IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE AMENDMENTS TO THE TENNESSEE RULES OF CRIMINAL PROCEDURE

No. ADM2015-01631

ORDER

The Court adopts the attached amendments effective July 1, 2016, subject to approval by resolutions of the General Assembly. The rules amended are as follows:

RULE 1	SCOPE AND DEFINITIONS
RULE 4	PRESENCE OF THE DEFENDANT
RULE 5	INITIAL APPEARANCE BEFORE MAGISTRATE
RULE 5.1	PRELIMINARY EXAMINATION
RULE 36.1	CORRECTION OF ILLEGAL SENTENCE
RULE 43	PRESENCE OF THE DEFENDANT.

The text of each amendment is set out in the attached Appendix.

IT IS SO ORDERED.

FOR THE COURT:

Sharon G. Lee

SHARON G. LEE
CHIEF JUSTICE

APPENDIX

AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 1

SCOPE AND DEFINITIONS

[Amend (b)(3) and (b)(9) and the 2006 Advisory Commission Comment as shown below; deleted text is indicated by overstriking, and new text is indicated by underlining:]

(a) COURTS OF RECORD. — * * * *

(b) GENERAL SESSIONS COURT. — These rules govern the procedure in the general sessions courts in the following instances:

(1) the institution of criminal proceedings pursuant to Rules 3, 3.5, and 4;

(2) the disposition of criminal charges pursuant to Rule 5;

(3) preliminary ~~examinations~~hearings pursuant to Rule 5.1;

(4) subpoena pursuant to Rule 17;

(5) venue pursuant to Rule 18;

(6) search and seizure pursuant to Rule 41;

(7) assignment of counsel pursuant to Rule 44;

(8) the use of electronic audio-visual equipment to conduct initial appearances pursuant to Rule 43;

(9) the time computations for setting and the process for continuing preliminary ~~examinations~~hearings pursuant to Rule 45; and

(10) any other situation where the context clearly indicates applicability.

(c) JUVENILE COURTS. — * * * *

Advisory Commission Comments. * * * *

Advisory Commission Comments [2006]. In 2006, the rules were updated and reformatted to make them more easily understood. The new format was based largely on a similar undertaking to update and reformat the Federal Rules of Criminal Procedure. The advisory commission comments also were extensively revised to update citations to particular parts of these rules, to remove obsolete language, and to make the comments more comprehensible. In revising the comments, the commission consolidated the original comments with the subsequent comments added over the years, as the rules were amended. Following the 2006 revisions, new advisory commission comments will be added as individual rules are amended. Where such new comments are added, the new comments are intended to supersede the older comments only to the extent that they are in conflict. However, the presence of both comments is designed to make alterations more readily apparent.

In the event a particular case involves application of a rule as it existed prior to the reformatting and updating of the rules in 2006, please refer to a historical volume of the rules. ~~A copy of the rules and comments, as they existed just prior to the revisions in 2006, may also be found on the website of the Tennessee Supreme Court.~~

Advisory Commission Comments [2007]. * * * *

Advisory Commission Comments [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5 and 5.1, obsolete references in Rule 1(b) to "preliminary examinations" are changed to "preliminary hearings."

Additionally, the second sentence of the 2006 Advisory Commission Comment (which sentence referred to historical information previously available on the Tennessee Supreme Court's website) is deleted because the information mentioned in that sentence is no longer available on the Court's website.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 4

PRESENCE OF THE DEFENDANT

[Amend the original Advisory Commission Comments as shown below (the text of the rule and the text of the other Advisory Commission Comments are not changed); deleted text is indicated by overstriking, and new text is indicated by underlining.]

Advisory Commission Comments. Note that the affidavit of complaint may be buttressed by additional affidavit(s) and that the magistrate or clerk may also examine under oath the complainant and any other witnesses.

A criminal summons may be issued instead of an arrest warrant; when a clerk is performing this judicial function, the district attorney general is empowered to direct the clerk whether to issue a warrant or a criminal summons upon a finding of probable cause.

Section (a)(3) requires that a docket book be kept in which every warrant and summons issued in a given county is recorded. This rule is meant to require any person issuing such a warrant or criminal summons who is not the clerk, to communicate this fact to the clerk of the court of general sessions and to see to it that the issuance is properly recorded. Rigid compliance with this rule is very important to the proper administration of criminal justice, and thus the rule is meant to be mandatory in nature.

Under section (b) probable cause for the issuance of arrest warrants and criminal summonses may be based in whole or in part upon credible hearsay. A different rule applies to the preliminary ~~examination~~hearing structured under Rule 5.1, in which the "evidence may not be inadmissible hearsay except documentary proof of ownership and written reports of expert witnesses."

The form of the arrest warrant, as set out in Rule 4(c)(1), makes no distinction between warrants issued for persons not yet arrested and those warrants issued for persons already arrested without a warrant. Such a warrant serves a dual function: first, as the authority for an arrest (where an arrest has not already been lawfully made) and, secondly, as a statement of the charge which the accused is called upon to answer. The commission did not recommend two separate warrant forms, one for use where the accused had not yet been arrested, and the second to merely state the charge against one already under arrest, because it is more utilitarian to have only the one form. The command to arrest is obviously surplusage where the warrant is directed against one already in custody; but a warrant in such cases still serves as the official charging instrument, issued after a judicial finding of probable cause, and gives notice of the charge which must be answered.

Rule 4 was substantially derived from the corresponding federal rule and § 40-6-202 of the Law Revision Commission's proposed code.

Note that the rule provides specifically for the reissuance of unexecuted complaints and summonses.

Wherever the words "magistrate" and "clerk" appear in Rule 4, they are to be understood as being qualified by the words "who is neutral and detached and who is capable of the probable cause determination required by this rule." *See Shadwick v. City of Tampa*, 407 U.S. 345 (1972).

See T.C.A. § 39-15-101 which sets limits on the issuance of arrest warrants for violation of support orders.

Advisory Commission Comment [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5 and 5.1, the fourth paragraph of the original Advisory Commission Comments to Rule 4 is amended to substitute the term "preliminary hearing" for the obsolete term "preliminary examination." No substantive changes are made to the Rule.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 5

INITIAL APPEARANCE BEFORE MAGISTRATE

[Amend Rule 5 and its Advisory Commission Comments as shown below; deleted text is indicated by overstriking, and new text is indicated by underlining:]

(a) IN GENERAL. —

(1) APPEARANCE UPON AN ARREST. — Any person arrested–except upon a capias pursuant to an indictment or presentment–shall be taken without unnecessary delay before the nearest appropriate magistrate of:

(A) the county from which the arrest warrant issued; or

(B) the county in which the alleged offense occurred if the arrest was made without a warrant, unless a citation is issued pursuant to Rule 3.5.

(2) AFFIDAVIT OF COMPLAINT WHEN NO ARREST WARRANT. — An affidavit of complaint shall be filed promptly when a person, arrested without a warrant, is brought before a magistrate.

(3) GOVERNING RULES. — The magistrate shall proceed in accordance with this rule when an arrested person initially appears before the magistrate.

(b) SMALL OFFENSES TRIABLE BY MAGISTRATE. —

(1) ADVICE AND PLEA ENTRY FOR SMALL OFFENSE. — When the offense charged is a small offense triable by the magistrate, without regard to the plea, the magistrate shall advise the defendant of the charge, and determine defendant's plea.

(2) JUDGMENT AND SENTENCE UPON PLEA. — When the defendant pleads guilty to a small offense, the magistrate may hear relevant evidence and sentence the defendant to pay a fine.

(3) TRIAL. — When the defendant pleads not guilty to a small offense, the case shall be set for trial at some future day and the defendant's pretrial release dealt with under the provisions of applicable law, unless the defendant agrees to an immediate trial.

(4) APPEAL. — A defendant who is convicted of a small offense may appeal as a matter of right to the Circuit or Criminal Court for a trial de novo without a jury.

(c) OTHER MISDEMEANORS. —

(1) UPON PLEA OF GUILTY. — If the offense charged is a misdemeanor, but of greater magnitude than a small offense, the magistrate shall inquire how the defendant pleads to the charge. If the plea is guilty, the plea shall be reduced to writing. The following rules shall then apply:

(A) ADVICE TO DEFENDANT. — The magistrate shall advise the defendant of the right to a jury trial and to be prosecuted only on an indictment or presentment.

(B) SET PRELIMINARY ~~EXAMINATION~~HEARING UNLESS NOT REQUIRED. — The magistrate shall schedule a preliminary ~~examination~~hearing to be held within ten days if the defendant remains in custody and within thirty days if released from custody, unless:

(i) the defendant expressly waives the right to a jury trial and to a prosecution based only on an indictment or presentment; or

(ii) a preliminary ~~examination~~hearing is not required under Rule 5(e) below.

(C) WAIVER. —

(i) OF PRELIMINARY ~~EXAMINATION~~HEARING. — The magistrate may bind the defendant over to the grand jury if the defendant waives a preliminary examination on a misdemeanor.

(ii) OF PRELIMINARY ~~EXAMINATION~~HEARING AND GRAND JURY. — If the defendant offers to waive the right to a grand jury investigation and a trial by jury, the court may permit it if the district attorney general or the district attorney general's representative does not then object. In the event of such waiver, the magistrate shall hear the misdemeanor case on the guilty plea and determine the sentence. The defendant may appeal judgment on a plea of guilty to a misdemeanor after waiver of a grand jury investigation and jury trial, but only as to the sentence imposed.

(2) UPON PLEA OF NOT GUILTY. —

(A) SET PRELIMINARY ~~EXAMINATION~~HEARING. — Unless the defendant expressly waives the right to a preliminary ~~examination~~hearing, when the defendant pleads not guilty the magistrate shall schedule a preliminary ~~examination~~hearing to be held within ten days if the defendant remains in custody and within thirty days if released.

(B) WHEN PRELIMINARY ~~EXAMINATION~~HEARING WAIVED. — The magistrate may bind the case over to the grand jury if the defendant waives in writing the preliminary ~~examination~~hearing.

(C) WHEN PRELIMINARY ~~EXAMINATION~~HEARING, GRAND JURY, AND JURY TRIAL WAIVED; APPEAL. — If the defendant offers to waive in writing the right to a grand jury investigation and a trial by jury, and to submit the case to the general sessions court–and the district attorney general or the district attorney general's representative does not object–the magistrate may accept the defendant's written waiver and hear the misdemeanor case on the not guilty plea. The magistrate may enter judgment, including any fine or jail sentence prescribed by law for the misdemeanor. The state may not appeal from a judgment of acquittal. The defendant may appeal a guilty judgment or the sentence imposed, or both, to the circuit or criminal court for a trial de novo as provided by law.

(d) FELONIES. —

(1) ADVICE TO DEFENDANT. — If the offense charged is a felony, the defendant shall not be called on to plead. The magistrate shall inform the defendant of:

(A) the charge and the contents of the affidavit of complaint;

(B) the right to counsel;

(C) the right to appointed counsel if indigent;

(D) the right to remain silent and give no statement;

(E) the fact that any statement given voluntarily may be used against the defendant;

(F) the general circumstances under which the defendant may obtain pretrial release; and

(G) the right to a preliminary ~~examination~~hearing.

(2) PRELIMINARY ~~EXAMINATION~~HEARING WAIVED. — When the defendant waives preliminary ~~examination~~hearing, the magistrate shall promptly bind the defendant over to the grand jury.

(3) SCHEDULE PRELIMINARY ~~EXAMINATION~~HEARING. — When the defendant does not waive preliminary ~~examination~~hearing and when a preliminary ~~examination~~hearing is not rendered unnecessary under Rule 5(e), the magistrate shall schedule a preliminary ~~examination~~hearing within ten days if the defendant remains in custody and within thirty days if released.

(e) INDICTMENT BEFORE PRELIMINARY ~~EXAMINATION~~HEARING; EXCEPTIONS. —

(1) ENTITLEMENT TO PRELIMINARY HEARING. — Any defendant arrested or served with a criminal summons prior to indictment or presentment for a misdemeanor or felony, except small offenses, is entitled to a preliminary hearing. A preliminary hearing may be waived as set forth by subsection (2) or as otherwise provided in this rule.

(2) WAIVER OF PRELIMINARY HEARING BY FAILURE TO APPEAR. — A defendant waives the right to a preliminary hearing by failing to appear for a scheduled preliminary hearing, unless the defendant presents before the general sessions court, and the court finds within fourteen days after the scheduled preliminary hearing, clear and convincing evidence that the failure to appear was beyond the defendant's control. Unless the general sessions court finds by clear and

convincing evidence that the defendant's absence was beyond the defendant's control and resets the preliminary hearing, the grand jury may return an indictment or presentment on the charges.

(3) EXPEDITIOUS HEARINGS. — While a defendant should have a reasonable opportunity to assert any legal right, preliminary hearings shall be conducted as expeditiously as possible considering the inconvenience to victims and witnesses, the parties, and the court by unnecessary delays.

(4) REMEDY FOR FAILURE TO AFFORD PRELIMINARY HEARING. — If an indictment or presentment is returned against a defendant who has not waived his or her right to a preliminary hearing, the circuit or criminal court shall dismiss the indictment or presentment on motion of the defendant filed not more than thirty days from the arraignment on the indictment or presentment. The dismissal shall be without prejudice to a subsequent indictment or presentment and the case shall be remanded to the general sessions court for a preliminary hearing.

(f) DEFENDANT'S PRESENCE. — The defendant's presence at the initial appearance is governed by Rule 43.

Advisory Commission Comments. As far as the actions before a magistrate exercising the jurisdiction of a general sessions court are concerned, Rule 5 substantially embodies existing law as to jurisdiction and procedure. This rule is intended to provide comprehensive guidance for those exercising this jurisdiction. Small offenses are those which carry a maximum fine of fifty dollars and for which no imprisonment may be inflicted. T.C.A. § 40-408 [now repealed]. It should be noted in connection with subdivision (b), dealing with small offenses triable by a magistrate, that there is no appeal from the judgment in a case in which a guilty plea is entered. Where trial is held for a small offense upon a plea of not guilty and a conviction results, there is a right to a trial de novo upon appeal, but there is no right to a jury upon the new trial (there being no such right as to small offenses in the first instance). Further, where the defendant in serious misdemeanor cases waives the right to a jury trial, that waiver before the magistrate carries over into the criminal or circuit court and attaches to the trial de novo on appeal unless the defendant demands a jury as part of the appeal notice as required by § 27-5-108. *See State v. Jarnigan*, 958 S.W.2d 135 (Tenn. 1998). The rights in all (except small) offenses to be

proceeded against only by indictment or presentment and to a trial by jury are grounded upon the provisions of Art. 1, Secs. 6 and 14, Constitution of Tennessee.

The preliminary ~~examination~~hearing referred to in this rule is the proceeding formerly called a preliminary ~~hearing~~examination. It must be scheduled within ten days if the accused is in custody, and within thirty days if the accused is on bond. See Rule 45(a), dealing with the computation of time.

It is important to note that while the Constitution and the Rules vest the right to trial by jury in the accused, this right cannot be waived under this rule in the face of an objection by the district attorney general or his or her representative. This provision acts as a safeguard against the possibility that an accused might be permitted to enter a guilty plea to a lesser included offense and effectively bar prosecution for a more serious crime. *Price v. Georgia*, 398 U.S. 323 (1970); *Waller v. Florida*, 397 U.S. 387 (1970). Hence, in effect the state now has a right to a trial by jury, if the district attorney general or his or her representative asserts the right by objecting to the waiver by the defendant. Note that the rule does not require an affirmative act on behalf of the state before an accused can effectively waive the right, but simply provides that it cannot be done in the face of an objection. This wording by the commission was deliberate, because it is recognized that many general sessions courts must sometimes operate without the presence of the district attorney general or his or her representative. Nevertheless, in order to exercise an objection and thus protect the state's position, the district attorney general personally or by representative will need to know of the proceeding and to enter an objection. The court should construe the words "or the district attorney general's representative" to include anyone connected with law enforcement who reports to the court that the district attorney general or one of his or her assistants has requested that the objection be made.

Under Rule 5(d), covering a felony charge, it is extremely important that the magistrate inform the accused in substantial compliance with this rule.

Rule 5(e) simply carries over into the Rules the same conditional right to a preliminary hearing now embodied in T.C.A. § 40-1131 [repealed]. It was not the intention of the commission to enlarge or diminish that conditional right; therefore, the body of case law which has been developed in connection with the statute retains its precedential value. *Waugh v. State*, 564 S.W.2d 654 (Tenn. 1978).

The commission's rationale, which was presented to the Supreme Court prior to the approval of these rules, is that the court has jurisdiction to enter a judgment calling for a fine in excess of fifty dollars, where provided by law and set by a jury. If the accused waives the right to have a jury set the fine and agrees that the judge set it, this act confers upon the court jurisdiction to set such a fine. An analogous situation arises each time a defendant waives a jury and permits a trial before a judge. In either instance the judge can exercise the full jurisdiction of the court because there has been a valid waiver of the right to have jury participation. Thus, under these rules, a judge can set a fine to the full limit of the appropriate penal statute, when a jury has been waived.

Rule 5(c)(1) and (2) conform the rule to T.C.A. § 40-4-112, which allows an appeal of the sentence even upon a plea of guilty.

This rule allows a de novo appeal "as provided by law" which contemplates a jury trial as provided by T.C.A. Section 27-3-131(a). Attorneys should be aware, however, that T.C.A. § 27-3-131(b) requires that the demand for a jury must be made at the time of filing an appeal.

These rules permit general sessions courts to use audio-visual technology to conduct initial appearances where a plea of not guilty is entered by the defendant. Nothing in paragraph (d) prohibits the prosecutor or defense counsel from being present and heard. In addition, paragraph (d) does not apply to preliminary ~~examinations~~hearings pursuant to Rule 5.1 nor misdemeanor trials. These amendments are substantially similar to Rule 5-303 of the New Mexico Rules of Criminal Procedure and Rule 10 of Hawaii Rules of Penal Procedure and reflect the growing need for the use of technology to expedite the processing of initial criminal proceedings and reduce the cost of such processing. The purposes for the Rules, which these amendments are intended to achieve, are set forth in Rule 2: "... to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

Advisory Commission Comment [2007]. * * * *

Advisory Commission Comment [2010]. * * * *

Advisory Commission Comment [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5.1, Tenn. R. Crim. P. 5 and its Advisory Commission Comments are amended to substitute the term "preliminary hearing" for the obsolete term "preliminary examination." No substantive changes are made to the Rule.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 5.1

PRELIMINARY ~~EXAMINATION~~HEARING

[Amend Rule 5.1 and its original Advisory Commission Comments as shown below, and also amend the title as shown above; deleted text is indicated by overstriking, and new text is indicated by underlining:]

(a) PROCEDURES. — The following rules apply to a preliminary ~~examination~~hearing:

(1) EVIDENCE. — The finding that an offense has been committed and that there is probable cause to believe that the defendant committed it shall be based on evidence which may not be inadmissible hearsay except documentary proof of ownership and written reports of expert witnesses. Rules excluding evidence acquired by unlawful means are applicable.

(2) DEFENDANT'S RIGHT TO PRESENT EVIDENCE AND CROSS-EXAMINE. — The defendant may cross-examine witnesses against him or her and may introduce evidence.

(3) CONTENT AND ACCESS TO RECORD OF PROCEEDING. — The evidence of the witnesses does not have to be reduced to writing by the magistrate, or under the magistrate's direction, and signed by the respective witnesses; but the proceedings shall be preserved by electronic recording or its equivalent. If the defendant is subsequently indicted, such recording shall be made available to the defendant or defense counsel so they may listen to the recording in order to be apprised of the evidence introduced in the preliminary ~~examination~~hearing. Where the recording is no longer available or is substantially inaudible, the trial court shall order a new preliminary hearing upon motion of the defendant filed not more than 60 days following arraignment. The indictment shall not be dismissed while the new preliminary hearing is

pending. If the magistrate conducting the new preliminary hearing determines that probable cause does not exist, the magistrate shall certify such finding to the trial court and the trial court shall then dismiss the indictment. The discharge of the defendant by the dismissal of the indictment in such circumstances does not preclude the state from instituting a subsequent prosecution for the same offense.

(b) WHEN PROBABLE CAUSE FOUND. — When the magistrate at a preliminary ~~examination~~hearing determines from the evidence that an offense has been committed and there is probable cause to believe that the defendant committed it, the magistrate shall bind the defendant over to the grand jury and either release the defendant pursuant to applicable law or commit the defendant to jail by a written order.

(c) WHEN PROBABLE CAUSE NOT FOUND. — When the magistrate determines from the evidence that there is not sufficient proof to establish that an offense has been committed or probable cause that the defendant committed it, the magistrate shall discharge the defendant. The discharge of the defendant does not preclude the state from instituting a subsequent prosecution for the same offense. The recording of the preliminary hearing shall be made available to the defendant in the event the defendant is subsequently prosecuted for the same offense by indictment or presentment. The remedy for the failure to preserve the recording in this circumstance shall be as set forth in subsection (a)(3).

(d) TRANSFER OF RECORDS. — At the conclusion of a proceeding where probable cause is found, the magistrate shall promptly transmit to the criminal court clerk all papers and records in the proceedings. When probable cause is not found, the magistrate shall return the records and papers to the general sessions court clerk.

Advisory Commission Comments. The subject of the preliminary hearing~~examination, or preliminary hearing,~~ has been the focus of a considerable amount of litigation in recent years. The purpose, scope, and quality of evidence to be admitted upon a preliminary hearing have likewise been the subjects of intense debate. Despite the language in *McKeldin v. State*, 516 S.W.2d 82 (Tenn. 1974), suggesting that this stage of the proceeding is a discovery procedure for the accused, it is the commission's position, to the contrary, that *McKeldin* does not convert the preliminary hearing into a "fishing expedition," with unlimited potential for discovery. The case holds that the preliminary hearing is a probable cause hearing, which can result in providing discovery to the defendant, an important byproduct of its probable cause function.

Discovery is specifically addressed elsewhere in these rules, and the rights of the accused and of the state clearly spelled out. As stated above, the preliminary ~~examination~~hearing is a probable cause hearing, and the scope of the proceeding is under the control of the magistrate in the exercise of a sound discretion. It is unnecessary for the magistrate to hear more of the state's proof than is necessary to establish probable cause, and the magistrate may terminate the hearing at any time that probable cause has been established and the accused has been afforded the opportunity to cross-examine the witnesses called by the state and to present defense proof reasonably tending to rebut probable cause. There is no right of the accused to call as witnesses all of the state's witnesses and question them. The magistrate may permit the accused to call witnesses summoned by the state, if in the exercise of a sound discretion the magistrate determines such testimony to be of use to the magistrate in determining probable cause, or the absence thereof. To repeat, the scope of the hearing is under the control of the magistrate, in the exercise of a sound discretion and governed by principles of fundamental fairness. The purpose of the hearing is to adjudicate the existence or absence of probable cause, and not to discover the state's case.

The quality of the evidence required is clear; it may not be inadmissible hearsay, except in those two instances deemed by the commission to be sufficient to warrant their being exceptions, i.e., documentary proof of ownership and written reports of expert witnesses.

Rule 5.1(a)(3) is drafted to make it clear that the constitutional right of the defendant to have access to a recording of the proceedings must be honored. *See Britt v. North Carolina*, 404 U.S. 226 (1971). There is no requirement that a written transcript of the proceedings be made; and certainly the requirement for an electronic recording can be waived, if knowingly and voluntarily done.

Advisory Commission Comment [2008]. The amendments provide remedies when the recording of a preliminary hearing is lost or damaged.

Advisory Commission Comment [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5, Tenn. R. Crim. P. 5.1 and its original Advisory Commission Comments are amended to substitute the term "preliminary hearing" for the obsolete term "preliminary examination." No substantive changes are made to the Rule.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 36.1

CORRECTION OF ILLEGAL SENTENCE

[Amend the rule by replacing the text of the current rule in its entirety with the following revised rule:]

(a) (1) Either the defendant or the state may seek to correct an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered. Except for a motion filed by the state pursuant to subdivision (d) of this rule, a motion to correct an illegal sentence must be filed before the sentence set forth in the judgment order expires. The movant must attach to the motion a copy of each judgment order at issue and may attach other relevant documents. The motion shall state that it is the first motion for the correction of the illegal sentence or, if a previous motion has been made, the movant shall attach to the motion a copy of each previous motion and the court's disposition thereof or shall state satisfactory reasons for the failure to do so.

(2) For purposes of this rule, an illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.

(b) (1) Notice of any motion filed pursuant to this rule shall promptly be provided to the adverse party. The adverse party shall have thirty days within which to file a written response to the motion.

(2) The court shall review the motion, any response, and, if necessary, the underlying record that resulted in the challenged judgment order. If the court determines that the motion fails to state a colorable claim, it shall enter an order summarily denying the motion.

(3) If the motion states a colorable claim that the unexpired sentence is illegal, the court shall determine if a hearing is necessary. If the court, based on its review of the pleadings and, if necessary, the underlying record, determines that the motion can be ruled upon without a hearing, it may do so in compliance with subdivision (c) of this rule. If the court determines that a hearing is necessary, and if the defendant is indigent and is not already represented by counsel, the court shall appoint counsel to represent the defendant. The court then shall promptly hold a hearing on the motion.

(c) (1) With or without a hearing, if the court determines that the sentence is not an illegal sentence, the court shall file an order denying the motion.

(2) With or without a hearing, if the court determines that the sentence is an illegal sentence, the court shall then determine whether the illegal sentence was entered pursuant to a plea agreement. If not, the court shall file an order granting the motion and also shall enter an amended uniform judgment document, see Tenn. Sup. Ct. R. 17, setting forth the correct sentence.

(3) With or without a hearing, if the court determines that the illegal sentence was entered pursuant to a plea agreement, the court shall determine whether the illegal aspect of the sentence was a material component of the plea agreement.

(A) If the illegal aspect was not a material component of the plea agreement, the court shall file an order granting the motion and also shall enter an amended uniform judgment document, see Tenn. Sup. Ct. R. 17, setting forth the correct sentence.

(B) If the illegal aspect was a material component of the plea agreement but the illegal aspect was to the defendant's benefit, the court shall enter an order denying the motion.

(C) If the illegal aspect was a material component of the plea agreement and the illegal aspect was not to the defendant's benefit, the court shall give the defendant an opportunity to withdraw his or her plea. If the defendant chooses to withdraw his or her plea, the court shall file an order stating its findings that the illegal aspect was a material component of the plea agreement and was not to the defendant's benefit, stating that the defendant withdraws his or her plea, and reinstating the original charge against the defendant. If the defendant does not withdraw his or her plea, the court shall file an order granting the motion and also shall enter an amended uniform judgment document, see Tenn. Sup. Ct. R. 17, setting forth the correct sentence.

(d) In any case in which the trial court failed to impose a statutorily required sentence of community supervision for life in conjunction with imposing a non-plea-bargained sentence, the state may file a motion under this rule to correct the omission. Any motion filed pursuant to this subdivision (d) must be filed no later than ninety days after the sentence imposed in the judgment order expires.

(e) An order granting or denying a motion filed under this rule shall set forth the court's findings of fact and conclusions of law as to the matters alleged in the motion.

(f) Upon the filing of an amended uniform judgment document in those proceedings in which the court grants a motion filed under this rule, or upon the filing of an order denying a motion filed under this rule, the defendant or the state may initiate an appeal as of right pursuant to Rule 3, Tennessee Rules of Appellate Procedure.

Advisory Commission Comments [2013]. Rule 36.1 was adopted to provide a mechanism for the defendant or the state to seek to correct an illegal sentence. With the adoption of this rule,

Tenn. R. App. P. 3 also was amended to provide for an appeal as of right from the court's ruling on a motion filed under Rule 36.1 to correct an illegal sentence.

Advisory Commission Comment [2016]. In 1978, the Tennessee Supreme Court stated that "[a]s a general rule, a trial judge may correct an illegal, as opposed to a merely erroneous, sentence at any time, even if it has become final." *State v. Burkhart*, 566 S.W.2d 871, 873 (Tenn. 1978). Rule 36.1 was adopted in order to incorporate within the Rules of Criminal Procedure the procedure for correcting illegal sentences, including those arising from plea bargains. Rule 36.1(a)(2) incorporates the definition of "illegal sentence" set forth in *Cantrell v. Easterling*, 346 S.W.3d 445 (Tenn. 2011).

The former version of subdivision (a) provided that a motion to correct an illegal sentence could be filed "at any time." Subdivision (a) is amended to clarify that such motions must be filed before the defendant's sentence expires, except as set forth in subdivision (d) (pertaining to the erroneous omission of a sentence of community supervision for life). Subdivision (a) also is amended to require the party seeking to correct an unexpired illegal sentence to include with the motion a copy of the relevant judgment order(s); to permit the movant to also include other supporting documents; and to require the movant to state whether the motion is the first motion to correct the illegal sentence (and, if not, to provide information about each earlier motion).

Subdivision (b) is amended to accord with the revisions to subdivision (a). Subdivision (b) also is amended to permit the summary denial of motions that do not set forth a colorable claim; to provide for the disposition on the merits of motions that do not require a hearing; and to require that any necessary hearing be held "promptly."

Subdivision (c)(3) is revised to limit the circumstances under which relief may be granted where the defendant has entered into a plea bargain which contains an illegal sentence. As revised, the rule provides that the court shall deny the motion if the defendant benefitted from the bargained-for illegal sentence. For example, if the illegal provision was for the sentence to run concurrently with another sentence, when the law actually required a consecutive sentence, the defendant benefitted from the bargained-for illegal sentence; in such cases, relief under this rule is not available. This revision of subdivision (c)(3) essentially incorporates the limitations on habeas corpus relief available for plea-bargained illegal sentences set forth in Tennessee Code Annotated section 29-21-101(b) (2012).

For clarity in the court's decision-making process, the substance of former subdivision (c)(4) is moved to the new subdivision (c)(3)(i).

New subdivision (d) is adopted to address the circumstances under which the state may seek to correct a judgment order that failed to impose a statutorily required sentence of lifetime community supervision. *See, e.g.*, Tenn. Code Ann. § 39-13-524 (2014). Subdivision (d) permits the state to seek such correction of non-plea-bargained sentences to add the community-supervision requirement, so long as the state's motion is filed no later than ninety days after the

expiration of the sentence set forth in the judgment order. The reason for allowing the state ninety days from the expiration of the sentence imposed in the judgment is that the state might not realize that the sentence of lifetime community supervision was omitted until the defendant is released from confinement.

To facilitate appellate review, new subdivision (e) requires courts to include their findings of fact and conclusions of law in the orders disposing of motions filed under this rule.

Subdivision (f) clarifies that the time period for filing an appeal commences upon the filing of an amended uniform judgment document in those proceedings in which the court grants relief under this rule, and upon the filing of an order in those proceedings in which the court denies relief under this rule.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 43

PRESENCE OF THE DEFENDANT

[Amend the original Advisory Commission Comments as shown below (the text of the rule is not changed); deleted text is indicated by overstriking, and new text is indicated by underlining:]

Advisory Commission Comments. This rule is based upon but is broader than the federal rule.

Rule 43(d)(4) allows the defendant to waive his or her physical presence at the arraignment but only when the defendant's counsel of record presents the written waiver to the trial judge. If an attorney enters such an appearance, the attorney is expected to continue representation of the defendant. This rule should not be read to allow an attorney to simply make an appearance for the limited purpose of arraignment.

Rule 43(e) permits general sessions courts to use audio-visual technology to conduct initial appearances where a plea of not guilty is entered by the defendant. Nothing in paragraph (e) [formerly (d)] prohibits the prosecutor or defense counsel from being present and heard. In addition, paragraph (e) [formerly (d)] does not apply to preliminary ~~examinations~~hearings pursuant to Rule 5.1 nor misdemeanor trials. These amendments are substantially similar to Rule 5-303 of the New Mexico Rules of Criminal Procedure and Rule 10 of Hawaii Rules of Penal Procedure and reflect the growing need for the use of technology to expedite the processing of initial criminal proceedings and reduce the cost of such processing. The purposes for the Rules, which these amendments are intended to achieve, are set forth in Rule 2: "...to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

The purpose of Rule 43(f) is to extend the discretion of the court to use electronic audio-visual technology to criminal arraignments. The Rule is intended to parallel Rule 43(e) and Rule 5 of the Tennessee Rules of Criminal Procedure permitting the use of electronic audio-visual technology in initial appearances. The Rule permits the court, in its discretion, to use electronic audio-visual technology at an arraignment if the use promotes the purposes for the Tennessee Rules of Criminal Procedure, allows the judge and defendant to communicate with and view each other simultaneously, permits discussions to be heard by the public, and does not involve the defendant's entry of a guilty plea.

Advisory Commission Comment [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5 and 5.1, the second paragraph of the original Advisory Commission Comments to Rule 43 is amended to substitute the term "preliminary hearing" for the obsolete term "preliminary examination." No substantive amendments are made to the Rule.