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December 1, 2022

The Honorable Roger A. Page, Chief Justice,
Tennessee Supreme Court
The Honorable Sharon G. Lee, Justice
The Honorable Jeffrey S. Bivens, Justice
The Honorable Holly Kirby, Justice
The Honorable Sarah K. Campbell, Justice

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

Re: 2023 Rules Package
No. ADM2022-01198 (Tenn. Aug. 31, 2022)
Comments of the Tennessee Association of Chiefs of Police and the Tennessee Sheriffs' Association to Proposed Amendments to Tenn. R. Crim. P. 41

Dear Chief Justice Page, Justice Lee, Justice Bivins, Justice Kirby, and Justice Campbell:

The Tennessee Association of Chiefs of Police (TACP) and the Tennessee Sheriffs' Association (TSA) submit these recommendations in response to the Court's order of August 31, 2022, seeking written comments on the recommendations made by The Advisory Commission on the Rules of Practice and Procedure during the 2021-2022 term.

We agree that Rules of Criminal Procedure need updating to keep up with the evolving technological landscape. However, we are concerned that the proposed changes will create more issues than they solve.

When considering the proposed changes to Tenn. R. Crim. P. 41, we respectfully request the court to remember Tenn. R. Crim. P. 2, which says:

> 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.

With Tenn. R. Crim. P. 2 in mind, please consider our specific concerns and suggested solutions in our comments below.

(c) Issuance and Content of Warrant.

Subsection (c)(2)(A)(ii)

Allowing law enforcement officers to swear out an affidavit exclusively by audio is a welcome change for law enforcement. This proposed step simplifies procedure and helps eliminate unjustifiable delay. Requiring an officer to appear in person later to swear out the affidavit again creates unnecessary complexity and delay and also the possibility of suppression if something happens to the officer in between. As a result, most officers will forgo the opportunity to swear out an affidavit by audio only because it will not save them time.

We suggest following Fed. R. Crim. P. 41 by removing the requirement to follow up later in person to swear to the affidavit.

Subsection (c)(2)(B)

Transferring the responsibility to the officer to obtain the original affidavit and warrant from the magistrate and then to file those documents within five days after the execution of the warrant complicates procedure and risks creating suppression issues with what is now a ministerial function. Again, what happens if something happens to the officer between warrant service and filing with the clerk? Processes should not be left to chance.

We suggest removing the transfer of responsibility requiring the officer to file the documents with the clerk and the five-day deadline to mirror the federal rule.

(e) Procedures to execute warrant.

Subsection (e)(3)

Adding a complicated set of requirements for determining the timeliness of the execution of a warrant authorizing the seizure of electronic storage media or electronically stored information creates complexity in procedure and creates more questions than it answers. For example, what is a "search" under this proposed change? Is the search when officers take possession of the physical device or hardware or when they make a copy of the data for analysis? Is the search when officers view the copied data? Is there a new search if officers view the data again? Is the outer shell of the device, for example, a mobile telephone, considered the object of the search, or is it the data it contains? These are just some legal complexities that traditional search and seizure case law struggles to answer.

The actual analysis process is tedious and very time-consuming. In addition, it takes costly special software and computer equipment to conduct a proper analysis to meet the standards that will allow the evidence to meet reliability standards for trial.

Because of the expense of the equipment and training requirements for competence, most law enforcement agencies must rely on the Tennessee Bureau of Investigation (TBI) to complete the analysis. Depending on what the ultimate definition of "search" is under the proposed changes, the complexity of this work will cause unjustifiable expense and delay in

meeting these deadlines. The costly equipment and extensive training requirements make this a considerable burden to add additional officers to decrease the workload. Therefore, the burden on law enforcement heavily outweighs any protections the proposals might create.

The maximum 60-day requirement to complete the "search," coupled with a misunderstanding of what it takes to analyze the digital media or electronically stored information, creates an almost undoable situation for the law enforcement officers conducting these types of investigations.

We suggest using the clear language of the Federal Rule of Criminal Procedure 41(e)(2)(B) instead because the officers who conduct these investigations are already familiar with the existing Fed. R. Crim. P. 41(e)(2)(B) and the guiding case law.

(i) Warrant for a Tracking Device.

New Subsection (i)(9)(C)

Requiring warrant service return on the owner with a maximum extension of up to 90 days creates an unnecessary burden on law enforcement to disclose the existence of an investigation prematurely. Moreover, many complex investigations last much longer than 90 days. Having an absolute deadline with no way to extend it for good cause would unjustifiably jeopardize legitimate but complex investigations.

We suggest changing the rule to remove the hard deadline and allow for extensions for good cause or clarifying that new subsection (j)(1) applies to this new subsection.

(j) Sealing Affidavits in Support of Warrants.

New subsection (j)(1)

It appears that this new subsection section may be a solution to our concerns in new subsection (i)(9)(C). However, if this new subsection intends to allow for an extension beyond the 90-day maximum in (i)(9)(C), we suggest additional clarification.

We understand that Rules of Criminal Procedure need to be updated to keep up with changing technology. However, we are concerned that the proposed changes will create more issues than they solve. Therefore, after conversations with our law enforcement officers who conduct these types of investigations and a review by our legal counsel, we respectfully ask the Court to reject the proposed changes to Rule 41 of the Tennessee Rules of Criminal Procedure as submitted.

Respectfully,

Chief Deborah Faulkner
President, TACP

Sheriff Robert Bryan
President, TSA

Sharry Dedman-Beard
Executive Director, TACP

Sheriff (retired) Jeff Bledsoe
Executive Director, TSA

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENTS TO TENNESSEE RULES OF CRIMINAL PROCEDURE

No. ADM2022-01198 – Filed: August 31, 2022

RESPONSE TO INVITATION FOR PUBLIC COMMENT

In response to the proposed amendment to Rule 41 of the Tennessee Rules of Criminal Procedure, as part of the Court's 2023 Rules Package, the Tennessee District Public Defenders Conference ("Conference") opposes the amendment to subsection (a), because while Tenn. Code Ann. § 40-1-106 was amended to give certain judges statewide jurisdiction to issue warrants, the amended rule would remove jurisdictional restrictions for all "magistrates" and the difference between the statute and the amended rule could lead to unnecessary confusion.

I. GEOGRAPHIC RESTRICTION

In February of 2016, police sought and obtained a search warrant for defendants in the 19th Judicial District from a judge in the 23rd Judicial District. *State v. Frazier*, 558 S.W.3d 145 (Tenn. 2018). The defendants challenged the search in the trial court and prevailed. *Id.* The Tennessee Supreme Court upheld the suppression, holding that "in the absence of interchange, designation, appointment, or other lawful means, a circuit court judge in Tennessee lacks jurisdiction to issue search warrants for property located outside the judge's statutorily assigned judicial district." *Id.* at 146. In so holding, the Court rejected the State's argument that Tenn. Code Ann. § 40-1-106 authorized a circuit court judge to issue search warrants for property located outside of the judge's assigned judicial district. *Id.*

The Court's reasoning was based in part on the plain language of Tenn. Code Ann. § 40-1-106 at that time, because the statute appeared to merely provide a definition of the term "magistrate," not to expand or even delineate jurisdiction:

> The judges of the supreme, appellate, chancery, circuit, general sessions and juvenile courts throughout the state, judicial commissioners and county mayors in those officers' respective counties, and the presiding officer of any municipal or city court within the limit of their respective corporations, are magistrates within the meaning of this title.

Tenn. Code Ann. § 40-1-106 (2018); *see Frazier*, 558 S.W.3d at 153.

In response, the legislature amended Tenn. Code Ann. § 40-1-106 (among other statutes) to provide that:

> The judges of the supreme, appellate, chancery, circuit, general sessions and juvenile courts throughout the state, judicial commissioners and county mayors in those officers' respective counties, and the presiding officer of any municipal or city court within the limit of their respective corporations, are magistrates within the meaning of this title. *The judges of chancery and circuit courts have statewide jurisdiction to issue search warrants pursuant to chapter 6, part 1 of this title in any district.*

Tenn. Code Ann. § 40-1-106 (West 2019). Emphasis added.

Thus, while the legislature did expand jurisdiction, it specifically limited the expansion to chancellors and circuit court judges.

The proposed amendment to Rule 41, however, would remove the legislature's limitation, or at least create unnecessary confusion as to whether any magistrate may issue a search warrant outside of their own jurisdiction. Currently, that rule provides "[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." Tenn. R. Crim. P. 41. The proposed amendment would define "magistrate" by referring to T.C.A. § 40-1-106, while eliminating the

jurisdictional limitation. In other words, a literal reading of the amended rule would indicate that any judge, not just chancellors or circuit judges, would have statewide jurisdiction to issue search warrants.

Finally, as the Supreme Court recently reminded us, such changes must be legislative, because Article VI, Section 8 limits the ability to change jurisdiction to that of the Tennessee General Assembly. *See Frazier* at 151. The Rule's proposed removal of the geographic limitations currently in Rule 41(a) expands the jurisdiction of all inferior courts.

II. LIMITATION ON THE ACCOUNTABLILTY OF ELECTED OFFICIALS

Removing geographic limitations on magistrates removes accountability of the elected official. The will of the people is undermined. Elections are held to give the people of a community a voice in who represents them in their government, but also to give citizens the power to hold public officials accountable for malfeasance. Article VI, Section 4 of the Tennessee Constitution declares that inferior court judges shall be elected by the qualified voters in the district or circuit in which they are established. *See Frazier,* 558 S.W.3d at 151. This should also limit the authority to act to within the district or circuit in which they were elected. *Id.* The electorate of another district or circuit did not have a say in their election, nor would they have a say in a recall petition.

Currently, a magistrate may only act upon search warrant requests for property located within the confines of the county in which he was elected. Malfeasance of the magistrate is answered by those same citizens.

By allowing a magistrate to act outside his county, the will of the people, or the will of the people to hold a magistrate accountable for his actions, is removed for those outside the

magistrate's county. Aggrieved citizens of a county outside the magistrate's county do not have the ability to seek a remedy for a magistrate who may have exceeded his authority.

III. FORUM SHOPPING

The proposed change to eliminate current jurisdiction requirements quietly permits, and perhaps encourages, forum shopping. For example, a law enforcement officer who knows a particular magistrate in another county, who is generally more amenable to their cause, and will authorize a search warrant where another may not, could choose to bypass their local magistrate and find a "friendlier" ear. Current law inhibits this type of improper behavior by limiting the effective jurisdiction of a magistrate to the county in which the property to be searched is located. Forum shopping has been discouraged in civil proceedings for decades[1], but has not been available in criminal law due to the current geographic limitations of a magistrate's authority in statute and court rule. The proposed change would enable the unfavored practice.

In effect, a police officer in Memphis could obtain a search warrant in Johnson City to authorize a search of a Memphis residence when the local Shelby County magistrate is reluctant to do so, especially given the other proposed changes for obtaining search warrants by audio-visual means.

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[1] "Despite the tendency of the Tennessee cases to resort to the "election of remedies" doctrine (which traces its origin to the rules of pleading and provides that if allegations are repugnant, the election of one creates an estoppel against the assertion of the other), the more defensible policy basis for this rule is the prevention of vexations litigation, of forum shopping, and of double recoveries for the same injury." *Gray v. Holloway Const. Co.*, 834 S.W.2d 277, 282 (Tenn. 1992).

IV. CONCLUSION

The Conference expresses opposes the proposed amendment of Tennessee Rule of Criminal Procedure 41(a), as it arguably expands the jurisdiction of certain magistrates beyond the intent of the General Assembly when it amended Tenn. Code Ann. § 40-1-106 in 2019.

Respectfully submitted,

Tennessee District Public Defenders Conference

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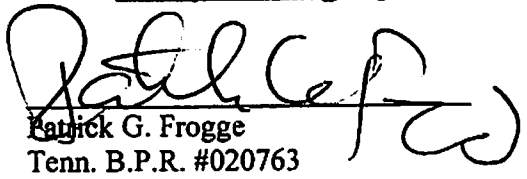
By: 
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November 22, 2022

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The Honorable Sharon G. Lee, Justice
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RE: No. ADM2022-01198 (Tenn. Aug. 31, 2022)
Comments of the Tennessee Bureau of Investigation to Proposed Amendments to Tenn. R. Crim. P. 41

Chief Justice Page, Justice Lee, Justice Bivins, Justice Kirby, and Justice Campbell:

This letter is submitted in response to the Court's order of August 31, 2022, seeking written comments on proposed amendments to the Tennessee Rules of Criminal Procedure, and in particular to changes to Tennessee Rule of Criminal Procedure 41. The Tennessee Bureau of Investigation has reviewed the proposed amendments, and for reasons set forth more fully below, recommends that the Court reject the proposed changes to Rule 41 in their current form.

Rule 41 governs the issuance and execution of search warrants, a process at the center of the work of the TBI. The proposed changes address a number of issues, but these comments focus on problems in two areas. First, the provisions governing the processing of digital evidence are wholly unworkable. Second, the provisions setting standards for the issuance of electronic tracking warrants are unnecessarily complex and burdensome.

The proposed amendment to subsection (e)(3) creates a requirement that a warrant authorizing a search of electronic storage media for electronically stored information must happen within 10 days of the officer taking possession of the media, or within sixty days upon a written showing of good cause. This effectively requires digital forensic examiners processing phones and computers to complete their examinations within sixty days of collecting a phone or computer.

TBI maintains the principal statewide digital forensics lab available to the law enforcement community in Tennessee. This unit is already under severe strain due to staffing limitations and the vast growth in workload brought on by the digital age. Case turnaround times routinely run in the three to nine-month range in all but the most exigent cases. Setting time windows for the processing of evidence which has been lawfully collected and inventoried is unnecessary and burdensome.

If this requirement was implemented, TBI's Digital Forensics Squad would be forced to reject the vast majority of case submissions entirely, in order to permit the timely processing of a small subset of cases. This would force difficult choices on law enforcement and district attorneys. What cases would take precedence, and which would be rejected? Online child exploitation? Homicides? Overdose death investigations? Human Trafficking?

Since TBI is the only source of advanced digital forensics support for many agencies, this would essentially strip those agencies of the ability to utilize digital evidence in a wide range of cases. Current best practices for the processing of digital evidence ensure that the media is securely imaged and maintained for processing in a repeatable and defensible way. Creating a time window for this process only creates a burden on law enforcement without providing any additional protections to those being investigated.

In contrast to the language of the amendments, the Federal Rules of Criminal Procedure have been updated to reflect current technology without over-complicating the process:

> **(2)(B) Warrant Seeking Electronically Stored Information.** A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review. Fed. R. Crim. P.41(2)(B).

This standard is consistent with current law enforcement practice and makes sense in light of currently available digital forensics technology.

In addition to the concerns over the time limitations surrounding digital evidence, the Bureau would also like to express concerns regarding adding 'tracking warrants' to (c)(1). Requiring that 'tracking warrants' be signed by circuit/criminal court level judges would bring jurisdictional consistency across the state considering recent statutory developments. The proposed language would read:

> "(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. A warrant for electronic information pursuant to section (c)(3)(E) of this Rule <u>or for a tracking device pursuant to section (l) of this Rule</u> shall issue only on an affidavit sworn before a judge of the chancery, circuit, or criminal court.

The use of legal process to obtain geo-location information (aka 'tracking warrants') is routine and integral part of a wide variety of criminal investigations. The TBI and other law enforcement agencies have long recognized the need for Rule 41 reform in this regard and feel that the

proposed changes are headed in the right direction. However, and for the reasons explained below, these proposed changes create unnecessary procedural hurdles for law enforcement with little substantive gain for potential criminal defendants. The TBI again proposes mirroring the Federal Rules of Criminal Procedure concerning tracking warrants which provides clear and concise guidance for law enforcement and has the added benefit of bringing consistency to our state and federal investigations in this regard.

The federal Rule 41 provisions concerning tracking warrants reads:

> (C) Warrant for a Tracking Device. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:
>
> > (i) complete any installation authorized by the warrant within a specified time no longer than 10 days;
> >
> > (ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and
> >
> > (iii) return the warrant to the judge designated in the warrant.

The proposed subsection (i)(6) requires that the officer to whom the warrant is issued for execution be present at the installation of the tracking device. The TBI recommends a rule that permits any law enforcement officer with jurisdiction to execute these search warrants. Recognizing the inherent mobility of vehicles, it is often very difficult, if not impossible, to predict where installation opportunities will intersect with the correct personnel being available, particularly within the 5-day installation window.

Similarly, the proposed requirement in (i)(7) that law enforcement officers file a 'return' on the installation creates another additional logistical burden with little added substantively. If the purpose of this provision is to ensure that the installation occurs within the 5-day period, a requirement to notate such on the final return once the search warrant is completed would suffice and operate within the currently existing guidelines for search warrant returns.

Another concern centers on subsection (i)(9)(C) which requires notice to anyone who is the target of a tracking warrant within 10 days (or 90 days total with extensions) that they were the subject of such a warrant. This timeline is very problematic considering that many complex investigations, including most TBI investigations, last far longer than the proposed 90 days.

If the provisions of proposed subsection (j) are intended to toll these notice requirements via judicial sealing of the warrant, the TBI humbly requests that language to that effect be included, or at a minimum, have a comment to the amendments reflect such intent.

The TBI respectfully submits that if amendments to Rule 41 are deemed advisable, then the carefully considered text of Rule 41 of the Federal Rules of Criminal Procedure would be an appropriate starting point. This provides two benefits. First, the text itself is simple, clear, and modern. Second, harmonizing the Tennessee standard with the federal one would provide

consistency for agents and examiners who move routinely between state and federal prosecutions.

In conclusion, TBI submits that the process of seeking search warrants in the current age of rapidly evolving scientific and digital evidence has become more than a purely legal exercise, and that specialized expertise in the gathering of that evidence would better inform the rulemaking process. TBI therefore requests that the court consider representation from TBI and other law enforcement agencies on the committee that recommends these changes.

For the reasons stated above, it is our belief that the proposed amendments to Rule 41 would cripple the Bureau's ability to process digital evidence and would unduly burden agents seeking court authorization for installation of electronic tracking devices. As a result, we urge the Court to reject their adoption. Thank you for your time and attention to these comments. Please let me know if TBI can provide any additional information or assistance.

Sincerely,

David B. Rausch
Director

Knoxville Bar Association

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November 28, 2022

VIA E-Mail: appellatecourtclerk@tncourts.gov

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

Re: No. ADM2022-01198

Dear Mr. Hivner:

Pursuant to the Tennessee Supreme Court's Order referenced above, the Knoxville Bar Association ("KBA") Professionalism Committee ("Committee") carefully considered the proposed changes to the Tennessee Rules of Appellate, Civil, Criminal, and Juvenile Procedure and the Tennessee Rules of Evidence, at its September and October 2022 meetings. The Committee presented a report of its review of the Order and proposed amendments at the October 26, 2022, meeting of the KBA Board of Governors (the "Board").

Following the Committee's presentation and thorough discussion by the Board, the Board unanimously voted to adopt the Committee's recommendation that the proposed changes to Rule 5.02 of the Tennessee Rules of Civil Procedure and Rule 49 of the Tennessee Rules of Criminal Procedure, permitting service via email on unrepresented parties and attorneys, respectively, be approved. The Committee also suggested that the Board recommend to the Supreme Court that the additional requirement to fax or mail a certification when a document is served by email be removed from the Rules. The Committee also found that the cross-reference in Rule 41(5)(A) needs clarification.

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

Sincerely,

Jason H. Long, President
Knoxville Bar Association

cc: Marsha Watson, KBA Executive Director (via e-mail)
Executive Committee of the Knoxville Bar Association