IN THE SUPREME COURT OF TENNESSEE

1. AT NASHVILLE

IN RE: TENNESSEE RULES OF CRIMINAL PROCEDURE

Filed: January 18, 2006

ORDER

In Binkley v. Medling, 117 S.W.3d 252 (Tenn. 2003), the Supreme Court concluded that an Advisory Commission Comment to Rule 58, Tenn. R. Civ. P., was obsolete and that it should be removed. The Court went on to ask the Advisory Commission on the Rules of Practice & Procedure to "undertake a review of the various rules of procedure and to recommend the removal of any other Advisory Commission Comments that are obsolete or otherwise inconsistent with later amendments to the various rules." Id. at 258. In response to the Court's request, the Commission revised the Advisory Commission Comments to the Rules of Appellate Procedure, the Rules of Civil Procedure, and the Rules of Evidence; after reviewing the Commission's proposed revisions, the Court entered orders adopting the updated Comments to those three sets of rules.

The Commission proposed to the Court a more substantial revision of the Rules of Criminal Procedure. In addition to updating the Advisory Commission Comments to those Rules, the Commission also proposed an overall reformatting of the Rules themselves. A draft of the proposed reformatted Rules was presented to the Commission in August 2005; a subcommittee of the Commission thereafter reviewed the proposal and presented a final draft to the Commission on November 18, 2005. On that date, the Commission voted to recommend the adoption of the proposed reformatted Rules of Criminal Procedure (including updated Advisory Commission Comments to those Rules).

The Court published the proposed reformatted Rules and revised Comments and solicited written comments from the public, judges, lawyers, and other interested parties. The deadline for submitting written comments was December 29, 2005.

Based upon the Court's review of the proposed reformatted Rules and revised Comments

submitted by the Advisory Commission and the written comments received during the public comment period, the Court concludes that the reformatted Rules and revised Comments should be adopted, as modified by the Court.

Accordingly, the Court adopts the attached Tennessee Rules of Criminal Procedure effective July 1, 2006, subject to approval by resolutions of the General Assembly. The current version of the Tennessee Rules of Criminal Procedure (including the Advisory Commission Comments thereto) will thereby be replaced in its entirety by the attached new version of the Tennessee Rules of Criminal Procedure, effective July 1, 2006.

IT IS SO ORDERED.

FOR THE COURT:

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WILLIAM M. BARKER, CHIEF JUSTICE

APPENDIX

TENNESSEE RULES OF CRIMINAL PROCEDURE

I. SCOPE—PURPOSE—CONSTRUCTION.

RULE 1. SCOPE AND DEFINITIONS

(a) Courts of Record. These rules govern the procedure in all criminal proceedings conducted in all Tennessee 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 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; and

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

(c) Juvenile Courts. These rules do not apply in juvenile courts except when an adult is charged and the context clearly requires the application of the rule.

(d) Other Inferior Tribunals. These rules apply in other inferior tribunals when the context clearly so indicates.

(e) Definitions. As used in these rules the following terms have the designated meanings:

(1) Demurrer, Motion, etc. The words "demurrer," "motion," "motion to quash," "plea in abatement," "plea in bar," or words to the same effect in any Tennessee statute are construed to mean the motion raising a defense or objection provided in Rule 12.

(2) Law. "Law" includes statutes, codifications contained in Tennessee Code Annotated, and published judicial decisions.

(3) Magistrate. "Magistrate" includes all judges of courts of record in the state but is primarily intended to mean judges of courts of general sessions. It also includes justices of the peace when they perform any of the functions contemplated by these rules.

(4) Person. "Person" includes an individual, corporation, limited liability company, limited liability partnership, firm, company, or association.

(5) Oath. "Oath" includes oaths and affirmations.

Advisory Commission Comment. These rules apply in cases which are clearly criminal in nature, including both misdemeanors and felonies. Procedures in purely juvenile and municipal courts are not covered. The term general sessions court, as used in these rules, includes all courts exercising the jurisdiction of a general sessions court in state criminal procedures, including: (1) municipal courts having such jurisdiction by special legislative enactment; (2) special courts of multiple functions that include some jurisdiction in state criminal cases the same as that exercised by general sessions courts; and (3) justices of the peace, to the extent that they may be permitted in some counties to perform any of the functions covered by these rules. In summary, the purpose of the commission was to formulate rules of practice in those state criminal cases presently considered to be state criminal procedures and now covered by rules serving the purposes of the ones promulgated herein.

These rules are not completely comprehensive. For example, they do not deal directly with

pretrial release. It is intended that these rules be applied in every instance in which they address the procedure involved. If they do not expressly or by clear implication relate to the procedure in question, then existing law is to be applied.

These rules take precedence over preexisting statutes and case law which are in conflict with them, but statutes passed subsequent to their adoption which conflict with these rules shall control. These committee comments were not as such adopted with the rules. They have been periodically revised by the advisory commission and published with the rules subsequent to the general assembly's adoption of the resolution approving them. The purpose of these comments is to aid in the understanding and application of the rules; but it must be made clear that the committee comments are not a part of the rules and are not binding upon the courts.

Advisory Commission Comment [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.

RULE 2. PURPOSE AND CONSTRUCTION

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure:

(a) simplicity in procedure;

(b) fairness in administration; and

(c) the elimination of:

(1) unjustifiable expense and delay; and

(2) unnecessary claims on the time of jurors.

Advisory Commission Comment. This rule conforms to Rule 2 of the Federal Rules of Criminal Procedure and is a clear statement of the intention of the commission.

Subdivision (c)(2) is designed to stress that the efficient use of jurors' time is a public interest that courts should consider in construing the Tennessee Rules of Criminal Procedure.

II. PRELIMINARY PROCEEDINGS

RULE 3. THE AFFIDAVIT OF COMPLAINT

The affidavit of complaint is a statement alleging that a person has committed an offense. It must:

(a) be in writing;

(b) be made on oath before a magistrate or a neutral and detached court clerk authorized by Rule 4 to make a probable cause determination; and

(c) allege the essential facts constituting the offense charged.

Advisory Commission Comment. This rule governs what must be done to secure the issuance of an arrest warrant. Under our statutory scheme, per T.C.A. § 40-6-214, clerks of courts of general sessions and their sworn deputies have jurisdiction and authority (concurrent with that of their judges) to issue arrest warrants. It is important that any clerk issuing an arrest warrant know and fully appreciate the legal significance of the fact that it is a judicial function which is being performed. The validity of the warrant depends upon the making of a probable cause determination; a warrant must never be issued as a mere ministerial act done simply upon application. Moreover, a valid warrant can be issued only by one who is neutral and detached and capable of making a probable cause determination, *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), based upon an adequate showing of probable cause, *Aguilar v. Texas*, 378 U.S. 108 (1964) [overruled by *Illinois v. Gates*, 462 U.S. 213 (1983)]. One who is paid a fee for the issuance of a warrant, but nothing where such issuance is refused, is not a neutral and detached magistrate who can validly issue warrants, *Connally v. Georgia*, 429 U.S. 245 (1977).

It must be emphasized that before a valid arrest warrant can issue, the judicial officer issuing the warrant must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant. *Whiteley v. Warden*, 401 U.S. 560 (1971). A factually sufficient basis for the probable cause judgment must appear within the affidavit of complaint. If hearsay evidence is relied upon, the basis for the credibility of both the informant and the informant's information must also appear in the affidavit. *Spinelli v. U.S.*, 393 U.S. 410 (1969) [overruled by *Illinois v. Gates*, 462 U.S. 213 (1983)]. The comparable federal rule calls this affidavit the "complaint." Since that technical term is used differently in our civil procedure, and also to further emphasize to the one issuing an arrest warrant the necessity for first having in hand a detailed complaint reduced to writing and sworn to, the commission adopted "affidavit of complaint" to describe the document upon which the issuance of the arrest warrant is based.

RULES 3.1—3.4 [RESERVED]

RULE 3.5. CRIMINAL CITATION

(a) Use of Citations. The use of citations in misdemeanor arrests is as provided by law.

(b) Reference to Citations. All references in these rules to citations mean citations issued pursuant to law.

Advisory Commission Comment. Use of the criminal citation in misdemeanor cases where no danger to the public interest will result is a procedure in keeping with the expressed goal of securing simplicity in procedure and eliminating unjustified expense and delay. The original substantive content of this rule was deleted in 1988 because T.C.A. § 40-7-118 now provides a comprehensive treatment of citations and mandates their use in some instances.

RULE 4. ARREST WARRANT OR SUMMONS ON A COMPLAINT

(a) Issuance of Warrant or Summons. If the affidavit of complaint and any supporting affidavits filed with it establish that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate or clerk shall issue an arrest warrant to an officer authorized by law to execute it or shall issue a criminal summons for the appearance of the defendant. More than one warrant or criminal summons may issue on the same complaint.

(1) District Attorney General's Choice. The district attorney general may direct the clerk to issue either a criminal summons or a warrant.

(2) Examination Under Oath. Before ruling on a request for a warrant, the magistrate or clerk may examine under oath the complainant and any witnesses the complainant produces.

(3) Record of Issuance. The general sessions court clerk shall promptly record in a docket book the issuance of every warrant and summons in the county.

(4) Failure to Appear for Summons. A warrant shall issue for a defendant who fails to appear in response to a criminal summons.

(b) Evidence of Probable Cause for Warrant or Summons. The finding of probable cause shall be based on evidence which may be hearsay in whole or in part provided there is a substantial basis to believe:

(1) the source of the hearsay is credible; and

(2) there is a factual basis for the information furnished.

(c) Form.

(1) Warrant. The arrest warrant shall:

(A) be signed by the magistrate or clerk;

(B) contain the name of the defendant or, if this name is unknown, any name or description by which the defendant can be identified with reasonable certainty;

(C) indicate the county in which the warrant is issued;

(D) describe the offense charged in the affidavit of complaint; and

(E) order that the defendant be arrested and brought before the nearest appropriate magistrate in the county of arrest.

(2) Summons. The criminal summons shall be in the same form as the arrest warrant except that it orders the defendant to appear before a magistrate at a stated time and place.

(d) Bail When Warrant Issued in One County and Executed in Another. A defendant arrested in one county on a warrant issued in another county for the commission of an offense for which the maximum punishment is imprisonment for ten (10) years or less is entitled to be admitted to bail in the county of arrest by the same officials and in the same manner as if arrested in the county issuing the warrant, subject to the following provisions:

(1) the appropriate clerk or magistrate shall determine the amount of bail and state it on the face of the warrant; and

(2) the sheriff or deputy sheriff of the county in which the arrest is made shall transmit the undertaking of bail to the sheriff of the county from which the warrant issued, who shall return it to the court as provided in T.C.A. § 40-11-106.

(e) Execution or Service; Return.

(1) By Whom. The arrest warrant shall be executed by an officer authorized by law. The criminal summons shall be served by a person authorized to serve a summons in a civil action.

(2) Territorial Limits. The arrest warrant or criminal summons may be executed or served in any Tennessee county.

(3) Manner.

(A) Warrant. An arrest warrant is executed by arresting the defendant. The arresting officer need not have the warrant in the officer's possession at the time of the arrest, but on request shall show the warrant to the defendant as soon as possible. If the arresting officer does not have possession of the warrant at the time of the arrest, the officer shall inform the defendant of the offense charged and that a warrant has been issued.

(B) Summons. A criminal summons is served in the same manner as a summons in a civil action.

(4) Return; Cancellation; Reissuance.

(A) Return. The officer executing a warrant shall return it to the magistrate or clerk or other officer before whom the defendant is brought pursuant to Rule 5. On or before the return day, the person to whom a criminal summons is delivered for service shall make a return to the magistrate or clerk before whom the summons is returnable.

(B) Cancellation of Unexecuted Warrant. At the district attorney general's request, any unexecuted warrant shall be returned to the magistrate or clerk by whom it was issued, who shall cancel it.

(C) Re-Execution or Renewed Service of Warrant or Summons. At the district attorney general's request made while the affidavit of complaint is pending, the magistrate or clerk may deliver to any authorized person for execution or service the original or a duplicate of:

(i) a warrant, returned unexecuted and not cancelled; or

(ii) a summons returned unserved.

Advisory Commission Comment. 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 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.

RULE 5. INITIAL APPEARANCE BEFORE MAGISTRATE

(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 following rules 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 Unless Not Required. The magistrate shall schedule a preliminary examination 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 is not required under Rule 5(e) below.

(C) Waiver.

(i) Of Preliminary Examination. 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 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. Unless the defendant expressly waives the right to a preliminary examination, when the defendant pleads not guilty the magistrate shall schedule a preliminary examination to be held within ten days if the defendant remains in custody and within thirty days if released.

(B) When Preliminary Examination Waived. The magistrate may bind the case over to the grand jury if the defendant waives in writing the preliminary examination.

(C) When Preliminary Examination, 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.

(2) Preliminary Examination Waived. When the defendant waives preliminary examination, the magistrate shall promptly bind the defendant over to the grand jury.

(3) Schedule Preliminary Examination. When the defendant does not waive preliminary examination and when a preliminary examination is not rendered unnecessary under Rule 5(e), the magistrate shall schedule a preliminary examination within ten days if the defendant remains in custody and within thirty days if released.

(e) Indictment Before Preliminary Examination. Any defendant arrested prior to indictment or presentment for a misdemeanor or felony, except small offenses, is entitled to a preliminary hearing on request, whether or not the county grand jury is in session. If the defendant is indicted while the preliminary hearing is being continued (whether at the defendant or prosecutor's request) or at any time before he or she has been afforded a preliminary hearing on a warrant, the defendant may dismiss the indictment on motion. No such motion to dismiss shall be granted after more than thirty days from the date of the defendant's arrest.

(f) Defendant's Presence. The defendant's presence at the initial appearance is governed by Rule 43.

Advisory Commission Comment. 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 referred to in this rule is the proceeding formerly called a preliminary hearing. 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 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."

RULE 5.1. PRELIMINARY EXAMINATION

(a) Procedures. The following rules apply to a preliminary examination:

(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.

(b) When Probable Cause Found. When the magistrate at a preliminary examination 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.

(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 Comment. The subject of the preliminary 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 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.

III. INDICTMENT AND INFORMATION

RULE 6. THE GRAND JURY

(a) Formation of the Grand Jury.

(1) Formation at a Regular Term. On the first day of each term of court at which a grand jury is required to be impaneled, the judge of the court authorized by law to charge the grand jury and to receive its report shall direct the names of all the qualified jurors in attendance for the criminal courts of the county to be written on separate slips of paper and placed in a box or other suitable receptacle and drawn out by the judge in open court. The foreperson and the twelve qualified jurors whose names are first drawn constitute the grand jury for the term and shall attend the court until dismissed by the judge or until the next term.

(2) Formation at a Special Term. The judge presiding at any special term of the court may impanel a grand jury in the same manner and of the same powers as at a regular term.

(3) Formation of Concurrent Grand Juries. When the expeditious administration of justice so requires, the court may likewise impanel a second grand jury to operate concurrently with the first.

(4) Oath of Grand Jurors. The following oath shall be administered to all members of the grand jury, including the foreperson:

You as members of the grand jury do solemnly swear (or affirm) that you will diligently inquire, and true presentment make, of all offenses given you in charge, or otherwise brought to your knowledge, committed or triable within this county; that you will keep secret the state's counsel, the other jurors' and your own; that you will present no person from hatred, malice, or ill will, nor leave any unpresented through fear, favor, or affection, or for any reward, or the promise or hope thereof, but that you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding. So help you God.

(5) Charge to the Grand Jury. After the grand jury has been impaneled and sworn, the judge shall instruct it concerning its powers and duties and the relevant law.

(b) Vacancies on the Grand Jury.

(1) Vacancy as to Grand Juror. When any grand juror becomes unable to serve out the term or is excused on any ground, the court shall fill the vacancy from the original panel. If the court is unable to fill the vacancy from the original panel, it must do so from qualified persons selected in accordance with Rule 6(b)(2).

(2) Vacancy as Foreperson. When the foreperson of the grand jury is unable to serve or is

relieved, the court shall appoint a new one according to Rule 6(g) until such time as the foreperson is able to serve or until expiration of his or her term.

(c) Disqualification of Grand Juror for Interest.

(1) Disqualification. No member of the grand jury shall be present during–or take part in–the consideration of a charge or the deliberation of the other grand jurors, if:

(A) the member is charged with an indictable offense;

(B) the member is a prosecutor;

(C) the offense was committed against the member's person or property; or

(D) the member is related to the person charged or to the victim of the alleged crime by blood or marriage within the sixth degree, computed by the civil law.

(2) Filling Vacancy Created by Temporary Disqualification. When a grand juror is excluded because of interest and fewer than twelve grand jurors remain to investigate any matter, the court shall fill the vacancy according to Rule 6(b) only during such investigation.

(d) Powers of the Grand Jury. The grand jury has inquisitorial powers over–and has the authority to return a presentment–of all indictable or presentable offenses found to have been committed or to be triable within the county. At all proper hours, the grand jurors are entitled to free access to all county offices and buildings and to examine, without charge, all records and other papers of any county officers in any way connected with the grand jurors' duties.

(e) Duties of the Grand Jury. It is the duty of the grand jury to:

(1) inquire into, consider, and act on all criminal cases submitted to it by the district attorney general;

(2) inquire into any report of a criminal offense brought to its attention by a member of the grand jury;

(3) inquire into the condition and management of prisons and other county buildings and institutions within the county;

(4) inquire into the condition of the county treasury;

(5) inquire into the correctness and sufficiency of county officers' bonds;

(6) inquire into any state or local officers' abuse of office; and

(7) report the results of its actions to the court.

(f) Individual Grand Juror's Duty to Inform. If a member of the grand jury knows or has reason to believe that an indictable public offense has been committed in the county, he or she shall inform the other jurors, who shall investigate it.

(g) Appointment, Qualifications, Term, Compensation, Vote, and Duties of Foreperson.

(1) Appointment of Foreperson. The judge of the court authorized by law to charge–and receive the report of–the grand jury shall appoint the grand jury foreperson. When concurrent grand juries are impaneled, the court shall appoint a foreperson for each grand jury.

(2) Qualifications of Foreperson. The foreperson shall possess all the qualifications of a juror.

(3) Duration of Appointment. The foreperson shall hold office and exercise powers for a term of two (2) years from appointment. In the discretion of the presiding judge, the foreperson may be removed, relieved, or excused from office for good cause at any time.

(4) Duties of Foreperson. The grand jury foreperson has the following duties:

(A) to assist and cooperate with the district attorney general in ferreting out crime, to the end that the laws may be faithfully enforced;

(B) out of term, to advise the district attorney general about law violations and to furnish names of witnesses, whom the district attorney general may, if he or she deems proper, order summoned to go before the grand jury at the next term;

(C) in term, (in addition to the district attorney general who also has such authority) to order the issuance of subpoenas for grand jury witnesses; and

(D) to vote with the grand jury, which vote counts toward the twelve necessary for the return of an indictment.

(5) Compensation. The county legislative body determines the foreperson's compensation, which must not be less than ten dollars ($10.00) per day for each day the foreperson's grand jury is actually in session. The foreperson's compensation may not be diminished during the term of appointment. The foreperson shall receive no other compensation for these services. The foreperson's compensation shall be paid out of the county treasury in the same manner as jurors are paid.

(h) Duties of District Attorney General.

(1) Attendance. When required by the grand jury, the district attorney general may appear before the grand jury for the purpose of giving legal advice, but shall not be present–nor shall any other officer or person other than the grand jurors be present–when the grand jurors vote on an indictment or presentment.

(2) Preparation of Indictments. The district attorney general shall promptly prepare indictments for the grand jury in all cases when a defendant has been bound over to answer a criminal charge or is in the sheriff's custody.

(i) Duties of Clerks.

(1) Furnishing Information to District Attorney General. On the first day of the term, the clerk shall furnish the district attorney general with the names of the prosecutor, defendant, and witnesses in each case.

(2) Issuing Subpoenas for Witnesses. On application of the grand jury, the court clerk shall issue

subpoenas for any witnesses the grand jury requires to give evidence before it.

(3) Issuing Process Between Terms. Between terms of court, when the district attorney general believes it necessary to secure the ends of justice and protect the interests of the state, he or she may direct the clerks to issue process to secure the attendance of witnesses before the grand juries on the first day of the succeeding term.

(j) Witnesses Before Grand Jury.

(1) Sending for Witnesses by Grand Jury. The grand jury shall send for witnesses whenever the grand jury or any member suspects that an indictable offense has been committed.

(2) Process for Grand Jury Witnesses. Process for grand jury witnesses shall be directed to the sheriff or other lawful officer, and may also be executed and returned by any officer the court appoints to assist the grand jury.

(3) Failure of Witnesses to Attend. Witnesses subpoenaed by the grand jury who fail to attend may be proceeded against as other defaulting witnesses.

(4) Oath of Grand Jury Witnesses. Witnesses summoned before the grand jury may be sworn by the clerk or foreperson. The foreperson of the grand jury may administer the oath to grand jury witnesses in all cases where the clerks of the criminal and circuit courts may administer such oaths. The person administering the oath shall indorse the fact on the subpoena, and sign his or her name to such indorsement.

(5) Compelling Witnesses to Testify. A person who refuses to testify before the grand jury may be compelled to do so by the court:

(A) on motion of the district attorney general; and

(B) on a grant of immunity from prosecution for any offense in relation to which the person has been ordered to testify.

(6) Immunity of Certain Witnesses from Prosecution. No witness shall be indicted for any offense in relation to which the district attorney general has compelled the witness to testify before the grand jury.

(7) Limited Detention of Grand Jury Witnesses. The district attorney general shall endeavor to detain witnesses only one (1) day for appearance before the grand jury.

(8) Limited Claim of Attendance of Witnesses Living Within Ten Miles. Witnesses who live within ten (10) miles of the court may claim only one (1) day's attendance before the grand jury, unless detained longer by court order.

(k) Secrecy of Proceedings; Exception.

(1) Grand Jury Proceedings Secret. Every member of the grand jury shall keep secret the proceedings of that body and the testimony given before it, except as provided in Rule 6(k)(2).

(2) Exception to Rule of Secrecy. The court may require a grand juror to reveal the testimony of

a grand jury witness:

(A) to ascertain whether the grand jury testimony is consistent with that given by the witness before the court; or

(B) to disclose the grand jury testimony of any witness charged with perjury.

(l) Grand Jurors as Petit Jurors.

(1) Grand Jurors Serving as Petit Jurors. Except as provided in Rule 6(l)(2), the grand jurors may act as petit jurors in civil or criminal cases when not engaged in grand jury business.

(2) Grand Jurors Barred as Petit Jurors in Certain Cases. No grand juror may sit as a petit juror for any cause involving a defendant in any criminal cause heard by the grand jury of which he or she is a member.

Advisory Commission Comment. This rule substantially reflects existing law, including the provision allowing concurrent grand juries. The voting power of the grand jury foreperson is made explicit. The judge's charge to the grand jury "shall instruct it concerning its powers and duties and expound the law to it as the judge shall deem proper."

Witness immunity provided in Rule 6(j)(5) and (6) requires comment. The first provision provides that: "A person refusing to testify before the grand jury may be compelled to testify by the court on motion of the district attorney general and upon a grant of immunity from prosecution for any offense in relation to which the person has been ordered to testify." This rule is triggered by the refusal of a witness to testify before a grand jury.

The second says: "No witness shall be indicted for any offense in relation to which the district attorney general has compelled the witness to testify before the grand jury." Note that the rule says "the district attorney general has compelled the witness to testify" rather than "has testified."

Rule 6(j)(5) carries the subtitle "Compelling Witnesses to Testify." It provides a tool whereby one can be required to give up an asserted Fifth Amendment right, but not until the witness is explicitly given a grant of immunity from prosecution (not just indictment, so one already indicted could be so compelled) for any offense in relation to which the witness has been ordered to testify.

Rule 6(j)(6) is subtitled "Immunity of Certain Witnesses from Prosecution" and expressly limits the immunity to indictment for offenses about which the witness was compelled to testify by the district attorney general. This rule grants immunity only to those witnesses compelled to testify by the district attorney general, or the district attorney general's assistant or agent, by virtue of subpoena or order of the judge. The commission does not desire to depart from the scope of the immunity given under T.C.A. § 40-1623 [now repealed], and the cases decided thereunder.

The commission views the immunity rules as being limited strictly to the instances addressed by them. Rule 6(j)(5) is triggered only where there is a Fifth Amendment or other refusal of a witness to testify and an explicit court order to do so; Rule 6(j)(6) is triggered only when the district attorney general compels the witness to testify.

T.C.A. §§ 40-12-104 – 40-12-107 provide a procedure designed to give citizens free access to the local grand jury. Under this statute, persons applying to testify before the grand jury are not immune from prosecution based upon or related to their testimony, except under express grant of immunity by the grand jury. The statute expressly states that it is supplemental to existing law.

RULE 7. INDICTMENTS, PRESENTMENTS, AND INFORMATIONS

(a) General Provision. The definition, form, use, return, endorsements, content, and procedure relating to indictments, presentments, and criminal informations are as provided by law.

(b) Amending Indictments, Presentments and Informations.

(1) With Defendant's Consent. With the defendant's consent, the court may amend an indictment, presentment, or information.

(2) Without Defendant's Consent. Without the defendant's consent and before jeopardy attaches, the court may permit such an amendment if no additional or different offense is charged and no substantial right of the defendant is prejudiced.

(c) Bill of Particulars. On defendant's motion, the court may direct the district attorney general to file a bill of particulars so as to adequately identify the offense charged.

Advisory Commission Comment. The criminal information has been used in state cases under the provisions of § 40-3-101, but because the Constitution of Tennessee, Art. 1, § 14, provides that no person shall be put to answer any criminal charge but by presentment, indictment or impeachment, its use is limited to those cases in which there is an agreement by the defendant to be bound by its use.

Subdivision (a) simply adopts the existing law, and leaves it subject to whatever changes and construction that may be made.

The first sentence of (b) deals with permissive amendments and follows existing statutory law per T.C.A. § 40-1713 [now repealed], while the second sentence permits some amendments in the face of the defendant's objection, as originally proposed by the Law Revision Commission in § 40-9-105 of its proposed code. The same constitutional provision set out at the beginning of this comment constitutes the basis for a caveat as to the extent to which nonconsensual amendments may constitutionally be made without resubmitting the matter to the grand jury.

Subdivision (c) provides for a bill of particulars when needed by the defendant to know precisely what he or she is charged with. This provision is to be construed to serve that singular purpose, and is not meant to be used for purposes of broad discovery.

RULE 8. JOINDER OF OFFENSES AND DEFENDANTS

(a) Mandatory Joinder of Offenses.

(1) Criteria for Mandatory Joinder. Two or more offenses shall be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or the offenses consolidated pursuant to Rule 13, if the offenses are:

(A) based on the same conduct or arise from the same criminal episode;

(B) within the jurisdiction of a single court; and

(C) known to the appropriate prosecuting official at the time of the return of the indictment(s), presentment(s), or information(s).

(2) Failure to Join Such Offenses. A defendant shall not be subject to separate trials for multiple offenses falling within Rule 8(a)(1) unless they are severed pursuant to Rule 14.

(b) Permissive Joinder of Offenses. Two or more offenses may be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or consolidated pursuant to Rule 13, if:

(1) the offenses constitute parts of a common scheme or plan; or

(2) they are of the same or similar character.

(c) Joinder of Defendants. An indictment, presentment, or information may charge two or more defendants:

(1) if each of the defendants is charged with accountability for each offense included;

(2) if each of the defendants is charged with conspiracy, and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy; or

(3) even if conspiracy is not charged and all of the defendants are not charged in each count, if the several offenses charged:

(A) were part of a common scheme or plan; or

(B) were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

Advisory Commission Comment. Compulsory joinder of offenses against a single defendant is covered in section (a). This rule is designed to encourage the disposition in a single trial of multiple offenses arising from the same conduct and from the same criminal episode, and should therefore promote efficiency and economy. Where such joinder of offenses might give rise to an injustice, Rule 14(b)(2) allows the trial court to relax the rule.

The commission wishes to make clear that section (a) is meant to stop the practice by some prosecuting attorneys of "saving back" one or more charges arising from the same conduct or from the same criminal episode. Such other charges are barred from future prosecution if known to the appropriate prosecuting official at the time that the other prosecution is commenced, but

deliberately not presented to a grand jury. "Appropriate prosecuting official" shall be so construed as to achieve the purpose of this rule, which is the prevention of a deliberate and willful "saving back"of known charges for future prosecution. The refusal of the grand jury to act upon such other charges would not be a violation of this joinder rule so as to bar future prosecution of such charges.

Permissive joinder of offenses, addressed in section (b), allows even unrelated offenses to be joined in the same indictment or presentment, when they are offenses of the same or similar character. These charges may be severed by the defendant as a matter of right under Rule 14(b), unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others, since a severance in such cases would accomplish nothing in the way of insulating the defendant from the evidence of all of the separate offenses.

Permissive joinder of defendants, addressed in section (c), is aimed at achieving improved judicial economy and efficiency. Severance of defendants is addressed in Rule 14(c).

RULE 9. CAPIAS OR SUMMONS ON AN INDICTMENT OR PRESENTMENT

(a) Issuance. After the grand jury returns an indictment or presentment, the clerk shall issue a capias or a criminal summons for each defendant named in the indictment or presentment:

(1) who is not in actual custody;

(2) who has not been released on recognizance or bail; or

(3) whose bail has been declared forfeited.

The clerk shall issue a criminal summons (instead of a capias) after an indictment or presentment and for any subsequent process when so requested by the district attorney general or directed by the court.

(b) Form and Content.

(1) Capias. The capias shall:

(A) be in the same form as an arrest warrant;

(B) be signed by the clerk;

(C) describe the offense charged; and

(D) command that the defendant be arrested and brought before the court in which the charge is pending.

(2) Summons. The criminal summons shall be in the same form as the capias except that it shall require the defendant to appear before the court at a stated time and place, and shall give the defendant notice that the failure to appear as ordered may constitute contempt of court.

(c) Delivery for Service. The clerk shall deliver the capias or criminal summons to the sheriff or other person authorized by law to execute or serve it.

(d) Execution; Return.

(1) Execution. A capias or criminal summons shall be executed and served as provided in Rule 4(e).

(2) Return. The peace officer executing a capias shall make a return to the court. On or before the return day, the person to whom a criminal summons was delivered for service shall make the return. At the request of the district attorney general, any unexecuted capias shall be returned and cancelled.

(e) Reissuance. At the request of the district attorney general made while the indictment is pending, or on the court's own initiative, the court may direct the clerk to deliver to the sheriff or other authorized person for execution or service a capias that was returned unexecuted and was not canceled, a criminal summons that was returned unanswered, or a duplicate of either.

(f) Failure to Appear. The court shall issue a capias to a defendant–other than a corporation, limited liability company, or limited liability partnership–who fails to appear in response to a criminal summons. If a corporation, limited liability company, or limited liability partnership does not appear after being summoned, the court having jurisdiction to try the offense for which the summons was issued shall enter a not guilty plea and may proceed to trial and judgment without further process.

Advisory Commission Comment. This rule is patterned after the proposals of the Law Revision Commission in § 40-9-107 and § 40-9-110 of their proposed code.

No provision is made for process following a prosecution commenced by a criminal information, because under Art. 1, § 14 of our Constitution and § 40-3-101, a threshold waiver and agreement by the accused would be required and hence process would not be needed.

This rule provides that the district attorney general or the trial judge may direct that the clerk issue a criminal summons rather than a capias.

IV. ARRAIGNMENT AND PRETRIAL

RULE 10. ARRAIGNMENT

(a) General. Before any person is tried for the commission of an offense, the person shall be called into open court and arraigned, except as provided in Rule 43.

(b) Procedure. The arraignment shall consist of the following:

(1) ensuring that the defendant has a copy of the indictment, presentment, or information before called upon to plead;

(2) reading the indictment, presentment, or information to the defendant or stating to the defendant the substance of the charge; and then

(3) asking the defendant to plead to the indictment, presentment, or information.

(c) Record. The arraignment shall be entered on the record.

(d) Jointly Charged Defendants. Defendants who are jointly charged may be arraigned separately or together in the court's discretion.

Advisory Commission Comment. This rule creates a formal arraignment procedure in Tennessee. The rule applies only to Circuit or Criminal Courts or other criminal courts of record.

The accused must be given a copy of the indictment or presentment before being called upon to plead. A uniform procedure is provided applicable to all cases.

RULE 11. PLEAS

(a) Plea Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. The court shall enter a plea of not guilty if a defendant refuses to plead or if a defendant corporation, limited liability company, or limited liability partnership fails to appear.

(2) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Before accepting a plea of nolo contendere, the court shall consider the views of the parties and the interest of the public in the effective administration of justice.

(3) Conditional Plea. A defendant may enter a conditional plea of guilty or nolo contendere in accordance with Rule 37(b).

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before accepting a guilty or nolo contendere plea, the court shall address the defendant personally in open court and inform the defendant of, and determine that he or she understands, the following:

(A) The nature of the charge to which the plea is offered;

(B) the maximum possible penalty and any mandatory minimum penalty;

(C) if the defendant is not represented by an attorney, the right to be represented by counsel–and if necessary have the court appoint counsel–at trial and every other stage of the proceeding;

(D) the right to plead not guilty or, having already so pleaded, to persist in that plea;

(E) the right to a jury trial;

(F) the right to confront and cross-examine adverse witnesses;

(G) the right to be protected from compelled self-incrimination;

(H) if the defendant pleads guilty or nolo contendere, the defendant waives the right to a trial and there will not be a further trial of any kind except as to sentence; and

(I) if the defendant pleads guilty or nolo contendere, the court may ask the defendant questions about the offense to which he or she has pleaded. If the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against the defendant in a prosecution for perjury or false statement.

(2) Insuring That Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court shall address the defendant personally in open court and determine that the plea is voluntary and is not the result of force, threats, or promises (other than promises in a plea agreement). The court shall also inquire whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the district attorney general and the defendant or the defendant's attorney.

(3) Determining Factual Basis for Plea. Before entering judgment on a guilty plea, the court shall determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) In General. The district attorney general and the defendant’s attorney, or the defendant when acting pro se, may discuss and reach a plea agreement. The court shall not participate in these discussions. If the defendant pleads guilty or nolo contendere to a charged offense or a lesser or related offense, the plea agreement may specify that the district attorney general will:

(A) move for dismissal of other charges;

(B) recommend, or agree not to oppose the defendant's request for, a particular sentence, with the understanding that such recommendation or request is not binding on the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

(2) Disclosing a Plea Agreement.

(A) Open Court. The parties shall disclose the plea agreement in open court on the record, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(B) Timing of Disclosure. Except for good cause shown, the parties shall notify the court of a plea agreement at the arraignment or at such other time before trial as the court orders.

(3) Judicial Consideration of a Plea Agreement.

(A) Rule 11(c)(1)(A) or (C) Agreement. If the agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept or reject the agreement pursuant to Rule 11(c)(4) or (5), or

may defer its decision until it has had an opportunity to consider the presentence report.

(B) Rule 11(c)(1)(B) Agreement. If the agreement is of the type specified in Rule 11(c)(1)(B), the court shall advise the defendant that the defendant has no right to withdraw the plea if the court does not accept the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, the court shall advise the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement.

(5) Rejecting a Plea Agreement. If the court rejects the plea agreement, the court shall do the following on the record and in open court (or, for good cause, in camera):

(A) advise the defendant personally that the court is not bound by the plea agreement;

(B) inform the parties that the court rejects the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than provided in the plea agreement.

(d) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. The admissibility of a plea, plea discussion, or any related statement is governed by Tennessee Rule of Evidence 410.

(e) Record of Proceedings. There shall be a verbatim record of the proceedings at which the defendant enters a plea. If there is a plea of guilty or nolo contendere, the record shall include the inquiries and advice to the defendant required under Rule 11(b) and (c).

Advisory Commission Comment. This rule is substantially the same as the federal rule. Entry by the court of a not guilty plea for one refusing to plead or standing mute is included in section (a). In addition, Rule 11 establishes a plea of nolo contendere, under limitations set out in section (a).

Although the rules do not require a plea of not guilty by reason of insanity, notice of the defendant's intention to defend on the basis of mental incompetency at the time of the offense is required under Rule 12.2. *See also* T.C.A. §§ 40-18-117 and 33-7-303.

The matters of specific advice to the defendant and explicit procedures for insuring on the record that pleas of guilty and nolo contendere are voluntarily and understandingly made are designed to produce finality in the proceedings. In addition to the matters specified in section (b)(1), Tennessee law requires that the defendant be further advised, "if applicable, that a different or additional punishment may result by reason of his prior convictions or other factors which may be established in the present action after the entry of his plea." *Mackey v. State*, 553 S.W.2d 337, 341 (Tenn. 1977). And, in addition to the matters specified in subdivision (b)(1), the *Mackey* decision requires the trial court to warn the defendant "further, that upon the sentencing hearing, evidence of any prior convictions may be presented to the judge or jury for their consideration in determining punishment."

As does the current federal rule, section (c) recognizes and approves the practice of plea

negotiation and agreement, and brings that process into the light of the open courtroom. Although subdivision (c)(1) purports to list possible alternative plea "bargains," it is not contemplated that this list be taken as exclusive. Common to state practice (but not to federal practice) are guilty pleas entered in exchange for reduction of the charge to a lesser-included offense, recommendation by the prosecutor that any sentence be suspended and the defendant placed on probation, etc.

The provision in subdivision (c)(2)(B) specifically permits the trial judge to impose reasonable pretrial time limits on the court's consideration of plea agreements, a practice which will allow maximum efficiency in the docketing of cases proceeding to trial on pleas of not guilty.

It should be noted in connection with the record requirements of section (e) that the *Mackey* opinion, supra, requires additionally an inquiry by the court "into the defendant's understanding of his entering a plea of guilty."

The commission feels that uniformity of procedure with the federal courts in procedural matters such as those contemplated under Rules 11 and 12 is beneficial to the public and to the legal profession.

The provisions of Rule 11(c) are similar to the Federal Rules of Criminal Procedure. Rule 11(c)(1) contains the plea bargaining options. A (c)(1)(A) and a (c)(1)(C) agreement are binding on the court only in the sense that the plea is contingent on the agreement as stated. The court may accept the plea agreement under (c)(3) or it may reject the plea agreement under circumstances set forth in (c)(4). As per prior law, acceptance or rejection of the plea may be deferred until consideration of a presentence report. This is essentially the procedure contemplated by T.C.A. § 40-35-203(b).

When the court rejects the plea agreement, the defendant is given the opportunity to withdraw the plea under (c)(5). When the court rejects the plea agreement but the defendant does not withdraw a guilty plea, T.C.A. § 40-35-203 gives the defendant the right to a sentencing hearing and presentence report.

The above discussion is relevant for pleas contingent on a specific sentence. Rule 11(c)(3)(B) addresses those agreements which are not plea contingent. These types of agreements are (c)(1)(B) agreements which are clearly not binding on the court. The important distinction is that where the court does not follow the agreement the defendant may not withdraw the plea. The essence of Rule 11(c)(3)(B) is for the court to so advise the defendant at the time of the plea.

The type of plea agreements have greatly expanded in recent years because judges now impose non-capital sentences. Consequently, it is important for the lawyers to have a clear understanding as to those aspects of the agreement which are plea contingent and those that are not. The defendant must also have an understanding so that the plea is knowing.

A simple example should illustrate the type of contingent and noncontingent agreements contemplated. The state may agree that in exchange for a plea to burglary the state will recommend four years and that at the time of the sentencing hearing the state will recommend probation but the latter is a nonbinding recommendation. Two separate agreements have thus been made. The first, the four years, is a (c)(1)(C) agreement. The defendant's plea is wholly

contingent on getting exactly four years. The sentence is not binding on the court but the alternative to rejection of the sentence agreement is a potential withdrawal of the plea. The second agreement, the recommendation of probation, is, under this example, a (c)(1)(B) agreement. The plea is contingent only on the state's recommendation of probation and not on probation actually being granted. If the court denies probation the defendant cannot withdraw the plea.

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

(a) Pleadings and Motions. Pleadings in criminal proceedings are the indictment, presentment, and information, and the pleas of not guilty, guilty, and nolo contendere. All other pleas, demurrers, and motions to quash are abolished; defenses and objections raised before trial that could have been raised by one or more of them are now raised only by motion to dismiss or to grant appropriate relief, as provided in these rules. Motions may be oral or written, at the discretion of the judge.

(b) Pretrial Motions.

(1) Motions That May Be Made Before Trial. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

(2) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in the institution of the prosecution;

(B) a motion alleging a defect in the indictment, presentment, or information–but at any time while the case is pending, the court may hear a claim that the indictment, presentment, or information fails to show jurisdiction in the court or to charge an offense;

(C) a motion to suppress evidence;

(D) a Rule 16 request for discovery; and

(E) a Rule 14 motion to sever or consolidate charges or defendants.

(c) Motion Date. Unless otherwise provided by local rule, the court may–at the arraignment or as soon afterward as practicable–set a deadline for the parties to make pretrial motions or requests and may also schedule a motion hearing.

(d) Notice by the State of the Intention to Use Evidence.

(1) At the State’s Discretion. At the arraignment or as soon afterward as practicable, the state may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(2)(C).

(2) At the Defendant’s Request. At the arraignment or as soon afterward as practicable, in order to afford an opportunity to move to suppress evidence the defendant may request notice of the

state's intent to use (in its evidence in chief at trial) any evidence that the defendant may be entitled to discover under Rule 16, subject to any relevant limitations prescribed in Rule 16.

(e) Ruling on Motion. The court shall decide each pretrial motion before trial unless it finds good cause to defer a ruling until trial or after a verdict. The court shall not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court shall state its essential findings on the record.

(f) Effect of Failure to Raise Defenses or Objections. Unless the court grants relief for good cause, a party waives any defense, objection, or request by failing to comply with:

(1) rules requiring such matters to be raised pretrial;

(2) any deadline set by the court under Rule 12(c); or

(3) any deadline extension granted by the court.

(g) Records. A verbatim record shall be made of all proceedings at the motion hearing, including any findings of fact and conclusions of law that are made orally.

(h) Effect of Decision on Motion.

(1) Confinement. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment, presentment, or information, it may also order that the defendant be continued in custody or that the defendant's bail be continued for a specified time pending the filing of a new indictment or information.

(2) Statute of Limitations. Nothing in this rule affects the provisions of any statute of limitations.

Advisory Commission Comment. This rule conforms to its federal counterpart and applies only in criminal courts of record.

The verbatim record referred to in section (g) means that the proceedings must be electronically (or in some other way) preserved, and does not necessarily mean that a written transcript must be prepared before it is needed for purposes of appeal or otherwise.

The state is also permitted to make appropriate pretrial motions under this rule.

RULE 12.1. NOTICE OF ALIBI

(a) State’s Request and Defendant’s Notice.

(1) State’s Request for Notice of Alibi Defense. A district attorney general who desires disclosure of a potential alibi defense shall serve the defendant with a written request to be notified of an intention to offer an alibi defense. The request shall state the time, date, and place at which the alleged offense was committed.

(2) Defendant's Notice in Response. On written request of the district attorney general under Rule 12.1(a)(1), the defendant intending to offer an alibi defense shall serve on the district attorney general a written notice of this intention.

(A) Content. The defendant's notice shall state:

(i) the specific place or places at which the defendant claims to have been at the time of the alleged offense; and

(ii) the name and address of each alibi witness on whom the defendant intends to rely.

(B) Timing. Unless the court directs otherwise, the defendant shall serve such notice within ten days of the state's request..

(b) State's Response to Defendant's Notice.

(1) Disclosure. If the defendant serves a notice pursuant to Rule 12.1(a)(2), the district attorney general shall disclose in writing to the defendant the name and address of:

(A) each witness on whom the state intends to rely to establish the defendant's presence at the scene of the alleged offense; and

(B) each witness on whom the state intends to rely to rebut testimony of any of the defendant's alibi witnesses.

(2) Timing. Unless the court directs otherwise, the district attorney general shall serve this notice within ten days after receiving defendant's notice of alibi but in no event less than ten days before trial.

(c) Continuing Duty to Disclose. If before or during trial either party learns of the existence of an additional witness who should have been included in the information furnished under Rule 12.1(a)(2)(A) or 12.1(b)(1), that party shall promptly notify the other party of the name and address, if known, of such additional witness.

(d) Failure to Comply. If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule does not limit the defendant's right to testify.

(e) Good Cause Exceptions. For good cause shown, the court may grant an exception to any of the requirements of this rule.

(f) Inadmissibility of Withdrawn Alibi. The following is not admissible in any civil or criminal proceeding against a defendant who gave alibi notice under Rule 12.1(a)(2):

(1) evidence of an intention to rely on an alibi defense, later withdrawn; or

(2) evidence of statements made in connection with that intention.

Advisory Commission Comment. This rule conforms to the federal rule, and is part of the

discovery package.

Rule 12.1 discovery is triggered by the written demand of the district attorney general. Note also that the state must reciprocate by furnishing the names of its witnesses who are expected to contradict the alibi witnesses.

Of significance to the trial judges is the provision of section (e): For good cause shown, the court may grant an exception to the requirements of this rule. The court should always state on the record the reason(s) for such a ruling.

RULE 12.2. NOTICE OF INSANITY DEFENSE OR EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION

(a) Defense of Insanity.

(1) Notice of Insanity Defense. A defendant who intends to assert a defense of insanity at the time of the alleged crime shall so notify the district attorney general in writing and file a copy of the notice with the clerk.

(2) Timing. Notice shall be given within the time provided for the filing of pretrial motions or at such later time as the court may direct. The court may, for cause shown, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(3) Failure to File Notice. A defendant who fails to comply with the requirements of Rule 12.2(a)(1) may not raise an insanity defense.

(b) Expert Testimony of Defendant's Mental Condition.

(1) Notice of Expert Testimony. A defendant who intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of his or her guilt shall so notify the district attorney general in writing and file a copy of the notice with the clerk.

(2) Timing. Notice described in Rule 12.2(b)(1) shall be filed within the time provided for the filing of pretrial motions or at such later time as the court may direct. The court may, for cause shown, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(c) Mental Examination of Defendant.

(1) Authority to Order Mental Examination. On motion of the district attorney general, the court may order the defendant to submit to a mental examination by a psychiatrist or other expert designated in the court order.

(2) Inadmissibility of Statements During Examination. No statement made by the defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant’s consent), no testimony by the expert based on such statement, and no other fruits of

the statement are admissible in evidence against the defendant in any criminal proceeding, except for impeachment purposes or on an issue concerning a mental condition on which the defendant has introduced testimony.

(d) Failure to Provide Notice of Expert Testimony or to Submit to Mental Examination. If a defendant fails to give notice under Rule 12.2(b) or does not submit to an examination ordered under Rule 12.2(c), the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's mental condition.

(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

Advisory Commission Comment. Like Rule 12.1, Rule 12.2 is a part of the discovery package, and conforms to the somewhat similar federal rule.

The burden is upon the defendant to give notice of any defense based upon mental condition, without a triggering request from the state.

Rule 12.2(b) imposes a notice requirement on the defendant when expert witnesses are to testify as to the defendant's mental state. The commission approves the federal advisory committee notes which indicate that lack of notice about the defendant's mental state may seriously disadvantage the district attorney general in preparing possible rebuttal proof.

Rule 12.2(c) allows examination by other experts and not just a psychiatrist. Further, the exclusion of use of the defendant's statement in a state requested examination is expanded to sentencing as well as guilt. However, this is not intended to preclude impeachment of the defendant under traditional impeachment rules.

RULE 12.3. NOTICE OF INTENT TO SEEK INCREASED SENTENCE

(a) Noncapital Cases. If the district attorney general intends to seek an enhanced punishment as a multiple, persistent, or career offender, the district attorney general shall file notice of this intention not less than ten (10) days before trial. If the notice is untimely, the trial judge shall grant the defendant, on motion, a reasonable continuance of the trial.

(b) Capital Cases.

(1) Timing. When the indictment or presentment charges a capital offense and the district attorney general intends to ask for the death penalty, he or she shall file notice of this intention not less than thirty (30) days before trial. If the notice is untimely, the trial judge shall grant the defendant, on motion, a reasonable continuance of the trial.

(2) Content. The notice shall specify that the state intends to seek the death penalty and shall specify the aggravating circumstances the state intends to rely on at the sentence hearing. The state may specify by referring to the statutory citation of the aggravating circumstance.

(c) Manner of Giving Notice. Notice under Rule 12.3(a) or (b) shall be in writing, filed with the court, and served on counsel. If the notice refers to a prior conviction or other sensitive matters, the court may permit the notice to be filed under seal.

Advisory Commission Comment. This rule implements the notice provisions of the Tennessee Criminal Sentencing Reform Act of 1989. Subdivision (a) requires that written notice under T.C.A. § 40-35-202(a) be filed not less than ten (10) days before trial. This time limitation will allow defense lawyers an opportunity to plan their trial strategy or engage in appropriate plea negotiations. Nevertheless, since the notice requirement is based on a defendant's prior record, this record may only come to light shortly before trial. Under this and related circumstances, it would be unfair for the state to proceed to trial unable to establish proof at the sentencing hearing. Consequently, the state may provide notice in less than ten (10) days but the defendant is entitled to a continuance to rechart a course of action. If the defendant does not request a continuance, the written notice shall be valid.

Subdivision (b) requires that the state give notice in capital cases. While perhaps not constitutionally required, it has been the recommended procedure. *State v. Berry,* 592 S.W.2d 553 (Tenn. 1980). It is also helpful to know prior to jury selection if the state will ask for the death penalty. Jury selection procedures will obviously be affected by notice of a capital offense, see *Witherspoon v. Illinois,* 391 U.S. 510 (1968). Moreover, the number of challenges will also vary, see Rule 24(e), as well as the number of allowed appointed counsel, see Rule 13, Section 3, Rules of the Tennessee Supreme Court. The time limitation under this subdivision is thirty (30) days although there is a safeguard as in the case of notice under subdivision (a).

Subdivision (c) provides that notices may be under seal, in the discretion of the court, if public notice may be prejudicial to the defendant such as disclosing a prior record.

RULE 13. CONSOLIDATION OR SEVERANCE

(a) Consolidation. The court may order consolidation for trial of two or more indictments, presentments, or informations if the offenses and all defendants could have been joined in a single indictment, presentment, or information pursuant to Rule 8.

(b) Severance. The court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or of the state pursuant to Rule 14.

Advisory Commission Comment. Rules 8, 13 and 14 are closely tied together. Rule 13 allows at the court's option the consolidation or severance of offenses or defendants in those instances in which the state or the defendant could have elected to consolidate or sever. When the court orders a consolidation under section (a), the case is then in the "permissive joinder" status, and the defendant(s) may exercise the options available under Rule 14. A severance ordered by the court under section (b) is final.

RULE 14. SEVERANCE OF OFFENSES AND DEFENDANTS

(a) Severance Motion.

(1) Timing.

(A) By Defendant. A defendant's motion for severance of offenses or defendants shall be made before trial, except that a motion for severance may be made before or at the close of all evidence if based on a ground not previously known. A defendant waives severance if the motion is not timely.

(B) By State. The state's motion for severance of counts or defendants may be granted by the court only prior to trial, except with the consent of the defendant.

(2) Double Jeopardy. If during the trial the court grants a motion for severance made by the defendant or with the defendant's consent, the ruling does not bar a subsequent trial of that defendant on the offenses severed.

(b) Severance of Offenses.

(1) Involving Permissive Joinder of Offenses. If two or more offenses are joined or consolidated for trial pursuant to Rule 8(b), the defendant has the right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible in the trial of the others.

(2) Involving Mandatory Joinder of Offenses. If two or more offenses are joined or consolidated for trial pursuant to Rule 8(a), the court shall grant a severance of offenses in any of the following situations:

(A) Before Trial. Before trial on motion of the state or the defendant when the court finds a severance appropriate to promote a fair determination of the defendant's guilt or innocence of each offense.

(B) During Trial. During trial, with consent of the defendant, when the court finds a severance is necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court shall consider whether–in light of the number of offenses charged and the complexity of the evidence–the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

(C) Conflicting Positions on Continuance. When the court finds merit in both the district attorney general's motion for a continuance based on exigent circumstances that temporarily prevent the state from being ready for trial of the joined prosecutions and in the defendant's objection to the continuance based on a demand for speedy trial. A court granting a severance under this subdivision shall also grant a continuance of the prosecutions in which the exigent circumstances exist.

(c) Severance of Defendants.

(1) Because of Out-of-Court Statement. If a defendant moves for a severance because an out-of-

court statement of a codefendant makes reference to the defendant but is not admissible against the defendant, the court shall determine whether the state intends to offer the statement in evidence at trial. If so, the court shall require the prosecuting attorney to elect one of the following courses:

(A) a joint trial at which the statement is not admitted in evidence or at which, if admitted, the statement would not constitute error;

(B) a joint trial at which the statement is admitted in evidence only after all references to the moving defendant have been deleted and if the redacted confession will not prejudice the moving defendant; or

(C) severance of the moving defendant.

(2) Because of Speedy Trial or Fair Determination Concerns. On motion of the state or the defendant other than under Rule 14(c)(1), the court shall grant a severance of defendants if:

(A) before trial, the court finds a severance necessary to protect a defendant's right to a speedy trial or appropriate to promote a fair determination of the guilt or innocence of one or more defendants; or

(B) during trial, with consent of the defendants to be severed, the court finds a severance necessary to achieve a fair determination of the guilt or innocence of one or more defendants.

(3) Because of Failure to Prove Grounds for Joinder. The court shall grant a severance of defendants if:

(A) a defendant moves for severance at the conclusion of the state's case or at the conclusion of all the evidence;

(B) there is not sufficient evidence to support the allegation on which the moving defendant was joined for trial with the other defendant or defendants; and

(C) in view of this lack of evidence, severance is necessary to achieve a fair determination of the moving defendant's guilt or innocence.

Advisory Commission Comment. Offenses permissively joined by the prosecution (or by the court) may be severed upon motion by the defendant as a matter of right, with one exception: where the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others.

The provisions of section (b)(2) set out when and under what circumstances there may be a severance of cases consolidated under the compulsory joinder rule.

Severance of defendants is covered in section (c), dealing with the *Bruton* issue. *Bruton v. United States*, 391 U.S. 123 (1968). Subdivision (c)(1) contains provisions making severance unnecessary where no *Bruton* violation would follow, as would be true, for example, where the confessing codefendant testifies or where redaction eliminates any prejudice to the nonconfessing codefendant.

RULE 15. DEPOSITIONS

(a) When Taken.

(1) In General. A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may:

(A) grant the motion because of exceptional circumstances and in the interest of justice; and

(B) order that the witness produce at the deposition any designated, non-privileged book, paper, document, record, recording, or other material.

(2) Detained Witness. A witness who is detained for failure to give bail to appear to testify at a trial or hearing may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the deposition is subscribed.

(3) By Written Agreement of the Parties. The district attorney general and the attorney for the defendant may take the deposition of a witness by written agreement of the parties without the necessity of court approval.

(b) Notice of Taking.

(1) To the Parties. A party at whose instance a deposition is to be taken shall give every other party reasonable written notice of the deposition's time and location. The notice shall state each deponent's name and address. On its own initiative or on motion of a party receiving this notice of a deposition, the court may change the deposition's time or location for good cause.

(2) To the Custodial Officer. The officer having custody of a defendant shall be notified of the time, date, and location of the deposition.

(c) Defendant's Presence.

(1) Defendant in Custody. The officer who has custody of a defendant shall produce the defendant at the deposition and keep the defendant in the witness's presence during the examination unless:

(A) the defendant waives in writing the right to be present; or

(B) the defendant persists in conduct justifying exclusion from the place of the deposition after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) Defendant not in Custody. A defendant who is not in custody has the right, on request, to be present at the deposition, subject to any conditions imposed by the court. If the state provides notice of the deposition and tenders expenses as provided by Rule 15(d) but the defendant still fails to appear, the defendant–absent good cause–waives both the right to appear and any objection, based on that right, to the taking and use of the deposition.

(d) Expenses. If a deposition is taken at the instance of the state or of a defendant who is unable to pay the deposition expenses, the court may order the state to pay:

(1) the expense of the defendant and defendant's attorney for travel and subsistence to attend the deposition; and

(2) the cost of the deposition transcript.

(e) Manner and Place of Taking.

(1) In General. Unless these rules or the court provides otherwise, a deposition shall be taken and filed in the manner as a deposition in civil actions, except that:

(A) a defendant may not be deposed without his or her consent; and

(B) the scope and manner of examination and cross-examination are the same as allowed at trial.

(2) Deponent's Prior Statements. The state shall provide to the defendant or the defendant's counsel, for use at the deposition, any statement of the deponent which is in the state's possession and to which the defendant would be entitled at trial.

(3) Place of Taking. A deposition may be taken in a location authorized by Rule 17(e).

(f) Use as Evidence.

(1) In General. At the trial or in any hearing, a party may use a part or all of a deposition –otherwise admissible under the Tennessee Rules of Evidence–as substantive evidence if:

(A) the witness is unavailable as defined in Rule 15(i); or

(B) on motion and notice, the court–in the interest of justice with due regard to the importance of presenting the testimony of witnesses orally in open court–finds such exceptional circumstances exist that make it desirable to allow the deposition to be used.

(2) Contradiction or Impeachment. Any party may use any deposition to contradict or impeach the testimony of the deponent as a witness.

(3) Completeness. If only part of a deposition is offered in evidence by a party:

(A) an adverse party may require the party to offer all of the deposition that is relevant to the part offered; and

(B) any party may offer other parts of the deposition.

(g) Objections to Deposition Testimony. A party objecting to deposition evidence or testimony shall state the grounds for the objection during the deposition.

(h) Unavailability.

(1) Definition. Unavailability of a witness under Rule 15(f) means situations in which the declarant:

(A) is exempted by court ruling on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(B) persists in refusing to testify concerning the subject matter of the declarant's statement despite a court order to do so;

(C) demonstrates a lack of memory of the subject matter of the declarant's statement;

(D) is unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity; or

(E) is absent from the hearing and the party seeking to introduce the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

(2) Exception for Wrongdoing. A declarant is not unavailable as a witness if the declarant's exemption, refusal, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.

Advisory Commission Comment. Since the Code of 1858, Tennessee has long provided that the accused may, by order of the court, have the depositions of witnesses taken in the manner prescribed for taking depositions in civil cases, on notice to the district attorney general. Rule 15 extends to the state the same potential use of depositions.

Prior law was that depositions could only be taken by leave of the court, and not upon agreement of counsel without such a court authorization. *Curtis v. State*, 82 Tenn. 502 (1884). This rule modification–included as part of the 2006 revision–alters the prior law, and parties may now take depositions by written agreement.

Apart from depositions taken by agreement, the commission also wants to make clear that depositions are not meant to function as discovery devices in criminal cases. Their taking is meant to be tightly confined to those exceptional cases where the interests of justice require the taking for the preservation of testimony for use at trial, and not for discovery.

This rule conforms to its federal counterpart, except that the commission added section (f)(1) to permit the use of a deposition as proof under extraordinary circumstances in the interest of justice.

Paragraph (h)(1)(C) makes lack of memory a ground of unavailability in conformity with Evidence Rule 804(a)(3).

RULE 16. DISCOVERY AND INSPECTION

(a) Disclosure of Evidence by the State.

(1) Information Subject to Disclosure.

(A) Defendant’s Oral Statement. Upon a defendant’s request, the state shall disclose to the defendant the substance of any of the defendant’s oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the state intends to offer the statement in evidence at the trial;

(B) Defendant’s Written or Recorded Statement. Upon a defendant’s request, the state shall disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) the defendant’s relevant written or recorded statements, or copies thereof, if:

(I) the statement is within the state’s possession, custody, or control; and

(II) the district attorney general knows–or through due diligence could know–that the statement exists; and

(ii) the defendant’s recorded grand jury testimony which relates to the offense charged.

(C) Organizational Defendant. Upon a defendant’s motion, if the defendant is a corporation, limited liability company, limited liability partnership, partnership, association, or labor union, the court may grant the defendant discovery of relevant recorded testimony of any witness before a grand jury who was:

(i) at the time of the testimony, so situated as an officer or employee as to have been able legally to bind the defendant regarding conduct constituting the offense; or

(ii) at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant regarding that alleged conduct in which the witness was involved.

(D) Codefendants. Upon a defendant’s request, when the state decides to place codefendants on trial jointly, the state shall promptly furnish each defendant who has moved for discovery under this subdivision with all information discoverable under Rule 16(a)(1)(A), (B), and (C) as to each codefendant.

(E) Defendant's Prior Record. Upon a defendant’s request, the state shall furnish the defendant with a copy of the defendant's prior criminal record, if any, that is within the state’s possession, custody, or control if the district attorney general knows–or through due diligence could know–that the record exists.

(F) Documents and Objects. Upon a defendant’s request, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, if the item is within the state’s possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(G) Reports of Examinations and Tests. Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph the results or reports of physical or mental examinations, and of scientific tests or experiments if:

(i) the item is within the state's possession, custody, or control;

(ii) the district attorney general knows–or through due diligence could know–that the item exists; and

(iii) the item is material to preparing the defense or the state intends to use the item in its case-in-chief at trial.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (E), and (G) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

(3) Grand Jury Transcripts. This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rule 6 and Rule 16(a)(1)(A), (B), and (C).

(4) Failure to Call Witness. The fact that a witness's name is furnished under this rule is not grounds for comment on a failure to call the witness.

(b) Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If a defendant requests disclosure under subdivision (a)(1)(F) or (G) of this rule and the state complies, then the defendant shall permit the state, on request, to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to introduce the item as evidence in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(F) or (G) of this rule and the state complies, the defendant shall permit the state, on request, to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to introduce the item as evidence in the defendant's case-in-chief at trial; or

(iii) the defendant intends to call as a witness at trial the person who prepared the report, and the results or reports relate to the witness's testimony.

(2) Information Not Subject to Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of:

(A) reports, memoranda, or other internal defense documents made by the defendant or the defendant's attorneys or agents in connection with the investigation or defense of the case; or

(B) a statement made by the defendant to the defendant's agents or attorneys or statements by actual or prospective state or defense witnesses made to the defendant or the defendant's agents or attorneys.

(3) Failure to Call Witness. The fact that a witness's name is on a list furnished under this rule is not grounds for comment on a failure to call the witness.

(c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial shall promptly disclose its existence to the other party, the other party's attorney, or the court if:

(1) the evidence is subject to discovery or inspection under this rule, and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery.

(1) Protective and Modifying Orders. At any time, for good cause shown, the court may deny, restrict, or defer discovery or inspection, or grant other appropriate relief. On a party's motion, the court may permit the party to make such showing, in whole or in part, by written statement that the court will inspect ex parte. If relief is granted following an ex parte submission, the court shall preserve under seal in the court records the entire text of the party's written statement.

(2) Failure to Comply with a Request. If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms or conditions;

(B) grant a continuance;

(C) prohibit the party from introducing the undisclosed evidence; or

(D) enter such other order as it deems just under the circumstances.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

Advisory Commission Comment. This rule substantially conforms to the new federal discovery Rule 16, and was adopted by the commission as a middle-ground reciprocal rule.

The reference in (a)(1)(B) to the discovery of recorded grand jury testimony of a defendant will not have the same utility in state court, because under state procedure a prospective defendant

seldom is required to testify before a grand jury. The commission left this language in the rule because it might be useful in connection with the operation of Rule 6(j)(5) and (6), the immunity provisions. Grand jury proceedings in Tennessee are not presently regularly recorded, but could be.

The rule is always triggered by the defendant; where the defendant requests disclosure, the reciprocal rights of the state come into play.

The commission agrees that the defendant shall still receive advance notice of the names of the state's witnesses, as is now provided by T.C.A. §§ 40-13-107, 40-17-106.

It is intended that section (a)(1)(F), as it relates to the inspection of tangible objects, shall mean that in controlled substance cases the defendant upon request must be furnished a sufficient quantity of the substance to permit a scientific examination for identification purposes. The defendant has this right under existing case law. The commission considers that a meaningful "inspection" of a controlled substance means a scientific testing of a sample thereof. Results are subject to discovery by the state under section (b)(1)(B).

The continuing duty to disclose set out in section (c), and the flexibility of the court's regulation of discovery as set out in section (d), are deemed to be very important.

Rules 12.1 and 12.2, although not technically discovery rules, are closely related.

While we have heretofore had a substantial body of statutory and case law providing for discovery by the defendant, this rule for the first time provides the state with reciprocal discovery.

This rule is not the exclusive procedure for obtaining discovery, since discovery required by due process is not expressly structured into the rule. For example, for the rule as to the state's duty to disclose exculpatory evidence, *see Brady v. Maryland*, 373 U.S. 83 (1963). The voluntary disclosure of evidence not within the ambit of this rule is encouraged by the commission. Under section (a)(1)(A), the commission originally provided that the defendant might obtain all of his or her statements, whether made to a law-enforcement official or to a lay witness. However, this was amended to conform to the federal rule, being limited by the language, "in response to interrogation by any person then known to the defendant to be a law-enforcement officer."

The statements of a codefendant discoverable by the codefendant are likewise made discoverable by the defendant, if the codefendant and the defendant are scheduled to be tried jointly. Such statements of a codefendant may be reviewed to determine whether or not a severance under Rule 14(c) need be sought.

The procedure provided in 16(a)(1)(E) conforms to T.C.A. § 40-17-120. It is similar to the federal Jencks Act (18 U.S.C. § 3500), but broader. This rule allows the defendant and the state to request a witness's statement from the presenting adverse party after the witness has testified on direct examination. Although it is technically a discovery device, its most important function is to promote the integrity of the fact-finding process, and is related to the due process requirements of *Brady* and its progeny. The commission deliberately did not incorporate that provision of subdivision (e)(3) of the federal Jencks Act, which applies to statements of

witnesses before a grand jury, and such statements are not meant to be obtainable hereunder simply because a grand jury witness testifies for the state. Such statements may only be obtained under the limited provisions of existing law now embodied in Rule 6(k)(2).

RULE 17. SUBPOENA

(a) Issuance. A subpoena shall be issued by a clerk or other authorized court officer, who shall sign it but otherwise leave it blank. The party requesting the subpoena shall fill in the blanks before the subpoena is served.

(b) Defendants Unable to Pay. On a defendant's ex parte application, the court shall order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness fees and that the presence of the witness is necessary for an adequate defense. If the court orders the subpoena to be issued, the process costs and witness fees shall be paid in the same manner as those paid for state witnesses.

(c) Witnesses. A subpoena shall state the court's name and the title of the proceeding and command each person to whom it is directed to attend and give testimony at the time and place and for the party the subpoena specifies.

(d) Documents and Objects. A subpoena may order a person to produce the books, papers, documents, or other objects the subpoena designates.

(1) Production to Permit Inspection. The court may direct that the designated items be produced in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

(2) Compliance Unreasonable. On motion made promptly and in any event by the time specified in the subpoena for compliance therewith, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may condition denial of the motion on the advancement by the party in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or other objects.

(e) Depositions; Place of Examination.

(1) Issuance. A court order to take a deposition authorizes the clerk of the court in which the proceeding is pending to issue subpoenas for the persons named or described in the deposition order.

(2) Place of Deposition. A Tennessee resident may be required to give a deposition only in the Tennessee county in which the person resides, is employed, transacts the person's business in person, or at such other convenient place the court orders. A nonresident of Tennessee may be required to attend only in the Tennessee county where the nonresident is served with subpoena or at such other place the court orders.

(f) Service.

(1) Method of Service. A subpoena may be served by any person authorized to serve process, or the witness may acknowledge service in writing on the subpoena. The server shall deliver or offer to deliver a copy of the subpoena to the person to whom it is directed or leave a copy with an adult occupant of the person's usual residence.

(2) Service Within State. A subpoena requiring the attendance of a witness at a hearing or trial may be served any place within Tennessee.

(g) Contempt. When a subpoena is served on a person, the court issuing the subpoena may deem the person's refusal to obey the subpoena to be contempt of court unless the person has an adequate excuse.

(h) Information not Subject to Subpoena. Statements by witnesses or prospective witnesses may not be subpoenaed from the state or the defendant under this rule, but are subject to production only in accordance with the provisions of Rule 26.2.

Advisory Commission Comment. This rule is an adaptation of the federal rule. The first provision of section (e)(2) is taken from the Tennessee Rules of Civil Procedure, Rule 45.04(2). The last clause of the last sentence in section (f), permitting service of a subpoena by leaving a copy at the prospective witness's usual place of residence, in the hands of an adult occupant, is a procedural product of the commission and essentially follows Tennessee civil rules. Rule 17(h) is similar to its federal counterpart. This provision only makes it clear that the proper method to secure witness statements from the opposing side–either at trial or at a pretrial hearing under Rule 12(b)–is as set forth in Rule 26.2.

RULE 17.1. PRETRIAL CONFERENCE

(a) Timing; Purposes. At any time after the filing of the indictment, presentment, or information, the court–on a party's motion or on its own initiative–may order one or more pretrial conferences to consider matters that will:

(1) promote a fair and expeditious trial; and

(2) to the extent feasible, minimize the time that jurors are not directly involved in the trial or deliberations.

(b) Memorandum of Result. At the conclusion of the conference, the court shall file a memorandum of the matters resolved.

(c) Admissibility of Defendant's Admissions. No admissions made by the defendant or the defendant's attorney at the conference may be used against the defendant unless the admissions are in writing and signed by the defendant and the defendant's attorney.

(d) Exception for Unrepresented Defendant. This rule shall not be invoked in the case of a defendant who is not represented by counsel.

Advisory Commission Comment. This rule, taken from the federal rules, provides the courts with an excellent tool for expediting trials.

Rule 17.1(a)(2) is designed to encourage judges to make serious efforts to reduce the time that jurors are required to be at the courthouse when not directly involved in the case. Pretrial conferences may greatly facilitate the efficient use of juror time by encouraging the pretrial resolution of evidentiary and other issues and the early preparation of jury instructions and juror notebooks.

V. VENUE

RULE 18. VENUE

(a) County of Offense. Except as otherwise provided by statute or by these rules, offenses shall be prosecuted in the county where the offense was committed.

(b) Multiple Counties. If one or more elements of an offense are committed in one county and one or more elements in another, the offense may be prosecuted in either county.

(c) Boundary. Offenses committed on the boundary of two (2) or more counties may be prosecuted in either county.

(d) All or Partly Outside State. In circumstances that give Tennessee jurisdiction to prosecute the offender, the following rules apply:

(1) An offense committed in part outside Tennessee may be prosecuted in any county in which an element of the offense occurs.

(2) An offense committed wholly outside Tennessee may be prosecuted in any Tennessee county in which the offender is found.

Advisory Commission Comment. Subdivision (a) is derived from Art. 1, § 9, Constitution of Tennessee; T.C.A. § 40-104 [now repealed]; and § 40-3-101 of the Law Revision Commission's proposed code.

RULE 19. [RESERVED]

RULE 20. [RESERVED]

RULE 21. CHANGE OF VENUE

(a) Grounds for Change. The court may change venue of a criminal case on the defendant's motion or on its own initiative with the defendant's consent. The court should order a venue change when a fair trial is unlikely because of undue excitement against the defendant in the county where the offense was committed or for any other cause.

(b) Motion and Affidavit. A defendant's motion for change of venue shall be accompanied by affidavit(s) averring facts constituting the alleged undue excitement or other cause on which the motion is based. The state may file counter-affidavits.

(c) Timing of Motion. A motion for a change of venue shall be made at the earliest date after which the cause for the change of venue is alleged to have arisen.

(d) Location of New Venue.

(1) Multi-County Circuit. In a multi-county judicial circuit, the court shall change the venue to the nearest county in the judicial circuit in which the prosecution is pending where the cause for change of venue does not exist. If the same cause for change of venue exists in all other counties in the judicial circuit, the court shall change venue to the nearest county where the same cause for change of venue does not exist.

(2) Single-County Circuit. In a single-county judicial circuit, the court shall change venue to the nearest county where the same cause for change of venue does not exist.

(3) Two Possible Counties. If the court finds that there are two (2) or more adjoining or approximately equivalent counties to which the case might be removed under the provisions of this rule, the court shall determine where the case is to be heard.

(e) Procedure After Venue Change Ordered.

(1) Duties of Clerk in Sending Court. After the court orders a change of venue, the clerk of that court shall:

(A) make a complete transcript of the record and proceedings in the case; and

(B) transmit the transcript, including the indictment and all other papers on file, to the clerk of the receiving court.

(2) Duties of Clerk in Receiving Court. The clerk of the receiving court shall enter the transcript from the sending court on the minutes of the receiving court.

(3) Defendant in Custody. If the defendant is in the custody of the sending county's sheriff, the sheriff shall–on order of the court–transfer and deliver the defendant to the sheriff of the receiving county to which the venue is changed. The sheriff of the receiving county shall receive and detain the defendant in custody until legally discharged.

(4) Receiving Court. The receiving court:

(A) shall take the case and proceed to trial, judgment, and execution, in all respects as if the indictment or presentment had been returned to that court;

(B) may release the defendant on bail or recognizance; and

(C) may enforce the attendance of the prosecutor and all witnesses by recognizance or bail.

(f) Fines, Forfeitures, and Fees After Venue Change. When venue is changed, all fines and forfeitures in such cases go to the county in which the indictment was returned, and judgment shall be rendered accordingly. The fees of all jurors and witnesses, on being properly certified by the clerk of the receiving court, are a charge to the county in which the indictment or presentment was returned, in like manner as if the trial had not been removed.

Advisory Commission Comment. This rule was derived from T.C.A. § 40-2201 [now repealed] et seq.; the Law Revision Commission's proposed code, § 40-3-105; and Smith-Hurd Illinois Ann. Stat. Ch. 38, § 114-6(b). This rule does not allow the defendant to choose the county to which the case is removed.

RULE 22. [RESERVED]

VI. TRIAL

RULE 23. TRIAL BY JURY

(a) Right to Jury Trial. In all criminal prosecutions except for small offenses, the defendant is entitled to a jury trial unless waived.

(b) Waiver.

(1) Timing. The defendant may waive a jury trial at any time before the jury is sworn.

(2) Procedures. A waiver of jury trial must:

(A) be in writing;

(B) have the consent of the district attorney general; and

(C) have the approval of the court.

Advisory Commission Comment. While the state does not have a constitutional right to a trial by jury, this rule requires the consent of the district attorney general to any waiver of the defendant's right. The court must also approve the waiver. This rule is applicable in general sessions court, in the context of a defendant's offer to waive trial by jury.

RULE 24. TRIAL JURORS

(a) Initial Actions in Jury Selection.

(1) By Court. The court shall:

(A) cause the prospective jurors to swear or affirm to answer truthfully the questions they will be asked during the selection process;

(B) identify the parties and their counsel; and

(C) briefly outline the nature of the case.

(2) By Counsel. At or near the beginning of jury selection, the court shall permit counsel to introduce themselves and make brief, non-argumentative remarks that inform the potential jurors of the general nature of the case.

(b) Questioning Potential Jurors.

(1) Questioning Jurors by Court and Counsel. The court may ask potential jurors appropriate questions regarding their qualifications to serve as jurors in the case. It shall permit the parties to ask questions for the purpose of discovering bases for challenge for cause and intelligently exercising peremptory challenges.

(2) Questioning Outside Presence of Other Jurors. On motion of a party or its own initiative, the court may direct that any portion of the questioning of a prospective juror be conducted out of the presence of the tentatively selected jurors and other prospective jurors.

(c) Challenges for Cause.

(1) Procedures. After examination of any juror, the judge shall excuse that juror from the trial of the case if the court is of the opinion that there are grounds for challenge for cause. After the court has tentatively determined that the jury meets the prescribed qualifications, counsel may conduct further examination and, alternately, may exercise challenges for cause.

(2) Grounds. Any party may challenge a prospective juror for cause if:

(A) Cause Provided by Law. There exists any ground for challenge for cause provided by law;

(B) Exposure to Information. The prospective juror's exposure to potentially prejudicial information makes the person unacceptable as a juror. The court shall consider both the degree of exposure and the prospective juror's testimony as to his or her state of mind. A prospective juror who states that he or she will be unable to overcome preconceptions is subject to challenge for cause no matter how slight the exposure. If the prospective juror has seen or heard and remembers information that will be developed in the course of trial, or that may be inadmissible but is not so prejudicial as to create a substantial risk that his or her judgment will be affected, the prospective juror's acceptability depends on whether the court believes the testimony as to

impartiality. A prospective juror who admits to having formed an opinion about the case is subject to challenge for cause unless the examination shows unequivocally that the prospective juror can be impartial.

(d) Exercising Peremptory Challenge. After the court conducts its initial examination and seats a tentative group of jurors not excluded for cause, the following procedure shall be followed until a full jury has been selected from those jurors and accepted by counsel:

(1) At each round of peremptory challenges, counsel shall submit simultaneously to the court either a blank sheet of paper or a sheet of paper challenging one or more jurors in the group of the first twelve (or more if additional jurors are seated under the single entity process of Rule 24(f)(2)(A)) jurors who have been seated. Neither party shall make known the fact that the party has not challenged a juror.

(2) Replacement jurors will be seated in the panel of twelve (or more if additional jurors are seated under the single entity process of Rule 24(f)(2)(A)) in the order of their selection.

(3) If necessary, additional replacement jurors will be examined for cause and, after passed, counsel will again submit simultaneously, and in writing, the name of any juror in the group of twelve (or more if additional jurors are seated under the single entity process of Rule 24(f)(2)(A)) that counsel elects to challenge peremptorily. Peremptory challenges may be directed to any member of the jury; counsel are not limited to using such challenges against replacement jurors.

(4) Alternate jurors are selected in the same manner, unless the single entity process of Rule 24(f)(2)(A) is used.

(5) The trial judge shall keep a list of those challenged. If the same juror is challenged by both parties, each party is charged with the challenge. The trial judge shall not disclose to any juror the identity of the party challenging the juror.

(e) Number of Peremptory Challenges.

(1) Death Penalty. If the offense charged is punishable by death, each defendant is entitled to fifteen peremptory challenges and the state is entitled to fifteen peremptory challenges for each defendant.

(2) Imprisonment More Than Year. If the offense charged is punishable by imprisonment for more than one year, each defendant is entitled to eight peremptory challenges and the state is entitled to eight peremptory challenges for each defendant.

(3) Imprisonment Less Than Year or Fine. If the offense charged is punishable by imprisonment for less than one year or by fine or both, each side is entitled to three peremptory challenges for each defendant.

(4) Additional Jurors. For each additional juror selected pursuant to Rule 23(f), each side is entitled to one peremptory challenge for each defendant. Such additional peremptory challenges may be used against any regular or additional juror.

(f) Additional Jurors. Before jury selection begins, the court may call and impanel one or more jurors in addition to the regular jury of twelve persons. The following procedures apply:

(1) Same as Regular Jurors. The additional jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors.

(2) Methods of Impaneling Additional Jurors. The trial court may use either of the following methods to select and impanel additional jurors:

(A) Single Entity. During jury selection and trial of the case, the court shall make no distinction as to which jurors are additional jurors and which jurors are regular jurors. Before the jury retires to consider its verdict, the court shall select by lot the names of the requisite number of jurors to reduce the jury to a body of twelve or such other number as the law provides. A juror who is not selected to be a member of the deliberating jury shall be discharged when that jury retires to consider its verdict.

(B) Separate Entities. Following the selection of the jury of twelve regular jurors, the additional jurors shall be selected and impaneled as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who become unable or disqualified to perform their duties prior to the time the jury retires to consider its verdict. An alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict.

(g) Admonitions. The court shall give the prospective jurors appropriate admonitions regarding their conduct during the selection process. After jurors are sworn, the court shall also give them appropriate admonitions regarding their conduct during the case. In both situations these shall include admonitions:

(1) not to communicate with other jurors or anyone else regarding any subject connected with the trial;

(2) not to form or express any opinion about the case until it is finally submitted to the jury;

(3) to report promptly to the court:

(A) any incident involving an attempt by any person improperly to influence any jury member; or

(B) a juror’s violation of any of the court's admonitions;

(4) not to read, hear, or view any news reports concerning the case; and

(5) to decide the case solely on the evidence introduced in the trial.

(h) List of Prospective Jurors. On request, the parties shall be furnished with a list indicating for each member of the jury panel:

(1) the member’s name, address, occupation, spouse’s name and occupation; and

(2) whether each member has served previously on a criminal court jury. Information about

previous jury experience need not be provided prior to the day of trial.

Advisory Commission Comment. This rule assures counsel the right to conduct at least part of the voir dire examination of prospective jurors. It also expressly reflects the trial court's authority to sequester prospective and tentatively selected jurors from a prospective juror being individually questioned.

A prospective juror who has formed or expressed an opinion as to the merits of the case may still be qualified to serve, but only upon an unequivocal showing of impartiality. The commission disapproves of questions tending to lead the prospective juror or suggest partiality in the first instance, and also disapproves of that procedure in "rehabilitating" the prospective juror into vocalizing impartiality. Such a prospective juror shall be held to be qualified only upon a truly unequivocal showing of impartiality.

The procedure for exercising peremptory challenges in writing is designed to insulate parties and counsel from the public exercise of a peremptory challenge. Counsel will be expected to honor the spirit of the rule and to maintain the privacy of their respective peremptory challenges.

The number of peremptory challenges is the same as that provided under present law.

The identity of and minimal information about each member of the jury panel available upon request should save time by shortening the voir dire.

Subdivision (d) permits trial judges to seat more than twelve prospective jurors for purposes of voir dire–possibly but not necessarily a number equal to twelve plus the number of peremptories to each side and the number of alternates available. All of these persons in the jury "universe" could be questioned at once. Note that if the “separate entities” procedure of Rule 24(f)(2)(B) is used, challenges are initially made to only the first twelve seated. Note also that under this procedure "replacement jurors will be seated in the panel of twelve in the order of their selection."

For example, a judge might chose to impanel thirty-two prospects. Each would be assigned a number. If during the initial round of peremptory challenges jurors number 3 and 6 are excused, juror 13 would replace 3 and juror 14 would replace 6. By this method lawyers would know who is coming up next.

Subdivision (e) gives the state the same number of challenges as the accused. For example, in most felony trials each side would have eight strikes. This amendment conforms the rule to T.C.A. § 40-18-118.

Subdivision (f) deletes the earlier limitation on the number of alternate jurors. Now more than four alternates can be selected, which may be necessary for protracted trials.

Rule 24(a)(2) gives counsel the right to make brief, non-argumentative statements near the beginning of the jury selection process. These may be made before selection begins or when counsel is first permitted to ask questions of prospective jurors. During these remarks counsel should introduce themselves and briefly describe the nature of the case. This process should give jurors a better sense of the participants in the trial and the nature of the responsibility the jurors may be chosen to undertake.

Rule 24(f)(2)(A) gives the court the option of using a procedure that eliminates the distinction between regular and alternate jurors. This procedure should facilitate juror attention to the evidence. If the court decides to use extra jurors in case a regular juror becomes unable to serve, the additional juror is combined with the other jurors for all purposes during the trial. Thus, if a court decides to use twelve jurors plus two additional jurors, all fourteen jurors are considered to be the jurors during the entire trial. Under this new rule, before the jury retires to deliberate the court will randomly deselect the additional jurors, leaving the desired number of jurors, ordinarily twelve. The deselected jurors are then discharged when the remaining jurors retire to deliberate.

Each side is given one peremptory challenge for each additional juror. Since under this model both regular and additional jurors are considered as part of a single jury, peremptory challenges may be used against any such juror, a process commonly known as “backstriking.” This procedure provides counsel with considerable flexibility in the exercise of peremptory challenges.

RULE 24.1 JUROR INFORMATION

(a) Notetaking.

(1) Notetaking Allowed. The court shall instruct jurors that they may take notes during the trial and deliberations.

(2) Materials. The court shall provide suitable materials for this purpose.

(3) Access to Notes. Jurors shall have access to their notes during recesses and deliberations.

(4) Destruction of Notes. After the jury has rendered a verdict, the notes shall be collected by court personnel who shall destroy them promptly.

(b) Notebooks.

(1) Allowed in Court’s Discretion. When the court deems it helpful in a particular case, jurors may be provided with notebooks to use in collecting and organizing appropriate materials, including items such as jury instructions, copies of written and other exhibits, and the juror's own notes.

(2) Participation by Counsel. Counsel should be apprised of this procedure and invited to prepare exhibits and other materials in a way that facilitates their inclusion in the jurors' notebooks.

(3) Disposition of Notebooks. At the end of the trial, the notebooks shall be collected by court personnel and their contents destroyed, unless the court instructs to the contrary.

(c) Juror Questions of Witnesses. In the court’s discretion, the court may permit a juror to ask a question of a witness. The following procedures apply:

(1) Written Submission of Questions. The juror shall put the question in writing and submit it to the judge through a court officer at the end of a witness' testimony. A juror's question shall be anonymous and the juror's name shall not be included in the question.

(2) Procedure After Submission. The judge shall review all such questions and, outside the hearing of the jury, shall consult the parties about whether the question should be asked. The judge may ask the juror's question in whole or part and may change the wording of the question before asking it. The judge may permit counsel to ask the question in its original or amended form in whole or part.

(3) Jury Instructions. When juror questions are permitted, the court shall instruct jurors early in the trial about the mechanics of asking a question and to give no meaning to the fact that the judge chose not to ask a question or altered the wording of a question submitted by a juror.

(4) Retaining Questions for Record. All jurors' questions–whether approved or disapproved by the court–shall be retained for the record.

Advisory Commission Comment. This rule permits three procedures designed to assist jurors in the effective performance of their important functions.

Rule 24.1(a) specifically states that jurors are allowed to take notes during the trial and to use those notes during deliberations. The court is to provide the necessary materials and to collect and destroy the notes at the end of the trial. The premise of this rule is that jurors, like judges and lawyers, may find it helpful to take notes during the trial in order to assist in remembering the evidence.

Rule 24.1(b) authorizes the court, in its discretion, to provide jurors with notebooks to use in collecting and organizing the various materials presented to the jury. The notebook might include such items as jury instructions, copies of exhibits (photographs, charts, etc.), basic definitions of words used in the trial, and any other appropriate materials.

The court is given the discretion whether to use notebooks. The court might want to ask counsel to assist in the preparation of the notebooks. The content and financial aspects of the notebooks might be discussed and resolved during pretrial conference. After the trial, the court may collect the notebooks and destroy any contents that will not be used again, although the actual disposition is left to the court's discretion.

Rule 24.1(c) gives the court the discretion to allow jurors to ask questions of witnesses. This rule is designed to assist jurors in their understanding of evidence and to make them feel more involved in the trial process. The procedure in this rule should ensure that improper questions are not propounded to witnesses. After a witness has completed testimony, a juror desiring to ask a question must submit that question in writing to a court officer who will give it to the judge. The question is submitted to the judge without identifying the juror who asked it. The judge then screens the question. Counsel shall be invited to comment on the propriety of the question out of the hearing of the jury. The court is given the discretion to reject or ask the question in whole or in part, to rephrase it, and to have counsel ask the question of the witness. If necessary, the court may accompany the question or the rejection of the question with appropriate jury instructions. All questions are to be retained for the record.

RULE 25. DISABILITY OF JUDGE

(a) During Trial. Any judge regularly presiding in or who is assigned to a court may complete a jury trial if:

(1) the judge before whom a jury trial has commenced is unable to proceed because of death, sickness, or other disability; and

(2) the judge completing the trial certifies that he or she has become familiar with the record of the trial.

(b) After Verdict of Guilt.

(1) In General. After a verdict of guilty, any judge regularly presiding in or who is assigned to a court may complete the court's duties if the judge before whom the trial began cannot proceed because of absence, death, sickness, or other disability.

(2) Granting a New Trial. The successor judge may grant a new trial when that judge concludes that he or she cannot perform those duties because of the failure to preside at the trial or for any other reason.

Advisory Commission Comment. This rule is similar to the current federal rule and is also what the Law Revision Commission proposed in its §§ 40-1941, 40-1942.

RULE 26. [RESERVED]

RULE 26.1. [RESERVED]

RULE 26.2. PRODUCTION OF STATEMENTS OF WITNESSES

(a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

(b) Production of Statement.

(1) Entire Statement. If the entire statement relates to the subject matter of the witness's testimony, the court shall order that the statement be delivered to the moving party.

(2) Redacted Statement.

(A) Delivery to Court. If the other party claims that the statement contains matter that does not relate to the subject matter of the witness's testimony, the court shall order that it be delivered to the court in camera.

(B) Redaction of Unrelated Portions. Upon inspection, the court shall redact the portions of the statement that do not relate to the subject matter of the witness's testimony. The remaining parts of the statement shall be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the state. In the event of a conviction and an appeal by the defendant, this preserved portion shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(c) Recess for Examination of Statement. The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.

(d) Sanction for Failure to Produce Statement. If the party who called the witness disobeys an order to deliver a statement, the court shall strike the witness's testimony from the record and order the trial to proceed. If the attorney for the state disobeys the order, the court shall declare a mistrial if required in the interest of justice.

(e) Production of Statements at Pretrial Hearing. Except as otherwise provided by law, this rule shall apply at a motion hearing under Rule 12(b).

(f) Definition of "Statement." As used in this rule, a witness's "statement" means:

(1) A written statement that the witness makes and signs, or otherwise adopts or approves; or

(2) A substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in a stenographic, mechanical, electrical, or other recording or a transcription of such a statement.

Advisory Commission Comment. The language of Rule 26.2 is similar to the language in Rule 26.2 of the Federal Rules of Criminal Procedure. There are, however, two differences that deserve comment.

First, the Committee deliberately did not incorporate that provision of subdivision (e)(3) of the federal Jenck's Act, 18 U.S.C. § 3500, which applies to statements of witnesses before a grand jury, and such statements are not meant to be obtainable simply because a grand jury witness testifies for the state. Such statements may only be obtained under the limited provisions of existing law now contained in Rule 6(k)(2).

Second, Rule 26.2(e) now makes it clear that this rule applies not only to trial situations, but also to pretrial testimony such as might be given at a suppression hearing. There would be little logic in requiring statement production only at trial, and not at pretrial hearings where testimony as to

the facts of the case is being given under oath. This provision is similar to language found in Rule 12(i) of the Federal Rules of Criminal Procedure, but the Tennessee rules commission elected to treat all witness statements in one rule. However, the Tennessee rule applies to all pretrial motions under Rule 12(b). Further, the Federal rule treats law enforcement officials as witnesses called by the state, but the commission elected not to adopt this provision. Obviously, Rule 26.2(b) applies to such pretrial motion hearings. Thus, only part of a witness' statement may be relevant to the hearing. The remainder may then be disclosed at trial under the provisions of Rule 26.2(a).

The commission desires to make clear that this entire rule in no way applies to a preliminary hearing or any other hearing conducted in general sessions court. Rather, Rule 26.2 applies only in criminal court.

RULE 26.3 ORDER OF EXPERT TESTIMONY

In a trial involving conflicting expert testimony and with the consent of all parties, the court may reorder the ordinary proof process to increase the likelihood that jurors will be able to comprehend and evaluate expert testimony.

Advisory Commission Comment. This rule is designed to assist jurors in understanding conflicting expert testimony by providing judges and lawyers with considerable flexibility in the scheduling and mode of that testimony. There are many possible methods that can be used pursuant to this rule. On rare occasions, it may be helpful if expert testimony on the same subject be given in the same block of time rather than separated by days or weeks and given during each party’s proof process. For example, in a criminal homicide case where both sides will present expert testimony on causation, jurors may benefit if the prosecution’s causation experts testify, followed immediately by the defendant’s causation experts. This procedure may give the jurors a better way of resolving the critical issue of causation. Because of the tactical, financial, scheduling, and procedural issues raised by this new procedure, it can only be utilized with the consent of the court and all parties.

RULE 27. [RESERVED]

RULE 28. INTERPRETERS

The court may appoint an interpreter pursuant to section 3 of Tennessee Supreme Court Rule 42. Reasonable costs associated with an interpreter's services may be assessed against the indigent defense fund pursuant to Tennessee Supreme Court Rule 13 if the party is indigent and is involved in a proceeding in which he or she has a statutory or constitutional right to appointed counsel. In all other proceedings the court may fix the reasonable compensation of an interpreter, and such compensation shall be taxed as costs.

Advisory Commission Comment [2006]. This revised rule distinguishes between indigent and

other litigants. It also cross-references the procedure judges should follow in selecting interpreters pursuant to Supreme Court Rule 42.

RULE 29. MOTION FOR JUDGMENT OF ACQUITTAL

(a) Directed Verdict Abolished. Motions for directed verdict are abolished and are replaced by motions for judgment of acquittal.

(b) Grounds for Judgment of Acquittal. On defendant's motion or its own initiative, the court shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, presentment, or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

(c) Proof After Denial of Motion. If–at the close of the state's proof–the court denies a defendant's motion for judgment of acquittal, the defendant may offer evidence without having reserved the right to do so.

(d) Reserving Decision on Motion at Close of Evidence. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury, and decide the motion:

(1) before the jury returns a verdict;

(2) after it returns a verdict of guilty; or

(3) after it is discharged without having returned a verdict.

(e) Motion After Guilty Verdict or Discharge of Jury.

(1) Timing of Motion. If the jury returns a verdict of guilty, a defendant may move for a judgment of acquittal, or renew such a motion, within 30 days of the date the order of sentence is entered or within such further time as the court sets during the 30-day period. If the jury is discharged without having returned a verdict, the 30-day period begins to run from the date the jury is discharged.

(2) Setting Aside Guilty Verdict. If the defendant moves for a judgment of acquittal after the jury returns a verdict of guilty, the court may set aside the guilty verdict, dispose of a motion for new trial, and grant the judgment of acquittal. The state may appeal when the court sets aside a verdict of guilty and enters a judgment of acquittal.

Advisory Commission Comment. Thirty days are allowed after the date the order of sentence is entered within which to move for a judgment of acquittal. This time period was selected to conform to that allowed for filing a motion for a new trial, and it is permissible to file the two together; indeed, the commission anticipates that this will be the case. The same time period of thirty days applies to motions for judgment of acquittal, motions for new trials, and motions in arrest of judgment. They may be filed in any order or together, without any waiver, but all must come within the thirty days after the date the order of sentence is entered.

RULE 29.1. CLOSING ARGUMENT

(a) State’s First Closing Argument; Waiver.

(1) State’s First Closing Argument. At the close of the evidence, the state has the right to make the first closing argument to the trier of facts.

(2) Waiver. If the state desires that all closing argument be waived, it may offer to waive such argument. If the defendant agrees, then no argument will be made. The state may not waive the first closing argument unless all closing argument is waived.

(3) Scope of State’s Opening Argument. The state's first closing argument shall cover the entire scope of the state's theory.

(b) Defendant’s Closing Argument; Waiver

(1) Defendant Argues after State. Each defendant shall be allowed to make a closing argument following the state’s first closing argument. If the defendant waives this closing argument, the state is not permitted to make a final closing argument.

(2) Scope of Defendant’s Argument. Defendant's closing argument may address any relevant and proper subject and is not limited to matters actually argued by the state.

(c) State’s Final Closing Argument.

(1) State’s Final Closing Argument. The state shall be allowed a final closing argument following the defendant’s closing arguments, unless the defendant has waived closing argument or the state has waived all argument or its final argument.

(2) Scope of State’s Final Closing Argument. The state's final closing argument is limited to the subject matter covered in the state's first closing argument and the defendant's intervening argument.

(d) Court’s Discretion to Control Closing Arguments.

(1) Discretion to Regulate Arguments. The court has discretion to set:

(A) the number of closing arguments permitted on behalf of the state beyond the first and final closing arguments;

(B) the number of closing arguments in excess of one permitted each defendant; and

(C) the order and length of closing arguments.

(2) Policies. The court shall allow adequate but not excessive time for closing arguments to make a full presentation of the theory of the case. If more than two arguments are made for the state, the court shall ensure that no defendant is deprived of the opportunity to answer a new argument

made by the state against that defendant. It is the purpose of this rule to ensure that all argument be waived only with the consent of both sides; that the defendant shall be permitted to waive all remaining argument after the state's first closing argument; and that while the state, having the burden of proof, has the right to open and close the argument, this right shall not be exercised in such way as to deprive the defendant of the opportunity to fully answer all state argument. The court, on motion, shall enforce this purpose.

Advisory Commission Comment. This rule reflects the generally-followed philosophy of controlling summation in this state. However, the commission is aware of variances in local practice and therefore deems it necessary to spell out both the philosophy and the mechanics in order to assure fairness and uniformity of procedure.

RULE 29.2. INTERIM COMMENTARY

During the course of the trial, the court may permit counsel to address the jury to assist jurors in understanding the evidence that has been presented or will be presented. The trial court may place reasonable time limits on such statements and shall permit all counsel to respond to the remarks of any one lawyer.

Advisory Commission Comment. This rule gives the court the discretion to allow counsel to speak directly to the jury during the trial in order to assist the jurors in understanding the context of the evidence. For example, the court may allow counsel to make a short explanation of what legal issue the next two witnesses will address. The court is given the discretion to place time and content limits on these statements, but each counsel must be given a chance to respond to the interim commentary of any lawyer.

RULE 30. INSTRUCTIONS

(a) Special Requests.

(1) Filing Request. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court may also entertain requests for instructions at any time before the jury retires to consider its verdict.

(2) Copy to Adversary Counsel. Counsel requesting a jury instruction shall furnish a copy to adversary counsel at the same time the request is filed with the court.

(3) Decision on Request. Prior to counsels' closing jury arguments, the court shall inform counsel of its proposed action on:

(A) the requests for jury instructions; and

(B) any other portion of the instructions concerning which inquiries are made.

(b) Objections to Instructions. After the court instructs the jury, the parties shall be given an opportunity to object–out of hearing of the jury–to the content of an instruction that was given or to the failure to give a requested instruction. Counsel's failure to object does not prejudice the right of a party to assign the basis of the objection as error in a motion for a new trial.

(c) Form, Use, and Disposition of Instructions. In the trial of all felonies–except where pleas of guilty have been entered–every word of the judge's instructions shall be reduced to writing before being given to the jury. The written charge shall be read to the jury and taken to the jury room by the jury when it retires to deliberate. The jury shall have possession of the written charge during its deliberations. After the jury's deliberations have concluded, the written charge shall be returned to the judge and filed with the record, but it need not be copied in the minutes.

(d) Timing of Jury Instructions.

(1) At beginning of trial. Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the general nature of the case, and the elementary legal principles that will govern the proceeding.

(2) Before and After Closing Argument. The court may instruct the jury on the applicable law before or after closing argument. After closing argument the court may repeat all or part of the instructions that were given before closing argument. The court may also give additional instructions concerning organizational and related matters after closing argument.

Advisory Commission Comment. This rule generally assures that counsel will know what the charge will contain before making the summation argument to the jury.

The requirement that a written charge be used in felony cases, which must be taken by the jury to the jury room, returned to the judge, and filed with the other papers, reiterates present law.

Rule 30(d) deals with the timing of jury instructions.

Rule 30(d)(1) requires the court to give basic instructions on procedures and law at the beginning of the trial. This requirement should better enable jurors to understand the evidence and apply the proof to the applicable law. With this background, jurors will be able to put the proof in the context of the legal rules involved in the dispute.

Rule 30(d)(2) provides the court the option of giving the bulk of the final jury instructions before closing argument. This procedure may improve the utility of counsel's closing argument by enabling the lawyers to make specific reference to the law at issue in the case. This option should greatly assist jurors in their efforts to apply the facts to the law. If such instructions are given before closing argument, the court should provide additional housekeeping instructions after that argument. The court may also repeat some of the substantive instructions already given before the closing argument.

RULE 30.1. EXHIBITS IN JURY ROOM

Unless for good cause the court determines otherwise, the jury shall take to the jury room for examination during deliberations all exhibits and writings, except depositions, that have been received in evidence.

Advisory Commission Comment. This rule changes the long-standing practice in Tennessee of not allowing the jury in criminal cases to take the exhibits to the jury room for their study and examination during deliberations.

This rule, applicable in criminal cases, is mandatory unless the judge, either on motion of a party or sua sponte, determines that an exhibit should not be submitted to the jury. Among the reasons why a particular exhibit might not be submitted are that the exhibit may endanger the health and safety of the jurors, the exhibit may be subjected to improper use by the jury, or a party may be unduly prejudiced by submission of the exhibit to the jury.

RULE 31. VERDICT

(a) Unanimity. The jury's verdict shall be unanimous.

(b) Return in Open Court. The jury shall return the verdict to the judge in open court.

(c) Multiple Defendants. If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed. If the jury cannot agree on all defendants, the state may try again any defendant on whom the jury was not in agreement.

(d) Conviction of Lesser Offense.

(1) Definition of Lesser Included Offense. The defendant may be found guilty of:

(A) an offense necessarily included in the offense charged; or

(B) an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(2) Procedures When No Unanimous Verdict. If the court instructs the jury on one or more lesser included offenses and the jury reports that it cannot unanimously agree on a verdict, the court shall address the foreperson and inquire whether there is disagreement as to the charged offense and each lesser offense on which the jury was instructed. The following procedures apply:

(A) The court shall begin with the charged offense and, in descending order, inquire as to each lesser offense until the court determines at what level of the offense the jury has disagreed;

(B) The court shall then inquire if the jury has unanimously voted not guilty to the charged offense.

(i) If so, at the request of either party, the court shall poll the jury as to their verdict on the charged offense.

(ii) If it is determined that the jury found the defendant not guilty of the charged offense, the court shall enter a not guilty verdict for the charged offense.

(C) The court shall then inquire if the jury unanimously voted not guilty as to the next, lesser instructed offense.

(i) If so, at the request of either party the court shall poll the jury as to their verdict on this offense.

(ii) If it is determined that the jury found the defendant not guilty of the lesser offense, the court shall enter a not guilty verdict for that offense.

(D) The court shall continue this inquiry for each lesser instructed offense in descending order until the inquiry comes to the level of the offense on which the jury disagreed.

(E) The court may then declare a mistrial as to that lesser offense, or the court may direct the jury to deliberate further as to that lesser offense as well as any remaining offenses originally instructed to the jury.

(e) Poll of Jury. After a verdict is returned but before the verdict is recorded, the court shall–on a party's request or on the court's own initiative–poll the jurors individually. If the poll indicates that there is not unanimous concurrence in the verdict, the court may discharge the jury or direct the jury to retire for further deliberations.

Advisory Commission Comment. This rule is similar to the federal rule, except that it contains no provision dealing with criminal forfeiture.

In cases where the court instructs the jury on the charged offense and one or more lesser offenses, and the jury reports an inability to reach a verdict, it is not always apparent on which offense the jury disagreed. The practice in Tennessee is to give sequential jury instructions that require a jury to consider guilty of the greatest charged offense before moving on to consider the lesser offenses. In some cases, the jury may acquit the defendant of the greater offense but be unable to reach a unanimous verdict on one or more lesser offenses. If the court grants a mistrial as to all offenses because of the jury's failure to reach agreement on a lesser offense, the double jeopardy clause is implicated if the jury actually acquitted the defendant of one or more of the greater offenses but disagreed on a lesser one.

Subdivision (d) is intended to minimize double jeopardy issues and avoid releasing a jury without determining whether it reached agreement on some degree of the charged offense.

The rule provides for a sequential inquiry by the trial court, beginning with the greatest charged offense and continuing in descending order of offenses until the court determines at what level the jury has disagreed. The court must then determine whether the jury unanimously found the defendant not guilty of any greater offense. To eliminate ambiguity, the rule also provides for jury polling on a party's request. Rule 30(e) also permits the court to poll the jury on the court's own initiative.

VII. JUDGMENT

RULE 32. SENTENCE AND JUDGMENT

(a) Sentence for Offense Committed Before July 1, 1982. Upon a verdict or plea of guilty, sentence shall be set as provided by law. In any case wherein an appeal lies, and the law permits a suspended sentence, if the defendant desires to petition for a suspended sentence, the defendant may do so within five (5) days after the overruling of his or her motion for a new trial or motion in arrest of judgment, whichever comes last. A record shall be made of the hearing upon the petition. The filing of the petition is no waiver of the right of appeal, whether the petition be granted or not. The judgment of the trial judge upon the petition is reviewable upon appeal by either the defendant or the state. A petition for a suspended sentence may not be filed after appeal. The trial judge shall hear all petitions for suspended sentences which have already been filed before the notice of appeal, and, in those cases wherein a notice of appeal of the convictions is filed before a petition for a suspended sentence is filed, the trial judge shall hold a hearing upon the petition within the time previously allowed for the filing of the transcript so as to make possible the inclusion in the transcript upon the petition for a suspended sentence.

(b) Sentence for Offense Committed On or After July 1, 1982. After a verdict or plea of guilty, the court shall set the sentence except as to habitual criminal charges or capital cases where notice has previously been given. When the court imposes sentence, the sentence shall be fixed as provided by law.

(c) Concurrent or Consecutive Sentences.

(1) Multiple Sentences from One Trial. If the defendant pleads guilty or is convicted in one trial of more than one offense, the trial judge shall determine whether the sentences will be served concurrently or consecutively. The order shall specify the reasons for this decision and is reviewable on appeal. Unless it affirmatively appears that the sentences are consecutive, they are deemed to be concurrent.

(2) Prior Sentence Not Fully Served.

(A) Prior Tennessee Sentence.

(i) Prior Tennessee Sentence Known. If the defendant has additional sentences not yet fully served as the result of convictions in the same court or in other courts of Tennessee and if this fact is made known to the court prior to sentencing, the court shall recite this fact in the judgment setting sentence, and the sentence imposed is deemed to be concurrent with the prior sentence or sentences, unless it affirmatively appears that the new sentence being imposed is to be served consecutively to the prior sentence or sentences. The judgment to make the sentences consecutive or concurrent shall explicitly relate the judge's reasons and is reviewable on appeal.

(ii) Prior Tennessee Sentence Unknown. When prior unserved Tennessee sentences are not called to the attention of the trial judge by or on behalf of the defendant at the time of sentencing

and are not included in the judgment setting the new sentence, the new sentence is deemed to be consecutive to any such undisclosed prior unserved sentence or sentences.

(iii) Parole Revocation. The new sentence is consecutive when the defendant is convicted of a misdemeanor while on parole from an undisclosed prior sentence, and the parole is subsequently revoked.

(B) Prior Non-Tennessee Sentence. If, as the result of conviction in another state or in federal court, the defendant has any additional sentence or portion thereof to serve, the court shall impose a sentence that is consecutive to any such unserved sentence unless the court determines in the exercise of its discretion that good cause exists to run the sentences concurrently and explicitly so orders.

(3) Mandatory Consecutive Sentences. When a defendant is convicted of multiple offenses from one trial or when the defendant has additional sentences not yet fully served as the result of convictions in the same or other courts and the law requires consecutive sentences, the sentence shall be consecutive whether the judgment explicitly so orders or not. This rule shall apply:

(A) to a sentence for a felony committed while on parole for a felony;

(B) to a sentence for escape or for a felony committed while on escape;

(C) to a sentence for a felony committed while the defendant was released on bail and the defendant is convicted of both offenses; and

(D) for any other ground provided by law.

(d) Release After Conviction, Pending Further Proceedings.

(1) Misdemeanor. A person convicted of a misdemeanor has a right to have bail set or to be released on recognizance pending the exhaustion of all direct appellate procedure in the case.

(2) Felony.

(A) Application Before Appeal Pending. When the law permits release on bail or recognizance after return of a guilty verdict for a felony, the trial judge may order such release pending further proceedings in a trial court or on direct appeal. If in a felony case the trial judge refuses to release the defendant who has applied for release, the trial judge shall enter in the minutes the reasons for the ruling. This decision is reviewable.

(B) Application When Appeal Pending. After the case is pending in an appellate court, the defendant may apply for release either to the trial court where the conviction was entered or to the appellate court where the appeal is pending.

(e) Judgment.

(1) Signed and Entered. A judgment of conviction shall be signed by the judge and entered by the clerk.

(2) Content of Judgment of Conviction. A judgment of conviction shall include:

(A) the plea;

(B) the verdict or findings; and

(C) the adjudication and sentence.

(3) Judgment of Not Guilty or Discharge. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall enter judgment accordingly.

(f) Withdrawal of Guilty Plea.

(1) Before Sentence Imposed. Before sentence is imposed, the court may grant a motion to withdraw a guilty plea for any fair and just reason.

(2) After Sentence But Before Judgment Final. After sentence is imposed but before the judgment becomes final, the court may set aside the judgment of conviction and permit the defendant to withdraw the plea to correct manifest injustice.

(g) Revocation of Probation. The court may revoke probation only after a hearing conducted according to law. The losing party may appeal the judgment resulting from this hearing. The defendant may be released pursuant to applicable law pending such hearing and/or such appeal.

Advisory Commission Comment. Subdivision (a) applies to cases arising under the law prior to the judge-sentencing provisions. Essentially, the defendant had a right to jury sentencing prior to 1982.

Subdivision (b) conforms to the judge sentencing laws of 1982 and 1989. A capital case requires notice under Rule 12.3(b). Fines are governed by T.C.A. Section 40-35-301.

Subdivision (c) deals with circumstances where sentences are to run concurrently or consecutively. The former rule is retained except that the state may appeal concurrent sentences as provided in T.C.A. Section 40-35-402.

Subdivision (e) deals with judgments. Counsel should be aware that Rule 17 of the Rules of the Tennessee Supreme Court provides for a Uniform Judgment Document.

RULE 33. NEW TRIAL

(a) Motion for a New Trial. On its own initiative or on motion of a defendant, the court may grant a new trial as required by law. If trial was by the court without a jury, the court on motion of a defendant for new trial may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment.

(b) Time for Motion; Amendments. A motion for a new trial shall be in writing or, if made orally in open court, be reduced to writing, within thirty days of the date the order of sentence is entered. The court shall liberally grant motions to amend the motion for new trial until the day of the hearing on the motion for a new trial.

(c) Procedures.

(1) Testimony. The court may allow testimony in open court on issues raised in the motion for a new trial.

(2) Affidavits.

(A) Affidavits in Support of Motion. Affidavits in support of a motion for a new trial may be filed with the motion or an amended motion. The court shall consider any such affidavits as evidence.

(B) Opposing Affidavits. The state shall have ten days after the filing of affidavits within which to file opposing affidavits. This period may be extended for not more than an additional twenty days by the court for good cause or by the parties' written stipulation. The court shall also consider opposing affidavits as evidence.

(C) Reply Affidavits. The court may permit reply affidavits.

(3) Findings and Conclusions. In ruling on the motion for a new trial, the court–on motion by either party–shall make and state in the record findings of fact and conclusions of law to explain its ruling on any issue not determined by the jury.

(d) New Trial Where Verdict Is Against the Weight of the Evidence. The trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence. Upon request of either party, the new trial shall be conducted by a different judge.

(e) Motion in Arrest of Judgment Not Waived. A motion for a new trial is not a waiver of the right to make a motion in arrest of judgment.

Advisory Commission Comment. It is important to note that a motion for a new trial must be filed within thirty days of the date the order of sentence is entered, without regard to when judgment is entered upon the verdict. This time period applies whether or not any other motion or petition is filed.

Some attorneys seek to "reserve the right to amend" a motion for a new trial, and subsequently file such amendments without a court order permitting it. Clearly the philosophy of the rule is to permit timely amendments, and for that reason the rule does not close that time frame until the motion is heard. However, the fact that the trial judge "shall allow amendments liberally" does not mean that the judge shall allow all such amendments, and counsel must not make a regular practice of filing only a skeletal motion with the intention of bringing all of their substantive grounds in an amendment carried to the hearing. The trial judge retains the power to deny amendments, and strong consideration should be given to whether the new ground being raised was promptly brought to the court's attention.

Affidavits provide a method for resolving factual issues, if the trial judge is satisfied that they adequately serve the purpose. The judge is not required to believe an incredible affidavit and may always require an evidentiary hearing with witnesses.

Under subdivision (e), neither the filing nor the denial of a motion for a new trial waives the

right to make a motion in arrest of judgment, so long as it is filed within thirty days of verdict.

Rule 33(d) changes the holdings in *State v. Johnson,* 692 S.W.2d 412 (Tenn. 1985), and *State v. Adkins,* 786 S.W.2d 642 (Tenn. 1990), which had abolished the thirteenth juror rule in criminal cases. One should distinguish a new trial granted because the verdict is against the weight of the evidence from a granted motion for judgment of acquittal under Tenn. R. Crim. P. 29(b) for insufficiency of evidence to convict. In the latter situation, retrying the defendant would result in double jeopardy, while in the former situation it would not. *See Tibbs v. Florida,* 457 U.S. 31 (1982).

The second sentence of Rule 33(d) requires that upon request a different judge preside at retrial if the original judge granted a new trial as thirteenth juror.

RULE 34. ARREST OF JUDGMENT

(a) Grounds. The court on motion of a defendant shall arrest judgment if:

(1) the indictment, presentment or information does not charge an offense; or

(2) the court was without jurisdiction of the charged offense.

(b) Procedures. The motion to arrest judgment may be made orally in open court, but it shall be reduced to writing and filed within thirty days of the date the order of sentence is entered.

(c) Motion for New Trial Not Waived. A motion to arrest judgment is not a waiver of the right to make a motion for a new trial.

Advisory Commission Comment. There is no requirement as to the order in which motions for judgment of acquittal after a verdict of guilty, motions for a new trial, and motions in arrest of judgment are made. Each must be made within thirty days after the order of sentence is entered.

RULE 35. REDUCTION OF SENTENCE

(a) Timing of Motion. The trial court may reduce a sentence upon motion filed within 120 days after the date the sentence is imposed or probation is revoked. No extensions shall be allowed on the time limitation. No other actions toll the running of this time limitation.

(b) Limits of Sentence Modification. The court may reduce a sentence only to one the court could have originally imposed.

(c) Hearing Unnecessary. The trial court may deny a motion for reduction of sentence under this rule without a hearing.

(d) Appeal. The defendant may appeal the denial of a motion for reduction of sentence but shall

not be entitled to release on bond unless already under bond. If the court modifies the sentence, the state may appeal as otherwise provided by law.

Advisory Commission Comment. This rule is somewhat similar to its federal counterpart. Under T.C.A. § 40-35-212, the trial judge retains jurisdiction to modify any sentence which is to be served in the jail or workhouse. However, the statute deprives the court of authority to modify a sentence to the department of corrections once the judgment is final in the trial court.

The motion to modify a sentence must be filed within 120 days of the date of the trial court's imposition of sentence. This time period may not be extended or tolled. Unlike the federal rule which also allows a modification after appeal, the 120 days run immediately after the sentence is imposed by the trial judge and *not* from the mandate of the appellate court.

While the judge may grant a hearing and modify the sentence, there is no requirement that a hearing even be held in the discretion of the court. If the judge denies relief and the defendant is already incarcerated, the defendant is not entitled to a bail pending an appeal of an adverse action under this rule. The policy behind the denial of bail is to prevent a motion to modify and an appeal taken for the sole purpose of keeping the defendant on bond.

The intent of this rule is to allow modification only in circumstances where an alteration of the sentence may be proper in the interests of justice. The modification permitted by this rule is any modification otherwise permitted by the law when the judge originally imposed sentence including but not limited to a transfer to the workhouse or probation to otherwise eligible defendants. If there is a modification, the state may appeal.

This rule does not alter the authority of the court to modify sentences to the jail or workhouse. These modifications are governed by statute. *See* T.C.A. §§ 40-35-306, 40-35-307, 40-35-311, and 40-35-312.

RULE 36. CLERICAL MISTAKES

After giving any notice it considers appropriate, the court may at any time correct clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission.

Advisory Commission Comment. This rule conforms to the corresponding federal rule.

VIII. APPEAL

RULE 37. APPEAL

(a) Definition of an Appeal. An “appeal” refers to direct appellate review available as a matter of right, appeals in the nature of writs of error, and all other direct appeals in criminal cases

(b) When an Appeal Lies. The defendant or the state may appeal any order or judgment in a criminal proceeding when the law provides for such appeal. The defendant may appeal from any judgment of conviction:

(1) on a plea of not guilty; or

(2) on a plea of guilty or nolo contendere, if:

(A) the defendant entered into a plea agreement under Rule 11(a)(3) but explicitly reserved–with the consent of the state and of the court–the right to appeal a certified question of law that is dispositive of the case, and the following requirements are met:

(i) the judgment of conviction or other document to which such judgment refers that is filed before the notice of appeal, contains a statement of the certified question of law that the defendant reserved for appellate review;

(ii) the question of law is stated in the judgment or document so as to identify clearly the scope and limits of the legal issue reserved;

(iii) the judgment or document reflects that the certified question was expressly reserved with the consent of the state and the trial court; and

(iv) the judgment or document reflects that the defendant, the state, and the trial court are of the opinion that the certified question is dispositive of the case; or

(B) the defendant seeks review of the sentence and there was no plea agreement under Rule 11(c); or

(C) the errors complained of were not waived as a matter of law by the guilty or nolo contendere plea, or otherwise waived, and if such errors are apparent from the record of the earlier proceedings; or

(D) the defendant–with the consent of the court–explicitly reserved the right to appeal a certified question of law that is dispositive of the case, and the requirements of Rule 37(b)(2) are met, except the judgment or document need not reflect the state’s consent to the appeal or the state’s opinion that the question is dispositive.

(c) Procedure for Advising Defendant of Appellate Rights. After overruling a motion for a new trial or a motion in arrest of judgment, whichever comes last, the trial judge shall do the following:

(1) Advise of Right to Appeal. Advise the defendant of the right to appeal; and

(2) Determine Indigency; Ensure Counsel. Determine–from evidence or stipulation–for the record whether the defendant is indigent. If the defendant is indigent, the court shall advise the defendant that, if he or she has not already retained appellate counsel or if counsel has not previously been appointed, the court will appoint appellate counsel and that a transcript or

statement of the evidence will be furnished at state expense.

(d) Pursuing or Waiving an Appeal. Before the judgment on the guilty verdict becomes final, the following shall be done:

(1) Seeking Appeal. If an appeal is sought, the defendant in person or by counsel shall file a timely notice of appeal with the clerk in accordance with Rule 4(a), Tennessee Rules of Appellate Procedure; or

(2) Waiving Appeal. If an indigent or nonindigent defendant who has the right to appeal a conviction chooses to waive the appeal, counsel for the defendant shall file with the clerk, during the time within which the notice of appeal could have been filed, a written waiver of appeal, which must:

(A) clearly reflect that the defendant is aware of the right to appeal and voluntarily waives it; and

(B) be signed by the defendant and the defendant's counsel of record.

(e) Duties of Counsel Regarding Appeal.

(1) Counsel Retained for Trial But Not Appeal. An attorney retained by the defendant to represent the defendant for the trial but not for appeal, shall timely advise the trial court of this fact at the hearing on the motion for a new trial. Thereupon, such counsel will be permitted to withdraw as counsel of record, except as provided in Rule 37(e)(2).

(A) Appellate Counsel for Non-Indigent Defendant. If the defendant is not indigent at the time counsel is permitted to withdraw, the court shall advise the defendant of the right of appeal and the time for filing the notice of appeal.

(B) Appellate Counsel for Indigent Defendant. If the defendant is indigent at the time counsel is permitted to withdraw, the court shall appoint appellate counsel for the defendant.

(2) Retained Counsel Filing Notice of Appeal. Retained counsel–whether or not fully paid–who files a notice of appeal shall represent the defendant on appeal. Such retained counsel shall fully comply with all appellate rules as to timely filing and appearances. Retained counsel shall be allowed to withdraw as counsel of record only for good cause and only if application is made when not delinquent in his or her duties.

(3) Appointed Counsel for Indigent Defendant. Pursuant to Tenn. Sup. Ct. Rule 13, § 1(e)(5), counsel appointed in the trial court to represent an indigent defendant shall continue to represent the defendant throughout the proceedings, including any appeals, until the case has been concluded or counsel has been allowed to withdraw by a court.

Advisory Commission Comments. This rule retains present law as to when a direct appeal lies, except for the significant provisions addressing appeals from pleas of guilty and nolo contendere. The first provision permits an appeal in the context of a controlling question that needs answering, such as the constitutionality of a statute upon which a charge is grounded or the validity of the search upon which the state's case must be made, and should avoid the necessity

for many trials. The rules regarding certified questions of law that are dispositive of the case vary depending on whether there is a plea bargain and whether the state agrees to the appeal. *See* Tenn. R. Crim. P. 37(b)(2)(i) and (iv). In order for an attorney to perfect an appeal of a certified question, the attorney must be certain that the application fully comports with the requirements for this type of an appeal as set forth by the Tennessee Supreme Court in its decision of *State v. Preston,* 759 S.W.2d 647 (Tenn. 1988). Failure to follow the dictates of the *Preston* decision could result in the dismissal of the appeal.

The second situation addressed was arguably always appealable, i.e., a sentence complaint where there was no agreement as to sentence. The third provision will apply in cases where guilt was not contested but the record clearly reflects an invalidating error, such as the clear denial of the right to counsel or a conviction under an invalid statute, wherein it would be judicially inefficient to require a post-conviction collateral attack when the error is apparent upon the face of the existing record.

The Rule requires that the defendant must be advised of pertinent appellate rights. In all cases if an appeal is to be waived, this must be put on record.

The problem of retained attorneys initiating an appeal and doing nothing further is addressed by Rule 12 of the Rules of the Tennessee Court of Criminal Appeals. This rule addresses the same problem. Retained counsel who commence the appellate process are deemed to be fully retained to complete it.

Counsel considering withdrawal or termination of representation should consult Tenn. Sup. Ct. R. 14 (procedure for withdrawal in Court of Appeals and Court of Criminal Appeals) and Tenn. Sup. Ct. R. 8, RPC § 1.16 (declining and terminating representation).

See T.C.A. § 40-26-105, dealing with the expanded circumstances under which the writ of error coram nobis may issue in criminal cases.

RULE 38. REVIEW OF DENIAL OF PRE-TRIAL DIVERSION

(a) Certiorari to Trial Court. A defendant who seeks and is denied pre-trial diversion pursuant to T.C.A. § 40-15-105 may petition for a writ of certiorari to the trial court for an abuse of prosecutorial discretion.

(b) Appeal.

(1) Interlocutory Appeal. If the trial court denies the writ of certiorari and finds that the prosecuting attorney has not committed an abuse of discretion in failing to grant pre-trial diversion, the defendant may pursue an interlocutory appeal of this decision pursuant to either Rule 9 or Rule 10 of the Tennessee Rules of Appellate Procedure.

(2) Direct Appeal. If the defendant does not pursue an interlocutory appeal of the denial of a writ of certiorari, the defendant may appeal the denial pursuant to Rule 3(b), Tennessee Rule of Appellate Procedure, following the entry of the final judgment in the trial court.

Advisory Commission Comment. This rule provides the methods by which denials of pre-trial diversion can be appealed. A failure to pursue an interlocutory appeal would not result in a waiver of the issue on direct appeal.

RULE 39. [RESERVED]

IX. SUPPLEMENTAL AND SPECIAL PROCEEDINGS

RULE 40. [RESERVED]

RULE 41. SEARCH AND SEIZURE

(a) Authority to Issue Warrant. A magistrate with jurisdiction in the county where the property sought is located may issue a search warrant authorized by this rule. The district attorney general, assistant district attorney general, criminal investigator, or any other law-enforcement officer may request a search warrant.

(b) Persons or Property Subject to Seizure by Warrant. A magistrate may issue a warrant under this rule to search for and seize any of the following:

(1) evidence of a crime;

(2) contraband, the fruits of crime, or items otherwise criminally possessed;

(3) property designed or intended for use, or that has been used in a crime;

(4) a person whose arrest is supported by probable cause; or

(5) a person who is unlawfully restrained.

(c) Issuance and Content of Warrant.

(1) Issuance. A warrant shall issue only on an affidavit or affidavits that are sworn before the magistrate and establish the grounds for issuing the warrant.

(2) Content. If the magistrate is satisfied that there is probable cause to believe that grounds for the application exist, the magistrate shall issue a warrant as follows:

(A) The warrant shall, as the case may be, identify the property or place to be searched, or name

or describe the person to be searched; the warrant also shall name or describe the property or person to be seized.

(B) The search warrant shall command the law enforcement officer to search promptly the person or place named and to seize the specified property or person.

(C) The search warrant shall be directed to and served by:

(i) the sheriff or any deputy sheriff of the county where the warrant is issued; or

(ii) any constable or any other law enforcement officer with authority in the county.

(D) The magistrate shall endorse on the search warrant the hour, date, and name of the officer to whom the warrant was delivered for execution.

(3) Hearsay. The magistrate may base a finding of probable cause on hearsay evidence in whole or in part.

(d) Copies and Record of Warrant. The magistrate shall prepare an original and two exact copies of each search warrant. The magistrate shall keep one copy as a part of his or her official records. The other copy shall be left with the person or persons on whom the search warrant is served. The exact copy of the search warrant and the endorsement are admissible evidence.

(e) Procedures to Execute Warrant.

(1) Who May Execute. The search warrant may only be executed by the law enforcement officer, or one of them, to whom it is directed. Other persons may aid such officer at the officer's request, but the officer must be present and participate in the execution.

(2) Authority for Forcible Entry. If, after notice of his or her authority and purpose, a law enforcement officer is not granted admittance, or in the absence of anyone with authority to grant admittance, the peace officer with a search warrant may break open any door or window of a building or vehicle, or any part thereof, described to be searched in the warrant to the extent that it is reasonably necessary to execute the warrant and does not unnecessarily damage the property.

(3) Timely Execution. The warrant must be executed within five days after its date.

(4) Leaving Copy of Warrant and Receipt. The officer executing the warrant shall:

(A) give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property; or

(B) shall leave the copy and receipt at a place from which the property was taken.

(f) Procedures After Execution of Warrant.

(1) Return and Inventory. The officer executing the warrant shall promptly make a return, accompanied by a written inventory of any property taken. Upon request, the magistrate shall cause to be delivered a copy of the return and the inventory to the person from whom or from

whose premises the property was taken and to the applicant for the warrant.

(2) Documents to Court Clerk. Unless the property is directed to be restored under these rules, the magistrate shall transmit the executed original warrant with the officer's return and inventory to the clerk of the court having jurisdiction of the alleged offense in respect to which the search warrant was issued.

(g) Motion for Return or Suppression of Property. A person aggrieved by an unlawful or invalid search or seizure may move the court pursuant to Rule 12(b) to suppress any evidence obtained in the unlawful search or seizure. If property was unlawfully seized, the aggrieved person may move for the return of the property. The motion shall be granted–except as to the return of contraband–if the evidence in support of the motion shows that:

(1) the search or seizure was made illegally without a search warrant or illegally with an invalid search warrant, or in any other way in violation of the constitutional protection against unreasonable searches and seizures;

(2) a search warrant was relied on, but the search warrant or supporting affidavit is legally insufficient on its face and hence invalid;

(3) the search warrant relied on was issued on evidence consisting in material part of willful or reckless misrepresentations of the applicant to the issuing magistrate, resulting in a fraudulent procurement;

(4) the search warrant does not describe the property seized, and the seized property is not of such a character as to be subject to lawful seizure without a warrant;

(5) the magistrate did not:

(A) make an original and two copies of the search warrant; or

(B) did not endorse on the warrant the date and time of issuance and the name of the officer to whom the warrant was issued; or

(6) the serving officer–where possible–did not leave a copy of the warrant with the person or persons on whom the search warrant was served.

(h) Nonwaiver of Objection by Testimony of Defendant as to Illegally Obtained Evidence. A defendant does not waive the right to object to the admissibility of evidence if:

(1) inadmissible evidence obtained by an illegal search or seizure is erroneously introduced against the defendant; and

(2) the defendant subsequently testifies as to the same evidence but gives it an innocent or mitigating cast as to the charge and denies the charge.

Advisory Commission Comments. Rule 41(b) is intended to conform to Rule 41 of the Federal Rules of Criminal Procedure. Search warrants have traditionally been issued for the seizure of physical items. The Rule now allows for a search warrant for persons. For example, a search warrant is now available to search for a person who is kidnaped under circumstances where

exigent circumstances might not justify a warrantless entry. The amendment also allows for a search warrant to effect an arrest where required by the decision in *Steagald v. United States,* 451 U.S. 204 (1981). The commission does not intend to suggest under what circumstances a search warrant is required to effect an arrest, but rather permits judicial authorization for a search warrant where required.

Property ordered suppressed or otherwise excluded from admission into evidence by any general sessions court or court exercising that jurisdiction shall not be returned to any owner or claimant over the objection of the district attorney general or his or her representative. The state must be free to pursue the prosecution to the next level, without being stripped of its evidence. The motion under subdivision (g) is meant to apply only to courts of record of general criminal trial jurisdiction such as Circuit and Criminal Courts.

Under subdivision (g)(1) the commission intended to say explicitly that the violation of any constitutional provision, such as a Fifth Amendment right, which results by operation of law in violation of the Fourth Amendment protection against unreasonable searches and seizures may be raised.

The provision of subdivision (h) is designed to change the rule of *Lester v. State*, 216 Tenn. 615, 393 S.W.2d 288 (1975), which often caused a defendant to waive one right by exercising another. Note that the provision applies only when the testifying defendant denies the charge.

RULE 42. CRIMINAL CONTEMPT

(a) Summary Disposition. A judge may summarily punish a person who commits criminal contempt in the judge's presence if the judge certifies that he or she saw or heard the conduct constituting the contempt. The contempt order shall recite the facts, be signed by the judge, and entered in the record.

(b) Disposition on Notice and Hearing. A criminal contempt shall be prosecuted on notice, except as provided in subdivision (a) of this rule.

(1) Content of Notice. The criminal contempt notice shall:

(A) state the time and place of the hearing;

(B) allow the defendant a reasonable time to prepare a defense; and

(C) state the essential facts constituting the criminal contempt charged and describe it as such.

(2) Form of Notice. The judge shall give the notice orally in open court in the presence of the defendant or, on application of the district attorney general or of an attorney appointed by the court for that purpose, by a show cause or arrest order.

(3) Release on Bail. The criminal contempt defendant is entitled to admission to bail as provided in these rules.

(4) Disqualification of Judge. When the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the hearing, except with the defendant's consent.

(5) Punishment Order. If the court finds the defendant guilty of contempt, the court shall enter an order setting the punishment.

Advisory Commission Comment. Rule 42 tracks some of the language of the federal rule. No right to a jury trial exists upon a state charge of criminal contempt under present law establishing the penalties for the offense.

X. GENERAL PROVISIONS

RULE 43. PRESENCE OF THE DEFENDANT

(a) Presence Required. Unless excused by the court on defendant's motion or as otherwise provided by this rule, the defendant shall be present at:

(1) the arraignment;

(2) every stage of the trial, including the impaneling of the jury and the return of the verdict; and

(3) the imposition of sentence.

(b) Continued Presence Not Required. The further progress of the trial, to and including the return of the verdict and imposition of sentence, shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present:

(1) Voluntary Absence. Voluntarily is absent after the trial has commenced, whether or not he or she has been informed by the court of the obligation to remain during the trial; or

(2) Disruptive Conduct. After being warned by the court that disruptive conduct will result in removal from the courtroom, persists in conduct justifying exclusion from the courtroom.

(c) Procedure After Voluntary Absence or Removal.

(1) Representation by Counsel. If a trial proceeds in the voluntary absence of the defendant or after the defendant's removal from the courtroom, he or she must be represented in court by counsel.

(2) Disruptive Conduct. If the defendant is removed from the courtroom for disruptive behavior under Rule 43(b)(2):

(A) Access to Counsel After Removal. The defendant shall be given reasonable opportunity to

communicate with counsel during the trial; and

(B) Periodic Review of Removal. The court shall determine at reasonable intervals whether the defendant indicates a willingness to avoid creating a disturbance if allowed to return to the courtroom. The court shall permit the defendant to return when the defendant so signifies and the court reasonably believes the defendant.

(d) Presence Not Required. A defendant need not be present in the following circumstances:

(1) Organizational Defendant. The defendant is a corporation, limited liability company, or limited liability partnership which is represented by counsel.

(2) Minor Offense. The maximum possible sentence is a fine not in excess of fifty dollars ($50.00), no incarceration is possible, and the defendant is represented by counsel.

(3) Question of Law. At a conference or argument on a question of law.

(4) Arraignment. At arraignment when:

(A) the defendant's attorney of record is present in open court and presents a waiver of presence signed by the defendant; or

(B) the arraignment is conducted by electronic audio-visual conference as set forth in Rule 43(f).

(e) Initial Appearance–Audio-Visual Devices. The initial appearance of the defendant before the court pursuant to Rule 5 of the Tennessee Rules of Criminal Procedure may be through the use of an electronic audio-visual device if:

(1) the judge or magistrate exercises sound discretion and determines that the use of such devices will achieve the purposes of the Rules of Criminal Procedure;

(2) the judge or magistrate and the defendant are able to view and communicate with each other simultaneously and to be heard in the courtroom by members of the public; and

(3) the court accepts no plea except a plea of not guilty.

(f) Arraignment–Audio-Visual Devices. Unless the defendant objects, he or she may be arraigned–pursuant to Rule 10 of the Tennessee Rules of Criminal Procedure–through the use of an electronic audio-visual device if:

(1) the judge exercises sound discretion and determines that the use of such devices will achieve the purposes of the Rules of Criminal Procedure;

(2) the judge and defendant are able to view and communicate with each other simultaneously and to be heard in the courtroom by members of the public; and

(3) the court accepts no plea except a plea of not guilty.

Advisory Commission Comment. 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 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.

RULE 44. RIGHT TO AND ASSIGNMENT OF COUNSEL

(a) Right to Assigned Counsel. Every indigent defendant is entitled to have assigned counsel in all matters necessary to the defense and at every stage of the proceedings, unless the defendant waives counsel.

(b) Waiver.

(1) Actions by Court. Before accepting a waiver of counsel, the court shall:

(A) advise the accused in open court of the right to the aid of counsel at every stage of the proceedings; and

(B) determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience, and conduct of the accused, and other appropriate matters.

(2) Written Waiver. A waiver of counsel shall be in writing.

(3) Record of Waiver. An accepted waiver of counsel shall be in the record.

(c) Procedures for Appointment of Counsel. The procedures for assigning counsel are those provided by law.

(d) Inquiry Into Joint Representation.

(1) Definition of Joint Representation. Joint representation occurs when:

(A) two or more defendants have been jointly charged under Rule 8(c) or have been joined for trial under Rule 13; and

(B) are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law.

(2) Court's Responsibilities in Cases of Joint Representation. The court shall promptly inquire about the propriety of joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe no conflict of interest is likely to arise, the court shall take appropriate measures to protect each defendant's right to counsel.

Advisory Commission Comment. This rule is similar to the federal rule.

RULE 45. COMPUTING AND EXTENDING TIME

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any court order:

(1) Day of Act or Event Excluded. Exclude the day of the act or event from which the designated period of time begins to run.

(2) Last Day of Period Included. Include the last day of the period unless it is:

(A) a Saturday, Sunday, or legal holiday; or

(B) when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible.

When the last day is so excluded, the period runs until the end of the next day that is not one of the aforementioned days.

(3) Exclusion from Periods of Less Than Seven Days. Exclude intermediate Saturdays, Sundays, and legal holidays when the period of time is less than 7 days.

(4) Definition of Legal Holiday. "Legal holiday" includes any national holiday or holiday designated by the state of Tennessee.

(b) Extending Time. When an act shall or may be done at or within a specified time, the court for cause shown may at any time extend the period, as follows:

(1) Before End of Specified Time. With or without motion or notice, the court may extend the period if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) After End of Specified Time. On motion made after the expiration of the specified period, the court may extend the period if the failure to act was the result of excusable neglect;

(3) Exception. The court may not extend the time for taking any action under Rules of Criminal Procedure 29, 33 and 34, except to the extent and under the conditions stated in those rules.

(c) Service of Motions and Affidavits.

(1) Written Motions. A written motion–other than one which may be heard "ex parte"– and notice of the hearing on the motion shall be served not later than 5 days before the time specified for the hearing, unless a different period is set by rule or court order. For cause shown, such an order may be made on "ex parte" application.

(2) Affidavits. An affidavit supporting a motion shall be served with the motion. Opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.

(d) Additional Time After Service by Mail. Whenever a party has the right to, or is required to, do an act within a prescribed period after the service of a notice or other paper, and the party is served by mail with the notice or other paper, the prescribed period is extended by 3 days.

Advisory Commission Comment. If a clerk's office is closed all day on a date other than a Saturday, Sunday, or legal holiday, a lawyer would be unable to gain entrance to file a document on the "deadline." Consequently Rule 45(a)(2) extends the deadline to the next business day that the courthouse is open or accessible.

RULE 46. [RESERVED]

RULE 47. MOTIONS

(a) In General. A party applying to the court for an order shall do so by motion.

(b) Form of Motion. A motion–except one made during a trial or hearing–shall be in writing unless the court permits it to be made orally.

(c) Content of Motion. A motion shall state:

(1) with particularity the grounds on which it is made; and

(2) the relief or order sought.

(d) Affidavit. A motion may be supported by affidavit.

Advisory Commission Comment. The lack of particularity in criminal motions, especially those filed pretrial, has been a source of complaint by appellate courts which have imposed a practical requirement of some specificity. *See State v. Davidson*, 606 S.W.2d 293 (Tenn. Crim. App. 1980). Rule 47(c)(1) therefore adds the word "particularity" to the required content of any motion. This is essentially the requirement of motions in civil practice. *See* Rule 7.02(1), Tenn. R. Civ. P.

RULE 48. DISMISSAL

(a) By the State. With the court's permission, the state may terminate a prosecution by filing a dismissal of an indictment, presentment, information, or complaint. A dismissal may not be filed during the trial without the defendant's consent.

(b) By the Court for Unnecessary Delay. The court may dismiss an indictment, presentment, information, or complaint if unnecessary delay occurs in:

(1) presenting to a grand jury a charge against a defendant who has been held to answer to the trial court; or

(2) bringing a defendant to trial.

RULE 49. SERVING AND FILING PAPERS

(a) When Required. A party shall serve on every other party:

(1) written motions, other than those heard ex parte;

(2) written notices;

(3) each order required to be served by the terms of the order;

(4) designations of record on appeal; and

(5) similar papers.

(b) Service; How Made.

(1) Upon Attorney. When the law, these rules, or a court order requires or permits service to be made on a party represented by an attorney, the service shall be made on the attorney unless service on the party in person is required by law or is ordered by the court.

(2) Method of Service. Service of a copy of a document on an attorney or party shall be made by one of the following methods:

(A) Delivery in Person. Delivery in person.

(B) Mail to Last Known Address. Mail to the recipient’s last known address. Service by mail is complete upon mailing.

(C) Leaving Copy with Court Clerk. If no address is known, service is accomplished by leaving the copy with the clerk of the court.

(3) Definition of Delivery. Delivery of a copy within this rule means:

(A) placing it in the hands of the attorney or the party;

(B) leaving it at that person's office with a clerk or other person in charge thereof or, if there is no one in charge, leaving it in a conspicuous place therein; or

(C) if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion residing there.

(c) Filing Served Papers with Court. Papers required to be served shall be filed with the court as follows:

(1) With Court Clerk. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge. When papers are filed with the judge, he or she shall note on the papers the filing date and promptly transmit them to the clerk’s office.

(2) Duties of Clerk. The clerk shall endorse on every pleading and on all other papers filed with the clerk in a proceeding the date and hour of the filing.

(3) Recycled Paper. The use of recycled paper with the highest feasible percentage of postconsumer waste content is recommended for all papers filed with the court.

(d) Service by Pro Se Inmate.

(1) When Deemed Filed. If a paper required or permitted to be filed pursuant to the rules of criminal procedure is prepared by or on behalf of a pro se litigant incarcerated in a correctional facility and is not received by the court clerk until after the deadline for filing, the filing is timely if the paper was delivered to the appropriate individual at the correctional facility within the time set for filing. This provision also applies to service of papers by such litigants pursuant to the rules of criminal procedure.

(2) Definition of Correctional Facility. "Correctional facility" includes a prison, jail, county workhouse, or similar institution in which a pro se litigant is incarcerated.

(3) Burden of Proving Timely Filing. When timeliness of filing or service is an issue, the burden is on the pro se litigant to establish compliance with this provision.

Advisory Commission Comment. This rule represents the commission's judgment on how best to accomplish service and filing, given the practicalities of practice and the necessity for

meaningful compliance.

It is the public policy of the State of Tennessee to encourage recycling and the use of recycled products and materials. This policy is reflected in the Tennessee Solid Waste Planning and Recovery Act ((title 68, ch. 211, part 6) et seq.) and in the Solid Waste Management Act of 1991 ((title 68, ch. 211, part 8) et seq.). Rule 49(c)(3) supports the Court's policy of recommending and encouraging that all papers filed in the Tennessee courts be submitted on recycled paper.

Pro se litigants who are incarcerated in correctional facilities cannot ensure the timely mailing of their mail and, as a consequence, cannot control the timely filing of their legal papers. The pro se prisoner-filing provision in Rule 49(d) covers all papers required or permitted to be filed pursuant to the rules of criminal procedure. Should timeliness of filing become an issue, Rule 49(d)(3) places the burden on the incarcerated person to establish compliance with the deadline. The provision relative to filing with the appropriate correctional personnel is consistent with the United States Supreme Court's ruling in *Houston v. Lack,* 487 U.S. 266 (1988).

RULE 49.1. FACSIMILE FILING OF PAPERS

(a) Definitions.

(1) Facsimile filing. "Facsimile filing" means the facsimile transmission of an original document which is received in the original document's entirety by the trial court clerk and filed by the clerk.

(2) Facsimile machine. "Facsimile machine" means a device capable of sending a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union in regular resolution. Any facsimile machine used to send documents to a court must send at an initial transmission speed of no less than 4800 baud and be able to generate a transmission record.

(3) Facsimile transmission. "Facsimile transmission" is the transmission of a document by a system that encodes a document into electrical signals, transmits these electrical signals over a telephone line, and reconstructs the signals to print a duplicate of the original document at the receiving end.

(4) Sender. "Sender" is the person or entity sending the facsimile transmission to the court.

(5) Transmission record. "Transmission record" means the document printed by the sending facsimile machine stating the telephone number of the receiving machine, the number of pages sent, the transmission time and date, and an indication of any errors in transmission.

(b) Facsimile Filing; Exceptions.

(1) Facsimile Filing Permitted. The trial court clerk shall accept papers for filing by facsimile transmission as provided in this rule. The trial court clerk shall maintain a dedicated telephone line for the clerk's facsimile machine.

(2) Exception: Facsimile Filing Not Permitted. The following documents shall not be filed in the

trial court by facsimile transmission:

(A) An appeal from a lower court to a circuit/criminal court;

(B) A notice of appeal to an appellate court;

(C) The affidavit of complaint for an arrest warrant or summons (see Tenn. R. Crim. Proc. 4);

(D) Search warrants, affidavits, returns, and inventories (see Tenn. R. Crim. Proc. 41);

(E) A confidential document that the court previously has ordered to be filed under seal; and

(F) Indictments, presentments, and informations.

(c) Requirements for Facsimile Filed Document.

(1) Cover Sheet. Any document filed by facsimile transmission shall be accompanied by: the uniform cover sheet set forth in the comment to this rule stating:

(A) the caption of the case;

(B) the trial court docket number;

(C) the title of the transmitted document;

(D) the number of pages of the facsimile transmission (including the cover sheet);

(E) the sender's name, address, voice telephone number, and facsimile telephone number;

(F) the date of the facsimile transmission; and

(G) clear and concise instructions as to the filing of the transmitted document.

(2) Size of Originals. The original document sent by facsimile transmission shall be on letter-sized paper (8 1/2 by 11 inches). Originals on larger-sized paper may be reduced prior to facsimile transmission if the reduction to 8 1/2 by 11 inch paper renders a legible and complete copy of the original.

(3) Length. No facsimile filing shall exceed ten (10) pages in length, including the cover sheet, unless authorized by the court; absent such authorization, a facsimile transmission exceeding ten (10) pages, including the cover sheet, shall not be filed by the clerk. A facsimile filing may not be split into multiple facsimile transmissions to avoid this page limitation.

(4) Compliance With Other Rules. All documents filed by facsimile transmission shall comply with all applicable rules of court, including, without limitation, rules governing the content and form of pleadings and other papers; the signing of pleadings, motions and other papers; and the service of all papers.

(d) Clerk’s Duties Upon Receipt of Facsimile.

(1) Notification of Receipt of Facsimile Not Required. The clerk is not required to notify the sender by return facsimile transmission or voice telephone call that the facsimile document has

been received by the clerk or that the facsimile document has not been received in its entirety. This provision shall not relieve the clerk of any notice requirements imposed by law or by the court.

(2) Placing Date on Received Facsimile Documents. Upon receiving a facsimile transmission in its entirety, the clerk shall note the filing date on the facsimile filing in the same manner as with original pleadings or other documents filed by mail or in person. For purposes of this provision, the clerk receives the facsimile transmission when indicated by the date and time printed on the facsimile transmission by the clerk's facsimile machine.

(e) Effect of Facsimile Filing.

(1) When Deemed Filed. A facsimile transmission received by the clerk after 4:30 p.m. but before midnight, clerk's local time, on a day the clerk's office is open for filing shall be deemed filed as of that business day. A facsimile transmission received after midnight but before 8:00 a.m., clerk's local time, on a business day, or a facsimile transmission received by the clerk on a Saturday, Sunday, legal holiday, or other day on which the clerk's office for filing is closed, shall be deemed filed on the preceding business day.

(2) Facsimile Signature. A signature reproduced by facsimile transmission shall be treated as an original signature.

(3) Risk on Sender.

(A) Sender Bears Risk of Faulty Transmission. The sender bears the risk of using facsimile transmission to convey a document to a court for filing, including, without limitation, malfunction of facsimile equipment, whether the sender's or the clerk's equipment; electrical power outages; incorrectly dialed telephone numbers; or receipt of a busy signal from the clerk's facsimile telephone number. In the event that a facsimile transmission to the clerk is unsuccessful, the sender may file the document by mail or in person; in such cases, the filing date shall be determined as provided in Rules 45 and 49, Tenn. R. Crim. Proc.

(B) Nunc Pro Tunc Remedy. If a facsimile transmission is not received in its entirety by the clerk because of a transmission error, the sender may move acceptance nunc pro tunc by filing a written motion with the court. The motion shall be accompanied by the sender's transmission record, the original document that was the subject of the attempted transmission, and an affidavit of the sender detailing the facts concerning the attempted transmission. The court, in its discretion, may order filing of the original document nunc pro tunc.

(f) Original Document. The filing of the original document shall not be required after facsimile filing. The sender shall retain the original document in the sender's possession or control during the pendency of the action and shall produce such document upon request by the court or any party to the action. Upon failure to produce such document, the court may strike the document filed by facsimile transmission.

(g) Facsimile Service Charge. The sender of the facsimile transmission shall pay to the trial court clerk a service charge for each facsimile filing in the amount of five dollars ($5.00) plus one dollar ($1.00) per page of the facsimile filing (including the cover sheet). Payment of the service

charge, accompanied by a copy of the facsimile filing cover sheet, shall be received by the trial court clerk not later than ten (10) calendar days after the facsimile filing. The facsimile service charge shall be paid by the sender as provided in this rule and shall not be taxed as court costs, subject to the following exception. If the sender is either a party who has been allowed to proceed on a pauper's oath or an attorney for such a party, timely payment of the facsimile service charge under this rule is suspended, and the charges shall be taxed as court costs.

Advisory Commission Comment. Rule 49.1 provides for the filing of papers in the trial court by facsimile transmission. The rule lists certain documents which cannot be filed by this method. Moreover, the rule covers only filing, not service, of papers. Service is governed by Rule 49.

RULE 50. SCHEDULING CASES

(a) Trial Schedule. Trial courts shall provide by rule for the scheduling of trials.

(b) Preferences.

(1) Criminal Cases. Those courts that try both civil and criminal cases shall give preference to criminal proceedings as far as practicable.

(2) Defendants in Custody or Posing Risk. Courts shall give preference over other criminal cases to the trial of defendants in custody and defendants whose pretrial liberty is reasonably believed to present unusual risks.

Advisory Commission Comment. Uniformity in the setting of cases in the trial courts of this state is impossible to accomplish by rule because of the diversity of factors involved. The commission leaves rule-making on setting of dockets to the trial judges, given the priority guidelines that have historically been advanced in this state.

RULE 51. FORMAL EXCEPTIONS UNNECESSARY

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving Error for Appeal. For all purposes for which an exception has heretofore been necessary, it is sufficient that a party–at the time the ruling or order of the court is made or sought–informs the court of:

(1) the action that the party desires the court to take; or

(2) the party's objection to the action of the court and the grounds for the objection. If a party has no opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.

Advisory Commission Comment. This rule is based on the similar federal rule.

RULE 52. HARMLESS ERROR AND PLAIN ERROR

(a) Harmless Error. No conviction shall be reversed on appeal except for errors that affirmatively appear to have affected the result of the trial on the merits.

(b) Plain Error. When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.

Advisory Commission Comment. This rule follows present law. Plain error may, not must, be noticed by the appellate court, even where substantial justice is involved.

RULE 53. [RESERVED]

RULE 54. [RESERVED]

RULE 55. RECORDS IN CRIMINAL PROCEEDINGS.

The clerks of general sessions courts and criminal courts of Tennessee shall keep such records in criminal proceedings as the law and these rules provide.

RULE 56. [RESERVED]

RULE 57. [RESERVED]

Advisory Commission Comment [2006]. The text of Rule 57 (pertaining to local rules of court) was deleted because it was rendered obsolete by the adoption of Tenn. Sup. Ct. R. 18, which now governs the local rules of practice for Tennessee trial courts.

RULE 58. [RESERVED]

RULE 59. EFFECTIVE DATE

These rules take effect ninety (90) days subsequent to their approval by the General Assembly and the Governor. They govern all criminal proceedings thereafter commenced, and so far as just and practicable, all proceedings then pending.

Advisory Commission Comment. On April 14, 1978, the Governor approved the joint resolution adopting these rules. They therefore became effective on July 13, 1978.

RULE 60. TITLE

These rules shall be known as the Tennessee Rules of Criminal Procedure and cited as Tenn. R. Crim. P.