Robert L. Holloway, Jr.
Court of Criminal Appeals
State of Tennessee
418 West 7th Street
Columbia, TN 38401
931-380-3007

FILED
OCT 28 2015
Clerk of the Courts
Rec'd By _____

October 26, 2015

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

Re: No. ADM2015-01631; Tennessee Rule of Criminal Procedure 36.1

Dear Mr. Hivner:

Recommendation: I would recommend changing the word "is" to "was" and adding "at the time the plea was entered" after the word "benefit" in the proposed Rule 36.1(c)(3)(ii).

Reason: Most of the Rule 36.1 opinions involving an illegal concurrent sentence issued by the Court of Criminal Appeals arise from motions filed by inmates in federal or state custody for unrelated offenses. These movants seek to withdraw their plea, often decades after the entire sentence had been fully served, so that the previous convictions cannot be used to enhance a sentence on an unrelated pending or future charge. I am concerned that the use of the present tense in the phrase "the illegal provision is to the defendant's benefit" could be interpreted to mean the defendant's benefit at the time the motion was filed as opposed to when the plea was entered. After the sentence has been fully served and the concurrence has been honored, the defendant has received the benefit of the illegally short sentence and only the detriment of having the convictions on his record remain.

Although my preference would be to repeal Rule 36.1 in its entirety, if that is not possible, I recommend the change discussed above.

Sincerely,

Judge Robert L. Holloway, Jr.
Tennessee Court of Criminal Appeals

September 17, 2015

FILED
2015 SEP 21 PM 1:36
APPELLATE COURT CLERK
NASHVILLE
ADM2015-01631

James M. Hivner, Clerk
Re: 2016 Rules Package
100 Supreme Court Building
401 7th Ave. North
Nashville, TN 37219-1407

RE Proposed changes to the Tenn. Rules of Juvenile Procedure

Dear Mr. Hivner:

This letter is in response to the August 27, 2015 solicitation for written comments to the proposed comprehensive revision of the Rules of Juvenile Procedure, which if adopted would replace in its entirety the current version of the Rules of Juvenile Procedure. I would like to begin by just saying 'Thank you' to the advisory commission which took the enormous time and energy necessary to complete this monumental task. In general, these proposed changes to the Rules of Juvenile Procedure are a welcome replacement for the current rules which have not been significantly modified in several decades. I will therefore limit my specific comments to just a few areas in the proposed rules with which I would suggest an amendment or elimination.

Proposed Rule 108: It is clear that the advisory commission wanted to limit the ability of an alleged perpetrator/nonparent to use civil proceedings as a discovery tool. More specifically, by limiting the alleged perpetrator's right of involvement as a "Party"(and I agree that "Party" must be defined within the scope of the rules), the new rules limit a perpetrator's ability to exploit further a child victim by utilizing tools to which the perpetrator would not otherwise be given access such as in a criminal proceeding.

While I agree that Proposed Rule 108 is a solid, beneficial change to the current rules, I would ask that the advisory commission consider deleting section (c)(7) which provides for automatic expiration of an Ex Parte Restraining Order unless there is consent or unless some other order is put into place within 15 days. Such a rule will be unworkable and impractical in many counties which may not set a court date within 15 days after the filing of an ex parte Restraining Order. Such a Restraining Order would not be a "removal," which would require a 72 hour preliminary hearing. Thus, the initial court date may not be set for some weeks away or not set at all. Such a rule will create confusion between Courts and Petitioners wherein Petitioners are required to go back time and again to obtain the same order. (C)(7) of this Proposed Rule is further unworkable as subsection (2) does not explain the form of consent. How will the Court know whether consent has been obtained? Under the current drafting the Petitioner could appear in court 16-60 days later and say "the Restraining Order has been extended by consent," however; the proposed rule does not have check for this.

Proposed Rule 117: The current rules of the Juvenile court do not explicitly state how an Order is entered, and the proposed rule amends to ensure that parties and courts have clarity on this critical subject. In cases involving visitation and custody it is therefore absolutely essential for all involved to understand exactly what has been agreed to and what has been ordered. The Advisory Commission Comments state that the rule is designed to make uniform across the state the procedure for the entry of the order. The proposed rule, which is similar to the Tenn. Rules of civil Procedure, R. 58 does make a strong attempt to impose that uniformity, however; it does not go far enough to ensure that parties –particularly unrepresented parties shall understand and have available to them copies of the Orders of custody and visitation.

Unlike the Civil Circuit court, the common litigant in Juvenile Court is often unsophisticated and unrepresented. I propose the following modification to Proposed Rule 117: In subsection (b), delete the phrase "when requested by counsel or unrepresented parties." Proposed Rule 117 does not require the clerk of the court to mail copies of the Orders to parties or unrepresented parties *unless they request.* My suggested modification would require the clerk to mail out the orders even without being asked. In this way, for example, an unrepresented grandmother who has been given custody of her grandchildren would automatically receive a copy of the court order. She and the parents (also probably unrepresented) will have full notice of the order governing visitation.

The Proposed Rule 117 as currently put forth provides for entry of an order, yes, but it does not explain how parties will actually receive the order. The current practice in Juvenile Courts throughout the State of Tennessee is as follows: DCS attorney prepares the order and provides a copy to the other parties. Even if Proposed Rule 117 is implemented as law, the current practice would likely not change. If the current practice does not change, Proposed Rule 117 would be undermined altogether. What is needed, is a complete shift in the burden regarding who must mail/provide the Orders and how that is done (not who will prepare them, but who will provide a copy of the entered order).

In Sevier County Juvenile Court one attorney is charged with preparing the Order at the end of each hearing. That attorney does prepare a certificate of service but below the signature line is written "deputy clerk, Sevier County Juvenile Court." Usually all attorneys have signed that order. There is no question that this is a final order and no question that all counsel and unrepresented parties will receive a copy of that order. My suggested modification to Proposed Rule 117 places the burden for mailing Orders on the Juvenile Court Clerk; it ensures that Orders are entered and effective. The process is seamless in Sevier County and could be implemented statewide to the benefit of children and parents.

Proposed Rule 118: In the Rule regarding Appeals, there is no mechanism for an appeal from a Magistrate to the Juvenile Judge. The Advisory comments state that it is not but

that it is covered by T.C.A. 37-1-107 in the law governing Magistrates. Shouldn't the Rules of Juvenile Procedure necessarily have such a rule to implement T.C.A. 37-1-107?

Proposed Rule 306: I am certain that many attorneys, judges, and child welfare advocates will appreciate this proposed rule which in the words of the Advisory Commission seeks to "balance the due process rights of the respondents with the need to protect child witnesses from unnecessary trauma." If you do nothing else, please implement this rule as written because the current Rules of Juvenile Procedure are virtually silent on this subject of children as witnesses. Current practices in Tenn. Juvenile courts vary widely.

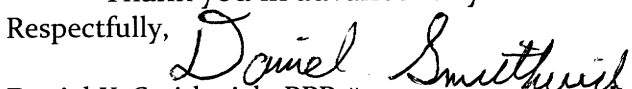
Proposed Rule 401: It is clear that the advisory commission wanted to eliminate much of the ambiguity between a "Permanency Plan Ratification Hearing" as required by T.C.A. 37-2-403 and a "Permanency Hearing" as required by T.C.A. 37-2-409. I agree that such a distinction in the rules is necessary and promotes the statutory scheme far better than the current Rules of Juvenile Procedure which blend the two types of hearing into a single rule, causing a great deal of confusion among courts and practitioners (See Rule 32A of the current Rules). The proposed rule(s) largely mirror the statute and come as a welcome addition. I wish to address one concern though and a possible solution. T.C.A. 37-2-403 does not require children to be present at the initial permanency plan ratification hearing. Because of the ambiguity and the confusion about the difference between these types of hearings, many judges and practitioners believe that the children must be present at the initial ratification. The proposed rule, as written, does not eliminate that confusion. The purpose of the initial ratification hearing, however, is to review the permanency plan, its goals, and requirements, not to see the children. I would propose the following addition to clear up the ambiguity:

"(J) A child adjudicated to be delinquent or unruly shall be present at the permanency plan ratification hearing. If a child is fourteen (14) years of age or more at the time of the permanency plan ratification hearing and that child is adjudicated dependent and neglect or alleged to be dependent and neglected, that child shall be present for the hearing."

My proposed addition is consistent with the advisory comments to the proposed rule and with T.C.A. 37-1-121 which requires that a summons be directed to a child in a dependency and neglect proceeding if the child is fourteen (14) years of age or more. Children who are 14 years of age apparently have some greater right to notice and participation according to the state legislature.

Thank you in advance for your consideration of my comments.

Respectfully,



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