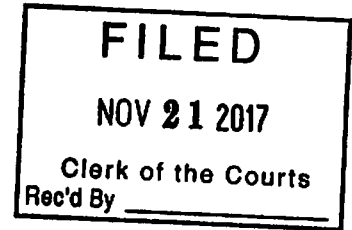


November 21, 2017

James Hivner, Clerk
Re: ADM2017-0182
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407



Mr. Hivner,

Please find public comments to:

Advisory Commission's recommended amendments set out in Appendix I (proposed amendments to the Rules of Appellate Procedure, the Rules of Evidence, the Rules of Civil Procedure, and the Rules of Criminal Procedure) and Appendix II (proposed amendments to the Rules of Juvenile Procedure) to this order.

APPENDIX I PROPOSED AMENDMENTS TO THE TENNESSEE RULES OF APPELLATE PROCEDURE RULES OF EVIDENCE RULES OF CIVIL PROCEDURE and RULES OF CRIMINAL PROCEDURE RULE 16 DISCOVERY AND INSPECTION (d) (3).

The deadline for submitting written comments is Wednesday, November 22, 2017.

Comments:

There should be no reason why the state has not provided a reasonable access to evidence. Controlled access prevents the duplication of such evidence.

The trial court should not have the authority to order the state to permit the defendant, or any representative, or any court personnel, to copy or photograph any documents or objects that constitute "material" (hereinafter "Prima Facie Contraband") as defined in Tenn. Code Ann. § 39-17-1002 and prohibited by Tenn. Code Ann. § 39-17-1003 and Tenn. Code Ann. § 39-17-1004.

This authority resides with the Legislature, General Assembly, as to a modification of the statutes to allow reproduction or dissemination in criminal cases. Tenn. Const. Art. II, § 3 defines this right and Tenn. Const. Art. IV, § 2 defines the limitations of the Supreme Court.

To be effective, a government must demonstrate in theory and practice a judicial system which provides the underlying concept of a person or persons being innocent until proven guilty and provide the defendant a reasonable access to the evidence being used against them.

The chain of possession in current rule and current law can be utilized to prevent the disclosure, and further exploitation, of the victim(s) and prevent an issue of an unfair trial based on the prosecutions inability to allow the defendant reasonable access to the evidence used against him or her.

The proposed rule change must take into account the case of *Brady v. Maryland*, 373 U.S. 83 (1963).

Brady v. Maryland, 373 U.S. 83 (1963) was a landmark United States Supreme Court case that established that the prosecution must turn over all evidence that might exonerate the defendant (exculpatory evidence) to the defense.

In this case, Brady challenged his conviction, arguing it had been contrary to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court held that withholding exculpatory evidence violates due process "where the evidence is material either to guilt or to punishment." The court determined that under Maryland law, the withheld evidence could not have exculpated the defendant but was material to his level of punishment.

In the case of *Brady v. Maryland*, 373 U.S. 83 (1963) one issue which can be argued is exculpatory evidence can also be defined as evidence which has been revealed, photographs or videos, but is denied to the defendant or defense for review.

The suggested rule change may violate the Fourteenth Amendment of The United States Constitution as the Protective Order purports the state has been unable to provide a reasonable access to evidence and seeks to correct this inability by a violation of Tenn. Code Ann. § 39-17-1003 and Tenn. Code Ann. § 39-17-1004.

Tenn. Code Ann. § 39-17-1005 should be removed from the proposed rule change as Tenn. Code Ann. § 39-17-1005 defines the offense of especially aggravated sexual exploitation of a minor and is not required for the proposed protective order.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 16

DISCOVERY AND INSPECTION.

[Modify the text of the rule to insert the new underlined subsection (d)(3); and, add new Advisory Commission Comment (2018 Amendment).]

* * * *

Strike All – Courts do not have the authority to amend or modify Tenn. Code Ann. § 39-17-1003 and Tenn. Code Ann. § 39-17-1004 as currently written. This authority is reserved for the Legislature or General Assembly.

* * * *

**PROTECTIVE ORDER
PURSUANT TO TENN .R. CRIM. P. 16(d)(3)**

1. The state of Tennessee has failed to demonstrate that the documents or objects subject to discovery pursuant to Tenn. R. Crim. P. 16(a)(F) will be made reasonably available to the defendant throughout the proceeding or has failed to make the property or material reasonably available to the defendant at any time during the proceeding. Therefore, the trial court orders the state to permit the defendant to copy or photograph any documents or objects that constitute "material" (hereinafter "Prima Facie Contraband") as defined in Tenn. Code Ann. § 39-17-1002 and prohibited by Tenn. Code Ann. §§ 39-17-1003, -1004, and ~~1005~~, subject to the following conditions.

Edward Arnold
5036 Suter Drive
Nashville, Tennessee 37211
(615) 331-7107

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED

2017 NOV 21 AM 11:32

IN RE: AMENDMENTS TO THE
TENNESSEE RULES OF
PROCEDURE & EVIDENCE

)
)
)
)
)

APPPELLATE COURT CLERK
No. ADM2017-01892
SMULLEN

COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association (“TBA”), by and through its President, Lucian T. Pera; the Chair of its Appellate Law Section, George T. (“Buck”) Lewis; its General Counsel, Ed Lanquist; and its Executive Director, Joycelyn Stevenson, makes the following comment regarding the proposed amendments to the Rules of Procedure & Evidence filed September 25, 2017:

BACKGROUND

On September 25, 2017, this Court issued an Order soliciting comments on various amendments proposed by the Advisory Commission on Rules of Evidence and Rules of Practice and Procedure. The Tennessee Bar Association asked its Appellate Practice Section, Litigation Section, Tort & Insurance Practice Section, Juvenile & Children's Law Section, Family Law Section, and Criminal Law Section to review the proposed rules and provide any comments or recommendations. Based upon that review, the TBA recommends the adoption of the rules without change except as to the following identified rules.

THE PROPOSED CHANGES TO RULE 3 OF THE TENNESSEE RULES OF APPELLATE PROCEDURE SHOULD BE ADOPTED WITH REVISIONS

The TBA is in favor of adoption of the proposed amendment to Rule 3 of the Tennessee Rules of Appellate Procedure. The TBA also recommends adding a “plea of nolo contendere” to this amendment. As noted in the comment to the proposed Rule change, the Supreme Court has already permitted an appeal as of right for the withdrawal of a guilty plea and this clarifies the applicable language. However, adding nolo contendere pleas is necessary because there are subtle distinctions between a guilty plea and a plea of nolo contendere.

The court has already permitted the withdrawal of a plea of nolo contendere in *State v. Crowe*, 168 S.W. 3d 731 (Tenn. 2005). As such, this proposed modification suggested in this comment is consistent with the case law.

Therefore, the TBA recommends that the terms “or plea of nolo contendere” be added immediately following the term “plea of guilty” or “guilty plea” wherever those terms appear throughout Rule 32, Tennessee Rules of Criminal Procedure. It should be noted that sometimes the term “plea of guilty” is used in Rule 32, while in other places the term “guilty plea” is used. Therefore, an insertion of “or plea of nolo contendere” would be required after both terms. It is also recommended that “or plea of nolo contendere” be inserted as appropriate in Rule 5 and Rule 30 (c).

Lastly, the citation to *State v. Peele* is incorrect in the comments and should be 59 S.W. 3d 701.

**THE PROPOSED CHANGES TO RULE 5 OF THE TENNESSEE RULES OF
CRIMINAL PROCEDURE SHOULD NOT BE ADOPTED**

The TBA does not support the adoption of the amendment to Rule 5 of the Tennessee Rules of Criminal Procedure. The ten-day limitation is sufficient and there is no substantive reason supporting this change other than a desire to mirror existing federal law. The proposed amendment will have a negative impact on indigent defendants by imposing additional confinement upon persons who are unable to post a bond that, in some cases, will cost more in some areas of the state than others.

It is unlikely that an extra four days will result in enough additional cases being prosecuted to justify the additional detention of those who may have their cases dismissed for failure to prosecute. The additional four days may also result in substantial added government costs to house an accused person.

Rule 5 should be amended to incorporate the term “nolo contendere” for the reasons set out above concerning the proposed amendment to Rule 3 of the Tennessee Rules of Appellate Procedure.

**THE PROPOSED CHANGES TO RULE 16 OF THE TENNESSEE RULES OF
CRIMINAL PROCEDURE SHOULD NOT BE ADOPTED WITHOUT
MODIFICATION**

The TBA does not support the adoption of the amendment to Rule 16 of the Tennessee Rules of Criminal Procedure without modification allowing for defense experts to examine the evidence in a secure laboratory setting.

While there is no objection to a defense attorney being restricted to viewing the evidence in the confines of the district attorney's office, this physical restriction to the district attorney's office is not sufficient to allow a defense forensic expert to properly analyze evidence when it may be necessary to view the evidence in a lab with specialized equipment. In most cases, the question is not whether the images are pornography, but rather how the files ended up on the computer and tracing the files to the person who downloaded the pornography.


It is prohibitively expensive, profoundly impractical, and prejudicial to defendants to require defense experts to go to the district attorney's office and examine computers when the expert needs the laboratory equipment to conduct the forensic examination.


While the TBA understands the concerns of having potential child pornography reside on a computer in an expert's laboratory, this concern must be balanced with the defense's right to an independent examination of contraband which was settled in *State v. Gaddis*, 530 S.W. 2d 64 (Tenn. 1975).


If more direct oversight is sought by the prosecution, the rule could provide the trial court the discretion to order that a state agent be permitted to be in attendance while the defense expert reviews the evidence at the expert's facility. This is not just a matter to be "worked out" at a local level. The Rule should be modified to presumptively permit defense inspection at the defendant's expert's laboratory with reasonable monitoring restrictions by the prosecution. This modification to the proposed amendment would strike a

reasonable balance between protecting the victims of the pornography and the rights of an accused.

RESPECTFULLY SUBMITTED,

By: /s/ by permission 
LUCIAN T. PERA (011641)
President, Tennessee Bar Association
Adams and Reese LLP
6075 Poplar Avenue, Suite 700
Nashville, Tennessee 38119
(901) 524-5278

By: /s/ by permission 
GEORGE T. (BUCK) LEWIS (007018)
Chair, Tennessee Bar Association
Appellate Practice Section
Baker, Donelson, Bearman, Caldwell &
Berkowitz, PC
165 Madison Ave., Suite 2000
Memphis, TN 38103
(901) 577-0749

By: /s/ by permission 
EDWARD LANQUIST (013303)
General Counsel,
Tennessee Bar Association
Patterson Intellectual Property Law, PC
1600 Division Street, Suite 500
Nashville, Tennessee 37203
(615) 242-2400

By: Joycelyn Stevenson
JOYCELYN STEVENSON (021710)
Executive Director,
Tennessee Bar Association
Tennessee Bar Center
221 Fourth Avenue North, Suite 400
Nashville, Tennessee 37219-2198
(615) 383-7421

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid within seven (7) days of filing with the Court.

Joycelyn Stevenson
Joycelyn Stevenson

Exhibit A

Dwight Aarons
President, National Bar Association,
William Henry Hastie Chapter
University of Tennessee College of Law
1505 Cumberland Avenue, Room 363
Knoxville, TN 37996-0681

Douglas Bates
President, Hickman County Bar
Association
Bates & Bates
P.O. Box 1
Centerville, TN 37033

Jason Long
Tennessee Bar Assoc. Immediate Past Pres.
London & Amburn, P.C.
607 Market Street, Suite 900
Knoxville, TN 37902

Mark Blakley
President, Scott County Bar Association
District Public Defender's Office
2792 Baker Highway; P.O. Box 310
Huntsville, TN 37756

Ben Boston
President, Lawrence County Bar Assoc.
Boston, Holt, Sockwell & Durham PLLC
P.O. Box 357
Lawrenceburg, TN 38464

Bruce Fox
President, Tennessee Trial Lawyers Assoc.
Fox & Farley
310 N. Main Street
Clinton, TN 37716

William Cockett
Johnson County Bar Association President
Smith & Cockett Attorneys
247 West Main Street, P.O. Box 108
Mountain City, TN 37683-0108

Heather Knott
Rutherford-Cannon County Bar Association
Pate & Knott
104 North Church Street
Murfreesboro, TN 37130-3636

Felisa Cox
President, National Bar Association
Memphis City Attorney's Office
4503 Pinegate Drive
Memphis, TN 38125

Lee Davis
President-Elect, Chattanooga
Bar Association
850 Fortwood Street
Chattanooga, TN 37403-2312

Alyssa Minge
President, ETLAW
Leitner, Williams, Dooley & Napolitan
900 S. Gay Street, Suite 1800
Knoxville, TN 37902-1864

Barri Bernstein
Executive Director
Tennessee Bar Foundation
618 Church Street, Suite 120
Nashville, TN 37219

Laurel Farrell
Washington County Bar Association Pres.
Sisters at Law
249 E. Main Street
Johnson City, TN 37604-5707

Keith Burroughs
President Elect, Knoxville Bar Association
Egerton, McFee, Armistead & Davis
900 S. Gay Street, 14th Floor
Knoxville, TN 37902

Charles Brasfield
President, Tipton County Bar Association
Brasfield & Brasfield
114 West Liberty Avenue, P.O. Box 846
Covington, TN 38019-0765

Kevin Bruce
President, NBA, Ben Jones Chapter
Bruce Turner, PLLC
2650 Thousand Oaks Blvd., Suite 2140A
Memphis, TN 38118

Curt Collins
President, Greene County Bar Association
C. Collins Law Firm
128 S. Main Street, Suite 102
Greeneville, TN 37743-4922

Bratten Cook
President, Dekalb County Bar Association
Bratten Hale Cook II
104 N. 3rd Street
Smithville, TN 37166

Terri Crider
President, Gibson County Bar Association
Flippin, Atkins & Crider PC
P.O. Box 160
Humboldt, TN 38343

Jason Davis
President, Marshall County Bar Association
Davis Law Firm
101 1st Avenue North
Lewisburg, TN 37091

Jeremy Ball
President, Jefferson County Bar
Association
District Attorney Office
P.O. Box 690
Dandridge, TN 37725

Jeff Ward
President
Tennessee Board of Law Examiners
Milligan & Coleman
P.O. Box 1060
Greeneville, TN 37744

Tessa Lawson
Putnam County Bar Association President
410 East Spring Street, Suite H
Cookeville, TN 38501-3495

Suanne Bone
TN Assoc. of Criminal Defense Lawyers
530 Church Street, # 300
Nashville, TN 37219

Joseph Ozment
President, TACDL
Law Office of Joseph S. Ozment, P.C.
212 Adams Avenue
Memphis, TN 38103

Terry Brack
President, Hamblen County Bar Assoc.
Terry, Terry & Stapleton
P.O. Box 724
Morristown, TN 37815

Daryl Colson
President, Overton County Bar Association
Colson & Maxwell
808 North Church Street
Livingston, TN 38570-1134

Frederick McLean
President, Paris-Henry County Bar Assoc.
McLean & McLean PC
206 W. Washington Street
Paris, TN 38242

Creed Daniel
President, Grainger County Bar Association
Daniel & Daniel
115 Marshall Avenue; P.O. Box 6
Rutledge, TN 37861-0006

Michael Davis
President, Morgan County Bar Assoc.
216 N. Kingston Street
P.O. Box 925
Wartburg, TN 37887-0925

Dan Douglas
President, Lauderdale County Bar
Association
P.O. Box 489
Ripley, TN 38063-0489

Vinh Duong
President, Tennessee Asian Pacific
American Bar Association
Waller Lansden Dortch & Davis LLP
511 Union Street, #2700
Nashville, TN 37210

Kelly Tollett
President, Cumberland County Bar
Association
Fields & Tollett
18 East Street
Crossville, TN 38555

Andrew Frazier
President, Benton County Bar Association
Whitworth Law Firm
P.O. Box 208
Camden, TN 38320

Kristen Corn
President, Williamson County Bar
Association
City of Franklin
109 3rd Avenue South
Franklin, TN 37064

James Gass
President, Sevier County Bar Association
Ogle, Gass & Richardson PC
P.O. Box 5365
Sevierville, TN 37864

Alberto Gonzales
Dean
Belmont University School of Law
1900 Belmont Boulevard
Nashville, TN 37212

David Stanifer
President, Claiborne County Bar
Association
Stanifer & Stanifer
P.O. Box 217
Tazewell, TN 37879

Amy Kathleen Skelton
Hawkins County Bar Association President
Law Office of Mark A. Skelton
121 South Depot Street
Rogersville, TN 37857

Lynda Hood
Executive Director
Chattanooga Bar Association
801 Broad Street
Suite 420 Pioneer Building
Chattanooga, TN 37402

Joanna Douglass
President, Lawyers Association for Women
Tennessee Department of Human Services
225 Martin Luther King Dr., #210
Jackson, TN 38301

Michael Mansfield
President, Tennessee Defense Lawyers
Association (TDLA)
Rainey, Kizer, Reviere & Bell, PLC
P.O. Box 1147
Jackson, TN 38302

Sam Felker
President, Tennessee Stonewall Bar Assoc.
Baker, Donelson, Bearman, Caldwell
211 Commerce Street, Suite 800
Nashville, TN 37201

Jeffrey Granillo
President, Federal Bar Association
Chattanooga Chapter
Chambliss Bahner & Stophel PC
605 Chestnut Street, Suite 1700
Chattanooga, TN 37450

Ami Brooks
President, Robertson County Bar
Association
Brooks & Hendricks, PLLC
509 W. Court Square
Springfield, TN 37172

Melanie Gober Grand
Executive Director
Lawyers Association for Women Marion
Griffin Chapter
P.O. Box 190583
Nashville, TN 37219

Kristin Green
President, Bedford County Bar Association
300 E. Lane Street; P.O. Box 461
Shelbyville, TN 37162-0461

Mary Moffatt Helms, President
NE Tenn. Chapter Federal Bar Assoc.
Wimberly, Lawson, Wright, Daves & Jones
929 W. 1st North Street; P.O. Box 1066
Morristown, TN 37816-1066

James Haywood
President, Haywood County Bar
Association
Haywood Law, PLLC
50 Boyd Avenue, P.O. Box 438
Brownsville, TN 38012-0438

Mark Hayes
Tennessee Bar Foundation Chair
Jenkins | Dedmon | Hayes Law Group LLP
111 South Mill Avenue
Dyersburg, TN 38024

Hilary Duke
President, Dickson County Bar Association
Reynolds, Potter, Ragan & Vandivort, PLC
210 East College Street
Dickson, TN 37055

Ariel Anthony
Chapter President, National Bar
Association, S.L. Hutchins Chapter
Husch Blackwell
735 Georgia Avenue, Suite 300
Chattanooga, TN 37402

Joseph Ford
President, Franklin County Bar Association
McBee & Ford
17 S. College Street
Winchester, TN 37398

Anne Fritz
Executive Director
Memphis Bar Association
145 Court Avenue, Suite 1
Memphis, TN 38103-2292

Sandy Garrett
Chief Counsel
The Board of Professional Responsibility
10 Cadillac Drive, Suite 220
Brentwood, TN 37027-5078

Diana Comes
President, AWA
Butler Snow LLP
6075 Poplar Avenue, Suite 500
Memphis, TN 38119

Chris Guthrie
Dean
Vanderbilt University School of Law
131 21st Ave. South, Room 108
Nashville, TN 37203-1181

Karen Crutchfield
President, TLAW
Wimberly Lawson Wright Davies
P.O. Box 2231
Knoxville, TN 37901-2231

Andrew Morgan
President, Bradley County Bar Association
Law Office of Andrew B. Morgan
P.O. Box 1161
Cleveland, TN 37364

Kevin Ritz
Federal Bar Association,
Memphis/Mid-South Chapter President
Office of US Attorney
167 N. Main Street, Suite 800
Memphis, TN 38103-1827

Christopher Bellamy
President, Napier-Looby Chapter
Neal & Harwell PLC
1201 Demonbreun St., Suite 1000
Nashville, TN 37203

Hannah Tippet
President, Anderson County Bar Assoc.
Mostoller, Stulberg, Whitfield & Allen
136 S. Illinois Avenue, Suite 104
Oak Ridge, TN 37830

Cindy King
Attorney at Law
President, Cocke County Bar Association
833 W. Highway 25/70, Suite A
Newport, TN 37821

Katherine Walker
Sumner County Bar Association President
113 W. Main Street, 3rd Floor
Gallatin, TN 37066-3130

Martin Holmes
President, Federal Bar Association
Nashville Chapter
Dickinson Wright, PLLC
424 Church Street, Suite 1401
Nashville, TN 37219

Cindy Hall
Tennessee CLE Commission Chair
Franklin, Cooper & Marcus PLLC
837 Fort Wood Street
Chattanooga, TN 37403

Jack Warner
President, Obion County Bar Association
Warner Law Firm PLC
308 W. Church Street
Union City, TN 38261

Monica Mackie
Executive Director
Nashville Bar Association
150 4th Avenue N., Suite 1050
Nashville, TN 37219

Peter Letsou
Dean, University of Memphis
Cecil C. Humphreys School of Law
1 North Front Street
Memphis, TN 38103

Mark Mesler
Tennessee Lawyers Fund for Client
Protection Chair
Rosenblum & Reisman, P.C.
6070 Poplar Avenue, Suite 550
Memphis, TN 38119

Tiffany Johnson
Tennessee Alliance for Black Lawyers
QP Legal Research & Writing Services
1067 Fleece Place
Memphis, TN 38104-5620

Amanda M. Busby
President, Knoxville Bar Association
Anderson Busby PLLC
P.O. Box 2588
Knoxville, TN 37901-2588

Suzanne Keith
Executive Director
Tennessee Association for Justice
629 Woodland Street
Nashville, TN 37206

Rebecca Parsons
Giles County Bar Association President
Rebecca Sue Parsons, Attorney at Law
P.O. Box 333
Pulaski, TN 38478-3219

Sheila Proffitt
President, Coffee County Bar Association
Sheila Bryan Proffitt, PLLC
202 Woodbury Highway, Suite 300
Manchester, TN 37355-1989

Michael King
Chair, Board of Professional
Responsibility
King Law Offices
P.O. Box 667
Huntingdon, TN 38344

Denny Mitchell
President, White County Bar Association
Mitchell Law Office
112 South Main Street
Sparta, TN 38583

David Myers
President, Union County Bar Association
105 Monroe Street; P.O. Box 13
Maynardville, TN 37807-0013

Matt Maddox
President, Carroll County Bar Association
Attorney at Law
P.O. Box 827
Huntingdon, TN 38344

Christopher Raines
President, Kingsport Bar Association
Blankenship Law Office
122 E. Market Street; P.O. Box 1909
Kingsport, TN 37662-1909

Danielle Hardee
President, Jackson-Madison-Henderson
County Bar Association
U.S. District Federal Court
111 S. Highland Avenue
Jackson, TN 38301

Bill Koch
Dean, Nashville School of Law
4013 Armory Oaks Drive
Nashville, TN 37204-4577

Kathleen Shell
President, McMinn-Meigs County Bar
Association
Law Office of Kathleen Hodge
291 Abel Avenue
Decatur, TN 37322

William Lawson
President, Unicoi County Bar Association
112 Gay Street, Suite A; P.O. Box 16
Erwin, TN 37650-0016

Judy McKissack
Director
Tennessee Commission on Continuing
Legal Education
1321 Murfreesboro Pike, #810
Nashville, TN 37217

Larry Stanley
President, Warren County Bar Association
100 W. Main Street
P.O. Box 568
McMinnville, TN 37111-0568

Dustin Franklin
President, Bristol Bar Association
Second Judicial District Public Defender's
Office
P.O. Box 839
Blountville, TN 37617

Ian McCabe
President, Loudon County Bar Association
Law Office of Ian McCabe
103 Suburban Road, #201
Knoxville, TN 37923-5584

Daniel Murphy
President, Maury County Bar Association
Fleming, Flynn & Murphy
P.O. Box 90
Columbia, TN 38402

Lynn Newcomb
Pres., Cheatham County Bar Assoc.
Balthrop, Perry, Noe, Newcomb &
Morgan
102 Boyd Street; P.O. Box 82
Ashland City, TN 37015

William Jones
President, Campbell County Bar Assoc.
Assistant Public Defender
3170 Appalachian Highway, Suite 1
Jacksboro, TN 37757

Beau Pemberton
President, Weakley County Bar Association
Law Office Of James H. Bradberry
109 North Poplar Street; P.O. Box 789
Dresden, TN 38225-0789

Ann Pruitt
Executive Director
Tennessee Alliance for Legal Services
1220 Vintage Place
Nashville, TN 37215

Liz Sitgreaves
President, LAW Marion Griffin Chapter
The Law Offices of John Day
5141 Virginia Way, Suite 270
Brentwood, TN 37027

Lisa Perlen
Executive Director
Tennessee Board of Law Examiners
511 Union Street, Suite 525
Nashville, TN 37219

Lauren Sherrell
President, SETLAW
O'Shaughnessy & Carter, PLLC
735 Broad Street, Suite 1000
Chattanooga, TN 37402

Nathan H. Ridley
President, Nashville Bar Association
Bradley Arant Boulton Cummings LLP
P.O. Box 340025
Nashville, TN 37203

Gary Wade
Dean, Lincoln Memorial University
Duncan School of Law
601 W. Summit Hill Drive
Knoxville, TN 37902

Mario Ramos
President, Tennessee Association of
Spanish Speaking Attorneys
2021 Richard Jones Road, Suite 300
Nashville, TN 37215

Earle Schwarz
President-Elect, Memphis Bar Association
2157 Madison Avenue, Suite 201
Memphis, TN 38104

Paz Haynes
President, Napier-Looby Bar Foundation
Bone McAllester Norton PLLC
511 Union Street, Suite 1600
Nashville, TN 37219

Amy Bates
President, Montgomery County Bar Assoc.
Mathis, Bates & Klinghard, PLLC
412 Franklin Street
Clarksville, TN 37040-3403

Terry Stevens
President, Roane County Bar Association
DA's Office of the 9th District
1008 Bradford Way; P.O. Box 703
Kingston, TN 37763-2850

Shea Wellford
Past President, Memphis Bar Association
Martin, Tate, Morrow & Marston, P.C.
6410 Poplar Avenue, Suite 1000
Memphis, TN 38119

Randall Self
President, Lincoln County Bar Association
Randall E. Self, Attorney At Law
131A Market Street E.; P.O. Box 501
Fayetteville, TN 37334-0501

Christie Sell
President-Elect, Chattanooga Bar Assoc.
General Session Court Judges
600 Market Street, 203 Courts Building
Chattanooga, TN 37402

Harriet Thompson
President, Hardeman County Bar
Association
P.O. Box 600
Bolivar, TN 38008

Travenia Holden
President, 15th Judicial District Bar Assoc.
Holden Law Office
1037 West Main Street, Suite C
Lebanon, TN 37087

Deborah Tate
Administrative Director
Administrative Offices of the Courts
511 Union Street, Suite 600
Nashville, TN 37219-1768

Drew Taylor
President, Carter County Bar Association
210 South Main Street
Elizabethton, TN 37643

James Taylor
President, Rhea County Bar Association
375 Church Street, Suite 300
Dayton, TN 37321-1322

Robert Thomas
NBA, Ballard Taylor Chapter President
Weinman & Associates
112 S. Liberty St., P.O. Box 266
Jackson, TN 38302-0266

John Lee Williams
President, Humphreys County Bar Assoc.
Porch Peeler Williams Thomason
102 S. Court Square
Waverly, TN 37185-2113

Julie Palmer
President, Dyer County Bar Association
Palmer Law Firm
116 W. Court Street
Dyersburg, TN 38024-4639

Marsha Wilson
Executive Director
Knoxville Bar Association
P.O. Box 2027
Knoxville, TN 37901-2027

Melanie Wilson
Dean
UT College Of Law
1505 W. Cumberland Avenue
Knoxville, TN 37996-1810

Kathryn Hatfield
President, Monroe County Bar Association
Ridenour & Hatfield
P.O. Box 444
Sweetwater, TN 37874-0444

Patrick G. Frogge
Executive Director
Public Defenders Conference
618 Church Street, Suite 300
Nashville, TN 37219

Bill Colvin
President, Chattanooga Bar Assoc.
William G. Colvin, PLLC
801 Broad Street, Suite 428
Chattanooga, TN 37402

Dean DeCandia
President, Memphis Bar Association
Shelby County DAG's Office
201 Poplar Avenue, Suite 301
Memphis, TN 38103-1945

Donna Hargrove
Public Defenders Conference Rep.
17th Judicial District Public Defender
P.O. Box 1165
Lewisburg, TN 37091-0165

Denise Lawrence
Executive Director
TN Assoc. of Criminal Defense Lawyers
530 Church Street, # 300
Nashville, TN 37219

Erin Palmer Polly
President-Elect, Nashville Bar Association
Butler Snow LLP
150 3rd Avenue South, Suite 1600
Nashville, TN 37201



TACDL

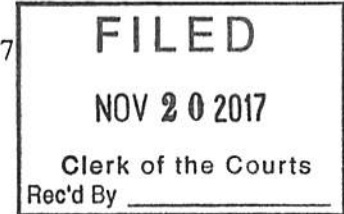
...wherever justice demands

Tennessee Association of Criminal Defense Lawyers

530 Church Street
Suite 300
Nashville, TN 37219
Phone: (615)329-1338
Fax: (615)329-1339
Email: office@tacdl.com

BOARD OF DIRECTORS

November 20, 2017



Executive Committee:

Joseph S. Ozment, President
Jeff Cherry, President-Elect
Jonathan D. Cooper, Treasurer
Michael Working, Secretary
Sara Compher-Rice, Past President

James Hivner, Clerk
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407
Via email: appellatecourtclerk@tncourts.gov

East Tennessee:

Nate Evans, Knoxville
Bill Jones, Jacksboro
Loretta Cravens, Knoxville
Ben McGowan, Chattanooga
Wencke West, Cleveland
Matthew Spivey, Kingsport

Re: No. ADM2017-01892 Proposed Amendments

Dear Mr. Hivner:

Middle Tennessee:

Jessica Van Dyke, Nashville
David Veile, Franklin
Amanda Gentry, Nashville
Roger Nell, Clarksville
Courtney Teasley, Nashville
Wesley Clark, Nashville

The following are written comments concerning the proposed changes to Tennessee Rules of Criminal Procedure 5 and 16 on behalf of the Tennessee Association of Criminal Defense Lawyers (TACDL). TACDL is a nonprofit association of criminal defense attorneys across the state committed to protecting the constitutional rights of all citizens accused of criminal offenses.

1. Criminal Procedure Rule 5 (Initial Appearance Before Magistrate)

West Tennessee:

Lauren Fuchs, Memphis
David Stowers, Covington
Mark Donahoe, Jackson
Glover Wright, Memphis
Kamilah Turner, Memphis
Claiborne H. Ferguson, Memphis

The proposed changes to Criminal Procedure Rule 5 extend the time in which a preliminary hearing must be held for a defendant in custody from ten days to fourteen days and to clarify that the time begins to run from the date of the initial appearance rather than the date of arrest.

Committee Chairs

Amicus Curiae: Richard Tennent
CLE: Rob McKinney, Jeff Cherry
Death Penalty: Jim Simmons, Anne Tipton
Expert and Investigative Services: Roger Nell
Innocence: Stephen Ross Johnson
Juvenile Defense: Chris Kleiser,
Diane McNamara
Legislative: Ben Raybin, Amanda Gentry

TACDL opposes extending the amount of time before which a preliminary hearing must occur. As a practical matter, this amendment will serve primarily to lengthen the incarceration of a significant number of indigent defendants who cannot afford bond, with little corresponding benefit. TACDL further advocates the Rule should clarify that the hearing must "occur" within ten days rather than merely being "schedule[d]," and that a remedy should attach for violations of the Rule.

Membership:

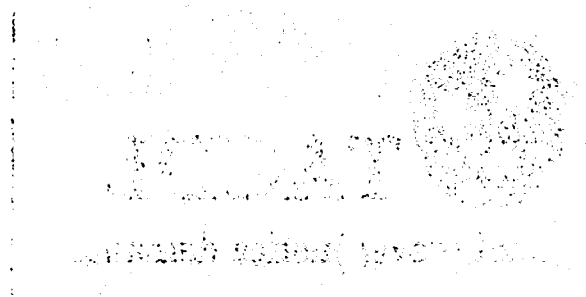
Claiborne H. Ferguson (West TN)
Wencke West (East TN)
Amanda Gentry (Middle TN)
Personnel: Claiborne H. Ferguson
Publications: Michael Working,
Stephen Ross Johnson
Roundtables: Nate Evans
Special Action: Paul Bruno
Strategic Planning: John G. Oliva
Strike Force: Rich McGee

Regarding the extension of time, a significant number of the affected defendants—who are presumed (and may in fact be) innocent—remain in custody due to poverty. Poor people live day-to-day financially and should not suffer irreparable harm due to their inability to post bail following arrest. The only reason to extend the time period from ten days to fourteen days is to allow the prosecutor extra time to prepare for the preliminary hearing. If the prosecutor requires more than ten days to present evidence at the preliminary

EXECUTIVE DIRECTOR (Interim)

Denise Lawrence

STATE OF TEXAS
COUNTY OF [illegible]
[illegible]
[illegible]
[illegible]



FILED
NOV 8 2017
Clerk of the Courts
Rec'd by

[illegible text]

[illegible text]

[illegible text]

[illegible text]

[illegible text]

[illegible text]

[illegible text]

[illegible text]

[illegible text]

hearing then the defendant can be released on her own recognizance on the tenth day.

The advisory comments do not clarify what “data from Tennessee courts” justify the need for this additional time. TACDL does not believe that evidence or witnesses unavailable within ten days will suddenly materialize within four additional days in the vast majority of cases. Yet the defendant will have to spend nearly a full additional work-week in jail. Should the evidence later emerge, the State has the option to renew prosecution because jeopardy would not have attached.

Moreover, in some counties the defendant is not brought before the magistrate for up to forty-eight hours following arrest. In reality, the proposed amendment may extend confinement to as many as sixteen days in such situations. Fourteen to sixteen days in jail before an adversarial testing of probable cause is too long. In fourteen days a defendant unable to post bail likely loses her job, her home, her children, and her possessions.

Insofar as preliminary hearings are not routinely conducted within thirty days for defendants on bond, the rule should be amended to reflect this reality and allow defendants on bond to waive the thirty day requirement with the advice of counsel.

Regarding the setting of preliminary hearings, courts across the state inconsistently interpret Rule 5 concerning whether the preliminary hearing shall occur within ten days or whether the magistrate shall schedule the preliminary hearing within ten days to be held at some later date. The proposed amendment does not eliminate this ambiguity. TACDL proposes that the Rule specifically state that the preliminary hearing shall be conducted within ten days from the date of the initial appearance for incarcerated defendants.

Finally, neither the current rule nor the proposed rule provide for sanctions or remedies when courts fail to abide by the rule. The lack of sanctions allows this rule to be applied at the sole discretion of each General Sessions judge with no recourse for the individual defendant. TACDL strongly urges that Rule 5 provide a remedy that the defendant be released from custody on her own recognizance if the preliminary hearing does not occur within the specified time. Furthermore, the date of the initial appearance varies by jurisdiction and may occur within hours of arrest in one county or weeks of arrest in another county. This rule should clarify that the initial appearance must be held as soon as possible after a warrantless arrest and in no event more than forty-eight hours.

2. Criminal Procedure Rule 16 (Discovery and Inspection)

TACDL is opposed to the proposed rule change regarding the disclosure of child pornography. The amendment will likely not solve any existing problem, will deny defendants the ability to obtain potentially exonerating evidence, will add financial burden to defendants who may be unable to afford the additional costs, and will likely lead to wrongful convictions.

As an initial matter, this is largely a “solution in search of a problem.” TACDL is not aware of a single incident in which child pornography has been improperly released by a criminal defense attorney or an expert while working a case in this state. By contrast, there are many examples of persons exonerated by vigorous forensic investigation. Thus, the proposed increased

restrictions will primarily affect only the ability of innocent people to raise a defense with no corresponding benefit.

There is no legal conflict in allowing defense attorneys and experts to possess these materials. In *State v. Allen*, the Tennessee Court of Criminal Appeals held that 18 U.S.C. § 3509(m) (part of the Adam Walsh Act) does not preempt state rules regarding discovery in state prosecutions involving child pornography. No. E2007-01018-CCA-R3-CD, 2009 WL 348555 (Tenn. Ct. App. Aug 17, 2009). Further, the court pointed out that § 3509 “has been interpreted to allow disclosure of offending materials where a defendant has shown that an analysis of the material at a government facility would be cost prohibitive; doubt about the reliability of an expert’s equipment would be raised if the expert were forced to move the equipment; or that the expert’s ability to analyze the material is so compromised that he is of no effective service to Defendant or Defendant’s attorney.” This decision was cited with approval by a federal court in a case in which an attorney was prosecuted for child pornography he claimed was obtained in his official legal capacity. *United States v. Flynn*, 709 F. Supp. 2d 737, 741 (D.S.D. 2010). See also *U.S. v. Knellinger*, 471 F.Supp.2d 640, 647-48 (E.D. Va. 2007).

TACDL believes that requiring a defense attorney and expert to work in a government facility—while probably being supervised by an agent of the prosecution—significantly impairs the ability to a defense in several ways. Computer technicians have their own equipment and programs which may not be easily brought into a government facility, which has its own equipment. The defense attorney and expert cannot candidly discuss the evidence with a government agent listening. It may take an expert many hours to personally review potentially thousands of files.

A recent case handled by a TACDL attorney—who is also a forensic computer expert—demonstrates the likelihood that wrongful convictions will result from the overly-restrictive limitations in the proposed amendment. In that case, the defendant was charged with possession of child pornography after 192 suspect images were found on his computer by the TBI. Once these images were discovered, the TBI did not do any further analysis to determine the source of the images. In fact, the TBI rarely performs such analysis to confirm that the suspect knowingly obtained the materials.

The defense was allowed to obtain a forensic “mirror” image of the defendant’s computer which was then analyzed by a computer forensics expert. The expert utilized specialized computer equipment, advanced forensic software tools and old-fashioned “gum-shoe” investigative technics to analyze numerous artifacts on the computer including:

- File System Indexing and Search
- Internet Browser History Analysis
- Review of all Internet Cookies
- Thumbnail Cache Analysis
- Photo Image Analysis
- System Log File Analysis
- Windows Event Log Analysis

- Windows Registry Search and Analysis
- Recycle Bin History Analysis and Carving
- USB Device Connection History
- Carved Space Recovery, Analysis and Search
- Shadow Copy Image Extraction and Analysis
- Windows Search Indexer windows.edb and *Gatherer File Analysis*

After over sixteen (16) hours of analysis, the expert conclusively reported that the images found on the defendant's computer were exclusively thumbnail images from "pop-up" web pages. There was no evidence that the defendant had ever searched for child pornography, that he had ever visited any websites known to contain child pornography, nor had he ever intentionally downloaded images containing child pornography. **In other words, the defendant did not knowingly or intentionally acquire the illegal images.** After reviewing the expert's report, the forensic analysts at the Tennessee Bureau of Investigation confirmed his findings. The District Attorney dismissed the case.

This defendant was charged with Sexual Exploitation of a Minor, a Class B Felony carrying 8-30 years in prison with no parole eligibility and lifetime placement on the Sex Offender Registry. The plea offer from the State was 10 years in prison. **Without the expert's analysis and report, an innocent person would likely have spent a decade in prison and forever been labeled a sexual predator.**

According to the TACDL member who performed the analysis, the defendant's exoneration might not have been possible if the expert been required to conduct his work at a government facility and/or utilizing only tools provided by the State for several reasons. First, the specialized computer used by the expert in this case was a large, server-class machine which is difficult to move from location to location. To understand why such specialized equipment is required, it helps to review the factors and process involved.

- A suspect computer must first be "imaged," meaning that an EXACT, bit-by-bit copy of the computer's storage device is copied and verified in a forensically sound and verifiable process.
- This mirror image of the suspect computer is then "ingested" by the forensic analysis computer. This includes copying the entire contents of the mirror image onto storage on the forensics computer. This process alone can take up to one (1) hour or more for a one (1) Terabyte image, even using a high-speed device and a properly configured forensic analysis computer.
- As the size of storage on personal computers increases, the time required to analyze the data on those devices increases.
- To accommodate this increase in data volume, specialize forensic analysis computers utilize a drive array, which is a group of multiple hard drives which are "bundled" by the computer to function as a single virtual hard drive.

Functionally, this allows multiple drives to “share” the task of reading the data, meaning that, for example, a four-drive array would have each drive doing ¼ of the work simultaneously with the other three drives.

- Once the suspect image is ingested by the forensic system, the entire contents of the image are indexed according to a predefined set of forensic rules and targets. This process can be very taxing on the forensic computer’s memory, processor and its storage drives. As such, a properly configured forensic analysis computer requires significantly more power in each of these subsystems than the average end-user’s computer. Even with such a properly configured forensic analysis computer, this indexing process can take hours for larger images.
- Once all of the aforementioned preparatory activities are complete, the forensic expert’s work truly begins. Modern computer systems are extremely complex, and the needs of the investigator are entirely dependent on the facts of the case. Determining what computer evidence and artifacts are relevant or important and then investigating that evidence is often an iterative, tedious and time-consuming process that is unpredictable at best. Forcing this investigative process into a confined “box” within a State facility during business hours makes the expert’s job extremely difficult if not impossible.
- Because the process is often iterative, and as the expert uncovers new information or clues, he must discuss his findings with defense counsel and adjust his inquiry accordingly. In the earlier example, the expert had numerous calls with defense counsel regarding various discoveries he made during his analysis which led to new lines of investigation.
- Finally, there are currently a VERY limited number of experts in Tennessee who possess the knowledge and equipment to conduct the necessary analysis. In the example case herein, the case was being prosecuted in a county over 120 miles from the expert’s office. Requiring the expert to travel to the State’s facility to conduct his investigation is overly burdensome when the two are located in the same city. When they are geographically separated by large distances, it become impossible.

Technical concerns are also significant in cases in which the person(s) depicted in the images may not actually be minors. Under the law, the State simply has to show that the person(s) in any given image or video are minors, but they do not have to prove the actual age. Tenn. Code Ann. § 39-17-1002 et seq. This effectively shifts the burden to the defense to establish reasonable doubt that they are *not* minors by proving their actual age. To accomplish this, one forensic strategy is to compare the suspect images against “known” images of persons who are not minors, but who appear very young. The only way to accomplish this is by comparing the suspect images against a database of known performers of this “genre” to determine if there is a match. This is virtually impossible within the confines of a State facility and without internet access.

Financial cost is an important consideration. Even if an adequate analysis is theoretically possible under the proposed new rules, it will undoubtedly cost more for the defense attorney and expert to work within the state's facilities and time availability, as well as to bring in additional software and computer resources. The proposed rule would put all of these additional costs on the defendant. If the defendant is indigent, investigation would be substantially limited by the caps on attorney time and limitations on expert rates. It is already challenging to find competent experts in many jurisdictions who are prepared to handle these cases at AOC rates, and the proposed change would only make this process more difficult for defendants. It will be unfair to indigent defendants to enact the proposed changes without also providing the additional financial resources required to comply with the new technical restrictions.

The TACDL member who conducted the computer analysis described above is only aware of **two forensic experts** (including himself) who will accept AOC rates for these kinds of cases. The TACDL member states that, if required to conduct his analysis in a state facility subject to the additional restrictions contemplated by the proposed amendment, he would charge at least twice his current rate and would not be able to work at AOC rates.

In TACDL's view, the better route to balance a defendant's right to a defense with victims' privacy concerns is a rule that contemplates protective orders that can be tailored to each situation and jurisdiction. Protective orders are regularly used in criminal and civil cases to safeguard dissemination of sensitive material. Attorneys and their experts are regularly trusted to maintain and protect these materials. If the State has a question about a particular defense attorney or expert, this could be raised to the judge in the process of obtaining the protective order. Perhaps the State could create a certification for private experts to demonstrate that they are capable of maintaining this information.

The TACDL member references above has had protective orders in every case of this nature he has worked on. These orders require that he maintain the evidence in a secure location within a locked cabinet within his locked office; that he severely restrict access to only those working directly under my supervision as the expert and only within a "controlled environment"; that no copies of the provided material are made except as required to copy it to his forensic analysis server; that the computer he uses for analysis is NEVER connected to the internet or any other network accessible to anyone else; and that he destroy the evidence using forensically sound methods within thirty (30) days of the termination of the case.


Although the proposed rule does contemplate the *possibility* for access outside a state facility, the rule would provide extremely limited availability and a high threshold to be able to pursue a protective order. We propose that an opposite approach should be taken. The **default** should be a protective order to give the defense and its expert direct access under appropriate conditions, and if the defense cannot satisfy an appropriate standard, then the court could order that the materials be made available only at a state facility. Should the court find that the proposed rule strikes a better balance, we propose that more research be done into the extent which investigators are able to do their job subject to these limitations, the cost of doing so, and the

extent to which this is truly needed. TACDL would be happy to assist the court or the rules commission in these matters if extended an invitation.

In essence, in a case where digital evidence is involved, the computer or other digital device becomes a "witness" which tells a story about the defendant's actions. The Confrontation Clause of the Sixth Amendment guarantees the right to cross examine every witness and accuser. Without an unfettered ability to fully analyze the extremely complex environment of any computer or digital device, the defendant is extremely prejudiced both in their right to confront and cross examine witnesses as well as their fundamental right to present a defense. Digital devices are "witnesses" which are unbiased and which cannot lie. However, determining the "real" story being told by that "witness" requires considerable skill, advanced tools and, most critically, time. TACDL believes that the proposed amendment will prevent most defendants from sufficient access to this evidence and will directly to wrongful convictions.

For these reasons, TACDL urges the Court not to approve the proposed amendment.

Very truly yours,



Joseph S. Ozment, President

Tennessee Association of Criminal Defense Attorneys

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
2017 NOV 20 PM 12:59

IN RE: AMENDMENTS TO TENNESSEE RULES OF PROCEDURE AND EVIDENCE

No. ADM2017-01892 – Filed: September 25, 2017

RESPONSE TO INVITATION FOR PUBLIC COMMENT

In response to the Court’s invitation for public comment to changes proposed by the Advisory Commission on the Rules of Practice and Procedure, the Executive Committee of the Tennessee District Public Defenders Conference (“Conference”) respectfully objects to the proposed changes to the Tennessee Rules of Criminal Procedure. Specifically, Tenn. R. Crim. P., Rule 5 (“Rule 5”), concerning the time period within which a court must schedule a preliminary hearing, and Tenn. R. Crim. P., Rule 16 (“Rule 16”), and pertaining to cases in which discovery materials in the possession of the district attorney general may contain examples of alleged child pornography, should be further amended.

I. THE CONFERENCE OBJECTS TO LENGTHENING THE DEADLINE FOR PRELIMINARY HEARINGS ABSENT A COMPELLING CAUSE

Currently, Tenn. R. Crim. P., Rule 5 requires that in felony cases in which the defendant remains in custody, the court must schedule a preliminary hearing within ten (10) days. The proposed change to Rule 5 would increase the time in which the hearing must be scheduled to fourteen (14) days. According to the Advisory Commission’s comment, the main impetus behind this change is a desire to align Tennessee’s rule with its federal counterpart. Absent a more compelling reason, the Conference must object to the change. The rule, which admittedly provides

no remedy for its violation, at least conveys a sense of urgency for the accused who awaits a judicial determination while incarcerated. That urgency is appropriate in the given circumstance, as the accused is, at that point, presumed innocent.

Furthermore, the current ten (10) day limit in Rule 5 is often ignored. As there is no remedy for the defendant or consequence for the court in failing to adhere to the rule, it is likely the fourteen (14) day limit will only serve to further extend the incarceration of indigent defendants who are unable to make bond awaiting preliminary hearings.

The Conference is opposed to the change to the rule, and further suggests that a remedy for its violation is a more appropriate change. The federal rule establishes a procedure for the federal courts to follow in circumstances which cause a court to consider extending the time for the defendant's preliminary hearing.¹

II. THE PROPOSED CHANGES TO DISCOVERY MATTERS IN SEXUAL EXPLOITATION OF MINORS CASES UNDER RULE 16 SHOULD BE PERMISSIVE

The proposed change to Tenn. R. Crim. P., Rule 16, adding an exception to the transfer of discovery materials in cases in which the material subject to discovery is alleged child pornography, is unworkable in the form presented.

Should the district attorney general not satisfactorily provide access to the materials in question, the court is permitted, but not mandated, to make the district attorney general provide the materials for review by the defense. *See* (d)(3)(C). This creates a paradox in which the court *shall* prevent the transfer of materials under (d)(3), unless the district attorney fails to abide by the

¹ With the defendant's consent and upon a showing of good cause--taking into account the public interest in the prompt disposition of criminal cases--a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, the magistrate judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay. Fed. R. Cr. P. 5.1(d) (2017).

court's order. In that circumstance the court is not required to remedy the situation, but "*may*." (Emphasis added). If the state refuses to abide by the requirements of the proposed change to Rule 16, then the access to the materials by the defendant should be mandatory, as the defendant's right to view the evidence against him should not be denied.

By limiting access to the material in these circumstances, a determination has already been made by the district attorney general and the court that the material in question is pornographic or sexually exploitive. The district attorney general or trial court appear to get to make such a determination pre-trial and limit a defendant's right to the materials during the discovery process.

It is worth noting that, at this stage of the proceeding the defendant is merely accused, and has a right to view the evidence against him and owns a presumption of innocence. *See Tidwell v. State*, 922 S.W.2d 497, 501 (Tenn. 1996) (stating that a criminal defendant "is presumed by law to be innocent until proven guilty."). Eliminating the defendant's participation in the review of evidence would undermine the defendant's ability to assist his counsel in trial preparation and infringe on his presumption of innocence. Further, if the defendant were to proceed *pro se*, it would appear that the defendant would not have the right to view the evidence against him.

IV. CONCLUSION

Therefore, the Tennessee District Public Defenders Conference respectfully requests the Court reconsider the proposed changes discussed herein and amend the Court's Rules package accordingly for submission to the General Assembly in its upcoming session.

Respectfully submitted,

Tennessee District Public Defenders Conference

By: Donna Hargrove (by permission PGF)

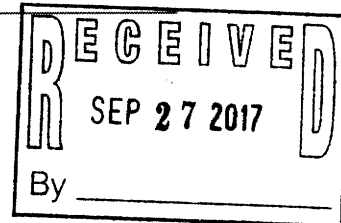
Donna Hargrove
Tenn. B.P.R. #014333
President
618 Church Street, Suite 300
Nashville, TN, 37219
Phone: 615-741-5562
Fax: 615-741-5568
Email: donna.hargrove@tn.gov

By: Patrick G. Frogge

Patrick G. Frogge
Tenn. B.P.R. #020763
Executive Director
618 Church Street, Suite 300
Nashville, TN, 37219
Phone: 615-741-5562
Fax: 615-741-5568
Email: patrick.frogge@tn.gov

Lisa Marsh - Fwd: No. ADM2017-01892 Crim. Pro. Rule 16 Amendment: Re Child Porn

From: appellatecourtclerk
To: Lisa Marsh
Date: 9/27/2017 12:10 PM
Subject: Fwd: No. ADM2017-01892 Crim. Pro. Rule 16 Amendment: Re Child Porn



See comment below.

>>> Chad Butler <_cbutler@tncoalition.onmicrosoft.com> 9/27/2017 11:45 AM >>>

Hello,

I think direct access by the defendant, highlighted in red below, should be removed from this proposal. A defendant does not have any constitutional right or statutory right that requires he view the evidence against him with his own two eyes. The law allows the State to proceed on cases where evidence has been lost or destroyed. Blind people can be prosecuted for crimes they commit, without ever seeing the evidence themselves. Allowing a defendant to access child pornography would be the equivalent of allowing someone charged with drug possession to personally use the seized the drugs to verify those are his/her drugs. Child porn CANNOT be treated like other evidence. It's not like any other contraband. Allowing defendants to personally view the images only serves to revictimize the children. Please consider amending the language that requires the State allow the defendant to personally access the contraband. Instead, language could just be added in the proceeding sentence that at a judge's discretion it MAY be allowed or permitted, but is not required.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 16

DISCOVERY AND INSPECTION.

[Modify the text of the rule to insert the new underlined subsection (d)(3); and, add new Advisory Commission Comment (2018 Amendment).]

* * * *

(d) *Regulating Discovery.*

* * * *

(3) *Procedure in Child Pornography Cases.* In any criminal proceeding relating to the sexual exploitation of minors under title 39, chapter 17, part 10 that involves documents or objects discoverable pursuant to Rule 16(a)(F), the court shall, on motion of the state:

(A) Deny any request by the defendant to copy or photograph any documents or objects depicting the sexual exploitation of minors under title 39, chapter 17, part 10, so long as the state shows that the documents or objects will be made reasonably available to the defendant throughout the proceeding.

(B) For the purposes of subdivision (d)(3)(A), documents or objects shall be deemed to be reasonably available to the defendant if the state provides ample opportunity for inspection, viewing, and examination at a state facility of the documents or objects by the defendant, the defendant's attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial. The Court may, in its discretion, permit other individuals, to have access to the

documents or objects if necessary to protect the rights of the defendant.

(C) If the state fails to demonstrate that the documents or objects will be made reasonably available to the defendant throughout the proceeding, or fails to make the documents or objects reasonably available to the defendant at any time during the proceeding, the trial court may order the state to permit the defendant to copy or photograph any documents or objects subject to terms and conditions set by the court in an appropriate protective order.

* * * *

Chad L. Butler

Staff Attorney

Tennessee Coalition to End Domestic and Sexual Violence

2 International Plaza Drive, Suite 425

Nashville, TN 37217

Toll Free: [800-289-9018](tel:800-289-9018) | Fax: [615-383-2967](tel:615-383-2967)

tncoalition.org | ProtectRespectTN.org | preventTN.com

