)(4) provides that "[i]mmediately after the jurors are drawn, the judge must issue a writ of venire facias for the jurors requiring their attendance on the first day of the week for which they have been drawn. This writ must be delivered to the chief of police or may be served by regular mail by the clerk of court."

§ 14-25-165(b)(1) provides the procedure for drawing jury lists for courts scheduling terms of court, rather than single trials. Under subsection (b)(2), "[n]ot less than ten nor more than forty-five (45) days prior to a scheduled term of jury trials, a person selected by the presiding judge shall draw at least forty jurors, but not more than one hundred (100) jurors, to serve one week

only. § 14-25-165(b)(3) allows municipal courts which have scheduled terms of court to receive prior approval from South Carolina Court Administration to draw "at least one hundred (100) names, but not more than a number determined sufficient by Court Administration to serve one week only." § 14-25-165 (b)(4) provides that "[i]mmediately after the jurors are drawn, the judge must issue a writ of venire facias for the jurors requiring their attendance on the first day of the week for which they have been drawn. This writ must be delivered to the chief of police, or may be served by regular mail by the clerk of court."

Pursuant to § 14-25-165(c), "[t]he names drawn pursuant to either subsection (a) or (b) must be placed in a hat or box and individual names randomly drawn one at a time until six (6) jurors and four (4) alternates are selected. Each party has a maximum of six (6) peremptory challenges as to primary jurors and four (4) peremptory challenges as to alternate jurors, and any other challenges for cause the court permits." The names are drawn and challenged until six (6) jurors and four (4) alternate jurors are selected. If it is not possible to select the jurors and alternates from the names drawn, a name shall be randomly drawn from the jury box until a sufficient number of jurors and alternates are selected.

In municipal court, peremptory challenges must be utilized on the date set for trial. If, on the date of the trial, less than six (6) jurors may be seated for the trial, additional juror(s) are selected from the remainder of the list, or if the list is exhausted, randomly from the jury box.

§ 14-25-170 provides for the drawing and summoning of jurors by computer. "In lieu of the manner requested by this chapter, jurors for municipal courts, at the discretion of the governing body of the municipality, may be drawn and summoned by computer in the manner the Supreme Court by order directs."

A juror should not be chosen if he is known to be closely related to either side of the case, or if he is a county official, or if he has been convicted of a crime punishable by imprisonment of more than one year, or if he is incapable by reason of mental or physical infirmity to render efficient jury services, or if he is incapable of reading or writing (or understanding) the English language. (§§14-7-810 and 820).

§ 14-7-840 provides:

> No person is exempt from service as a juror in any court of this State except men and women over sixty-five years of age. A person exempt under this section may be excused upon telephone confirmation of date of birth and age to the clerk of court or chief magistrate. Notaries public are not considered state officers and are not exempt under this section.

Please note that this is an "exemption," not a "disqualification," from jury service. Many individuals over the age of 65 wish to serve on a jury and are constitutionally entitled to that duty. These individuals are entitled to serve and must be issued a juror summons if a court draws their name.

A student or school employee selected for jury service during the school term may request a postponement to a date that does not conflict with the school term. (§14-7-845). § 14-25-180 provides that "[u]pon furnishing an affidavit to the clerk of court requesting to be excused from jury duty, a person either may be excused or transferred to another term of court by the municipal judge if the person performs services for a business, commercial, or agricultural enterprise, and the person's services are so essential to the operations of the business, commercial, or agricultural enterprise that the enterprise must close or cease to function if the person is required to perform jury duty." § 14-7-860 provides that a person who is the primary caretaker of a person 65 years of age or older or a severely disabled person who cannot care for himself or cannot be left unattended may be excused from jury duty by the presiding judge.

If a juror who has been summoned for jury duty in a municipal court should fail to appear at the designated time and place and fail to supply to the municipal judge within forty-eight (48) hours sufficient reason for such failure to appear in obedience to the venire issued, the juror may be punished for contempt. He should be given an opportunity to appear before the municipal court at the time he is sentenced for contempt, however. Such appearance may be obtained through issuance of a Rule to Show Cause. If the Rule to Show Cause is ineffective, you may then issue a bench warrant. (See §14-25-185).

After the jury is selected and before it is sworn, the defendant or the prosecution may ask the court to hold a hearing, charging that the other side was purposeful and discriminatory in their use of peremptory strikes in selecting the jury. The municipal judge must then hold a Batson (Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)) hearing to determine if the charges are legitimate. State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995). The South Carolina Supreme Court in State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999), discussed at length as to how a Batson hearing must be conducted. The court stated:

> A Batson hearing is conducted is the following manner. First, the trial judge must hold a Batson hearing when members of a cognizable racial group or gender are struck and the opposing party requests a hearing. Second, the proponent of the strike must present a race- or gender-neutral explanation. At the second step, the proponent of the strike no longer is required to offer a reason that is race or gender-neutral and clear, reasonable specific, and legitimate. The reason must only be race-or gender neutral. Third, the opponent of the strike must show that the race-or gender-neutral explanation given was mere pretext. State v. Adams, 322 S.C.114, 124, 470 S.E.2d 366, 372 (1996) [adopting the Batson procedure set forth in Purkett v. Elem, 513 U.S. 765, 115 S. Ct. 1769, 131 L.Ed.2d 834 (1995)]. The burden of persuading the court that a Batson violation has occurred remains at all time on the opponent of the strike. Id.
>
> The court went on to say that "[p]retext generally will be

> established by showing that similarly situated member of another race were seated on the jury. Under some circumstances, the race-neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine, at the third step of the analysis, that the explanation was mere pretext even without a showing of disparate treatment." Payton v. Kearse, 329 S.C. at 55, 495 S.E.2d at 207; accord State v. Adams, supra; State v. Casey, 325 SC 447, 481 S.E.2d 169 (Ct. App. 1987).

In Payton v. Kearse, the court adopted a "'tainted' approach in which a fundamentally implausible or pretextual reason for a strike taints any other legitimate reason for the strike. 'Once a discriminatory reason has been uncovered--either inherent or pretextual--this reason taints the entire jury selection procedure.'" The court went on to say that the purpose of Batson "is to ensure peremptory strikes are executed in a nondiscriminatory manner." Id., 329 S.C. at 59, 495 S.E.2d at 210.

Therefore, if the party accused of using peremptory strikes in a discriminatory manner fails to show a valid race or gender neutral reason for the strikes, a new jury must be selected from the jury box; otherwise, the original jury panel selected may be sworn and the case may proceed. Under the guidelines as set forth by the U.S. Supreme Court, any person regardless of race or gender may set forth a valid Batson claim. Likewise, the striking of any juror can raise the inference of race and/or gender based discrimination.

7. Voir Dire

Once six jurors have been selected as provided by law, they are then placed on voir dire if either side makes a motion to the judge to do so. Voir dire means "to speak the truth", and refers to an investigation to assure that each prospective juror is fair and unbiased in the case. It is the judge's duty to assure himself that each juror is unbiased, fair, and impartial. State v. Britt, 237 S.C. 293, 117 S.E.2d 379 (1960). Therefore, a judge can place jurors on their voir dire on his own motion. The voir dire examination is a guarantee of the right of the defendant to an impartial jury, and when a timely request is made, it is the duty of the magistrate or municipal judge to make reasonable inquiry of the jurors to determine whether bias or prejudice exists. State v. Brown, 240 S.C. 357, 126 S.E.2d 1 (1962). If a judge were to refuse to examine the jurors on voir dire when properly requested, this would be a clear violation of the defendant's right to an impartial jury under Art. I, Section 14 of the S.C. Constitution, and would require reversal of any conviction against him.

The judge usually conducts the voir dire examination, but he/she may permit the parties or their attorneys to examine the jurors. Ordinarily, however, the judge does the actual questioning, although he/she may accept questions from the parties to ask of the jurors.

The questions to be asked are within the discretion of the judge, but generally each juror shall be examined as to whether he is related to either party, has any interest in the case, has already expressed or formed an opinion of the case, or has any bias or prejudice in the case. If a juror indicates in some way that he cannot give the defendant a fair trial, or that he is biased or prejudiced in some way that would be detrimental to the just disposition of the case, he must be dismissed from the panel, and replaced according to

the procedure outlined above. It should be noted that this is a dismissal for cause, and has nothing to do with the peremptory challenges which are afforded each side in §22-2-100 prior to the trial date.

After six qualified jurors have been seated, the judge then administers the oath. A suggested form is:

> Do you, and each of you, solemnly swear or affirm that you will well and truly try the issues between the State of South Carolina [or Municipality of _____, if a violation of a municipal ordinance is involved] and the defendant in the case at bar, and give a true verdict according to the law and the evidence presented, so help you God?

After a panel of six persons has been placed in the box, the jury is seated and sworn. The warrant is read to them, perhaps with some additional statement to clarify the nature of the charges. For example:

> Ladies and gentlemen of the jury, the State alleges that the defendant, Mr. Jones, on May 1, 1976, committed the crime of petit larceny by taking some garden tools from Mrs. Alice Doe, without her permission. Mr. Jones pleads not guilty. That is what this case is all about. It is your job to determine beyond reasonable doubt whether he did so, or to find him not guilty.

8. Taking Down and Preserving Testimony

a. Magistrate

Before proceeding to the introduction of evidence, the magistrate should determine whether the defendant is willing to waive his right to have the testimony taken down in writing by the magistrate. If the defendant does not waive this right, the magistrate must write down the testimony of each witness and each witness must sign the writing. At some time during or after the trial, preferably immediately after the witness has testified, the magistrate should read the statement to the witness and have him sign it. Where a court reporter is available, or the testimony is electronically recorded, the magistrate does not have to write down the testimony and have the witness sign it; the record is preserved by the court reporter's transcript or the electronic recording. (§22-3-790). This statutory obligation requiring the magistrate to write down the testimony unless waived by the defendant is burdensome on the magistrate and since the state cannot afford court reporters for every magistrate, it is recommended that the testimony be recorded.

Although it is not clear what §22-3-790 requires of the magistrate when he is to take down "the testimony of all witnesses," it is generally accepted that this does not mean that he is to make a verbatim copy of the testimony. If he does not have a tape recorder, he should make sufficient notations as to all essential facts alleged by the witnesses so that the record is clear and as complete as practicable.

b. Municipal Court

§ 14-25-195 gives any party the right to have testimony in a jury trial taken stenographically or mechanically by a reporter. If the party does not provide for the mechanical recording of the proceeding himself, but requests the court to do so, he must pay the charges of the municipal court reporter for the taking and transcribing of the testimony. It is not clear what the responsibility of the municipal judge may be when the defendant appeals from the sentence or judgment, and has not provided for the recording himself, or requested the court to do so and a reporter was not present at trial.

9. Witnesses

Each party has the right to introduce witnesses to bolster his case. Certainly persons who have direct knowledge of the facts involved provide useful testimony. In addition, character witnesses may be introduced to testify as to the veracity and general good behavior of the defendant and other principals in the case. The judge does not have to allow an interminable string of witnesses, but he must certainly permit the introduction of all witnesses who have testimony which is material and relevant.

A magistrate or municipal judge can summon a witness, under threat of contempt, on request of either party. The witness in a magistrate's court must reside in the county of the magistrate's court, however. The summons must be served in such a manner as to be received by the witness at least one day before the trial. (§22-3-930). Should a properly notified witness fail to appear, the judge may issue a rule to show cause, commanding the appearance of that person for the purpose of offering "good cause" for his failure to appear. If the delinquent witness should fail to offer "good cause", the judge may punish that witness for contempt by imposition of a sentence up to the limits imposed on magistrate's court in § 22-3-550. (§22-3-930).

In some cases, a magistrate or municipal judge may take depositions (testimony de bene esse) from a witness to be used at the trial where it appears that attendance of the witness is virtually impossible because of extreme age, sickness, infirmity, indispensable absence on public official duty, in consequence of intended removal from the State before trial, or when the witness is a resident of another county or outside the limits of the State. (§22-3-940). In lieu of the magistrate or municipal judge taking the deposition himself, he may cause it to be done by a magistrate or an officer authorized by law to administer oaths. The opposing party must be given proper notice according to the statute, and has the right to attend. The deposition is sealed and conveyed to the magistrate or municipal judge authorizing it.

10. Conduct of the Trial

When beginning a criminal trial, the judge should state the nature of the proceeding and require all potential witnesses in the case to take the following oath:

> Do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

In some instances, a witness may refuse to take an oath or appeal to God based on

religious beliefs. In U. S. v. Looper, 419 F.2d 1405, at 1407 (4th Cir. 1969) it was stated that:

> The common law. . . requires neither an appeal to God nor the raising of a hand as a prerequisite to a valid oath. All that the common law requires is a form or statement which impresses upon the mind and conscience of a witness the necessity for telling the truth.

All witnesses may be sworn at the same time, but a witness who enters the proceedings later is required to take the "oath" individually before testifying.

Both parties in a criminal trial have the right to make an opening statement, present evidence, and make a closing statement. The prosecution makes its opening statement first and then the defense may offer its opening statement, or it may wait until after the prosecution has presented its case. In any event, the prosecution puts forth its case before the defense. However, the defense makes the first closing statement which is followed by that of the prosecution. Therefore, a criminal proceeding follows either of these forms:

I. Prosecution's Opening Statement
Defendant's Opening Statement
Prosecution's Case
Defendant's Motion for Judgment of Acquittal (Directed Verdict)
Defendant's Case
Prosecution's Rebuttal
Defendant's Motion for Judgment of Acquittal (Directed Verdict)
Defendant's Closing Statement
Prosecution's Closing Statement

OR

II. Prosecution's Opening Statement
Prosecution's Case
Defendant's Motion for Judgment of Acquittal (Directed Verdict)
Defendant's Opening Statement
Defendant's Case
Prosecution's Rebuttal
Defendant's Motion for Judgment of Acquittal (Directed Verdict)
Defendant's Closing Statement
Prosecution's Closing Statement

The initial step in the prosecution's case is the calling and questioning of witnesses. This process is called direct examination. The defense next cross-examines the witness, usually regarding subjects which were raised on direct examination. When the defense completes its cross-examination, the prosecution is allowed a redirect examination of the witness concerning matters raised on cross-examination. Whenever a redirect examination is allowed, the defense has the right to recross-examination. This witness is then released and the magistrate requests the prosecution to either call another witness or rest its case. This process is repeated for each witness called by the prosecution.

After the prosecution has finished presenting its case, if the defense believes that case to be insufficient to prove each element of the offense beyond a reasonable doubt, the defense will move for a judgment of acquittal (i.e., a directed verdict of not guilty). The judge should then excuse the jury while both parties argue for or against the motion.

In ruling on a motion for a directed verdict, the trial judge is concerned with the existence of evidence, not its weight. State v. Bryant, 316 S.C. 216, 447 S.E.2d 852 (1994). The trial court must view the evidence in the light most favorable to the State, and should submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. State v. Prince, 316 S.C. 57 , 447 S.E.2d 177 (1993). The judge is not deciding at this point whether the defendant is guilty or not guilty. He is only deciding whether the trial should stop or whether it should proceed.

If the motion for directed verdict is denied, the defense makes its opening statement, if it has not already done so, and then calls its first witness. The same procedure is followed with defense witnesses as was followed with the prosecution witnesses; direct examination, cross-examination, redirect and recross-examination. If the defendant chooses to testify, the same procedure is used with him as with all other witnesses. This process continues until the defense rests its case. Under Rule 607 of the South Carolina Rules of Evidence, the credibility of a witness may be attacked by any party, including the party calling the witness.

As a general rule, a party offering a witness vouches for his truthfulness and cannot cross-examine or impeach the witness. State v. Hamlet, 294 S.C. 77, 362 S.E.2d 644 (1987). However, a party may impeach his own witness if the witness is declared hostile. A witness should not be declared hostile except upon a showing of both actual surprise and harm. State v. Bendoly, 273 S.C. 47, 254 S.E.2d 287 (1979).

Once both parties have rested their cases, the prosecution may present rebuttal evidence to contradict the evidence for the defense. The prosecution may not, however, use this time to bolster its case by presenting evidence to fill any gaps in the proof of the crime. Direct examination, cross-examination, redirect and recross-examination are conducted as before.

During the trial, the judge should refrain from questioning the witnesses, unless the witness' response is ambiguous, in which case the judge may ask questions until the ambiguity is eliminated.

In a jury trial, after all the evidence has been presented, the defense will again move for a directed verdict of not guilty. The judge should use the reasonable man standard as discussed earlier to decide whether to grant the motion or deny it. Again the judge should excuse the jury while the motion is being argued. If the motion is denied, the defense then presents its closing argument in which it tries to persuade the jury to view the evidence in a light favorable to the defendant. The prosecution's closing argument follows that of the defense. The magistrate or municipal judge then requests instructions for the jury from both the prosecution and the defense. After the magistrate or municipal judge instructs the jury regarding applicable law and procedure, the jury retires to deliberate.

In a non-jury trial, the defense will make a motion for a directed verdict of acquittal and

support it with a closing argument. The prosecution presents its closing argument and argues against the motion. The magistrate or municipal judge then renders his verdict.

11. The Court's Instructions to the Jury

Following the argument to the jury, it is the duty of the magistrate or municipal judge to instruct or charge the jury as to the law involved in the case and as to the manner by which they are to reach the verdict. (S.C. Const., Art. V, Section 21).

Article V, §21 of the S.C. Constitution provides: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." The basis of this constitutional provision is founded upon the concept of our system of justice that every person charged with a crime has the right to a fair and impartial trial and that such a trial may only be achieved with the neutrality of the trial judge. In the course of the trial of a criminal case, the trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of evidence, the credibility of witnesses, or the guilt of the accused, as to the controverted facts. State v. Kennedy, 272 S. C. 231, 250 S.E.2d 338 (1978); State v. Pruitt, 187 S. C. 58, 196 S. E. 371 (1938); S. C. Constitution, Art. 5, Sec. 21.

The instruction or charge may be broken down into several parts. The judge in the first part of the charge should clearly define the separate duties performed by the judge and the jury. Also, a discussion of the nature of the offense with which the defendant has been accused should be included. Examples of frequently-needed instructions follow:

a. Separate Duties Performed By Judge and Jury

> Ladies and gentlemen of the jury, you have listened to the proceedings and the evidence in this case and it is now my duty to instruct you as to the law which applies to the facts in this case. The laws of the State of South Carolina do not permit me to comment on the facts in the case. You, as jurors, are the sole judges of the facts in the case; however, it is my duty
>
> to give you the law and you must accept and apply the law as I give it to you and be guided thereby in your consideration and in your deliberation upon the evidence in the case.
>
> Not only are you the sole judges of the facts in this case, but you, as a jury, are the sole and exclusive judges of the effect and value of the evidence in the case, as well as the credibility of all the witnesses who have testified in the case. It is for you to determine which witness or witnesses are recalling and truthfully relating what transpired at the time of the alleged commission of the crime, as described in the warrant.
>
> To weigh the evidence, you must consider the credibility of the witnesses. You will apply the test of truthfulness, which you are accustomed to applying in your daily lives. You may consider the manner of testifying; the appearance of the witness upon the witness stand; the reasonableness of the testimony; the

opportunity the witness had to see or hear; accuracy of memory; intelligence, interest and bias, if any; together with all the facts and circumstances surrounding the testimony.

You are the sole judges of the facts, the credibility of the witnesses and the weight of the evidence. You may believe or disbelieve all, or any part, of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief, according to the weight you assign to the testimony of each witness.

The defendant is charged by the State of South Carolina, under the warrant which I read to you at the beginning of this trial, with having violated Section _____ of the Code of Laws of South Carolina (or the common law) (or Ordinance No. _____ of the Town of _____). This is the offense of having _____ (explain in simple terms)_____.

b. Circumstantial Evidence

There are two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence - such as the testimony of an eye witness. The other is indirect or circumstantial evidence - the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

Before you can convict a defendant on circumstantial evidence, the circumstantial evidence must measure up to the requirements of the law. So, I charge you that where it is undertaken by the State in a criminal case to prove the guilt of the defendant by circumstantial evidence, not only must the circumstances be proven, but they must point conclusively to the guilt of the accused. They must be wholly and in every particular perfectly consistent with each other, and they must also be absolutely inconsistent with any other theory than that of the guilt of the accused.

The courts of this State have ruled, in cases of circumstantial evidence, that every circumstance which is relied upon by the State as material must be brought to the test of strict proof. All the facts proved must be consistent with each other, and taken together, should be of conclusive nature producing a reasonable and moral certainty that the defendant and no one else committed the offense charged. It is not enough that they created a probability, though a strong one; and assuming all the facts which the evidence tends to establish to be true, if there may yet be accounted for any theory which does not include the guilt of the defendant, then the proof fails.

The reason for this is that all presumptions of law, independent of evidence, are in favor of the innocent, and every person is

presumed to be innocent until he is proved to be guilty. One cannot be convicted on suspicion however strong that suspicion might be.

A verdict of guilty can be based upon circumstantial evidence as safely as upon direct evidence, provided the circumstantial evidence relied upon to prove guilt measures up to these requirements of the law that I have just stated to you.

c. Presumption of Innocence

The law does not require any defendant to prove his or her innocence of a crime. On the contrary, the law requires the State to establish a defendant's guilt by legal evidence and beyond a reasonable doubt. The law presumes the defendant to be innocent of the charge made against him in the arrest warrant until his guilt has been proven beyond a reasonable doubt. The burden of overcoming this presumption of innocence is placed upon the State and rests upon the State throughout the trial until the State has satisfied you by evidence of the defendant's guilt beyond a reasonable doubt.

d. Reasonable Doubt

What is a reasonable doubt? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.

e. Failure of Defendant to Testify

The prosecution may not comment on or make any reference to the fact that the accused failed to testify in his own behalf. State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985).

Since the defendant may not wish to draw further attention to his failure to testify, the magistrate or municipal judge should give the defendant the option as to whether or not to read the following instruction.

> The failure of any defendant to take the stand and testify in his own behalf does not create any presumption against him. I charge you that you must not permit this fact to weigh in the slightest against the defendant. Nor should this fact enter into the discussion or deliberation of the jury in any manner.

f. Law of the Case

The magistrate or municipal judge should read the statute or common law involved in the case and explain it to the jury in simple terms.

g. Form of Verdict

> Your verdict in this case will be one of two forms (an exception to this can be the traffic offense of speeding). If from the evidence and the law, you find that the defendant is not guilty, you will write "Not Guilty" on the back of the warrant and the foreman will sign his name. If on the other hand, you find that the defendant is guilty, based upon the evidence and the law which you have heard, you will write "Guilty" on the back of the warrant and the foreman will sign his name. Your verdict must be unanimous. It must be guilty or not guilty.

12. Jury Deliberation

After the magistrate or municipal judge charges the jury as to the principles of law to be applied in determining the issues in the case, the jury retires to a private place for deliberations. The jury must be kept together while it deliberates. They must be kept away from the judge, the complainant, the defendant, the law enforcement officer, and all other persons. The magistrate or municipal judge or the constable or some law enforcement officer not involved in the case should take the jury to another room to deliberate free from external influence and distractions. The jurors should take the warrant with them, and at the discretion of the judge, they may take any items admitted in evidence during the trial. The jurors cannot take objects and papers with them which were not admitted as evidence. The jurors should not be permitted access to law books since they must follow the judge's instructions as to the legal principles in the case and not try to interpret the law themselves.

If the jury cannot reach a verdict within a reasonable time, the judge must decide whether to recall the jury and inquire whether there is a reasonable probability that it will reach a verdict. Although the judge cannot coerce or threaten the jury, he can encourage them to reconcile their differences by impressing upon them the importance of their reaching a verdict. He can point out the expense incurred by a mistrial and ask them to further consider the evidence. The jurors can be asked to give due consideration to their fellow jurors' opinions and to try to reach a verdict. A suggested charge to encourage the jury to reach a verdict follows:

> It is sometimes difficult for six men and women to agree on any important issue, especially if it is controversial. Hence a jury would hardly be expected to reach an agreement without considerable reasoning together, laying aside all extraneous matters, and considering the various viewpoints and suggestions of the individual members, with an eye single to the truth. Therefore, it is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment.
>
> You each must decide the case for yourself, but you should do so only after a consideration of the case with your fellow jurors. You should not hesitate to change your opinion when convinced that it is erroneous, but of course there should be no surrender of a well-considered conscientious opinion.
>
> I am therefore going to ask you to return to your room and continue your deliberations in the hope that you may be able properly to agree on a verdict. I am confident that you will make a fair and honest effort to that end.

If during the deliberations, the jury wishes to have a part of the instructions repeated, the judge calls the jury back to the courtroom and with the defendant present, he can repeat or clarify whatever they wish. He can state the pertinent law again and then send the jury back for further deliberation.

If the jury cannot reach a verdict after deliberation, the judge must declare a mistrial and discharge the jury. Another trial can be scheduled by the judge.

When the jury reaches a verdict, it is written on the back of the warrant. The defendant is asked to stand and face the jury. The judge receives the verdict from the jury foreman and reads it aloud.

Where several counts have been alleged, the jury should find a decision on each count. Where several persons are tried together, the verdict must be specific as to each defendant. The jury can convict them all, acquit them all, or it can convict one or more and acquit the others.

13. Sentencing

a. General Sentencing Procedures

When a defendant is found guilty, either by the judge or a jury, the magistrate or municipal judge must then sentence the defendant. The judge may use his discretion in sentencing as long as his decision conforms with the statutory requirements for the particular offense for which the defendant has been convicted. He may impose a fine or require imprisonment, or both within the statutory limitations. (§22-3-550). Where a statute prescribes a minimum sentence, the magistrate or municipal judge may not impose a lesser sentence, except in the case of a conviction for drawing a fraudulent check. (§22-3-800). (See CRIMES AND OFFENSES, Fraudulent Checks). Of course, the magistrate or municipal judge may not exceed the statutory limits with any sentence. Where separate charges have been alleged and proven, the magistrate or municipal judge may impose sentences to run concurrently or consecutively. The sentences will be served concurrently unless the judge specifically orders them to be served consecutively. Finley v. State, 219 S.C. 278, 64 S.E.2d 881 (1951); State v. DeAngelis, 257 S.C. 44, 183 S.E.2d 906 (1971). §22-3-550 prohibits a magistrate from sentencing any person to consecutive terms of imprisonment totalling more than ninety days (except for convictions resulting from violations of Chapter 11 of Title 34, pertaining to fraudulent checks, or violations of §16-13-110(B)(1), relating to shoplifting).

If, upon conviction, a defendant is sentenced to a term of imprisonment for three months or less, the defendant is placed in the custody of the county (or municipality) in which he was sentenced. If the county (or municipality) has facilities suitable for confining the defendant, his sentence should be served in that county or municipality. Any defendant who receives a term of imprisonment from a court of competent jurisdiction exceeding ninety days is placed in the custody of the Department of Corrections, which will then designate the facility at which the defendant will be incarcerated.

b. Restitution

In addition to any sentence imposed, a magistrate, pursuant to §22-3-550, may order a criminal defendant to make restitution to the victim of the crime for any monetary or property loss that resulted from the crime. Under subsection (A), "a magistrate may order restitution in an amount not to exceed five thousand dollars." When determining the "amount of restitution, the judge shall determine and itemize the actual amount of damage or loss in the order. In addition, the judge may set an appropriate payment schedule," and the "magistrate may hold a party in contempt for failure to pay the restitution ordered if the judge finds the party has the ability to pay."

The magistrate's order of restitution may be appealed within thirty days. The order of restitution may be appealed separately from an appeal relating to the conviction. § 22-3-1000.

§ 14-25-65 provides that "a municipal judge may order restitution in an amount not to exceed five thousand dollars. In determining the amount of restitution, the judge shall determine and itemize the actual amount of damage or loss in the order." Under the new law, "the judge may set an appropriate payment schedule." The municipal judge may also "hold a party in contempt for failure to pay the restitution ordered if the judge finds the party has the ability to pay."

c. Suspension of Sentences

The suspension of sentences is provided for in §22-3-800. At the time of sentencing, the magistrate or municipal judge may suspend the imposition or execution of a sentence "Upon such terms and conditions as he may deem appropriate, including imposing or suspending up to one hundred hours of community service, except where the amount of community service is established otherwise." With the exception of fraudulent check cases, which have a rather specialized sentencing procedure available, and penalties arising under Title 50, a sentence may not be suspended below the minimum sentence if one is provided. Community service may not be ordered in lieu of a sentence for offenses arising under Title 50, fraudulent check offenses (§34-11-90), or for an offense of driving under suspension (§56-1-460) when the person's driver's license was suspended pursuant to a driving under the influence conviction (§56-5-2990). The court is required to keep records on the community service hours ordered and served. § 22-3-800 also notes that the judge may not suspend any specific suspension of any rights or privileges, such as the prohibition from holding public office or suspension of a driver's license, as imposed under any statutory administrative penalty.

Some criminal offenses have suspension of sentence requirements incorporated into the statute that establishes the offense. For example, the fine for a first offense conviction of criminal domestic violence (§16-25-20(B)) may be suspended upon the offender completing, to the satisfaction of the court, a program designed to treat batterers. Reference should be made to each individual statute prior to sentencing to ensure there are no stipulations on your ability to suspend a sentence.

The suspension of sentence upon appropriate terms and conditions, if any, is generally unrestricted except, as noted above, that a sentence cannot be suspended below a minimum when such is provided by statute. In certain cases, a sentence involving a fine or imprisonment will benefit neither the state nor the defendant, and many courts use a suspended sentence to provide a more creative penalty for the crime. While the services of the state's probation officers are not available to the magistrate or municipal courts, the imposition of a sentence, in whole or in part, may be postponed (suspended) while a court waits to see if the defendant will perform certain terms or conditions.

A good example of the suspension of a sentence upon the performance of certain conditions is when a defendant is convicted of first offense of simple possession of marijuana and the sentence is suspended upon the defendant's successful completion of a specific drug abuse program. Failure to complete the program subjects the defendant to being called back to court on a bench warrant to pay the suspended portion of the sentence. Successful completion of the program relieves the defendant of the obligation to pay or serve that suspended portion.

First offense convictions of simple possession of marijuana or hashish (§44-53-370(c) and (d)(3)) provide a good example of the various suspension of sentence techniques available. The fine for the offense is not less than one hundred dollars ($100) nor more than two hundred dollars ($200); a defendant could be fined $200 with $100 being suspended upon completion of a drug abuse program. Failure to complete the program would subject the defendant to the 30-day imprisonment. Thus the defendant would have an even greater incentive for completing the drug abuse program. Persons charged with first offense simple possession might also participate in a drug abuse program as a part of pre-trial intervention (see CRIMINAL, Trial Procedure, PreTrial Intervention) or pursuant to a conditional discharge (see OFFENSES, Possession of Small Quantities of Marijuana or Hashish).

d. Revocation or Suspension of Driver’s License

Anyone who forfeits bond, is convicted of, or pleads guilty or nolo contendere to an offense requiring their driver's license to be revoked or suspended must surrender his or her driver's license to the court. The clerk of court, magistrate, or municipal judge must transmit the driver's license to the Department of Public Safety within five days of receipt. Failure to comply within the five day period is punishable by a fine not to exceed five hundred dollars.

e. Offenses Requiring Revocation or Suspension of Driver's License

The following magistrate and municipal court offenses require the revocation or suspension of the convicted's driver's license:

Offense	Revocation or **Suspension**

	Provision
DUI 1st (56-5-2930, 56-5-2933, 2940(1))	56-5-2990
Reckless Driving 2d+ (56-5-2920)	56-5-2920
All DUS offenses except for those resulting from a conviction for DUI 56-1-460	56-1-460
Operation, allowing operation uninsured vehicle, 1st (56-10-520)	56-10-520
False insurance certificate 1st (56-10-260)	56-10-260
Operation unlicensed taxi (58-23-1210)	56-1-290
Possession small amount of marijuana or hashish 1st offense (44-53-370(d)(3))	56-1-745
DL or ID or another, lend or permit use 1st (56-1-510(2))	56-1-746
Failure to surrender suspended, revoked DL 1st offense (56-1-510(4))	56-1-746
DL or ID of another or false or altered, use of (56-1-515(2)(4))	56-1-746
False age information to purchase beer, wine (61-4-60)	56-1-746
Purchase beer, wine on behalf of underaged person (61-4-80,60)	56-1-746
Transfer beer, wine, liquor to underaged person (61-4-90,61-6-4070)	56-1-746
Purchase, possession beer, wine by underaged person (20-7-8920)	56-1-746
Purchase, possession furnishing false age to purchase liquor by underaged person (20-7-8925)	56-1-746
Person under 21 driving with alcohol concentration of .02 (56-1-286)	56-1-286

Upon conviction, collect the driver's license. If the offense was charged on an Uniform Traffic Ticket, attach the license to the pink and yellow copies of the ticket and to the Transmittal Form (DL-76-B). For charges initiated on an ABC summons, attach the driver's license to the mustard copy of the summons and the transmittal form. For charges initiated on a DNR (Department of Natural Resources) ticket, attach the driver's license to the blue or gold copy of the ticket and the transmittal form. PLEASE NOTE: A certified, true copy of the ticket may be submitted if the blue or gold copy is not available. Use a separate form for cases brought by each arresting agency. Complete the transmittal form in quadruplicate, retain one copy for your files, and submit three copies to the Department of Public Safety. They will return copies to you to verify acceptance.

14. Appeals

a. Magistrate Courts

Any person convicted of any offense by a magistrate may appeal the sentence to the Court of Common Pleas for that county. (§18-3-10). The appellant must serve notice of appeal upon the magistrate within ten days after sentencing and state the grounds for his appeal (§18-3-30). If a defendant makes a motion for a new trial within five (5) days as provided in § 22-3-1000, and the motion is denied the time for appeal is extended to thirty days. § 22-3-1000 provides: "No motion for a new trial may be heard unless made within five days from the rendering of the judgment. The right of appeal from the judgment exists for thirty days after the rendering of the judgment. A magistrate's order of restitution may be appealed within thirty days. The order of restitution may be appealed separately from an appeal, if any, relating to the conviction."

Payment of any fine imposed by the magistrate will not bar an appeal. Appeal lies only from a final judgment of the magistrate, as opposed to an interlocutory order from which no appeal lies. Upon service of the notice of appeal on the magistrate, the magistrate shall admit the defendant to bail if he so demands. (§18-3-50).The conditions of bail are that the defendant appear at the court appealed to until final judgment is rendered, that he abide by this judgment and that he be of good behavior pending final disposition of the case.

When a defendant is convicted of an offense which requires suspension or revocation of his or her driver's license (see b. Offenses Requiring Revocation or Suspension of Drivers' Licenses under No. 13 Sentencing), and the defendant appeals the conviction, the appeal acts as a supersedeas and stays such suspension or revocation for 60 days. See § 56-1-430 which provides: "Upon conviction of an offense making mandatory the suspension or revocation of the driver's license of the person so convicted, an appeal taken from such conviction shall act as a supersedeas so as to preclude for a period of sixty days from the date of conviction, any such suspension or revocation." Under § 56-1-430, the stay is for only 60 days. "Prompt disposition of appeal required to set aside conviction. Defendant was charged with knowledge of the time limit imposed on the magistrate for filing the record and of the sixty-day supersedeas provided by this section and having failed to take any step toward effecting a prompt disposition of his appeal, he was not entitled to have his conviction set aside and the charges against him dismissed." State v. Adams. 244 S.C. 323, 137 S.E.2d 100 (S. C. 1964). See also Opinion No. 3681 of Attorney General dated January 2, 1974. "The failure of a magistrate or recorder to file a return so that the appeal can be heard does not entitle the defendant to a stay of license suspension or dismissal of the charge. His remedy is to apply for an order of mandamus to require the trial judge to file the return." 1974 S.C. Op. Atty. Gen. 12. "Appeal from a conviction of reckless homicide stays suspension of the defendant's driver's license for sixty days only." 1965-66 Ops. Att'y. Gen., No. 2116, p 226.

The magistrate is required to file the notice of appeal with the clerk of court within ten days of service, together with the record, a statement of all the proceedings in the case, a list of the witnesses and the substance of their testimony, taken at the trial as provided in §22-3-790. (§18-3-40). The clerk

then places the case upon the motion calendar of the Court of Common Pleas. (§18-3-60). The appeal is not "de novo." That is, the appeal is heard on the grounds of exceptions and the record of the magistrate without the examination of the witnesses. The circuit court will affirm, reverse, or modify the magistrate's sentence as it sees fit. § 18-3-70. However, if the circuit court finds the magistrate's return to be inadequate, the circuit court judge may direct the magistrate to do an amended return, and may do so as often as may be necessary. The circuit court judge may also compel the magistrate to comply with his or her order. § 18-7-80. See also: Chapman v. Computers, Parts & Repairs, 334 S.C. 387, 513 S.E.2d 120 (Ct. App. 1999).

b. Municipal Court

Any person convicted of any offense by a municipal court may appeal the sentence to the Court of Common Pleas. (§14-25-95). The appellant must serve the notice of intention to appeal upon the municipal judge or the clerk of the municipal court within ten days of sentencing and state the grounds for his appeal. If a defendant makes a motion for a new trial within five (5) days as provided in § 22-3-1000, and the motion is denied, the time for appeal is extended to thirty days. § 22-3-1000 provides: "No motion for a new trial may be heard unless made within five days from the rendering of the judgment. The right of appeal from the judgment exists for thirty days after the rendering of the judgment." A judge's " order of restitution may be appealed within thirty days. The order of restitution may be appealed separately from an appeal, if any, relating to the conviction."

Payment of any fine imposed by the municipal court will not bar an appeal. Appeal lies only from final judgment of the court, as opposed to an interlocutory order, from which no appeal lies. Upon service of the notice of intention to appeal on the municipal judge or clerk of the municipal court, the municipal court shall admit the defendant to bail. The conditions of bail are that the defendant appear and defend at the next term of the Court of Common Pleas or pay the fine assessed. § 14-25-95.

When a defendant is convicted of an offense which requires suspension or revocation of his or her driver's license (see b. Offenses Requiring Revocation or Suspension of Drivers' Licenses under No. 13 Sentencing), and the defendant appeals the conviction, the appeal acts as a supersedeas and says such suspension or revocation for 60 days. See § 56-1-430 which provides: "Upon conviction of an offense making mandatory the suspension or revocation of the driver's license of the person so convicted, an appeal taken from such conviction shall act as a supersedeas so as to preclude for a period of sixty days from the date of conviction, any such suspension or revocation." Under § 56-1-430, the stay is for only 60 days. "Prompt disposition of appeal required to set aside conviction. Defendant was charged with knowledge of the time limit imposed on the magistrate [municipal judge] for filing the record and of the sixty-day supersedeas provided by this section [Code 1962 Section 46-189] (now § 56-1-430) and having failed to take any step toward effecting a prompt disposition of his appeal, he was not entitled to have his conviction set aside and the charges against him dismissed." State v. Adams, 244 S.C. 323, 137 S.E.2d 100 (S.C. 1964). See also Opinion No.

3681 of Attorney General dated January 2, 1974. "The failure of a magistrate or recorder to file a return so that the appeal can be heard does not entitle the defendant to a stay of license suspension or dismissal of the charge. His remedy is to apply for an order of mandamus to require the trial judge to file the return." 1974 S.C. Op. Atty. Gen. 12. "Appeal from a conviction of reckless homicide stays suspension of the defendant's driver's license for sixty days only." 1965-99 Ops. Att'y. Gen., No. 2116, p 226.

The municipal court judge is required to make a return to the Court of Common Pleas, consisting of a written report of the charges, the proceedings, a list of the witnesses, the substance of their testimony, and the sentence of judgment. When the testimony has been taken by a reporter, the return shall include the reporter's transcript of the testimony. The return shall be filed with the Clerk of Court of Common Pleas of the county in which the trial was held. The Clerk of Court of Common Pleas then places the case on the motion calendar. The appeal is not "de novo." That is, the appeal is heard on the grounds of exceptions and the record of the municipal court without examination of witnesses. The circuit court will affirm, reverse, or modify the sentence of the municipal court as it deems fit. However, if the circuit court finds the municipal judge's return to be inadequate, the circuit court judge may direct the municipal judge to do an amended return, and may do so as often as may be necessary. The circuit court judge may also compel the municipal judge to comply with his or her order. § 18-7-80.

15. Expungements

Expungement of criminal records information must come pursuant to petition to the circuit court. Magistrates and municipal judges do not have the authority to order the expungement of any records. Only a circuit judge may order the destruction of records. Op. Atty. Gen. dated Oct. 25, 1985. However, magistrates and municipal judges are responsible for verifying certain records subject to expungement, which will be discussed below.

The authority for expunging criminal records is found in seven sections of the S.C. Code. The first is §17-1-40 which provides for the destruction of all booking reports and arrest records when an individual is acquitted of criminal charges or the charges are discharged, dismissed, or nolle prossed. Op. Atty. Gen. dated Dec. 12, 1978. In addition, §17-22-150(a) provides for the destruction of all official records relating to the arrest or charge when an individual successfully completes the pretrial intervention program. § 34-11-90(e) allows for the expungement of a first offense misdemeanor fraudulent check conviction if no additional criminal conviction has taken place in one year from the date of conviction. § 41-53-450(b) allows the expungement of a simple possession of marijuana or hashish conviction after successful completion of the terms of a conditional discharge. § 22-5-910 allows a defendant who has been convicted of a first offense in summary court to apply to the circuit court for an order expunging all records pertaining to the arrest and conviction. The defendant must wait three years from the date of conviction (five years in the case of a first offense criminal domestic violence conviction) and receive no other convictions during that period before applying to the circuit court. This section does not apply to offenses involving the operation of a motor vehicle or to a violation of Title 50 or the regulations promulgated under it for which points are assessed, suspension provided for, or enhanced penalties for subsequent offenses

authorized, or to an offense contained in Chapter 25 of Title 16 (Criminal Domestic Violence) except for a first offense pursuant to §16-25-20. No person may have his records expunged under this section more than once. "'Conviction' includes a guilty plea, a plea of nolo contendere, or the forfeiting of bail." § 22-5-910. § 22-5-920 allows the expungement of a conviction for a first offense as a youthful offender. Finally, § 56-5-750 (f) provides for the expungement of a first offense misdemeanor conviction for failureto stop for a blue light.

By Order of the Chief Justice dated December 20, 2005, all petitions for expungement of criminal records must be initiated in the Solicitor's Office in the circuit where the charge arose. All questions by citizens relating to the expungement of criminal records should be referred to the appropriate Solicitor's Office.

As stated earlier, summary court judges are required to verify convictions obtained in those courts when records are sought to be expunged pursuant to § 34-11-90(e) (first offense fraudulent check), § 22-5-910 (summary court conviction), or § 44-53-450(b) (conditional discharge). Upon receipt of an application for expungement from the Solicitor's Office, the summary court judge must verify that the charge was adjudicated in that court. Although SLED is required to verify the defendant's criminal record, it may be prudent for the summary court judge to verify that no other convictions against that individual had been obtained in that court. Additionally, in the case of conditional discharges, that summary court judge must verify that the terms and conditions of the discharge were met. Verification is memorialized by the summary court judge?s signature on the application for expungement. The application is then returned to the Solicitor's Office. The Order of the Chief Justice dated December 20, 2005, incorporates procedures issued by the Chief Justice through the Office of Court Administration, which requires that the summary court verify and return the application within ten business days.

When a signed order of the circuit court is received by a summary court requiring the expungement of criminal records, all records pertaining to the case named in the order must be destroyed. All identifying references on the docket sheet, warrant stub, and receipt concerning the case should be obliterated and a reference to the order entered. The common practice of sealing the records and maintaining them in a location accessible only to the office staff is not appropriate. The case number should be recorded on the order of expungement in case future reference to that case number is necessary. The order of expungement should be maintained in a locked file accessible to only the judge.