



# SOUTH CAROLINA CIRCUIT PUBLIC DEFENDERS

---

**Mark A. Leiendecker**  
1<sup>st</sup> Circuit Public Defender

**E. Fielding Pringle**  
5<sup>th</sup> Circuit Public Defender

**D. Ashley Pennington**  
9<sup>th</sup> Circuit Public Defender

**Christopher D. Scalzo**  
13<sup>th</sup> Circuit Public Defender

**De Grant Gibbons**  
2<sup>nd</sup> Circuit Public Defender

**Michael Lifsey**  
6<sup>th</sup> Circuit Public Defender

**Jennifer L. Johnson**  
10<sup>th</sup> Circuit Public Defender

**Stephanie Smart Gittings**  
14<sup>th</sup> Circuit Public Defender

**Edgar R. Donald, Jr.**  
3<sup>rd</sup> Circuit Public Defender

**Michael Morin**  
7<sup>th</sup> Circuit Public Defender

**Robert M. Madsen**  
11<sup>th</sup> Circuit Public Defender

**Ronald W. Hazzard**  
15<sup>th</sup> Circuit Public Defender

**Matthew Rivers**  
4<sup>th</sup> Circuit Public Defender

**Janna Gregory**  
8<sup>th</sup> Circuit Public Defender

**Scott Floyd**  
12<sup>th</sup> Circuit Public Defender

**B.J. Barrowclough**  
16<sup>th</sup> Circuit Public Defender

**To: Members of the Equitable Justice Reform Committee**

**From: South Carolina Circuit Public Defenders**

**Date: August 10, 2020**

**Re: Proposed Reforms to the Criminal Justice System**

---

The Circuit Public Defenders are the chief public defenders in South Carolina. We, along with the lawyers in our offices, represent all 16 judicial circuits and 46 counties in the state.

Public defenders represent roughly 80 to 90 % of the people charged with crimes in General Sessions and Family Court in South Carolina. We represent a significant number of the people charged with crimes in magistrate and municipal courts. All of the people we represent are poor.

In our capacity as the lawyers for a significant portion of the people charged with crimes in this state and as lawyers for many of the most marginalized South Carolinians, we submit the following suggestions and proposals to advance the cause of the Equitable Justice Reform Committee.

Below is a summary of our proposals followed by a more in-depth discussion of each proposal. We look forward to working with this Committee to help create a fairer and more equitable criminal justice system for South Carolina.

## Summary of Proposals

### Law Enforcement Officer Training

- 1) Reform and enhance officer hiring and training practices.
- 2) Create a statewide database for police misconduct.
- 3) End qualified immunity for police misconduct.
- 4) Expand body-worn-camera requirements to all officers (including narcotics officers).

### Civil Asset Forfeiture

- 1) Make asset forfeiture a part of the criminal litigation in General Sessions court.
- 2) Require a finding of a criminal violation as a basis for seeking asset forfeiture.
- 3) Expand the allocation of proceeds from asset forfeiture to all stakeholders in the criminal justice system.

### Sentencing Reform

- 1) Eliminate mandatory minimum sentences, especially in drug cases.
- 2) Eliminate the “serious offense” designation for all drug offenses.
- 3) Adopt the drug law revisions proposed by the Sentencing Reform Oversight Commission.

### Criminal Statutory Review

- 1) Reduce the offense of Habitual Traffic Offender from a felony to a misdemeanor.
- 2) Change the presumption in § 23-3-430(C)(15) that a conviction for the offense of Kidnapping automatically requires enrollment on the sex offender registry.
- 3) Revise and reform the burglary offenses statutes (§ 16-11-311 and -312) to better reflect fair and appropriate sentencing.

### **Proposals for Law Enforcement Training**

The Circuit Public Defenders propose reforms that are aimed at training officers to treat the citizens of South Carolina more respectfully, more race-neutrally, and with more accountability to the citizens they serve and protect. Although training itself is a broad topic, there are some fundamental principles that should be implemented. First all law enforcement officers should be mandated to complete basic training before beginning the performance of duties or the exercise of authority. As part of basic training, officers should receive legal training from licensed attorneys. We believe these sessions should be live and not virtual as teaching attorneys impart a true respect for individual rights and constitutional protections. Second psychological screenings should be made part of the certification process. Currently mandated minimum standards for precertification screening are age, lack of criminal history, high school diploma and valid driver's license. Proper psychological screening of all new hires would help identify individuals with a propensity for behaviors inconsistent with good officers. Finally officers should be required to attend ongoing periodic training, particularly in the areas of decision making and conflict resolution. Officers should be trained in not just the technical requirements of "how" to make an arrest but just as importantly the knowledge of "when" to make an arrest. Similar parallels can be drawn in the use of force environment. Just because an officer can lawfully use force; should they? We believe the implementation of this type of ongoing training will improve the outcomes of many officer/citizen encounters.

The Circuit Defenders also recommend the creation of a statewide database of police misconduct. This would be used by police agencies for employment purposes to weed out "bad apples." Accurate reporting of reasons for discipline, terminations and other misconduct should be mandated. Access to this database should be made available to the criminal defense bar.

Officer's misconduct in prior cases should be available for impeachment in the defense of current cases. Knowledge that this misconduct is accessible would have a twofold deterrent effect; it would deter individual officers from bad behavior as they will not want it to taint their ability to make future cases and it would motivate prosecutors to do more to discourage misconduct as they will know that it will undermine the credibility of their officer witnesses.

Similarly the Circuit Defenders recommend ending Qualified Immunity as a defense to civil liability for police misconduct. For too long Qualified Immunity has served to insulate bad police officers from the consequences of their actions and denied the victims financial redress for their harm suffered.

Finally the Circuit Defenders recommend expanding the body-cam requirement to all officers, including narcotics officers. From personal experience we know that the greatest area of the law creating mistrust in minority and low income communities is the investigation and prosecution of drug cases. This is exacerbated by the fact that narcotics officers are the only officers who routinely do not record their interactions with defendants. Credibility issues ranging from whether consent to search was given, to the location of where drugs were found, often come down to swearing contests. Combined with the use of mandatory minimums (discussed infra) to intimidate people out of going to trial and even have access to all of their discovery, this glaring absence of video evidence adds fuel to the community's belief that drug prosecutions are unfair and illegitimate.

### **Civil Asset Forfeiture**

The Circuit Public Defenders support the approach to reform outlined in H. 3968 and S. 462. Both bills use the proper approach and process to address the on-going concerns of the current civil asset forfeiture process: (1) making sure people are treated fairly and (2) ensuring

that assets are forfeited only when the government can directly tie those assets to legitimate criminal offense. Both bills move asset forfeiture away from the current method of the state filing a separate civil lawsuit. Under both bills, asset forfeiture is more appropriately defined as part of the companion criminal action. This approach provides citizens with the proper constitutional and due process protections they do not currently receive in the civil litigation.

Additionally, we support that both bills require a finding of a potential criminal violation as the basis for seeking asset forfeiture. This is done using a preliminary hearing or findings to ensure that some probable cause-type basis exists in order to continue with an asset forfeiture action in the criminal case. This process prevents law enforcement from holding or otherwise tying up assets that do not have a direct link to criminal activity or where the state cannot establish a viable link between a crime and the seized assets.

Finally, both bills incorporate the specific court process and procedures of the South Carolina court system and attempt to properly allocate forfeited assets (or funds from the sale of those assets) amongst stakeholders. The circle of stakeholders should be expanded beyond law enforcement and the solicitors to include the court and indigent defense, particularly given the fact that infusing the forfeiture process with much need due process and procedural fairness will increase the burden of the workload on the courts and indigent defense.

The criminal process is the fairest method to use for asset forfeiture and it is the best method for ensuring that the abuses and unfair practices of the current civil approach are corrected and prevented. The Circuit Public Defenders look forward to working with this Committee to achieve a more equitable and fair asset forfeiture process.

## Sentencing Reform

The Circuit Defenders believe that one of the most important items for the Equitable Justice Reform Committee to address is the elimination of mandatory minimums especially for drug offenses. Given the fact that the “War on Drugs” has had such a deleterious effect on minority communities, it is particularly appropriate that this Reform Committee examine doing away with them. Mandatory minimums lead to draconian results and often racially and/or socioeconomically disparate impacts. Additionally they are frequently used to intimidate defendants out of exercising their jury trial rights. In drug cases this also often means restricting their access to discovery. Thus minimums serve to diminish due process and insulate police conduct from scrutiny. These are negative outcomes that again affect minority communities disproportionately.

Another negative consequence of the existence of the minimums is their use by prosecutors to strip judges of discretion in sentencing. In some Counties, 2nd and 3rd drug offenses above possession level involve plea offers of coming off the minimum for a negotiated amount of time that the assistant solicitor thinks is appropriate. Often the sentence is more than what defendants are sentenced to in other jurisdictions around the state and country. Often it is more than what the judge thinks is appropriate. Yet due to the existence of the minimum, the judge’s hands are tied.

In a similar fashion we believe that drug offenses, especially “Proximity” offenses should lose their “Serious Offense” designation. Beyond the fact that in many cities and towns there is no location not within a half mile of a park or school; Proximity strikes and life notice threats are used identically as mandatory minimums to coerce defendants to plead guilty and sentence them with negotiated sentences determined by the solicitor.

This issue has already been studied by the Sentencing Reform Oversight Commission. In an effort to not “reinvent the wheel” the Circuit Defenders recommend the adoption of the proposed drug law revisions to sentencing and inference level weights that were created by the Oversight Commission. A copy of these proposals is attached to this letter as Attachment A.

### **Criminal Statutory Review**

There are a broad array of criminal statutes that should be reviewed. We focus on three important revisions this Committee should take up.

The crime of Habitual Traffic Offender is treated as a serious felony. It is not. This offense, like other traffic offenses, does not carry with it a criminal intent, and, as such, is a status offense warranting misdemeanor status and a misdemeanor’s sentencing structure.

The presumption in the Kidnapping statute (§ 23-3-430(c) (15)) that a conviction requires that a defendant register as a sex offender should be changed. Like assault and battery offenses, the presumption should be that the offense does not require registry as a sex offender unless and until the judge makes a finding that the kidnapping offense was related to a sex crime. Across the state, and for many years, defendants who have committed no sexual offense have had to register and attempt to untangle the complicated web of sex offender registry requirements for offenses they never committed in the first place.

The burglary offenses should be revised and reformed. First degree burglary carries a mandatory minimum sentence of 15 years up to a sentence of life without parole. However there are so many ways in which First Degree Burglary is defined that often Defendants find themselves facing a potential life sentence for essentially a property crime. South Carolina should adopt the analysis of many states and define First Degree Burglary as entering an

**occupied** residence without consent and with the intent to commit a crime inside. The only factor that should matter is whether or not anyone is home when the burglary occurs. In our experience that is the only factor that correlates with the most egregious fact scenarios. All of the other “aggravating factors” should be eliminated. Additionally Burglary First Degree should be a Class A felony carrying a sentence of up to 30 years akin to Attempted Murder and Kidnapping. Once First Degree Burglary is reformed an analysis of which fact scenarios fit more appropriately under the 15 year or the 10 year Second Degree Burglary designations can be undertaken.

**Conclusion**

The Circuit Public Defenders of South Carolina are committed to helping to improve our criminal justice system, to bend the curve that much further toward justice. We offer the proposals included in this letter. And we offer the collective knowledge and experience the Circuit Public Defenders can bring to this Committee’s work.

We thank you for your consideration of our proposals and look forward to helping this Committee do the work of the people of South Carolina.

Respectfully submitted,

<b>Mark A. Leiendecker</b>	<b>De Grant Gibbons</b>	<b>Edgar R. Donald, Jr.</b>	<b>Matthew Rivers</b>
<b>E. Fielding Pringle</b>	<b>Michael H. Lifsey</b>	<b>Michael Morin</b>	<b>Janna Gregory</b>
<b>D. Ashley Pennington</b>	<b>Jennifer L. Johnson</b>	<b>Robert M. Madsen</b>	<b>Scott Floyd</b>
<b>Christopher D. Scalzo</b>	<b>Stephanie Smart Gittings</b>	<b>Ronald W. Hazzard</b>	<b>B.J. Barrowclough</b>



## ATTACHMENT A

### SROC- PROPOSED DRUG PENALTIES

**POSSESSION:** (Cocaine, Meth, MDMA)

Current Law	Proposed Penalties
0-3 yrs (1 <sup>st</sup> offense)	0-3 yrs (1 <sup>st</sup> off.)
0-5 yrs (2 <sup>nd</sup> offense)	0-5 yrs (2 <sup>nd</sup> or subseq. off.)
0-10 yrs (3 <sup>rd</sup> offense)	

**PWID:** (Cocaine, Meth, MDMA)

Current Law	Proposed Penalties
0-15 yrs (1 <sup>st</sup> off.)	0-5 yrs (1 <sup>st</sup> off.)
5-30 yrs (2 <sup>nd</sup> off.)	0-10 yrs (2 <sup>nd</sup> off.)
10-30 yrs (3 <sup>rd</sup> off.)	0-15 yrs (3 <sup>rd</sup> off.)

**TRAFFICKING COCAINE:**

Current Law	Proposed Penalties
10-28g = 3-10 yrs (1 <sup>st</sup> offense) 5-30 yrs (2 <sup>nd</sup> offense) 25-30 yrs (3 <sup>rd</sup> offense)	28-100g = 0-10 yrs (1 <sup>st</sup> off.) 0-20 yrs (2 <sup>nd</sup> off.) 0-30 yrs (3 <sup>rd</sup> off.)
28-100g = 7-25 yrs 7-30 yrs 30 yrs mandatory	100-400g = 0-20 yrs 0-25 yrs 0-30 yrs
100-200g = 25 yrs mandatory	400g or more = 0-30 yrs
200-400g = 25 yrs mandatory	
400g or more = 25-30 yrs	

**TRAFFICKING METH/CRACK**

Current Law	Proposed Penalties
10-28g = 3-10 yrs (1 <sup>st</sup> offense) 5-30 yrs (2 <sup>nd</sup> offense) 25-30 yrs (3 <sup>rd</sup> offense)	28-100g = 0-10 yrs (1 <sup>st</sup> off.) 0-20 yrs (2 <sup>nd</sup> off.) 0-30 yrs (3 <sup>rd</sup> off.)
28-100g = 7-25 yrs 7-30 yrs 30 yrs mandatory	100-400g = 0-20 yrs 0-25 yrs 0-30 yrs
100-200g = 25 yrs mandatory	400g or more = 0-30 yrs
200-400g = 25 yrs mandatory	
400g or more = 25-30 yrs	

**TRAFFICKING MDMA:**

<b>Current Law</b>	<b>Proposed Penalties</b>
100-500 tablets = 3-10 yrs (1 <sup>st</sup> off.) 5-30 yrs (2 <sup>nd</sup> off.) 25-30 yrs (3 <sup>rd</sup> off.)	28-100g = 0-10 yrs (1 <sup>st</sup> off.) 0-20 yrs (2 <sup>nd</sup> off.) 0-30 yrs (3 <sup>rd</sup> off.)
500-1000 tablets = 7-25 yrs (1 <sup>st</sup> off.) 7-30 yrs (2 <sup>nd</sup> off.) 20-30 yrs (3 <sup>rd</sup> off.)	100-400g = 0-20 yrs 0-25 yrs 0-30 yrs
1000 tablets or more = 25 yrs mandatory	400g or more = 0-30 yrs

**TRAFFICKING HEROIN/OPIUM**

<b>Current Law</b>	<b>Proposed Penalties</b>
4-14g = 7-25 yrs (1 <sup>st</sup> offense) 25 yrs mandatory (2 <sup>nd</sup> offense)	4-14g = 0-10 yrs (1 <sup>st</sup> offense) 0-15 yrs (2 <sup>nd</sup> offense)
14-28g = 25 yrs mandatory	14-28g = 0-15 yrs
28 g or more = 25-30 yrs	28g or more = 0-20 yrs

**TRAFFICKING MARIJUANA**

<b>Current Law</b>	<b>Proposed Penalties</b>
10 - 100 lbs = 1-10 yrs (1 <sup>st</sup> off.) = 5-20 yrs (2 <sup>nd</sup> off.) = 25 yrs (3 <sup>rd</sup> off.)	20 - 200 lbs = 0-10 yrs (1 <sup>st</sup> off.) = 0-15 yrs (2 <sup>nd</sup> off.) = 0-20 yrs (3 <sup>rd</sup> off.)
100-2000 lbs = 25 yrs mandatory	200-1000 lbs = 0-15 yrs
2000 - 10K lbs = 25 yrs mandatory	1000 lbs. or more = 0-20 yrs
10K lbs or more = 25 - 30 yrs	

**TRAFFICKING FLUNITRAZEPAM (Rohypnol)**

<b>Current Law</b>	<b>Proposed Penalties</b>
1-100g = 1-10 yrs (1 <sup>st</sup> offense) 25 yrs (2 <sup>nd</sup> offense)	1-100g = 0-10 yrs (1 <sup>st</sup> offense) 0-15 yrs (2 <sup>nd</sup> offense)
100-1000g = 20 yrs	100-1000g = 0-20 yrs
1000g - 5 kg = 25 yrs mandatory	1000g or more = 0-20 yrs
5 kg or more = 25-30 yrs mandatory	

**TRAFFICKING LSD**

<b>Current Law</b>	<b>Proposed Penalties</b>
100-500 units = 3-10 yrs (1 <sup>st</sup> off.) 5-30 yrs (2 <sup>nd</sup> off.) 25-30 yrs (3 <sup>rd</sup> off.)	100-500 units = 0-10 yrs (1 <sup>st</sup> off.) 0-15 yrs (2 <sup>nd</sup> off.) 0-20 yrs (3 <sup>rd</sup> off.)
500-1000 units = 7-25 yrs (1 <sup>st</sup> off.) 7-30 yrs (2 <sup>nd</sup> off.) 25-30 yrs (3 <sup>rd</sup> off.)	500 or more units = 0-15 yrs (1 <sup>st</sup> off.) 0-20 yrs (2 <sup>nd</sup> off.) 0-25 yrs (3 <sup>rd</sup> off.)
1000 units or more = 25 yrs mandatory	

**TRAFFICKING GAMMA HYDROXYBUTYRIC ACID - GHB**

<b>Current Law</b>	<b>Proposed Penalties</b>
50 ml/mg or more = 1-10 yrs (1 <sup>st</sup> off.) 25 yrs (2 <sup>nd</sup> off.)	50 ml/mg or more = 0-10 yrs (1 <sup>st</sup> off.) 0-15 yrs (2 <sup>nd</sup> off.)

**PWID presumption weights**

	<b>Current</b>	<b>Proposed</b>
Cocaine	1 gram	4 grams
Cocaine Base/Crack	1 gram	4 grams
Methamphetamine	1 gram	4 grams
MDMA	15 tablets	4 grams
Alpha or Beta-eucaine	100 milligrams	100 milligrams
Opium	4 grains	10 grains
Morphine	4 grains	10 grains
Heroin	2 grains	10 grains
Isonipecaine	100 milligrams	100 milligrams
Marjuana	1 ounce	10 ounces
LSD	50 micrograms	100 micrograms
gamma hydroxybutyric acid	20 ml/milligrams	20 ml/milligrams