IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENTS TO TENNESSEE RULES OF CRIMINAL PROCEDURE

ORDER

The Court adopts the attached amendments effective July 1, 2010, subject to approval by resolutions of the General Assembly. The rules amended are as follows:

RULE 5	INITIAL APPEARANCE BEFORE MAGISTRATE;
RULE 12.2	NOTICE OF INSANITY DEFENSE OR EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION AND DISCOVERY AND DISCLOSURE OF EVIDENCE IN PRETRIAL COMPETENCY HEARINGS;
RULE 15	DEPOSITIONS.

IT IS SO ORDERED.

FOR THE COURT:

JANICE M. HOLDER
CHIEF JUSTICE

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 5

INITIAL APPEARANCE BEFORE MAGISTRATE

[Amend Rule 5(e) to read as follows:]

* * * *

(e) Indictment Before Preliminary Examination; Exceptions. –

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

(2) Waiver of Preliminary Hearing by Failure to Appear. A defendant waives the right to a preliminary hearing by failing to appear for a scheduled preliminary hearing, unless the defendant presents before the general sessions court, and the court finds within fourteen days after the scheduled preliminary hearing, clear and convincing evidence that the failure to appear was beyond the defendant's control. Unless the general sessions court finds by clear and convincing evidence that the defendant's absence was beyond the defendant's control and resets the preliminary hearing, the grand jury may return an indictment or presentment on the charges.

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

(4) **Remedy for Failure to Afford Preliminary Hearing.** If an indictment or presentment is returned against a defendant who has not waived his or her right to a preliminary hearing, the circuit or criminal court shall dismiss the indictment or presentment on motion of the defendant filed not more than thirty days from the arraignment on the indictment or presentment. The dismissal shall be without prejudice to a subsequent indictment or presentment and the case shall be remanded to the general sessions court for a preliminary hearing.

(f) * * * *

2010 Advisory Commission Comment

Rule 5(e) has been amended in its entirety so as to clarify when the defendant is entitled to a preliminary hearing. Rule 5(e)(1) and (4) make clear that the defendant enjoys the right to a preliminary hearing following arrest on a warrant or an appearance by a criminal summons which cannot be defeated by either an indictment or presentment. The former rule omitted the presentment, apparently by oversight, and this has been corrected. The amendment retains the former procedure of requiring a motion to dismiss if there is a premature indictment or presentment but the time for the motion is no longer measured from the "arrest," but rather from the date of the arraignment on the indictment or presentment in circuit or criminal court.

Rule 5(e)(2) provides that a defendant waives the preliminary hearing by failing to appear. There is a relief from waiver provision if the defendant promptly establishes that the defendant's absence was beyond the defendant's control. The State has the right to seek an indictment or presentment during the intervening fourteen days, which is subject to a dismissal if the defendant makes the required showing.

Rules 5(c)(1)(B) and 5(d)(3) set forth the minimum time within which preliminary hearings must be held. Rule 5(e)(3) addresses the reverse issue: the pernicious problem of preliminary hearings being routinely continued for so long that witnesses, parties, and the Court are prejudiced. While there may be sound reasons for continuing the hearing, such as a mental examination, the hearing should not ordinarily be delayed unless it is essential for the interests of justice.

Rule 5 by its terms does not apply to an arrest upon a capias pursuant to indictment or presentment. Rule 5(a)(1). These amendments are in no way intended to change the rule that, when there is no arrest warrant or criminal summons issued on an affidavit of complaint (where the State commences the prosecution by indictment or presentment), there is no right to a preliminary hearing. See *Moore v. State*, 578 S.W.2d 78 (Tenn. 1979).

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 12.2

NOTICE OF INSANITY DEFENSE OR EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION AND DISCOVERY AND DISCLOSURE OF EVIDENCE IN PRETRIAL COMPETENCY HEARINGS

[Amend the title to read as set out above and add the following new paragraphs (f) and (g):]

* * * *

(f) Reports of Competency Examinations. – Prior to any hearing on competency to stand trial, the parties shall permit the opposite party, on request, to inspect and copy or photograph any results or reports of psychiatric, psychological, or mental examinations and of scientific tests or experiments made in connection with evaluating the defendant's competency to stand trial, or copies thereof, if:

(1) the item is within the party's possession, custody, or control; and

(2) the party intends to introduce any part of the item as evidence in the party's case-in-chief at the competency hearing; or

(3) the party intends to call as a witness at the competency hearing the person who prepared the report, and the results or reports relate to the witness' testimony. This provision does not limit the State's duty to disclose such information under other appropriate rules or the duty to produce exculpatory evidence. Disclosure under this provision shall occur at least 21 days prior to a hearing on competency to stand trial unless the court finds that a shorter time is essential in the interests of justice so as not to unduly delay the trial. The court may also make such orders as are necessary to compel disclosure or make other appropriate orders.

(g) Inadmissibility of Defendant's Statements During Competency Examination. – No statement made by the defendant in the course of any examination relating to his or her competency

to stand trial (whether conducted with or without the defendant's consent), no testimony by any expert based on such statement, and no other fruits of the statement are admissible in evidence against the defendant in any competency hearing or criminal proceeding except for impeachment purposes or an issue concerning a mental condition on which the defendant has introduced evidence of incompetency or evidence requiring notice under Tenn. R. Crim. P. 12.2(b).

2010 Advisory Commission Comment

New subsections (f) and (g) are taken from the temporary procedures in *State v. Harrison*, 270 S.W.3d 21 (Tenn. 2008). Competency to stand trial is an issue which should be raised at the earliest practical time. In most instances 21 days is sufficient time for expert and document disclosure, particularly where the hearing has been scheduled well in advance of trial. Occasionally a finding of competency may be subject to change such as where the defendant's mental state is fragile or the defendant's medication is altered. In such cases the court might need to revisit the competency issue; therefore another competency hearing might need to be conducted on the morning of trial. So as not to unduly delay the trial, the court might shorten the time for disclosure or require immediate disclosure as the circumstances of the case dictate. Note that *State v. Reid*, 981 S.W.2d 166 (Tenn. 1998) may impose additional notice requirements for which advance disclosure may be required.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 15

DEPOSITIONS

[Amend Rule 15(f)(1)(A) to read as follows:]

* * * *

(f) Use as Evidence. –

(1) * * * *

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

* * * *

2010 Advisory Commission Comment

The amendment to Rule 15(f)(1)(A) corrects a cross-reference.