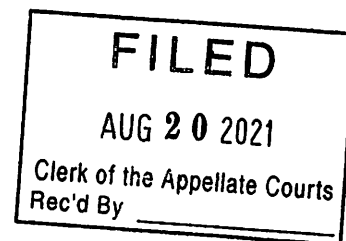




THE UNIVERSITY OF
TENNESSEE
KNOXVILLE



August 19, 2021

James Hivner, Clerk

Re: Tenn. Sup. Ct. R. 13, 5 (a)(1), (d)(1)- Docket No. ADM 2021-00237

Tenn. Sup. Ct. R. 12, 5(e)(4)-(5) – Docket No. ADM 2021-00308

100 Supreme Court Building

401 Seventh Avenue North

Nashville, TN 37219-1407

Chief Justice and Members of the Tennessee Supreme Court

Thank you for the opportunity to submit a comment on the petitions to vacate or modify Tennessee Supreme Court Rule 13, Sections 5(a)(1), 5(d)(1), and 5(e)(4)-(5) filed by the Petitioners Choosing Justice Initiative, Tennessee Association of Criminal Defense Lawyers and the Tennessee Post-Conviction Defender Organization. The docket numbers for both matters is set out in the caption above.

My perspective on the Proposed Amendments to Section 5 of Rule 13 is informed by my practice of family law and criminal defense law, including representing adults in parental termination cases and juveniles transferred and tried as adults; my former opportunity to serve on the trial and appellate courts, hearing criminal and family law matters; and my current work as a law professor teaching and writing about evidence, criminal procedure, pretrial litigation, and professional responsibility. My position is also influenced by my research on issues related to the legitimacy of the courts, my life-long support and passion for the rule of law, and my heartfelt belief that a fair and impartial judiciary is the most critical component of a thriving democracy. Based on these perspectives, I fully support and endorse the proposed amendments and list below some of the reasons for that enthusiastic support.

Docket No. ADM 2021-00237

Recommendation related to Sections 5(a)(1), 5(d)(1) - Resources for Experts, Investigators, and other Support Services

While the overall aim of the justice system is that justice be done, the perception that justice is being done is equally important. Fundamental to achieving justice as well as to the perception that justice is being achieved is the judiciary's ability to render fair, impartial, and wise results, based on reliable and trustworthy information from witnesses and tangible evidence. While the prosecution in criminal cases and state agencies in parental termination cases are supported financially by the state in their efforts to

Center for Advocacy and Dispute Resolution
College of Law

1505 W. Cumberland Ave., Knoxville, TN 37996-1810
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locate witnesses and tangible evidence, a legitimate adversary system cannot exist when only party has the ability to locate, develop, and present evidence.

Investigation is critical to the process of finding and securing fact witnesses; moreover, investigation is itself a skill, a skill neither taught nor fully addressed in law school. As a result, an attorney who performs her own investigation runs the risk of providing ineffective assistance of counsel because she is not trained to investigate properly or, perhaps even worse, may be *per se* ineffective because she will be unable to demonstrate inconsistencies between information she received when interviewing the witness and the witness' in-court testimony. *See* Tenn. R. Prof. Cond. 3.7. I will not repeat, but agree wholeheartedly with other commenters, who have emphasized the importance of investigation being conducted very early in the case, and thus support the appointment of investigators at the earliest possible juncture, and certainly in advance of any hearings in the case.

Very often, of course, fact witnesses cannot provide a sufficient bases for the court to render a fair and wise disposition of the case. In some situations, the General Assembly has required judges to make specific findings and conclusions that are beyond the realm of lay witness testimony. The relevant statutes for both parental termination and juvenile transfers require judges to make determinations that are largely dependent upon scientific, specialized, or technical knowledge. *See e.g.*, Tenn. Code Ann. §§ 36-1-113(c); 37-1-134(a) (4)(B), (C); (b)(2)(5). In these situations, expert testimony is critical to the proper exercise of the judicial function. *See* Tenn. R. Evid. 702. Given the specific findings required in some instances (see example below) and the level of proof demanded in others (for example, clear and convincing evidence in termination cases), a judge's conclusion may be a result of the absence of qualified proof. More specifically, the law may require the judge to reach a particular result solely because the party did not have access to an expert witness whose testimony might convince the judge that the opposite ruling is actually the wise and correct one. For example, when the prosecution seeks to transfer a juvenile accused to adult court for trial, the court is required to consider the juvenile's amenability to treatment. If counsel has not had the resources to investigate the available treatment facilities, or to have the appropriate experts evaluate her client to determine how the available services might be used, counsel may be unable to present qualified proof on that subject. The judge may transfer a juvenile simply because the evidence presented did not enable the judge to consider doing otherwise. In a sense, the transfer decision is not made consistent with the legislative directive, but is by default the best the judge could do under the circumstances. In so many of these situations, good enough is simply not good enough.

Additionally, more often than not, individuals facing the termination of their parental rights and juveniles charged with serious criminal offenses, who may be transferred for trial as an adult, are struggling with underlying mental health conditions that are both relevant to the proceedings and that also impair counsel's ability to render competent representation. Thus, it is critical, and arguably ethically required, that counsel have resources to explore the client's mental state both as it relates to the case and to the representation. *See* ABA Standards for the Defense Function, Standard 4-3.1 (c). Whether counsel can provide competent representation cannot depend upon the client's financial status.

The fee petitions filed with the court's administrative offices would undoubtedly substantiate that the overwhelming majority of parents in termination cases and juveniles in cases in which transfer is sought are indigent, represented by our state's public defenders or appointed private counsel. Their financial disadvantage makes it unlikely that will be able to secure investigative or expert services with their own resources. Yet these parties are entitled to the same measure of justice as those who are not financially disadvantaged. Giving these parties access to resources that are critical to their representation is consistent with our purported guarantee of equal justice and with constitutional interpretations, *see Ake v. Oklahoma*, 470 U.S. 68 (1986), but it is also essential to the broader objectives of assuring fair and seeking accurate dispositions of cases.

The statutory requirements that the legislature has imposed – in adopting standards for transfer, for findings of delinquency, for parental termination – create obligations on all components of the justice system. Judges must adhere to the statutory requirements in rendering decisions, necessarily, but counsel must also meet their obligations under the law. While the obligations of the juvenile defense counsel or the parents in a termination proceeding may be readily apparent (and have been at least partially discussed), perhaps a prosecutor’s obligation in the former proceeding, or the agency’s attorney’s obligation in the latter proceeding, is not as clear.

All lawyers are required by the Tennessee Rules of Professional Conduct to exercise fairness in their dealings with opposing party and counsel, *see* Tenn. R. Prof. Cond. 3.4, and candor toward the court, with regard to both facts and law. *See* Tenn. R. Prof. Cond. 3.3. Moreover, a prosecutor bears “special” responsibility, including a “duty to seek justice rather than merely to advocate for the State’s victory at any given cost.” *State v. Superior Oil, Inc.*, 875 S.W.2d 658, 661 (Tenn. 1994), *see also* Tenn. R. Prof. Cond. 3.8, Comment [1]. Among a prosecutor’s discrete obligation is the obligation to disclose information that may tend to negate guilt or mitigate the offense or sentence. Arguably, an agency lawyer representing the State in a termination proceeding bears similar responsibilities to assure that parental rights are only terminated when termination is in the best interest of the child and clear and convincing evidence establishes a statutory ground for termination. In both scenarios, to do justice under the applicable statutory frameworks, government counsel has a duty to become informed about the facts, before stating to the court that they have satisfied the statutory criteria supporting either termination or transfer. They are not at liberty to simply advocate for “victory,” when doing so either misstates the facts or misleads the judge.

Docket No. ADM 2021-00308

Recommendation related to Section 5(e)(4) – Approval of judicial authorization by director


In returning to the perspective of one who is influenced by research on judicial legitimacy, I also appreciate the opportunity to express support for the removal of the provision in Rule 5(e)(4) that purportedly gives a non-judicial administrative official the authority to approve, and presumably disapprove, an order by a judge authorizing support services. To be candid, I have not personally recently requested services nor been denied services. But to the extent the provision anticipates that a judge’s order could be disregarded (disapproved) by (1) a non-judicial officer who has (2) no jurisdiction to review judicial orders; who (3) reviews the “order and any attachments,” (4) without a record, (5) without notice, (6) without a hearing and (7) without guiding standards, regulations, or authority, it is antithetical to the most rudimentary notions of judicial decision-making and fundamental fairness.

The Supreme Court, under Rule 13, has entrusted the trial judge to exercise reasonable discretion in determining whether the request for services should be granted based upon information presented in accordance with established procedures. *See* Tenn. Sup. Ct. R. 13, Section 5(b)(2),(3),(c)(1)-(4)(detailing the requirements for requesting and securing resources for support services and procedure to be followed by judge in determining whether to grant the request). In a variety of context, trial judges are routinely required to exercise discretion and, as a result, are experienced in evaluating the necessary factors, weighing the alternatives, and reaching a sound result. The exercise of judicial discretion is so frequently required and so widely trusted, that the standard for reversal of a discretionary ruling is extremely high, allowing a reviewing *court* to reverse a discretionary ruling only when the trial judge’s ruling represented an “abuse” of discretion. *See Southern Fire & Cas. Co. v. Cooper*, 292 S.W.2d 177, 178 (1956)(noting that a trial judge’s discretion is “very wide” and that an appellate court cannot interfere absent some error of law, error of fact or error in the form or substance of the order.”). There simply is no basis to allow

the review of an order, issued under the authority of a Supreme Court Rule, after the exercise of judicial discretion, by an administrative official whose process is unknown and through a procedure that was neither vetted through the administrative rule-making or the legislative process. Such a casual disregard for a court order undermines the integrity of the court, trivializes judicial action, and is in opposition to the support of counter to the

Thank you for the opportunity to comment on these proposals. Should you have questions or need additional information, please feel free to contact me via email at pwhite4@utk.edu or at 865-974-6830.

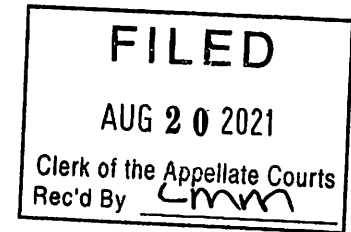
Sincerely yours,

A handwritten signature in black ink, appearing to read "Penny J. White". The signature is fluid and cursive, with a large initial "P" and "J".

Penny J. White
Elvin E. Overton Distinguished Professor of Law
Director, University of Tennessee
Center for Advocacy and Dispute Resolution

Lisa Marsh - Fwd: Comment to Petitions regarding Rule 13

From: Jim Hivner <jim.hivner@tncourts.gov>
To: Lisa Marsh
Date: 8/20/2021 4:59 PM
Subject: Fwd: Comment to Petitions regarding Rule 13



Sent from my iPhone

Begin forwarded message:

From: Margaret Behm <behm@dodsonparker.com>
Date: August 19, 2021 at 8:21:22 PM CDT
To: Jim Hivner <Jim.Hivner@tncourts.gov>
Cc: Buck Lewis <blewis@bakerdonelson.com>, Marcy Eason <Marcia.Eason@millermartin.com>, Douglas A Blaze <blaze@utk.edu>, Gail Ashworth <gail@wisemanashworth.com>
Subject: Comment to Petitions regarding Rule 13

Jim

I have tried several times to submit this comment online and get back an error notice regarding these Petitions:

No. ADM2021-00237 and No ADM2021-00308

I am authorized to submit this comment on behalf of former Tennessee Access to Justice Chairs, who are copied on this email.

All of us, who are former Tennessee Access to Justice Chairs, support these Petitions for the reasons articulated.

Margaret Behm, Buck Lewis, Dean Doug Blaze, Marcie Eason and Gail Ashworth

Would you please make sure that the Court receives these comments, since I am unable to submit it online? Please also feel free to include this comment on your website.

Thanks for your assistance.

Margaret

Margaret L. Behm
Dodson Parker Behm & Capparella, PC
1310 Sixth Avenue North
Nashville, TN 37208
(615) 254-2291
(615) 726-2241 (fax)

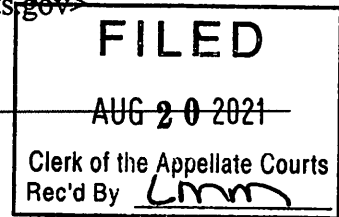


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Lisa Marsh - Comment on ADM2021-00237

From: "Suvall, Cara H" <cara.suvall@vanderbilt.edu>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 8/19/2021 1:42 PM
Subject: Comment on ADM2021-00237



Dear Appellate Court Clerk's Office,

Unfortunately the electronic portal was not working today (I received a "403 Forbidden" notification), so I am submitting two comments—one below, the other in another email—by email. I appreciate your work collecting these comments.

Sincerely,
Cara Suvall

To the Honorable Justices of the Tennessee Supreme Court:

I am writing to urge the adoption of the proposed amendment, ADM2021-00237, to Rule 13. This amendment will provide access to expert and investigative services as needed to all stages of the delinquency and criminal process, not just after indictment. Often, the early stages of a proceeding are the most significant. The negative consequences of a delinquency or criminal case begin to accrue the moment an arrest is made—direct consequences, including being held in jail or detention, onerous bond conditions, and more, as well as collateral consequences, including loss of jobs, housing, and licensing, immigration consequences, consequences in family court, and more are all underway well before indictment. Failure to provide these resources early in the process hamstrings defense arguments and limits the information available to all court actors at this essential stage. Ensuring that indigent defendants—both children and adults—can access needed funding early in the process will promote access to justice as well as promote appropriate court outcomes. This is an important amendment to Rule 13, and I urge you to adopt it.

Thank you for your consideration.

Sincerely,
Cara Suvall
Associate Clinical Professor
Vanderbilt Law School
131 21st Ave S.
Nashville, TN 37203

Cara Suvall

Associate Clinical Professor of Law
Youth Opportunity Clinic
Vanderbilt University Law School
131 21st Ave. S.
Nashville, TN 37203
(615) 343-2659

FILED

AUG 19 2021

Clerk of the Appellate Courts
Rec'd By _____

August 18, 2021

Re: Public Comment on ADM2021-00237

The Tennessee Innocence Project supports the amendment of Supreme Court Rule 13, Section 5(a) & (d)(1). According to the National Registry of Exonerations, to date, more than 2,800 people have been wrongfully convicted across the United States for crimes they did not commit. False or misleading forensic evidence was present in 687 of those cases. A quarter of all wrongful convictions involved an inadequate legal defense. As science continues to evolve, it is imperative for attorneys to have access to education, research, and testing. Any opportunity to provide attorneys with additional resources and expert guidance – at the earliest stages of the process – will assist them in delivering the constitutionally guaranteed defense their clients are entitled to and will result in fewer wrongful convictions.

If we give attorneys the tools to effectively advocate for their clients, the entire criminal justice system will become more fair, just, and equitable.

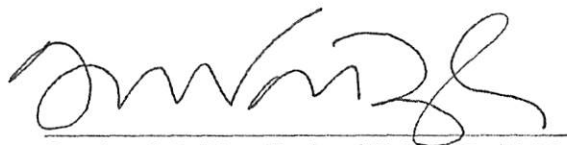


2126 21ST AVE. S. | NASHVILLE, TN 37212

P: 615.581.7230

W: WWW.TNINNOCENCE.ORG

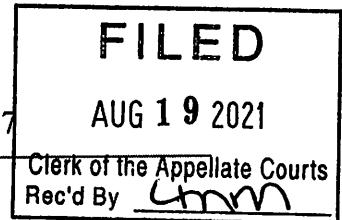
Respectfully submitted,



Jessica M. Van Dyke (TN BPR #30385)
2126 21st Ave. S.
Nashville, TN 37212
(615) 581-7230 (phone)
jessica@tninnocence.org

Lisa Marsh - Comments in support of Petition ADM2021-00308 and ADM2021-00237

From: "Kristen Anderson" <kanderson@pdknox.org>
To: <appellatecourtclerk@tncourts.gov>
Date: 8/19/2021 3:59 PM
Subject: Comments in support of Petition ADM2021-00308 and ADM2021-00237



Mr. Hivner,

I am writing in full support of Petition ADM2021-00308 proposing changes to Rule 13, Section 5(e)(4)-(5) and Petition ADM2021-00237 proposing changes to Rule 13, Section 5(a) & (d). My name is Kristen Anderson and I am an Assistant Public Defender with the Knox County Public Defender's Community Law Office in the 6th Judicial District. I am a graduate of the University of Tennessee College of Law; a member of the National Juvenile Defenders Center; and am co-host of the In Defense of Children Podcast, which discusses topics relevant to youth defense practice and the policies surrounding the juvenile justice system.

As a front line defender with the privilege of representing indigent children in delinquency proceedings in the Knox County Juvenile Court, I support the proposed changes to Rule 13 that would ensure indigent youth have access to necessary expert and investigative services at all stages of delinquency and criminal proceedings against them. Many juvenile cases could be resolved by employing investigative and expert services far earlier than transfer to criminal court, therefore saving the state significant resources and preventing unnecessary litigation. Research supports that well-resourced juvenile defenders increase public safety and save the state money by keeping children in the community. Without funding, indigent children are basically denied effective representation during critical stages of adjudication, such as transfers, while economically-advantaged families have the ability to defend their child's case from the very beginning. In a juvenile justice system built on the premise of rehabilitation and treatment, the practice of denying indigent children the ability to hire these resources until they are already sitting in an adult court proceeding is so incredibly *unjust and inequitable*.

Moreover, no exception exists for extraordinary circumstances in which specific experts may charge rates in excess of the Court's mandated caps. For instance, according to the Expert Institute, the average cost for an expert in Psychiatry in Tennessee is \$350/hour. See <https://www.expertinstitute.com/resources/expert-witness-fees/>. Market rates can fluctuate significantly from year to year and the current cap doesn't provide for flexibility in specialization, changes in the market, geographic location, or the needs of a specific case. While employing specialty experts may be rare, there should be a discretionary exception to allow for those extraordinary cases. I fully support the implementation of the Rule as outlined in the Petition in order to allow the presiding court discretion in granting an exception to the cap in those cases.

Thank you for your consideration.

Best,
Kristen D. Anderson, *Assistant Public Defender*
Knox County Public Defender's Community Law Office
1101 Liberty Street Knoxville, Tennessee 37919
O: (865) 215-6474 | kanderson@pdknox.org

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Lisa Marsh - petitions regarding Rule 13

From: "Robinson, Rob (Public Defender)" <robobinson@jnsnashville.gov>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 8/19/2021 4:05 PM
Subject: petitions regarding Rule 13

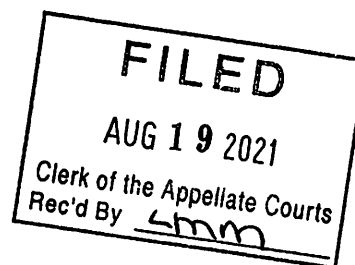
I am writing in support of the two petitions to reinstate indigent funding for experts & investigators in Tennessee juvenile courts.

I have been an attorney in the Public Defender's Office in Nashville for many decades and have practiced primarily in juvenile court during that time.

Access to experts and investigators is crucial in properly defending those juveniles charged with offenses, as it is for adults, and the need for those experts is magnified in those juvenile court cases where the district attorney is seeking transfer of juveniles to adult court. To refer to the transfer decision the court is being asked to make a critical stage of the matter against a juvenile really is not strong enough language.

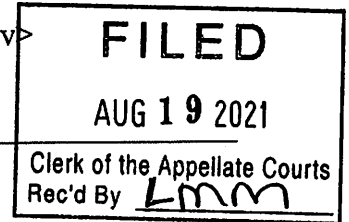
I would be glad to go into more detail and offer examples of many cases where access to experts and investigators have made the difference in how a case was resolved in juvenile court. Please feel free to contact me.

Sincerely,
Rob Robinson
Davidson County Public Defender's Office
615-668-2672



Lisa Marsh - Comments on Petitions ADM2021-00308 and ADM2021-00237

From: "Maroney, Terry" <terry.maroney@Vanderbilt.Edu>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 8/19/2021 3:29 PM
Subject: Comments on Petitions ADM2021-00308 and ADM2021-00237



To the Court clerk -

I am writing to express my strong support for the above-referenced petitions. I attempted to submit my comments earlier this week on the web form, but am concerned that they were not registered; in both instances, I got an error message after hitting submit. I therefore am writing to quickly bottom-line those comments. Both petitions advance the interest of justice, and properly recognize the authority of the trial courts. I have taught criminal and juvenile law subjects at Vanderbilt Law School for 15 years. I also teach a class on wrongful conviction. One overwhelming truth I have observed is that consistent and early access to adequate investigative and expert resources is always in everyone's interest. Such access gets to the truth earlier, changing plea dynamics, illuminating possible diversion options, uncovering solvable underlying problems - and sometimes showing that the charged person should not be charged at all. Investigation and expert help can prevent inaccuracies and injustices that may be impossible to remedy later-or, as in many innocence cases, that can be remedies only after enormous expense, drain on the courts, and human suffering.

As to ADM2021-00308 specifically: if a trial judge determines that investigative and/or expert services are appropriate, neither the AO nor the Chief Justice should be in a position to summarily reverse that more informed on-the-ground assessment. Allowing that practice raises the potential that such decisions will rest not on the specific needs of the case but, rather, on questions of budget or generalized notions of what is or is not needed in specific sorts of cases.

And as to ADM2021-00237 specifically: there is no reason to artificially curtail access to experts and investigators when they can be shown to be necessary; indeed, earlier access is always better, and the current rule introduces the potential for needless delay. Further, if the trial judge assesses that extraordinary circumstances warrant an exception to hourly fee caps, that assessment should be respected.

Thank you for considering my perspective, formed over many years of litigation, study, and teaching.

Terry A. Maroney

Terry A. Maroney
Robert S. and Theresa L. Reder Chair in Law
Professor of Law
Professor of Medicine, Health, and Society
Vanderbilt University
131 21st Avenue South
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terry.maroney@vanderbilt.edu
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New scholarship: (What We Talk About When We Talk About) Judicial Temperament, webcast series here
New co-edited special issue: "Judging, Emotion and Emotion Work" in *Oñati Socio-Legal Series*

FILED

AUG 19 2021

Clerk of the Appellate Courts
Rec'd By Lmm

JOHN COOPER
MAYOR


Juvenile Court
METROPOLITAN NASHVILLE & DAVIDSON COUNTY

SHEILA D.J. CALLOWAY, JUDGE

JUVENILE COURT OF DAVIDSON COUNTY
100 WOODLAND STREET
P.O. BOX 196306
NASHVILLE, TENNESSEE 37219-6306

August 18, 2021

Mr. James Hivner
Clerk of the Appellate Courts
100 Supreme Court, Building 401
Seventh Avenue North
Nashville, TN 37219-1407

Re: Support for Petitions ADM2021-00237 and ADM2021-00308

Dear Mr. Hivner:

I am writing to express my support for Petitions ADM2021-00237 and ADM2021-00308 proposing amendments to Tennessee Supreme Court Rule 13. It recently came to my attention that the Administrative Office of the Courts has stopped funding indigent defense experts and investigators in juvenile cases, including juvenile transfer hearings, under Tennessee Supreme Court Rule 13, Section 5. I respectfully request that Tennessee Supreme Court Rule 13 be amended to require funding for indigent defense experts and investigators when a juvenile judge has made a finding of particularized need for such services.

While I support all the provisions of the above-referenced petitions, I am especially concerned about the need for indigent defense experts and investigators in juvenile transfer cases. A juvenile transfer hearing determines whether a youth will receive treatment and rehabilitation in the juvenile system up until age 19 or face prosecution and imprisonment in the adult criminal justice system, which still includes the possibility of life without parole for juveniles in Tennessee. There is no more critical part of the criminal process for a youth than the transfer hearing. Although the standard of proof at a transfer hearing is probable cause, as opposed to the "beyond a reasonable doubt" standard of a trial, a youth is afforded many of the same constitutional rights at a transfer hearing as in a criminal trial. *See, e.g.*, Tenn. Code Ann. §37-1-124, Tenn. Code Ann. §37-1-126, and Tenn. Code Ann. §37-1-127. When a juvenile court judge transfers a youth to the adult system, juvenile jurisdiction is terminated for that youth with respect to the present case, as well as all future delinquent acts with which the youth may be

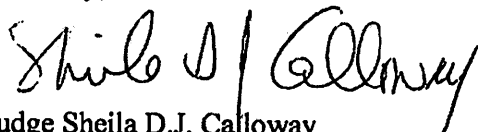
charged. Further, pursuant to Tenn. Code Ann. §37-1-159(d), the decision of a juvenile court judge regarding transfer to the adult system is not subject to appeal, so the outcome of a transfer hearing is of similar or greater consequence than a criminal trial.

According to Tenn. Code Ann. §37-1-134 (a)(4), to transfer the child to the adult system, the Court must find probable cause to believe: (A) the child committed the delinquent act as alleged; (B) the child is not committable to an institution for the developmentally disabled or mentally ill; and (C) the interests for the community require the child be put under legal restraint or discipline. In making the determination as to whether probable cause has been met, there are a list of factors the juvenile court must consider, including: 1) The extent and nature of the child's prior delinquency records; 2) The nature of past treatment efforts and the nature of the child's response thereto; 3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person; 4) Whether the offense was committed in an aggressive and premeditated manner; 5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and 6) Whether the child's conduct would be a criminal gang offense, as defined in §40-35-121, if committed by an adult.

In order to adequately address these enumerated factors in the transfer hearing, the defense may need the assistance of an indigent defense expert or investigator. The youth's attorney cannot testify as his or her own witness at the hearing, and the transfer factors cannot always be adequately addressed with lay testimony. When a juvenile court has determined there is a particularized need for expert assistance in a transfer hearing, denying such services could result in irreparable harm to the youth. Further, from a fiscal standpoint, denying funding for proper investigation of a transfer case could result in youth being transferred to the adult criminal justice system to face lengthy incarceration in the adult penitentiary, whereas the youth might have remained in the juvenile system if they had been able to effectively present evidence about the relevant transfer factors with expert testimony.

For all the reasons described in Petitions ADM2021-00237 and ADM2021-00308 as well as these additional concerns related to juvenile transfer hearings, I request that Tennessee Supreme Court Rule 13 be amended as specified in the petitions. I would sincerely appreciate your assistance in sharing this letter with the appropriate individuals. If you would like any additional information, please do not hesitate to contact me at 615-862-8073.

Sincerely,



Judge Sheila D.J. Calloway
Davidson County Juvenile Court

JULIE A. GALLAGHER, PSY.D. ABPP

CLINICAL AND FORENSIC PSYCHOLOGIST

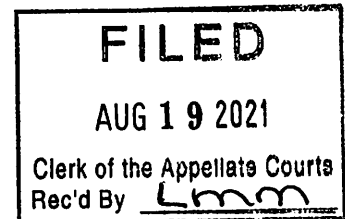
BOARD CERTIFIED IN FORENSIC PSYCHOLOGY

2200 21st Avenue South, Suite 401
Nashville, Tennessee 37212
www.DrJulieGallagher.com

Phone (615) 491-3229
Fax (615) 750-5796
Dr.Julie.Gallagher@gmail.com

August 18, 2021

James Hivner, Clerk
Re: Tenn. Sup. Ct. R. 13, 5(a)(1) and 5(d)(1)
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407



**In Re: PETITION TO MODIFY TENNESSEE SUPREME COURT RULE
 13, SECTION 5(a)(1) and (5)(d)(1)**
Docket No. ADM2021-00237

To Whom it May Concern:

I am writing to express my support for the petition to modify Tennessee Supreme Court Rule 13 to expand the right to expert, investigative and other support services to all critical stages of a criminal prosecution, including, among other things, juvenile delinquency and juvenile transfer hearings.

I am a clinical and forensic psychologist, board certified in forensic psychology by the American Board of Professional Psychology. I have provided my services as a forensic psychologist to the criminal and juvenile courts in Tennessee for almost a decade. Prior to that, I was the Director of Forensic Services at Child Study and Treatment Center, the state hospital in Washington State that does all of the court-ordered juvenile forensic evaluations for the State of Washington.

I have been contacted by attorneys on a number of occasions who have struggled with funding expert services under Rule 13. I have seen cases in General Sessions court where the defendant was floridly psychotic – completely out of touch with reality such that they did not understand that they were facing charges or could be punished – and the AOC refused to fund a competency evaluation. I am also aware of cases in juvenile court where attorneys have struggled to obtain funding for transfer evaluations.

Juvenile proceedings address issues unique to the juvenile justice system that require experts with specialized knowledge and expertise. As the United States Supreme Court has recognized since *Roper v. Simmons*, 543 U.S. 551 (2005), juveniles are fundamentally different than adults in that their brains are still developing, resulting in ongoing changes in emotional and cognitive processing that affect decision-making. In addition, it has been my experience that a majority of juvenile defendants have educational or mental disabilities that warrant special education services. These factors add a level of complexity to the assessment of forensic issues such as competency to proceed, mental state at the time of the offense and juvenile transfer. As a result, these evaluations are more complex than the evaluations typically ordered for adult defendants and evaluators require specialized training and experience to complete them.

Juvenile transfer hearings in particular, where the stakes are so high, require this expertise in juvenile development and mental health to properly inform the court as to whether the child is committable and to identify the rehabilitation needs of the child under T.C.A. § 37-1-134. Specialized forensic assessment of the sophistication and maturity of the juvenile is also relevant to transfer proceedings, in keeping with the factors identified in *Kent v. United States*, 383 U.S. 541 (1966). So many of the youth facing transfer are indigent. They deserve the same access to experts to address these issues as youth of greater means.

Unfortunately, there are only a small number of forensic psychologists in Tennessee with the necessary combination of expertise in forensic psychology and juvenile development. This has become a significant challenge as, due to developmental factors, juveniles are much more likely to commit crimes with peers, resulting in many cases with multiple co-defendants. As a result, we often “run out” of experts for all of the co-defendants in juvenile cases (as it would be a conflict to evaluate multiple co-defendants in the same case).

This problem is driven both by the lack of experts in the state and the reimbursement rates currently set by Rule 13. As noted in the 2017 Report of the Indigent Representation Task Force,¹ the currently set maximum hourly rates for psychologists, which have not been adjusted in decades, are so far below market rates,² attorneys often struggle to find other experts, whether from in or out of state, who are willing to work at the currently set rates.

I have been contacted many times in these situations. I feel an obligation to the indigent juveniles of the state to take these cases when I can, but have limited it to a certain number per year, as these rates are so far below reasonable market rates. This creates an obvious inequality where all indigent defendants do not have access to the same experts that non-indigent defendants do. I often end up referring these cases to colleagues out of

¹ <https://www.tncourts.gov/IndigentRepresentationTaskForce>

² A recent survey found that the national average rate for forensic psychologists is \$280/hour (<https://osf.io/5pzyt/>). Local rates are, in some areas, significantly higher. Forensic psychologists at Vanderbilt charge \$400/hour for privately retained cases.

Gallagher Letter
Re: ADM2021-00237

state, especially when the limited number of local experts are already involved or have conflicts, and have found that out-of-state colleagues are often reluctant to travel at these rates (notably, the rate for travel is half the hourly rate). The proposed modification of Rule 13 to allow judicial discretion under extraordinary circumstances is an appropriate step to begin to address this.

It is my hope that the changes proposed in this petition will allow for greater equality in access to experts for the indigent juvenile and adult defendants involved in the court system in the state of Tennessee.

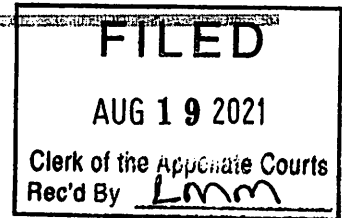
Respectfully,

A handwritten signature in black ink, appearing to read 'Julie A. Gallagher ABPP'. The signature is stylized and cursive.

Julie A. Gallagher, Psy.D. ABPP
Board Certified in Forensic Psychology
Licensed Psychologist, Health Services Provider

Lisa Marsh - Petition ADM2021-00308 & Petition ADM2021-00237

From: Laurie Sansbury <lauriesansbury@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 8/19/2021 6:46 AM
Subject: Petition ADM2021-00308 & Petition ADM2021-00237



I am writing in STRONG SUPPORT of Petition ADM2021-00308 & Petition ADM2021-00237. Children in Juvenile Court and adults in General Sessions court throughout Tennessee need access to expert and investigator funding.

I am a public defender in Shelby County, TN. I am writing this in my personal capacity. My practice includes cases in General Sessions and Criminal Courts, and I have worked in our Juvenile Court with a focus on children charged with serious offenses at high risk of transfer. Access to funding at the beginning of a case, instead of only post-indictment (which in Shelby County can be 6 months to over one year) would allow us to provide better representation for our clients in Juvenile and General Sessions courts at a critical time in the case.

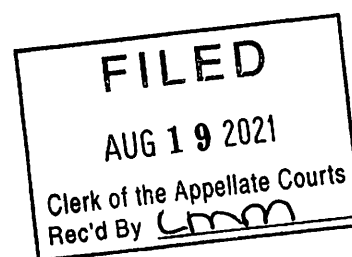
Thank you,
Laurie S. Sansbury, TN BPR 31285
Assistant Public Defender
Shelby County Public Defender's Office
201 Poplar Ave. Ste 2-01 • Memphis, TN 38103
lauriesansbury@gmail.com

Lisa Marsh - ADM2021-00237 and ADM2021-00308

From: Thomas Miller <thomasmiller@thomasmillerattorney.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 8/19/2021 11:22 AM
Subject: ADM2021-00237 and ADM2021-00308

I am writing in support of amending Supreme Court Rule 13 to allow funding for indigent defense experts and investigators in juvenile cases. Judge Sheila Calloway has argued well the case for that funding in transfer cases. An equally compelling argument can be made in dependent and neglect cases, especially where there is the possibility of a finding of severe child abuse, since that is a statutory ground for termination of parental rights.

Thomas H. Miller
Attorney at Law
P.O. Box 681662
Franklin, TN 37068-1662
615-516-0819 (cell)





State of Tennessee

TWENTIETH JUDICIAL DISTRICT

FILED

AUG 19 2021

Clerk of the Appellate Courts
Rec'd By Lmm

MARK J. FISHBURN, JUDGE
CRIMINAL COURT, DIVISION VI
EMAIL: MARKFISHBURN@JIS.NASHVILLE.ORG

408 2ND AVENUE NORTH, SUITE 5130
NASHVILLE, TENNESSEE 37201
(615) 880-3419
FAX: (615) 880-3424

Mr. James Hivner, Clerk
100 Supreme Court Building
401 7th Ave. N.
Nashville, TN. 37219-1407

In Re: Proposed rule changes to S. Ct. Rule 13, §5(a) & (d)
ADM 2021-00237

Dear Mr. Hivner:

Although I have a lot I could say in support of the proposed rule changes to the above existing Supreme Court Rule, I will spare you a lengthy diatribe on the subject as I could not express with such fervor, clarity and legal authority what the original Petitioners have set forth in their petition. However, I do find, and I do teach in criminal trial advocacy, that analogies sometimes help in trying to establish with the jury or the audience the justness of the advocate's cause or to weaken the position of the opposition.

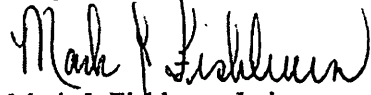
Imagine if you will the thrill of being chosen to play on a major league baseball team although in a back-up role. Suddenly one day you are called up by the manager to pinch-hit for a starting player who is injured in the first inning while turning a double play. After you warm up with the weighted bat, you go to get a game bat, but are denied access to one. Instead, you are told "you are on your own". This is what it is like to be appointed to a criminal case in General Sessions court and during bin-over. No matter the seriousness of the charge, "you are on your own". Federal and state constitutions and statutes demand you hit a home run by providing effective representation and other due process guarantees, but the team leaders don't give you the bat to achieve those lofty goals. It is time that the rules be changed to provide a more level playing field.

Prosecutors have the evidence in advance of any given case so that they can prepare to be an effective advocate at the preliminary hearing, the "first inning", with the law enforcement readily available to provide a full scouting report of the opposing pitcher. Defense counsel has his client to fill him in on the scouting report of the prosecutor assuming the client trusts this unknown "team manger" sufficiently to be forthcoming in a matter of a few days or weeks. Is that a level playing

field as required by due process? Should a defendant have to wait until the fifth or sixth inning to be given a bat?

How is it that we in the legal community can genuinely clamor for a level playing field to ensure that all persons, no matter their station in life, are treated equally, fairly and justly when we have one side equipped and playing on a major league level while the other side is playing on an unkept sand lot in a decaying neighborhood. If we are honest with ourselves, we cannot do so. To some, the call for fairness and justice in the criminal justice system may be a worthy thought or sound bite, to the rest it is a beacon of hope to be pursued and achieved. We can take one small step to making that beacon of hope a reality by adopting the proposed rule changes sought by Petitioners.

Respectfully submitted,

A handwritten signature in black ink that reads "Mark J. Fishburn". The signature is written in a cursive, slightly slanted style.

Mark J. Fishburn, Judge

Criminal Court, Div. VI

markfishburn@jnsnashville.gov

BPR 006697



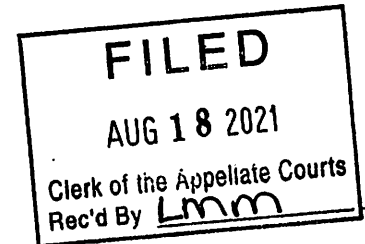
LAW OFFICE OF
JOE G. RILEY

560 HEADDEN DRIVE
RIDGELY, TENNESSEE 38080

Phone (731) 445-9624

Rule 31 Listed General Civil Mediation
E-Mail: joe-riley@att.net

August 18, 2021



James Hivner, Clerk
appellatecourtclerk@tncourts.gov
Re: Tenn. Sup. Ct. R. 13, 5(a)(1) and 5(d)(1); and
Tenn. Sup. Ct. R. 13, 5(e) (4)-(5)

Dear Mr. Hivner:

I am a former trial court judge and appellate criminal court judge. I am very familiar with the issues addressed by the two petitions submitted by Choosing Justice Initiative, Tennessee Association of Criminal Defense Lawyers, and Tennessee Post-Conviction Defender Organization.

Tenn. Sup. Ct. R. 13, 5(a)(1) and 5(d)(1):

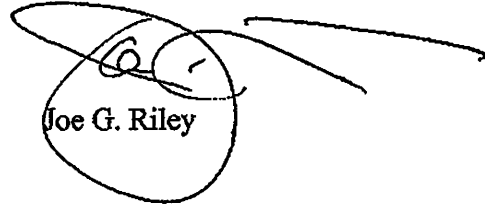
It would appear that the proposed amendments are clearly justified. They are necessary in order that all indigent defendants accused of a crime have the appropriate and timely access to the expert, investigative, and other support services necessary to prepare their defense for trial and to protect their constitutional rights. It would also appear the present rule creates an unnecessary disparity with other defendants who are not indigent, and with some indigent defendants depending upon the type of appointed counsel representing them.

Tenn. Sup. Ct. R. 13, 5(e) (4)-(5):

It would appear that the proposed amendments are clearly justified. The current rule authorizes lower court judges to approve funds to ensure that an indigent person receives the protections guaranteed by our federal and state constitutions. It would appear that allowing the AOC Director and Chief Justice to unilaterally vacate such orders is indeed and unnecessarily problematic. It would seem that only the proper appellate court would have the authority to overrule the lower court's decision.

I respectfully suggest adoption of the proposed rule changes.

Sincerely yours,

A handwritten signature in black ink, consisting of a large, stylized 'J' and 'R' that are connected and looped together. The signature is written over a circular stamp.

Joe G. Riley

From: <ckleiser@pdknox.org>
To: <appellatecourtclerk@tncourts.gov>
Date: 8/18/2021 10:25 AM
Subject: Support for Motion to amend Rule 13

FILED
AUG 18 2021
Clerk of the Appellate Courts
Rec'd By Lmm

ADM2021-00237

My name is Chris Kleiser. I am an assistant public defender in the 6th judicial district and have been both a front line defender of youth and supervisor of our office's work in Juvenile Court since June 2006. I graduated from DePaul University College of Law in 1997 and am a licensed attorney in Illinois (inactive), Ohio (inactive) and Tennessee (active). I am the co-chair of TACDL's juvenile committee, was on the Blue Ribbon task force, testified before the Indigent Representation Task Force, am on the National Advisory Board of the National Juvenile Defender Center, am on the Court Improvement Project committee that works on Juvenile Court reforms, train nationally on all aspects of youth defense and am a co-host of the In Defense of Children podcast. <http://indefenseofchildrenpodcast.org/>

I am deeply committed to making sure that all children in Tennessee accused of delinquent conduct are given access as early as possible to high quality, well-resourced defense counsel. Research supports that effective, well-resourced defenders increase public safety and save the state money by keeping youth in the community. In addition research supports that effective juvenile defense systems lead to youth success.
<https://njdc.info/wp-content/uploads/2016/05/2016-NJDC-SMART-One-Pager.pdf>

Simply stated, I cannot do my job effectively without the ability to access funds for experts. Having a system where children cannot hire their own expert to aid in their defense is not a just system. Many people think that what happens in Juvenile Court simply is not as important as what happens in criminal court. This couldn't be farther from the truth in the mind of a child facing consequences of lifetime juvenile sex offender registries, transfer to adult court or lengthy juvenile incarceration away from their families because of a DCS Juvenile Justice commitment.

I can tell you that it is rare when I've had to hire an expert for a matter in Juvenile Court, but if I did not have the ability to do so if needed, I could not ethically move forward on a case.

Please call me if you have any questions about my comments.

Sincerely,
Chris Kleiser

--
Christina M. Kleiser
Assistant Public Defender
Knox County Public Defender's Community Law Office
1101 Liberty Street
Knoxville, TN 37919
(865) 215-6473 (office)
(865) 215-6516 (fax)

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Lisa Marsh - In support of Petition to Amend Rule 13; Docket Nos. ADM2021-00308, ADM2021-00237

FILED
AUG 18 2021
Clerk of the Appellate Courts
Rec'd By *lmm*

From: Amber Kaset <ak@akinvestigations.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 8/18/2021 3:24 PM
Subject: In support of Petition to Amend Rule 13; Docket Nos. ADM2021-00308, ADM2021-00237

Dear Mr. Hivner,

I am a fact investigator, mitigation specialist and owner of Nashville-based private investigations firm AK Investigations. With roughly 18 years of experience working in the criminal defense arena, I have seen firsthand the benefit that the accused are afforded by having the expert assistance of a defense investigator upon arrest. Clients with financial resources are fortunate enough to have this privilege, as they are given timely attention. Indigent clients' cases suffer for their inability to pay and their cases are effectively put on hold for months after arrest as they wait on indictment in order to obtain investigative services. To delay investigation in a case up to many months after a person is charged means that witnesses often move, memories fade and innocent individuals will spend more time in jail as they wait on justice. All humans, no matter their socioeconomic circumstance, deserve the same rights: access to necessary expert and investigative services at all stages of the court proceedings. The term human includes children. In the last month, my agency was approved for Court funding for two indigent children in two separate cases both set for transfer hearings. The AOC denied our funding approval "per chief justice." At this juncture, these two children have no one investigating their cases, and should they get transferred to adult court and get convicted, they could die in prison. The clock is ticking.

I appreciate your consideration of the petitions regarding the Rule 13 amendments.

Sincerely,

Amber Kaset



Amber Kaset
Owner, Private Investigator & Mitigation Specialist
(615) 210-3144
www.akinvestigations.com
PO Box 68192 Nashville, TN 37206



Knoxville Bar Association
505 Main Street, Suite 50
P.O. Box 2027
Knoxville, TN 37901-2027
PH: (865) 522-6522
FAX: (865) 523-5662
www.knoxbar.org

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Executive Director
Marsha S. Watson
mwatson@knoxbar.org

August 17, 2021

VIA E-Mail: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: **No. ADM2021-00237**

Dear Mr. Hivner:

I am writing to you and the Tennessee Supreme Court on behalf of the Knoxville Bar Association (KBA) Board of Governors regarding Order No. ADM2021-00237 filed by Choosing Justice Initiative, Tennessee Association of Criminal Defense Lawyers, and Tennessee Post-Conviction Defender Organization to amend TENN. SUP. CT. R. 13.

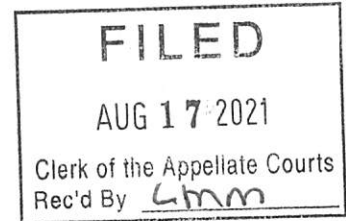
The KBA's Professionalism Committee carefully considered the Court's Order and recommended that the KBA Board of Governors strongly support the proposed rule changes to TENN. SUP. CT. R. 13 dealing with the funding of experts, investigators, and other support services for indigent parties. The Committee stressed the importance of support services that would offer meaningful assistance to the defense at the earliest possible time in Sessions and Juvenile Court proceedings, especially since many, if not most, cases are resolved at a very early stage, putting indigent defendants and juveniles in the position of having to make life-altering decisions without adequate investigation or expert evaluation. At its meeting on June 16, 2021, the Board of Governors voted unanimously to strongly support the proposed changes to TENN. SUP. CT. R. 13.

As always, the KBA appreciates the invitation to consider and comment on proposed rules changes.

Sincerely,

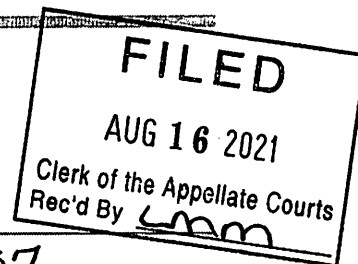
Cheryl G. Rice, President
Knoxville Bar Association

cc: Marsha Watson, KBA Executive Director (via e-mail)



appellatecourtclerk - Comments in Support of Amendments to Supreme Court Rule 13

From: Kevin McGee <kevin@kevinmcgeelaw.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 8/16/2021 4:14 PM
Subject: Comments in Support of Amendments to Supreme Court Rule 13



ADM2021-00237

Dear Mr. Hivner,

I am writing in support of the proposed amendments to Supreme Court Rule 13, specifically sections 5 (a) and (d), relating to the petition filed in ADM2021-00237. I am also in support of the proposed amendments to Supreme Court Rule 13, specifically sections 5(e)(4-5), relating to the petition filed in ADM2021-00308. I would like to especially express my views supporting the petition in ADM2021-00237, which would enable an indigent defendant to receive expert assistance at the General Sessions Court level.

I have been practicing criminal defense for sixteen years, and I am currently in private practice as a solo practitioner. Prior to starting my private practice, I was an Assistant Public Defender for three years in the Nashville Defender's Office. I then practiced as an Assistant Public Defender in the Knox County Public Defender's Office for an additional three years.

I cannot overstate the crucial importance of early investigation in any case, but especially in serious cases, at the General Sessions Court level. I practice primarily in Davidson County. If a client is in custody, it takes an average of three to six months from the time that a person is arrested for their case to be indicted in Criminal Court. For clients on bond, it can take much longer for a case to make its way from the date of arrest to being indicted in Criminal Court. In my experience, cases in Davidson County tend to move quicker through the Grand Jury than many of the other surrounding counties in which I practice. These time frames were pre-COVID as well. We all know the tremendous backlog that exists in every county in Tennessee relating to mandatory shutdowns in the criminal justice system.

The vast majority of my clients are retained clients. I handle some homicide cases on an appointed basis, but not many at this stage of my career. That said, most of my clients cannot afford to pay an attorney and also afford expert assistance in the form of investigators and other necessary experts in their defense. When I worked as an Assistant Public Defender, I had the opportunity to utilize investigators at the earliest possible stage of a case. This was crucial to providing effective assistance. I had the opportunity to use investigators to interview and track down witnesses, take statements, preserve evidence, and support my client's defense theory at the earliest and most crucial stage of the case--typically right after the event happened. When I represent a client with the financial means to hire an investigator at the General Sessions Court level, the same is true for my practice now. And the difference in my ability to provide effective assistance of counsel when I have access to an investigator in General Sessions Court is enormous. However, even with my retained clients, this is the exception and not the norm by any means.

The difference in the outcome for my clients that have access to investigative assistance at the General Sessions Court level as opposed to just the Criminal Court level many months or even a

year down the road is significant. I have literally saved multiple clients from the potential of life sentences in prison through early crucial investigation using competent investigators at the General Sessions Court level. I can say with experience that early investigation is crucial.

Imagine the scenario that plays out almost every day in our court system with multiple co-defendants. All are charged with the same crime. The Public Defender's Office gets appointed to represent one. The other co-defendants get appointed private attorneys. The one who is lucky enough to have the Public Defender gets a staff with investigators, social workers, and other crucial experts to work on their case as soon as the person is arrested. Again, as a former Assistant Public Defender I know this from personal experience. The other co-defendants have no access to an investigator, no access to mental health specialists, and no access to social workers until at best several months after the arrest. Is this fair? The answer is obvious and the answer is NO. And as I mentioned above, even when a client or his or her family has the means to retain me for General Sessions Court, it is quite the rare occasion that the client or the family has the means to also afford an investigator in General Sessions Court. For Rule 13 to have any real value in serious cases, defendants must have the ability to seek court approved necessary funding for investigators in General Sessions Court.

I wholeheartedly support both petitions that have been filed to amend Rule 13. I wanted to specifically speak to the importance of investigative funding at the earliest crucial stage of a case because it matters so much. I respectfully urge the Court to adopt these amendments.

Thank you for your consideration.

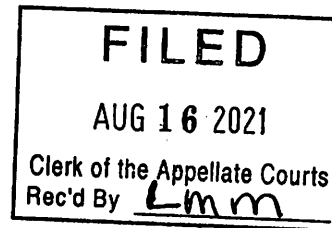
Sincerely,
Kevin McGee

--
Kevin McGee
Attorney at Law
1308 Rosa L. Parks Blvd.
Nashville, TN 37208
(615) 254-0202 (w)
(615) 254-3355 (f)
www.kevinmcgeelaw.com



The lifting power of many wings can achieve twice the distance of flying alone.

Re: ADM2021-00308 and ADM2021-00237



To Whom it May Concern,

The Tennessee Disability Coalition is an alliance of organizations and individuals who have joined to promote the full and equal participation of Tennesseans with disabilities in all aspects of life. We are people with various disabilities, including those with intellectual and developmental disabilities, physical and mental health concerns, family members, and other advocates. We work together to advocate for public policy that ensures self-determination, independence, empowerment, and inclusion for people with disabilities. As disability advocates, we support the changes in this petition.

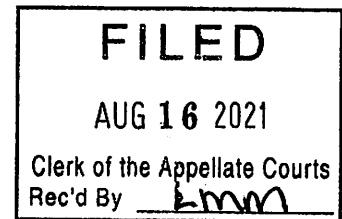
We understand that these changes would permit court-ordered, constitutionally-entitled funding to be transmitted to defense teams as soon as a case begins, rather than face a delay or potential denial. These funds are immensely important to providing a full and adequate defense for indigent individuals in the criminal justice system. It is even more important for individuals that live with an intellectual disability or mental illness whom are disproportionately represented in the criminal justice system.

These individuals are particularly vulnerable to inadequate representation because they are less capable of contributing to their own defense. Individuals with disabilities and mental illnesses are also more likely to live in poverty, further limiting access to vital resources, such as intelligence and mental health screenings. Further, the Supreme Court has ruled that both mental illness and intellectual disability diminish criminal culpability, and without adequate resources for and access to testing, individuals may be denied these constitutional protections.

Equal and reliable access to necessary resources can help to ensure that disability or mental illness do not diminish the quality of a person's defense and that the constitutional rights of these individuals are respected and assured.

Sincerely,

Jeff Strand
Tennessee Disability Coalition
Coordinator of Government and External Affairs



IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENTS TO RULE 13, SECTION 5, RULES OF THE SUPREME
COURT

No. ADM2021-00237 – Filed: May 21, 2021

RESPONSE TO INVITATION FOR PUBLIC COMMENT

In response to the Court’s invitation for public comments concerning the proposed amendments to Tennessee Supreme Court Rule 13, Sections, 5(a)(1) and (5)(d)(1), the Tennessee District Public Defenders Conference (“Conference”) supports each of the amendments to the sections of Rule 13 by Choosing Justice Initiative, Tennessee Association of Criminal Defense Attorneys, and Tennessee Post-Conviction Defender Organization (“Petitioners”).

Fundamental fairness guides the public defenders in their position. Prosecutors and non-indigent defendants have access to investigators and expert assistance at any time, but the current version of Rule 13 requires indigent defendants to wait until their case is pending in criminal court, often many months after the prosecution has commenced. Too often the ability of attorneys to provide effective representation is hampered because of the inability to secure funding for investigators or expert services timely. Appropriate defenses or appropriate plea negotiations on behalf of a client may rely on the immediate evaluation of the defendant to review the potential interactions and inspection of evidence that occurs at a time that is proximate to the offense date. Requiring a defendant to wait until after a plea offer or until a trial setting can result in the deterioration or complete destruction of evidence that is critical to the accused.

For example, in some cases, a defendant’s state of mind or psychological condition should be reviewed at a time proximate to the events which led to the arrest, versus months later when

other external factors such as subsequent treatment, changing medications, or jail conditions could skew the results of the defendant's mental or psychological evaluation. Such a delay has the potential to make the results of late analysis less representative and less reliable concerning the defendant's condition at the time of the offense.

In other cases, early investigation is critical in determining the best course of action to take when advising a client. Not having an investigator available to an indigent defendant can disadvantage the defendant and his attorney's ability to inspect evidence, especially crime scene evidence near the time of the crime, because crime scenes are subject to deterioration or complete destruction as time passes. Prosecutors have access to police officers. If a defendant is not allowed to inspect the scene until an investigator is provided in later proceedings, the opportunity for inspection may have been entirely lost to the defendant.

Furthermore, the ability to evaluate the defendant for medical issues or toxicology analysis can be critical in advising a defendant who is considering an offered plea. Determining whether justice necessitates a trial to present or contest evidence requires the ability of counsel to review all of the evidence and have his own analysis performed on the evidence that would be critical to assist in making a plea/trial determination.

These are only a few examples in which time is of the essence. In these and many other cases, allowing an indigent defendant access to funds for investigators and experts is paramount to the attorney's ability to provide effective assistance of counsel from the date of appointment. The defendant is constitutionally entitled to effective representation at every critical stage of the proceedings against him, and general sessions level proceedings are no less critical than later proceedings. As the United States Supreme Court affirmed in *Rothgery v. Gillespie County*, the constitutional right to counsel attaches "at the first appearance before a judicial officer at which a

defendant is told of the formal accusation against him and restrictions are imposed on his liberty.”¹ Defense attorneys are constitutionally required to be effective and competent, even prior to a plea.² To be effective, counsel must have access to all of the tools available at any stage of the prosecution for the offenses for which his client stands accused.

Lastly and for similar reasons, the fees an expert or investigator charge for their services should not be so strictly construed if the defendant can show cause as to why an exception should be made to the mandated cap on the hourly rate for an expert or investigator. In certain rare cases, only a few experts in a particular field exist. In other cases, there may be only one local expert already retained by the prosecutor. The market can also cause fluctuations for expert fees for which the Court would necessarily be slow to respond. For example, if the rate for a particular type of expert suddenly rises across the board, the Court may not be aware of such a change and may be reluctant to grant an exception. In these circumstances, if cause can be shown, an exception to the established rate would ensure that counsel for the accused can secure expert or investigatory services to provide the effective assistance required of every attorney.

For these reasons, the Conference fully supports the amendments proposed by the petitioners for amending Tennessee Supreme Court Rule 13 as outlined in their brief and the Court’s order.

¹ *Rothgery v. Gillespie County*, 554 U.S. 191, 194, 128 S.Ct. 2578, 2581 (2008).

² *Padilla v. Kentucky*, 599 U.S. 356, 364, 130 S.Ct. 1473, 1480 (2010).

Respectfully submitted,

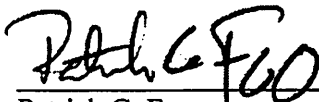
Tennessee District Public Defenders Conference

By: /Steve Smith, by permission Patrick G. Frogge



Steve Smith
Tenn. B.P.R. #021698
President
618 Church Street, Suite 300
Nashville, TN, 37219
Phone: 615-741-5562
Fax: 615-741-5568
Email: ssmith@hamiltontn.gov

By:



Patrick G. Frogge
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Lisa Marsh - Petition ADM2021-00237

From: Ryan Davis <ryan@ryancdavislaw.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 8/9/2021 9:56 AM
Subject: Petition ADM2021-00237

<p>FILED</p> <p>AUG - 9 2021</p> <p>Clerk of the Appellate Courts</p> <p>Rec'd By <u>lmm</u></p>

Dear Sir or Madam,

I am writing in support of Petition ADM2021-00237. It is imperative that this rule is amended in order to and protect access for juveniles to the constitutional right to access to experts and investigators.

Thank you,
Ryan

Ryan C. Davis, Esq.
Ryan C. Davis Law, PLLC
1224 2nd Ave South, Suite #102
Nashville, TN 37210
615-649-0110

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Lisa Marsh - Petition ADM2021-00308, Petition ADM2021-00237

From: Cody Johnson <cody@turklaylaw.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 8/8/2021 7:45 PM
Subject: Petition ADM2021-00308, Petition ADM2021-00237

Dear Supreme Court,

I support the petitions listed in the subject line of this email.
Let's get this done. Better late than never.

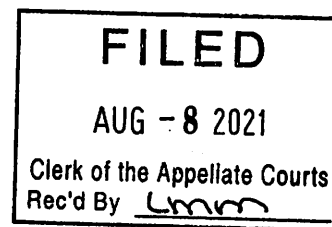
Cheers,

--



Cody Johnson / Lawyer & Managing Partner
cody@turklaylaw.com / (765) 722-8731

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Lisa Marsh - Changes to Rule 13, section 5

From: Erin Coleman <erin.d.coleman@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 8/8/2021 11:14 AM
Subject: Changes to Rule 13, section 5

ADM2021-237 and ADM2021-00308

Good morning,

I have read the proposed changes to Rule 13 and agree with them whole heartedly. It is of the utmost importance that indigent people are able to receive similar resources to those that are not indigent.

In my non-indigent cases, I am able to engage a private investigator from day one. This ensures all videos and other types of material are at my disposal for the preliminary hearing and the negotiation process in general sessions. This allows my client to have a more advantageous position throughout the criminal justice process. Having my indigent clients have to wait until after their arraignment to ask for a PI puts them at a increased detriment. This is not fair and I would dare say not constitutional.

Please approve the changes to Rule 13.

Thank you,
Erin Coleman, BOR #034887

FILED
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Lisa Marsh - Fwd: Changes to Rule 13, section 5

From: appellatecourtclerk
To: Lisa Marsh; Kim Meador
Date: 8/8/2021 10:03 PM
Subject: Fwd: Changes to Rule 13, section 5
Attachments: Changes to Rule 13, section 5

Please see attached comment for processing.

Jim

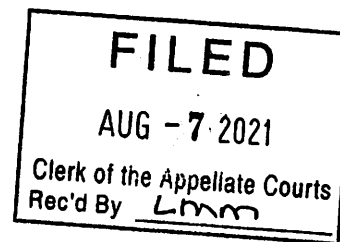
Lisa Marsh - ADM2021-00308 and ADM2021-00237: Comments in Support of Proposed Amendments to Rule 13

From: Sarah M <sarah.graham.mcgee@gmail.com>
To: appellatecourtclerk <appellatecourtclerk@tncourts.gov>
Date: 8/7/2021 1:33 PM
Subject: ADM2021-00308 and ADM2021-00237: Comments in Support of Proposed Amendments to Rule 13

Dear Mr. Hivner,

My name is Sarah McGee. As an attorney who has had the privilege to serve indigent clients in both the juvenile and adult systems, I wholeheartedly support the amendments proposed in ADM2021-00308 and ADM2021-00237. It is crucial that those advocating on behalf indigent adults and children have access to resources that help ensure our constitutional protections are provided to all. Thank you for your time and attention.

Respectfully,
Sarah McGee
Franklin, Tennessee
BPR 030257



**Lisa Marsh - Fwd: ADM2021-00308 and ADM2021-00237: Comments
in Support of Proposed Amendments to Rule 13**

From: appellatecourtclerk
To: Lisa Marsh; Kim Meador
Date: 8/7/2021 1:42 PM
Subject: Fwd: ADM2021-00308 and ADM2021-00237: Comments in
Support of Proposed Amendments to Rule 13
Attachments: ADM2021-00308 and ADM2021-00237: Comments in
Support of Proposed Amendments to Rule 13

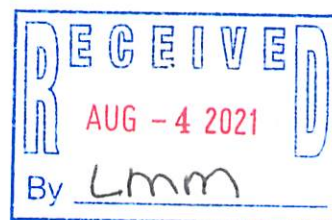
See attached comment for processing.

Jim

Lisa Marsh - Petition ADM2021-00308 and Petition ADM2021-00237

From: courtney cteasleylaw.com <courtney@cteasleylaw.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 8/4/2021 7:19 PM
Subject: Petition ADM2021-00308 and Petition ADM2021-00237

I am emailing in support of amending Rule 13. As a criminal defense attorney here in TN, the necessity of expert funding is undeniably necessary. It is hard to provide effective representation for an indigent person when we do not have the tools necessary to do so. Juveniles facing transfer hearings and many general sessions cases could more than likely be resolved if the necessary expert and investigator funds are granted. I am asking as a member of the bar in good standing that these rules be amended. Thank you.



Lisa Marsh - Petition ADM2021-00237 - I support

From: Stephen Nault <steve@naultlaw.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 8/4/2021 12:32 PM
Subject: Petition ADM2021-00237 - I support



As an attorney specializing in juvenile delinquency, I am writing in support of Petition ADM2021-00237 - to ensure indigent children have access to the resources necessary for a credible defense. Defendant's are already at a disadvantage versus the state (with seemingly endless resources). In the area of juvenile delinquency experts are increasingly more important, especially as it pertains to "transfer hearings" (Aka being tried as an adult) - and to better understand the mental state of the defendant, so the court may properly craft the best disposition - in hopes of successful rehabilitation (the stated goal of the juvenile justice system).

Thank You,

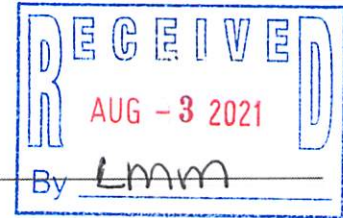
-

Stephen Nault
 Attorney at Law
 121 S. Hickory Ave.
 Gallatin, TN 37066
 p: [615-953-9505](tel:615-953-9505)

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Lisa Marsh - Petition ADM2021-00237

From: Josh Hoepner <josh@hoepnerlaw.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 8/3/2021 8:27 PM
Subject: Petition ADM2021-00237



To whom it may concern,

My name is Josh Hoepner, and I am an attorney in Kingsport, Tennessee. Please see this email as my support for the above petition, which ensures that indigent children and adults have access to necessary expert and investigative services at all stages of delinquency and criminal proceedings against them. Said petition also asks to create an exception to the hourly fee caps when a court finds extraordinary circumstances exist that make doing so necessary and appropriate

It is my sincere hope that this petition will pass as an amendment to existing Supreme Court rules. I appreciate your consideration, and feel free to reach out anytime.

Thanks,
Josh

--

Josh Hoepner, Attorney at Law
Hoepner Law, PLLC
201 West Sullivan Street
Kingsport, TN 37660
(423) 247-6151
josh@hoepnerlaw.com

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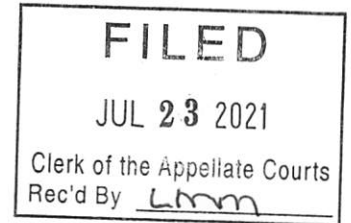


SHERRARD
ROE
VOIGT
HARBISON

Amy Rao Mohan

Direct Dial (615) 742-4571
amohan@srvhlaw.com

July 23, 2021



ADM2021-00237

BY EMAIL & US MAIL

James M. Hivner, Clerk
RE: Tenn. Sup. Ct. R. 21, section 3.01
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407
appellatecourclerk@tncourts.gov

**Re: In support of Petition to Amend Rule 13; Docket Nos. ADM2021-00308,
ADM2021-00237**

Dear Mr. Hivner:

Many of my partners and I have had the opportunity to work *pro bono* on a number of criminal, habeas, and clemency matters in conjunction with other state and federal attorneys. Phil Cramer and I worked on a case a couple years ago with the Tennessee Office of the Post-Conviction Defender and saw firsthand the significant and crucial need for experts and investigative services in this meaningful work.

As illustrated in the petitions, the necessity of this expert funding to establish a defense or claims of constitutional violations is essential to these indigent defendants and the fairness and equity of our legal system hinges on the proper application of Rule 13. I understand from our colleagues in the criminal defense bar and specifically at the Post-Conviction Office that at times, the expenditure of expert expenses, approved and ordered by a court, is later overruled by administrative entities. This is a detrimental and sometimes even fatal blow to an indigent defendant's case.

In turn, my partners and I support the recent petitions filed by the Tennessee Office of the Post-Conviction Defender and other criminal defense organizations to amend Rule 13 to ensure that indigent defendants receive the crucial funding for expert and investigative services and that Rule 13 clarify that an indigent client can receive funding for expert and investigative services as soon as the criminal proceedings against him or her are initiated. We must ensure as fellow members of the bar that indigent clients have the tools necessary to defend themselves or in the case of capital petitioners, to challenge their convictions and sentence.

James M. Hivner, Clerk
July 19, 2021
Page 2

We appreciate your consideration of the petitions regarding the Rule 13 amendments and fully support its adoption.

Very truly yours,

A handwritten signature in cursive script that reads "Amy Rao Mohan".

Amy Rao Mohan

ARM/sjd

appellatecourtclerk - R. 13 Comment

From: Tim Irwin <Tim.Irwin@knoxcounty.org>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 7/23/2021 12:47 PM
Subject: R. 13 Comment

It is imperative we amend Rule 13 to cover experts and investigators in Juvenile Court delinquent proceedings, termination of parental right cases and particularly transfer hearings. In Re Gault requires the juveniles have the same constitutional protections that adults enjoy. Children charged with murder are facing up to fifty-one (51) years if transferred to adult court. Appointed council in these cases must be able to have competent psychiatric evaluations to determine if the accused child is committable to an institution for the insane or mentally retarded. It is often necessary for an expert to render an opinion on the availability of the treatment and care, remaining for the accused in the juvenile system. Finally, appointed counsel must be able to use an investigator for the probable cause phase of the hearing. They are unable to investigate themselves since they could, "likely become a witness."

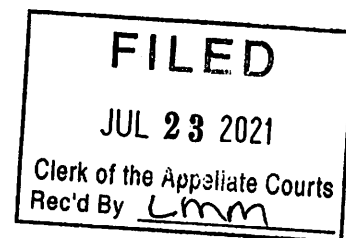
Ceasing to pay for these services has created a delay resulting in a large number of children (often detained) awaiting a transfer hearing in my county (Knox). I am strongly in support of the proposed changes to Rule 13 submitted by The Tennessee Association of Defense Lawyers.

Sincerely,

Judge Timothy E. Irwin

Timothy E. Irwin, Judge

Knox County Juvenile Court
 3323 Division Street
 Knoxville, Tennessee 37919
Office: (865) 215-6475
Fax: (865) 215-6546
tim.irwin@knoxcounty.org



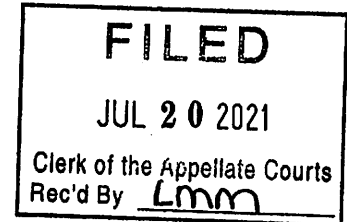
ADM2021-00237

PAMELA AUBLE, PH.D., ABPP-CN

Clinical and Forensic Neuropsychology, Personality Assessment
2200 21st Avenue South, Suite 401, Nashville, TN 37212
(615) 340-4686 cell (615) 308-5823 fax (615) 750-5796

July 20, 2021

James Hivner, Clerk
Re: Tenn. Sup. Ct. R. 13, 5(a)(1) and 5(d)(1)
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407



ADM2021-00237

Re: Docket No. ADM2021-00237

To Whom it May Concern:

I am a forensic neuropsychologist who has been doing evaluations on criminal defendants in Tennessee for roughly 35 years.

I am writing in support of the proposed changes to Rule 13 in which the Rule is modified to include all of the critical stages of a criminal prosecution. The modification would also include the trial and direct appeal of termination of parental rights, juvenile delinquency, and juvenile transfer hearings. I also support the change that "compensation for individuals or entities providing the following services shall not exceed the following maximum hourly rates, unless in its sound discretion the presiding court determines that extraordinary circumstances exist that have been proven by clear and convincing evidence."


I support the change to include all of the critical stages of a criminal prosecution because there are cases in which an early investigation or evaluation of a defendant can help to determine whether there is evidence that could either mitigate the offense or whether there is evidence that the defendant has not been accurate in their description of the offense or their reported mental state. Ultimately, an early evaluation could save the courts and the attorneys time and would help in resolving the case; thus, saving money in the long run. Delaying access to the services drives up expenses.

I support the change to include juvenile cases in Rule 13, particularly juvenile transfer hearings. Having worked as an expert evaluating a child for a transfer hearing, I understand that the basis for the decision to keep the child in the juvenile system can be that the child is committable, or, if not committable whether the child has any number of factors which could make transfer inappropriate. These factors include whether the child has received treatment or could benefit from treatment and whether the child can be rehabilitated. Whether a child suffers from a mental illness or developmental disability is a question that needs to be answered by an expert in mental health rather than a lay witness. Whether a child is a good

candidate for treatment or rehabilitation also needs an evaluation by an expert who understands child psychology and who has personally worked with the child to make such a determination.

Finally, I support the change to make it possible for expert services to exceed the published maximum hourly rates upon the finding that there are extraordinary circumstances. I note that the maximum hourly rates have not increased in more than twenty years, making it increasingly difficult or impossible for indigent defendants to find available and qualified experts. I have accepted the AOC rate for psychological services since its inception, though I am paid more per hour in all other cases. Increasingly, if there are providers willing to accept the rates, they are going to be likely to be inexperienced or poorly qualified because experienced and highly qualified experts will have their schedules full with examinees who are paying twice as much per hour or more.

Sincerely,

A handwritten signature in black ink that reads "Pamela Auble". The signature is written in a cursive, flowing style.

Pamela Auble, Ph.D., ABPP
Licensed Psychologist, Health Service Provider
Board Certified in Clinical Neuropsychology