Knoxville Bar Association

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November 4, 2016

James Hivner, Clerk
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: 2017 Rules Package - Order filed August 30, 2016 under ADM2016-01777 - IN RE: AMENDMENTS TO THE TENNESSEE RULES OF PROCEDURE & EVIDENCE

Dear Mr. Hivner:

Pursuant to the Tennessee Supreme Court's Order referenced above, the Knoxville Bar Association (the "KBA") Professionalism Committee (the "Committee") carefully considered the current Tennessee Rules of Civil Procedure, Rules of Appellate Procedure, Rules of Criminal Procedure and Rules of Evidence in conjunction with the proposed amendments thereto (the "Amendments") during its meeting on October 11, 2016. The Committee presented a detailed report of its review during the KBA Board of Governors' (the "Board") October 19, 2016 meeting with the recommendation to support the Amendments. Following the Committee's presentation and thorough discussion by the Board, the Board unanimously adopted the Committee's recommendation. Accordingly, the KBA hereby offers it approval and support of the Amendments.

As always, the KBA appreciates the opportunity to comment on proposed Rules promulgated by the Tennessee Supreme Court.

With kindest personal regards,

Yours very truly,

Wayne R. Kramer
President
Knoxville Bar Association

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENTS TO TENNESSEE RULES OF PROCEDURE AND EVIDENCE

No. ADM2016-01777 – Filed: August 30, 2016

RESPONSE TO INVITATION FOR PUBLIC COMMENT

In response to the Court's invitation for public comment to changes proposed by the Advisory Commission on the Rules of Practice and Procedure, the Executive Committee of the Tennessee District Public Defenders Conference ("Conference") expresses a concern with the proposed addition of the Advisory Commission Comment [2017] to Tennessee Rules of Evidence, Rule 611, Mode and Order of Interrogation and Presentation ("Commission Comment").

I. THE PROPOSED COMMISSION COMMENT CREATES CLASSES OF WITNESSES IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE TENNESSEE AND UNITED STATES CONSTITUTIONS

The Fourteenth Amendment to the United State Constitution and Article XI, Section 8 of the Tennessee Constitution guarantee that an individual is not to be denied equal protection of the law. This guarantees that all citizens in similar circumstances will be treated the same. *State v. Robinson,* 29 S.W.3d 476, 480 (Tenn. 2000). Tennessee's Supreme Court has noted that while each constitution has distinct language, the protections offered are essentially the same. *State v. Tester,* 879 S.W.2d 823, 827 (Tenn. 1994). When reviewing the framework and application of the law in Equal Protection litigation, Tennessee Courts have adopted the scrutiny standards of the United States Supreme Court. *Id.* at 828. Of the three standards (strict, heightened, or reduced scrutiny), strict scrutiny analysis is utilized when a law functions to deny a suspect class of citizens the rights guaranteed to others or when the law threatens a fundamental right. *Id.* "[W]e cannot

conceive of any right more fundamental under either the Tennessee Constitution or the federal constitution than the right to personal liberty." *Doe v. Norris,* 751 S.W.2d 834, 841 (Tenn. 1988). An "individual's right to personal liberty is a fundamental right for equal protection purposes." *Id.* at 842.

A criminal defendant is guaranteed a right to trial by a jury of his peers and a presumption of innocence. Tenn. Const. Art I. § 6 and § 8. Further, the defendant has a right to be heard, or to waive that right and not be compelled to testify against himself. Tenn. Const. Art. I, § 9. As discussed previously in *Norris*, any denial of these constitutional protections should be reviewed under a strict scrutiny standard. *Norris* at 841. Therefore, the State (here the Advisory Commission) would have to show that the classification of witnesses into the four categories listed in the proposed comment to Tenn. R. Evid., Rule 611 demonstrates that the burden imposed on the defendant by this proposed comment is justified by a compelling state interest, and that it is narrowly tailored to achieve that compelling state interest. *See City of Memphis v. Hargett,* 414 S.W.3d 88, 102 (Tenn. 2013) (discussing the strict scrutiny standard that has to be met for a fundamental right). Further, if there is an alternative way for the state to achieve its goal which is "less intrusive and comparably effective," the rule cannot be considered narrowly tailored. *Id.* at 103.

As drafted, the proposed comment to the rule provides that if the witness is a minor, an alleged victim of a crime, or person with a demonstrable intellectual or emotional challenge, there appears to be a presumption that those witnesses will be entitled to some testimonial assistance in the form of a support animal, toy, or person upon judicial review. However, if the witness is not one of those classifications, additional judicial review, or proof, is required for a witness to claim the need of assistance in communicating his or her testimony effectively. Clearly, the burden

placed on witnesses to prove the need for a form of testimonial aid is different depending on the "class" of witness the witness is alleged to be. And, making the "test" for whether a witness should be permitted a testimonial aid the same for all witnesses would achieve the same result and be less intrusive on a defendant's rights. It would appear that there is an alternative means for achieving the same result, and therefore the Commission Comment could not be considered narrowly tailored under a strict scrutiny analysis.

Based on the Commission Comment in its current form, if an alleged victim was a witness against a defendant and was granted the use of some form of testimonial assistance after minimal review by the trial court, and the same court later denied similar assistance to a testifying defendant based on a more stringent trial court review, under strict scrutiny analysis the defendant could allege a denial of his Equal Protection rights under both the Tennessee and United States Constitutions.

II. THE COMMISSION COMMENT CREATES WITNESS CLASSIFICATIONS NOT PRESENT IN THE HOLDING OF THE COURT OF CRIMINAL APPEALS IN *STATE V. JOSE REYES.*

The Commission Comment would expand the holding in *State v. Reyes,* and would impermissibly create classifications of witnesses that were not endorsed in the opinion issued by the Court of Criminal Appeals or the trial court in *State v. Reyes*.

As it appears that this issue was one of first impression in Tennessee, the Court of Criminal Appeals performed a thorough review of the different ways other states had previously addressed "facility" dogs in the United States. *State v. Jose Reyes,* No. M2015-00504-CCA-R3-CD, 2016 WL 3090904, at *4 (Tenn. Crim. App. 2016). In all of the cases reviewed by the Court of Criminal Appeals the witnesses were children, as was the witness in *Reyes*. *Id.* at *4 -*5. The trial court in

Reyes made the dog available to *all witnesses* throughout the trial, including any defense witness or the defendant, using the same procedure for both parties. *Id.* at *5 (emphasis added). Further, the court specifically instructed the jury not to make any inferences from the presence of the dog, or to express sympathy for any witness who utilized the "facility" dog. *Id.*

However, the Commission Comment under review here has added specific circumstances in which a "facility" dog, or similar "device" may be used, relying on *Reyes* as justification for the perceived limitations. The Commission Comment creates four distinct classes of witnesses: Minors, Alleged Victims, Mentally or Emotionally challenged witnesses, and "a person *otherwise shown* to be a witness at risk for being unable to communicate effectively without the aid of such comfort." (Emphasis added.) The specific classes were not present in the *Reyes* trial court ruling, or the opinion of the Court of Criminal Appeals. While the Commission Comment, as drafted, may create constitutional difficulties, it also limits the holding of both the trial and appellate courts in *State v. Reyes,* if adopted by the Court. The trial court in *Reyes* made the "facility" dog available to *all* witnesses, and made no distinction that particular classes of witnesses enjoyed less or more scrutiny from the court in determining whether the "facility" dog was required for the witness to communicate effectively. *Reyes* at *7 (emphasis added). The trial court made no finding that any specific delineation of the type of witness was necessary to be considered for assistance with their testimony. The Court of Criminal Appeals affirmed the trial court's actions and ruling on this issue, finding no abuse of the trial court's discretion. *Id.*

The four witness classes proposed by the Commission Comment appear to create a presumption that the trial court may allow a witness to use a testimonial aid, such as a "facility" dog, for three of the classes, while it creates an additional level of proof for the fourth class. Because of a witness' status in the first three classes, no additional showing of difficulty in

testifying effectively appears to be required. Whereas, other witnesses, such as the defendant or a witness for the defendant, must show a separate need based on the chance or risk that the witness cannot communicate effectively without such aid. This additional showing appears to indicate that a presumption is to be taken by the trial court in reviewing testimonial aids for three classes of witnesses that is not present for witnesses in the fourth class, a class which may or may not include the defendant. As previously mentioned, this distinction was not present in the trial court's ruling in *Reyes*, nor is it present in the Court of Criminal Appeal's review of the case.

Finally, the trial court's order demonstrated no favoritism or bias toward either side of the preceding, which is lacking in the Commission Comment as drafted. The *Reyes* court made it clear that all witnesses, *equally for both the prosecution and defense*, could use the "facility" dog. *Reyes* at *5 (emphasis added). As Tennessee's Supreme Court has stated, "All defendants are entitled to a trial by a jury free of 'bias or partiality toward one side or the other of the litigation.'" *State v. Sexton,* 368 S.W.3d 371, 390 (Tenn. 2012), *quoting State v. Schmeiderer,* 319 S.W.3d 607, 624 (Tenn. 2010) (appendix). The Commission Comment, by neglecting to clearly establish that Tenn. R. Evidence 611 is to apply to all witnesses equally, including the defendant, creates a potential bias in its interpretation by courts across the state.

III. IF TESTIMONIAL ASSISTANCE IS OFFERED, THAT AN EQUAL AND NON-DISCRIMINATORY APPROACH SHOULD BE EXPRESSED IN THE FORTHCOMING CHANGES TO THE PATTERN JURY INSTRUCTIONS FOR CRIMINAL PROCEEDINGS

The Conference seeks to ensure that both the prosecution and defense have equal access to such assistance for witnesses the parties wish to have testify in their cases, and that any inferences or bias be actively minimized. The Conference is aware that the Tennessee Judicial Conference ("Judicial Conference") has drafted a pattern jury instruction for future proceedings in which the

use of a testimonial aids is necessary. *See* Appendix 1. The Conference believes the instruction created by the Judicial Conference better reflects the holding in *State v. Reyes,* and is less constitutionally suspect. In addition, it reflects that each witness has equal access in a criminal prosecution to "things" that will aid a witness in presenting difficult testimony. Further, to support the introduction of testimonial aids, the Conference proposes changes to the Commission Comment which the Conference believes better reflects the holding in *Reyes*. The Conference suggests its proposed modifications to the Commission Comment supports a more balanced and Constitutional application of the use of testimonial aids by witnesses in criminal trials in Tennessee. The Conference proposal is attached as Appendix 3.

IV. THE PROPOSED JURY INSTRUCTION COULD IMPLY THAT AN ACCOMODATION WAS MADE ON BEHALF OF THE DEFENDANT AND THE DEFENDANT STILL REFUSED TO TESTIFY

While the Conference believes the Judicial Conference's proposed jury instruction, previously mentioned, is a better reflection of the holding of the Court of Criminal Appeals, the Conference is concerned that it may create bias in jury deliberations, because the instruction creates a potential inference that the defendant may be hiding something because of the defendant's choice to not testify, even though testimonial assistance would have been provided. Tenn. Code Ann. § 40-14-101 and Article I, Sec. 9 of the Tennessee Constitution ensure the defendant has the right to be heard in any criminal proceeding brought against him. Article I, Sec. 9 also ensures that a defendant "shall not be compelled to give evidence against himself." Whether to testify on his own behalf is a decision for the defendant to make at trial. *Momon v. State,* 18 S.W.3d 152, 161 (Tenn. 1999), *citing Jones v. Barnes,* 463 U.S. 745, 751 (1983). In addition, any closing arguments that comment on an accused's decision not to take the stand or testify is a violation of

the accused's constitutional rights to not testify. *State v. Jackson,* 444 S.W.3d 554, 585 (Tenn. 2014).

The concern with the proposed jury instruction is that the fact that the prosecution decided to use a "facility" dog for one of their witnesses may create a presumption that the defendant could have used the dog if he or she had chosen to testify, or that the "facility" dog was available to assist in the defendant's testimony, and yet that assistance was not enough to compel the defendant to defend himself by taking the stand. *See* Appendix 1. Thus, the inference in the instruction is not unlike a prosecutor commenting on a defendant's decision to not testify, especially when the defendant had testimonial assistance available for which the defendant did not avail himself. The Conference believes this may compromise the protections offered under the Fifth Amendment to the U.S. Constitution and Article I, Sec. 9 of the Tennessee Constitution, that a defendant not be forced to testify or incriminate himself. A simple change could alleviate this apparent bias, and the Conference proposal for this change is attached as Appendix 2.

V. ANY TESTIMONIAL AID SHOULD BE PROVIDED ONLY AFTER THE JURY IS REMOVED FROM THE COURTROOM AND THE WITNESS SEATED WITH ANY AID PERMITTED BY THE COURT. IN ADDITION, WHEN POSSIBLE ANY TESTIMONIAL AID PERMITTED SHOULD BE OUT OF SIGHT OF THE JURY

The *Reyes* court noted that, "the trial court should 'attempt to make the presence of the support dog as unobtrusive and as least disruptive as reasonably possible' and shall give an 'appropriate admonishment to the jury to avoid, or at least minimize, any potential prejudice to the defendant.'" *Reyes at *7, citing People v. Chenault,* 227 Cal. App. 4th 1503, 1517 (Cal. Ct. App. 2014). Indeed, the trial court in *Reyes* noted that the "facility" dog was "not likely" visible to the jury. *Reyes* at *5.

The Conference believes it is in the best interest of justice that in circumstances in which a testimonial aid, such as a "facility" dog, is permitted by the trial court, every opportunity to shield the testimonial aid from the jury's view should be promoted. Further, any introduction of the testimonial aid should be minimized so as to not create any inference that the assistance is personal in nature, or may cause the jury to experience undue sympathy for the testifying witness. Otherwise, unfair prejudice against the defendant will result by placing inappropriate "weight" on the testimony of a perceived sympathetic witness. While the referenced jury instruction moves toward this goal, any appearance of a special relationship between the testimonial aid and the witness should be minimized in the eyes of the jury. This could be accomplished by requiring that the witness not be seen taking the stand, or sitting in the courtroom, with a "facility" dog prior to the witness's testimony. Further, the jury should be removed from the courtroom while the testimonial aid, i.e. "facility" dog, and witness are seated in preparation for the testimony the witness is to give.

VI. CONCLUSION

Therefore, the Tennessee District Public Defenders Conference respectfully requests the Court reject the version of the proposed Advisory Commission Comment to Rule 611, of the Tennessee Rules of Evidence, as drafted. In addition, the Conference offers its recommendation to change the Advisory Commission Comment to better reflect a more equitable application of Tennessee Rules of Evidence, Rule 611, and the Equal Protection guaranteed by the Tennessee and United States Constitutions. *See* Appendix 2. Further, the recommended change to the commission comment should better reflect the holding of the Tennessee Court of Criminal Appeals in *State v Reyes.* The Conference proposes a change to the proposed Commission Comment which is attached as Appendix 3 to the Conference response. Finally, a review of the

Pattern Jury Instruction by the Tennessee Judicial Conference may be appropriate if the Court finds the potential for undue inference or bias exists in the language as currently drafted.

Respectfully submitted,

Tennessee District Public Defenders Conference

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APPENDIX 1

T.P.I. – CRIM. 42.28

USE OF A FACILITY DOG

The law allows either the prosecution or the defense to use a facility dog during the testimony of witnesses. This dog is not a pet, does not belong to any witness, and is a highly trained professional animal, available for use by either side. The presence of a facility dog is in no way to be interpreted as reflecting upon the credibility of any witness. You may not draw any inference, either favorably or negatively, for or against either the prosecution or the defense because of the dog's presence, and should attach no significance to the use of a facility dog by any side or witness. You also may not allow any sympathy or prejudice to enter into your consideration of the evidence during deliberations merely because of the use of a facility dog.

COMMENTS

1. In *State v. Jose Reyes*, No. M2015-00504-CCA-R3-CD, 2016 WL 3090904 (Tenn. Crim. App. May 24, 2016), the trial court approved the use of a professionally trained facility dog after taking testimony about the need for the dog by that victim. The dog laid still at the child victim's feet while he was on the witness stand throughout his testimony, including prior to the jury's being brought in and until after they left the courtroom. In *Reyes*, the Court held that while "the cases involving the use of a facility dog during a trial are not plentiful, it is clear that the evolving law permits their use." *Id.* at *6. They also observed that "the trial court also determined that the presence of [the facility dog] during the young victim's testimony would ease his being able to testify and that [the dog] would be handled in such a way as to make his presence as unobtrusive as possible and, further, the trial court instructed the jury that no inferences should be made, nor sympathy result from the presence of the facility dog. Accordingly, we cannot conclude that the trial court abused its discretion in permitting the use of the [dog] during the trial." *Id.* at *7. The above suggested instruction was drawn from language used in *Reyes* and from cases from other states cited in that opinion.

APPENDIX 2

T.P.I. – CRIM. 42.28

USE OF A FACILITY DOG

The law allows either the prosecution or the defense to use a facility dog during the testimony of witnesses. This dog is not a pet, does not belong to any witness, and is a highly trained professional animal, available for use by either side. The presence of a facility dog is in no way to be interpreted as reflecting upon the credibility of any witness. You may not draw any inference, either favorably or negatively, for or against either the prosecution or the defense because of the dog's presence, and should attach no significance to the use of, or a decision to not testify by use of, a facility dog by any side or witness. You also may not allow any sympathy or prejudice to enter into your consideration of the evidence during deliberations merely because of the use of a facility dog.

APPENDIX 3

TENNESSEE RULES OF EVIDENCE

RULE 611

MODE AND ORDER OF INTERROGATION AND PRESENTATION

Advisory Commission Comments [2017]

Nothing in these rules prohibits the court in its inherent authority from permitting a suitable animal, toy, or support person to accompany a witness, for either the prosecution or the defense, who is ~~a minor, an alleged victim of a crime, a person with a demonstrable intellectual or emotional challenge, or~~ a person otherwise shown to be a witness at risk for being unable to communicate effectively without the aid of such comfort. *See State v. Jose Reyes,* No. M2015-00504-CCA-R3-CD, 2016 WL 3090904 (Tenn. Crim. App. May 24, 2016).

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September 15, 2016

Mr. James Hivner, Clerk
Re: 2017 Rules Package
100 Supreme Court Building
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Nashville, TN 37219-1407

Re: No. ADM2016-01777 - Tenn. R. Civ. P. 4

Dear Mr. Hivner:

On behalf of Tennessee Farmers Insurance Companies and affiliates ("TFIC"), I want to express my appreciation for the Advisory Commission's request for comments on the proposed amendments and to seek your consideration of our comments regarding the practical effect of the Advisory Commission's proposed changes to Rule 4 of the Tennessee Rules of Civil Procedure on the public and the business community in our great state.

My concern is with the proposed amendment to Rule 4.04(10) that would allow for entry of a default judgment when the record contains "a return receipt stating that the addressee or the addressee's agent refused to accept delivery, which is deemed to be personal acceptance by the defendant pursuant to Rule 4.04(11)." This proposal does not provide any relief in the event an addressee or its agent has a valid reason for refusing to accept delivery of certified mail, which is far too often in my experience.

I serve as the registered agent for TFIC, and the Tennessee Commissioner of the Department of Commerce and Insurance ("TDOI") serves as the statutory agent for acceptance of service for all insurance companies. Despite this registered agent information being readily available on the Tennessee Secretary of State's website and the website of the TDOI, my office frequently handles service of process mistakes. Most often, these errors fall into one of three categories in which (a) service is attempted on an entity that does not exist (i.e. the named defendant is not an actual corporation), (b) service on an entity that does exist is attempted to be completed through a person who is not authorized to accept service, or (c) service on an entity is not directed to any person or authorized agent.

At TFIC we have processes in place to handle these situations. Both our legal department and TDOI frequently refuse to accept certified mail that is not addressed to a valid entity. Our office also refuses acceptance of certified mail that is not addressed to a person within the companies. When made aware of the event, we object to service on persons not authorized to accept service on behalf of our organizations. These processes have been put in place to make sure service is made on a corporate entity that actually exists under state law and so that persons who can respond to such service are notified of the action. However, under the proposed rule, it appears that following these processes might be grounds for a default judgment against one of our organizations when service is refused for a valid reason.

In addition, application of this proposed rule could work an unfair hardship on small businesses and nonprofit corporations served with legal process that might not have such processes in place or fully understand the effect of a failure to timely respond, especially in circumstances in which the wrong entity or person is served with a lawsuit. For example, the local non-profit Farm Bureau agriculture organizations in counties across this state are sometimes served with process when it really is meant for one of our insurance companies. If one of those nonprofits refuses service for a valid reason, for example the person served is not the registered agent for the nonprofit, the proposed rule would allow entry of a default judgment against the nonprofit in such action.

As I do not want to complain without offering a solution, I respectfully suggest changes to Rule 4.04 as set forth below. A marked draft is attached.

Revise Rule 4.04(4) as follows:

Upon a domestic corporation, or a foreign corporation doing business in this state, by delivering a copy of the summons and of the complaint to the registered agent or other agent specifically authorized by appointment or by law to receive service on behalf of the corporation, or if no such agent exists, to an officer or managing agent thereof.

Revise the proposed change to Rule 4.04(10) as follows:

Service by mail shall not be the basis for the entry of a judgment by default unless the record contains either: (a) a return receipt showing personal acceptance by the defendant or by persons specifically designated by Rule 4.04 or statute; or (b) a return receipt stating that the addressee or the addressee's agent refused to accept delivery, if the return receipt was properly addressed to the defendant or persons designated by Rule 4.04 or statute, which is deemed to be personal acceptance by the defendant pursuant to Rule 4.04(11).

Revise Rule 4.04(11) as follows:

When service of a summons, process, or notice is provided for or permitted by registered or certified mail under the laws of Tennessee and the addressee or the addressee's agent refuses to accept delivery, if the return receipt is properly addressed to the defendant or persons specifically designated by Rule 4.04 or by statute and such refusal is so stated in the return receipt of the United States Postal Service, the written return receipt if returned and filed in the action shall be deemed an actual and valid service of the summons, process, or notice.

Thank you for the opportunity to share my thoughts on this matter with the Committee and your efforts to craft well-considered, fair rules for our civil court system.

Very truly yours,

Ed Lancaster
General Counsel

Proposed Revisions to Tenn. R. Civ. P. 4
Marked Draft

Revise Rule 4.04(4) as follows:

Upon a domestic corporation, or a foreign corporation doing business in this state, by delivering a copy of the summons and of the complaint to ~~an officer or managing agent thereof, or to the chief agent in the county wherein the action is brought, or by delivering the copies to any other agent~~ the registered agent or other agent specifically authorized by appointment or by law to receive service on behalf of the corporation, or if no such agent exists, to an officer or managing agent thereof.

Revise Rule 4.04(10) as follows:

Service by mail shall not be the basis for the entry of a judgment by default unless the record contains either (a) a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 or statute; or (b) a return receipt stating that the addressee or the addressee's agent refused to accept delivery, if the return receipt was properly addressed to the defendant or persons designated by Rule 4.04 or statute, which is deemed to be personal acceptance by the defendant pursuant to Rule 4.04(11). If service by mail is unsuccessful, it may be tried again or other methods authorized by these rules or by statute may be used.

Revise Rule 4.04(11) as follows:

When service of a summons, process, or notice is provided for or permitted by registered or certified mail under the laws of Tennessee and the addressee or the addressee's agent refuses to accept delivery, if the return receipt is properly addressed to the defendant or persons designated by Rule 4.04 or by statute and ~~it~~ such refusal is so stated in the return receipt of the United States Postal Service, the written return receipt if returned and filed in the action shall be deemed an actual and valid service of the summons, process, or notice. Service by mail is complete upon mailing.