For The Defense

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Tennessee’s Troublesome Possessing With Intent To Go Armed Or Employing A Firearm During The Commission Of A Dangerous Felony Law

By: Eugene L. Belenitsky

Save the Date

DUI Defense Seminar

Caesars Entertainment Hotels ~ Horseshoe & Tunica Roadhouse

October 22-23, 2015

See pages 30 - 31 of this issue

HOTEL ACCOMMODATIONS:

TACDL reserved a block of rooms with the Horseshoe Tunica Hotel, 1021 Casino Center Drive, Tunica, MS 38664. If you are interested in a room, please contact the hotel at 1-866-635-7095 before October 1, 2015 and advise the hotel you are with the TN Association of Criminal Defense Lawyers by using the group code S10 TAC 5. The rate is $69/day.
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Mary-Kathryn Harcombe
Rob McKinney
Chelsea Nicholson
Mike Working
CALLING ALL TACDL MEMBERS! TACDL needs you to get involved. TACDL is strong. TACDL continues to offer great CLEs. TACDL is in great shape financially. TACDL is making great strides with its legislative efforts. As President of TACDL, I want to do all I can to continue to improve TACDL. That is why I am asking each of you to get involved with TACDL. Each of you has something to offer the other members of TACDL, and I am asking you to get involved with a committee, a roundtable, a CLE, or some other aspect of TACDL. Please contact me at paulbruno@thebrunofirm.com or Executive Director Suanne Bone at suannebone@tacdl.com to let us know how you would like to get involved to improve TACDL.

I also want to hear your ideas for improving TACDL. The members of TACDL know best what TACDL can do better and what TACDL needs to offer its members. I am very interested in all of your ideas and want you to email me with your ideas.

Finally, it is my goal to increase the membership of TACDL. Admittedly, TACDL benefits by an increase in its membership. More importantly, criminal defense lawyers benefit by membership in TACDL. All Tennessee criminal defense lawyers need notice of and access to all TACDL CLEs, need access to the TACDL listserv, and need the support and advice from other criminal defense lawyers. Together, we will not only make TACDL better, but we will also make the entire criminal defense bar better.

I challenge each of you to encourage at least one non-member criminal defense lawyer to join TACDL this year. They need TACDL, and TACDL needs them.

I looking forward to hearing from each of you, and I look forward to a great year for TACDL. Thank you for getting involved.

Paul Bruno is the President of TACDL. His office is in Nashville and he can be reached at paulbruno@thebrunofirm.com and 615-251-9500.

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JOIN TACDL TODAY!

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Tennessee Association of Criminal Defense Lawyers
530 Church St., Suite 300
Nashville, TN 37219
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TACDL MEMBER
I am happy to report TACDL is alive and well with over 950 active members. Only with the support of each member will this association continue to grow. Please encourage new lawyers to join TACDL and partake in the following benefits: a 650 member active listserv, quarterly publications, a weekly online newsletter, an active Amicus committee, informative and cutting edge continuing legal education programs, monthly roundtables around the state, an engaged legislative presence, a soon to be revived mentoring program, and the camaraderie of criminal defense professionals across the state.

Paul Bruno, Brittany Davis and I met with Donette Bayne of the Tennessee Commission on CLE & Specialization. TACDL intends to become involved with a lawyer-to-lawyer mentoring program. Stay tuned for further details about the opportunity. TACDL anticipates having the program in place by December.

The 42nd Annual Meeting and CLE Seminar was a huge success! The seminar began with a Welcome Reception on Wednesday evening at The Johnny Cash Museum. Thank you to the following sponsors for a wonderful evening: The Law Firm of Lowery, Lowery & Cherry, PLLC, Grumpy’s Bail Bonds, Minnesota Lawyers Mutual, The Law Offices of Andrew Farmer, PLLC, Rob McKinney Attorney at Law, Thomson Reuters, and Sara Compher-Rice. The entire museum was rented for TACDL members only. The seminar began on Thursday morning with a slate of dynamic presentations – thank you to Paul Bruno for securing the speakers. On Thursday evening, TACDL reserved a suite at the First Tennessee Park for an exciting game between the Nashville Sounds and the Memphis Redbirds. The presentations resumed on Friday morning, with the Annual Membership Meeting and Awards Luncheon held during the lunch hour. Sam Perkins handed the President’s Gavel to Paul Bruno (Nashville) and the following members were elected to serve on the Executive Committee: Sara Compher-Rice (Knoxville) as President-Elect, Joe Ozment (Memphis) as Treasurer, Patrick Frogge (Nashville) as Secretary and Sam Perkins as Past President.

During the luncheon the following individuals received awards and recognition for outstanding service to TACDL. The Joseph B. Jones award was presented to Paul J. Bruno. The Robert W. Ritchie award was presented to Mike Working. The Work Horse award was presented to Jeff Cherry and Sara Compher-Rice. The Capital Defense awards were presented to C. Anne Tipton and Kathleen Morris. The Massey McGee Trial Advocacy Awards were presented to Haden Lawyer, Rhonda Lee, Carlissa Shaw, and Courtney Teasley. Also, thank you to Larry Drolsum for seamlessly coordinating the audio/visual during the seminar and the photographs from the Annual Meeting, which are included in this issue.

The Annual DUI Seminar and Training is right around the corner! The two day training will be held on October 22-23, 2015, at a Caesars Entertainment Property – the Tunica Roadhouse and the Horseshoe. Rob McKinney is the producer of the informative and much anticipated training. A complete list of speakers and topics is included on pages 30-31 of this issue. Visit the TACDL website, www.tacdl.com, to register.

As always, feel free to contact me with questions or concerns. I appreciate the guidance from all TACDL members and look forward to working with you in the future.

Suanne Bone is the Executive Director of TACDL. She may be reached at suannebone@tacdl.com and 615-329-1338.
TACDL Roundtables

Nashville

1st Thursday of each month
Rich McGee and Lisa Naylor
615-254-0202
richardmcgeelaw@gmail.com and lisanaylor@comcast.net

Chattanooga

1st Thursday of each month
Myrlene Marsa and Rich Heinsman
423-756-4349 (Myrlene) and 423-757-9995 (Rich)

Memphis

1st Thursday of each month
Lauren Fuchs
901-384-4004
lfmdefend@aol.com

Williamson County

3rd Thursday of each month
Elizabeth A. Russell
615-791-1819
erussell@johnstonandstreet.com

Knoxville

Last Thursday of each month
Nate Evans
865-546-8030, ext. 144
NEvans@bsmlaw.com

Join fellow criminal defense professionals for discussion on pertinent legal issues and be entered into a drawing for a free CLE!
Orange is the New Black. The book and the Netflix television series by this name have made the author and main character, Piper Kerman, a member of our popular culture. Her appearance at the 2015 annual meeting of the National Conference of State Legislatures drew a standing room only crowd. In her remarks, she noted that the important word in phrase “criminal justice system” is “system,” and any analysis should include law enforcement, courts, correction, and re-entry. For women particularly, Ms. Kerman noted that women are worse off when they are released from confinement than when they enter the system.

Governor Haslam’s Task Force. Recently, Governor Haslam’s Task Force on Sentencing and Recidivism issued its final report. The early reviews of the 21 page report are mixed. While “truth in sentencing” has a nice ring to it, Tennessee earlier experiments with determinate sentencing and its limits on judicial discretion and parole board discretion led to a federal takeover of our correction system in the 1980’s. On the other hand, the task force recommendations also include continued support for drug recovery and treatment services through our drug courts. Other recommendations include raising the threshold for a felony theft case from $500 to $1,000, and using an individual case management plan for each felony offender. Here is a link to the full report: https://mgtvwjl.files.wordpress.com/2015/08/final-report-of-the-governor_s-task-force-on-sentencing-and-recidivism.pdf

Price Tag. Tennessee continues to be a low tax, low service state, and the use of more orange prison suits is expensive. The task force consultants from the Vera Institute estimate the proposed sentence increases for drug offenders and burglars would lead to a six percent increase in the state’s prison population over five years. 29,000 x .06 = 1740 new prisoners = one very large new state prison. Without comparable reductions in other sentences, the fiscal effect for the capital costs of prison construction and annual operating costs are significant.

What’s next? Commissioner of Safety & Homeland Security and former District Attorney General of Shelby County, Bill Gibbons is a valued member of Governor Haslam’s Cabinet, and he will be a persistent advocate for the Task Force’s recommendations. The Governor’s Subcabinet on Public Safety will probably vet the recommendations. Then, it will be interesting to see which, if any, of the recommendations make it into the Governor’s 2016 legislative package.

Conclusion. Governor Haslam holds a wide base of popular support in Tennessee, but his legislative support base seems skinnier as reflected in the 2015 defeat of his “Insure Tennessee” proposal. Being a responsible steward in the management our state’s criminal justice system and making a solid proposal for change provide a nice opportunity for a legislative success, but it remains to be seen whether the 21 page task force report can be the foundation of a legislative proposal for 2106.

TACDL Checklist for this quarter.

Call your elected state officials and ask about support for SB 1009 / HB 1025 concerning indigent representation.

Make sure all you and all your employees are registered to vote.

Recruit a new member for TACDL. Enthusiasm is contagious.

Plan to attend a TACDL CLE seminar this year. You have to get 15 hours for 2015, and the TACDL classes will be the most relevant for your criminal defense practice.

Calendar Notes: State offices will be closed Monday, September 7, for the Labor Day Holiday.

Nathan Ridley is an attorney with the Nashville firm, Bradley Arant Boult Cummings LLP. You may contact him by e-mail at nridley@babc.com.
Speakers and Topics are listed below:

-Specialized Juvenile Defense Practice: Identifying and Working with Clients who are also Victims of Sex Trafficking  
  *Christian Coder, Elizabeth Appleton & Randee Waldman*

-Uncovering and Presenting your Client’s Story; Defending at Disposition and Transfer; Best Practice Mitigation Preparation  
  *Mae Quinn & Autumn Chastain*

-Representing Kids on the Registry: What We’ve Learned Four Years after the Passing of TN’s Juvenile Sex Offender Registry and Where We Go From Here  
  *Chris Kleiser & Brooke Burns*

-Highlights of the Proposed New TN Rules of Juvenile Procedure  
  *Christian Coder*

-Hashtags, Selfies and Electronic Sharing: Social Media Investigations to Make or Break a Case  
  *Sarah Young & Angela Chang*

-4th Amendment and the School: Case Law Update and Creative Strategies for Push Back  
  *Randee Waldman*

*Contact the TACDL office at 615/329-1338 or visit www.tacdl.com to purchase the materials!*
EVIDENCE

State of Tennessee v. Kathy L. Bartlett, M2014-01530-CCA-R3-CD, Williamson Co., 7/17/15, The Defendant was indicted for DUI. The Defendant filed a Ferguson Motion to Dismiss for lost evidence. The charge was dismissed pretrial after the trial court granted appellee’s motion to dismiss. The State appealed the trial court’s granting of the motion and argued that the trial court misapplied the law relating to lost or destroyed evidence. The CCA reversed the ruling of the trial court, reinstated the indictment, and remanded for further proceedings consistent with this opinion.

State of Tennessee v. Heng Lac Liu, M2013-02838-CCA-R3-CD, Davidson Co., 5/19/15, A Davidson County jury convicted the Defendant of four counts of sexual battery. On appeal, the Defendant contended: (1) that the trial court improperly admitted hearsay evidence; (2) that the trial court improperly excluded defense evidence of the victim’s bias and lack of credibility; and (3) that the cumulative effect of these errors warrants a new trial. The CCA held that the trial court erred in admitting hearsay testimony through two witnesses and concluded that the cumulative effect of the errors by the trial court warranted a new trial for the Defendant.

POST-CONVICTION

Curtis Cecil Wayne Bolton v. State of Tennessee, E2014-00559-CCA-R3-PC, Campbell Co., 7/29/15, The Defendant was convicted of the first degree premeditated murder of his two and one-half year old son and received a life sentence. In the present post-conviction action, the post-conviction court granted relief on two ineffective assistance of counsel claims. In this appeal, the State contended that the post-conviction court erred by granting relief for ineffective assistance of counsel. The CCA affirmed the judgment of the post-conviction court granting post-conviction relief on the ground that trial counsel was ineffective for failing to seek a severance.

State of Tennessee v. Roger Gordon Brookman, Jr., M2014-00745-CCA-R3-CD, Davidson Co., 6/26/15, The Defendant filed a motion in the Davidson County Criminal Court, seeking expunction of dismissed charges. The trial court denied the motion, and the appellant appealed. The CCA reversed the judgment of the trial court and remanded for expunction of the charges. The CCA found that the charge at issue should be expunged because, “a conviction for one count in a multi-count indictment or presentment does not preclude expungement of the records relating to a separate count when the criteria of section 40-32-101 have been satisfied.”

State of Tennessee v. Nickelle N. Jackson, W2014-02445-CCA-R3-CD, Shelby Co., 7/14/15, In 1993, the Defendant pleaded guilty to three counts of aggravated robbery, one count of unlawful carrying a weapon, one count of theft of property valued between $10,000 and $60,000, and two counts of theft of property valued over $500. In accordance with the plea agreement, the trial court sentenced the Defendant as a Range II, multiple offender, to a total effective sentence of twelve years in confinement. In 2014, the Defendant filed a motion to correct an illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1, which the trial court summarily dismissed based upon its finding that the Defendant’s illegal sentence had expired in 2006. On appeal, the Defendant contended that the trial court erred when it dismissed his motion because his sentence contravenes the Tennessee Criminal Sentencing Reform Act of 1989. He explained that the trial court erred when it ordered his sentences to run concurrently because he had been released from jail on bail for some of the offenses when he committed the other offenses, which would require consecutive sentencing. The CCA reversed the trial court’s judgment and remanded the case for appointment of counsel and a hearing on the Defendant’s Rule 36.1 motion.

of the Petitioner’s claim regarding his 2012 MVHO conviction for having been untimely filed. However, the CCA reversed the post-conviction court’s summary dismissal of the Petitioner’s claim regarding his 2013 failure to appear conviction because the Petitioner stated a colorable claim for relief and remanded the case to the post-conviction court for further proceedings.

**State of Tennessee v. Terrance E. Kindall,** M2014-01680-CCA-R3-CD, Rutherford Co., 7/7/15, The Defendant appealed the Rutherford County Circuit Court’s revoking his community corrections sentence for carjacking and ordering that he serve the balance of his sentence in confinement. The CCA concluded that the Defendant was statutorily ineligible for community corrections. The Defendant’s community correction sentence was vacated, and the case was remanded to the trial court for an evidentiary hearing to determine whether the illegal sentence was a bargained-for element of the appellant’s plea agreement.

**State of Tennessee v. Travis Heath King,** M2014-01478-CCA-R3-CD, Maury Co., 5/22/15, The Defendant appealed the summary dismissal of his motion, filed pursuant to Tennessee Rule of Criminal Procedure 36.1, to correct what he believes to be an illegal sentence. Because the Defendant stated a colorable claim for relief under the terms of Rule 36.1, the trial court erred by summarily dismissing his motion. Accordingly, the CCA reversed the judgment of the trial court and remanded the case for further proceedings. The Defendant filed a pro se Motion under Rule 36.1 claiming that the trial court’s failure to grant him the appropriate amount of pretrial jail credits rendered his sentence illegal.

**Sylvia Laird v. State of Tennessee,** M2014-02020-CCA-R3-PC, Davidson Co., 6/1/15, The Petitioner appealed the denial of her petition for post-conviction relief. She claimed that she received ineffective assistance of counsel when she was erroneously informed that she could not file a motion to withdraw her guilty plea before sentencing. Consequently, the Petitioner argued that a subsequent guilty plea agreement that determined her sentence was unconstitutional because it was entered unknowingly, involuntarily, and unintelligently. The CCA concluded that Petitioner has proven that she is entitled to post-conviction relief and, therefore, reversed the decision of the post-conviction court. The Petitioner was advised that she could not withdraw her guilty plea after more than thirty days had passed since the plea. Tennessee Rule of Criminal Procedure 32(f) affords a defendant two opportunities to seek withdrawal of a guilty plea: (1) before sentence is imposed and (2) after sentencing but before the judgment becomes final. A judgment of conviction becomes final thirty days after entry, and the trial court then loses jurisdiction. *State v. Pendergrass,* 938 S.W.2d 834, 837 (Tenn. 1996). Withdrawal of a guilty plea is permitted prior to sentencing for “any fair and just reason,” but after sentencing, withdrawal is available only “to correct manifest injustice.” Tenn. R. Crim. P. 32(f)(1)-(2).

**Marcus Deangelo Lee v. State of Tennessee,** W2014-00994-CCA-R3-CO, Shelby Co., 5/13/15, The Defendant argued that the trial court erred in denying him relief under Tennessee Rule of Criminal Procedure 36.1 after finding that his sentences were illegal and the illegality was a material component of the plea agreement. The State agreed with the Defendant’s assertion. The CCA concluded that the trial court should have allowed the Defendant the remedies available to him under Rule 36.1, and therefore, reversed the judgment of the trial court and remanded the case. The Defendant’s sentence were illegal sentences when he pleaded in 1995. The CCA held even though the sentences had long since expired, under Rule 36.1, which has just been enacted recently, the Defendant still could challenge the sentence because the clear language of the rule stating, “Either the defendant or the state may, at any time, seek the correction of an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered.” Tenn. R. Cr. P. 36.1(a).

**PRE-TRIAL DIVERSION**

**State of Tennessee v. Gary Hamilton,** E2014-01585-CCA-R9-CD, Knox Co., 7/6/15, The Defendant filed an interlocutory review of the district attorney general’s denial of his application for pretrial diversion and the trial court’s affirmance of that denial. The Defendant, a former teacher’s assistant, was charged with assault after engaging in an altercation with a student at the school where he was employed. The district attorney general denied the Defendant’s application for pretrial diversion. The Defendant filed a petition for writ of certiorari to the trial court, challenging the denial, and the trial court upheld the district attorney general’s decision. On appeal, the Defendant argued that the district attorney general abused his discretion in denying pretrial diversion and that the trial court erred when it found no abuse of discretion. The CCA held that the trial court did not properly review the district attorney general’s decision to deny pretrial diversion. Additionally, although the district attorney general consid-
have had no purpose other than to place the Defendant in a bad light, appeal to racial prejudice, and, apparently, and the words of a "local rapper who doesn't . . . have anything to do with this case." The racial epithets appear to was error and submitted, "We conclude that the State committed prosecutorial misconduct by this portion of the rebuttal argument. Racial insults are not permissible simply because they were in material quoted by the speaker which was on the Defendant's social media page and submitted it as intent of the Defendant. The CCA held this was error and submitted, "We conclude that the CCA reversed the judgment of the trial court and remanded for a new trial. The State recited a rap song, with "a weapon; (2) the trial court erred by overruling defense counsel's objection to a detective's testimony re-
tenced Defendant to an effective sentence of 16 years and 6 months. On appeal, the Defendant contende that: (1)
was indicted for aggravated rape and domestic assault. A jury convicted Defendant as charged. The trial court sen-
dence in the record to support the denial of pretrial diversion. The CCA reversed the order of the trial court and remanded the case to the trial court with instructions that the Defendant be granted pretrial diversion upon the terms and conditions of the diversion to be established by the trial court. The CCA declined to instruct that pretrial diversion be granted nunc pro tunc to 2012.

**PROSECUTORIAL MISCONDUCT**

*State of Tennessee v. Susan Gail Stephens*, M2014-01270-CCA-R9-CD, Coffee Co., 7/7/15, In this interlocutory appeal, the Defendant challenged the prosecutor's denial of her application for pretrial diversion. She filed this appeal requesting to remand the case to the prosecutor with instructions that the Defendant be granted pretrial diversion. She also requested the CCA to instruct the prosecutor to grant pretrial diversion nunc pro tunc to the Defendant's 2012 update to her application for pretrial diversion. The CCA found that there was no substantial evidence in the record to support the denial of pretrial diversion. The CCA reversed the order of the trial court and remanded the case to the trial court with instructions that the Defendant be granted pretrial diversion upon the terms and conditions of the diversion to be established by the trial court. The CCA declined to instruct that pretrial diversion be granted nunc pro tunc to 2012.

*State of Tennessee v. Deandre D. Rucker*, M2014-00742-CCA-R3-CD, Davidson Co., 7/9/15, The Defendant was convicted of first degree premeditated murder and sentenced to life imprisonment. On appeal, he argued that the trial court erred in denying his motion to sever, the evidence was insufficient to sustain the conviction, and the court erred in denying a motion for a mistrial or a cautionary instruction because of prosecutorial misconduct during the State's closing argument. The CCA agreed that the State's closing argument was improper to such a degree that the CCA reversed the judgment of the trial court and remanded for a new trial. The State recited a rap song, which was on the Defendant's social media page and submitted it as intent of the Defendant. The CCA held this was error and submitted, “We conclude that the State committed prosecutorial misconduct by this portion of the rebuttal argument. Racial insults are not permissible simply because they were in material quoted by the speaker and the words of a “local rapper who doesn’t . . . have anything to do with this case.” The racial epithets appear to have had no purpose other than to place the Defendant in a bad light, appeal to racial prejudice, and, apparently, suggest the Defendant occupied a position superior to that of the co-defendant, the Defendant getting his “little man” to commit the killing. No attempt was made by the State to tie the violent and belligerent attitude of the rap lyricist to specific actions of the Defendant.” This was error.

*State of Tennessee v. Adam Wayne Robinson*, M2013-02703-CCA-R3-CD, Davidson Co., 6/23/15, The Defendant was convicted by a jury of three counts of aggravated sexual battery. The Defendant raised three issues on appeal: prosecutorial misconduct during closing argument, sufficiency of the evidence to sustain the convictions, and cumulative error. During closing argument, the prosecutor improperly commented upon the Defendant’s right not to testify and engaged in a persistent pattern of other improper prosecutorial argument. The CCA concluded that the prosecutor’s comments on the Defendant’s right not to testify constituted reversible non-structural constitutional error. Moreover, the record established that the prosecutor engaged in a persistent pattern of other improper prosecutorial argument, the cumulative effect of which constituted plain error. The CCA reversed the judgments of the trial court and remanded the case for a new trial.

*State of Tennessee v. Caleb Joseph Latham*, E2014-01606-CCA-R3-CD, Blount Co., 8/3/15, The Defendant entered a guilty plea to driving under the influence DUI first offense. As a part of his guilty plea, the Defendant served a certified question of law pursuant to Tennessee Rule of Criminal Procedure 37(b)(2) challenging his warrantless seizure. The CCA concluded that the trial court should have granted the Defendant's motion to suppress because he was subjected to a seizure without reasonable suspicion. The ruling of the trial court was reversed, and the charges against the Defendant were dismissed. The CCA found that the Defendant was sitting in a parking lot.
at Hardee’s with his turning signal light on next to a dumpster. The Court found these facts alone did not provide reasonable suspicion that a crime either had occurred or was about to in order to seize the Defendant.

**State of Tennessee v. Jeffery D. Aaron**, M2014-01483-CCA-R3-CD, Williamson Co., The Defendant was indicted by the Williamson County Grand Jury for DUI. Prior to trial, the trial court granted Defendant’s motion to suppress evidence obtained as a result of the state trooper’s stop of Defendant. The State appealed. The CCA, relying upon our supreme court’s decision in **State v. Brotherton**, 323 S.W.3d 866 (Tenn. 2010), concluded that the trooper had reasonable suspicion, based on specific and articulable facts, that Defendant had committed or was about to commit the Class C misdemeanor offense set forth in Tennessee Code Annotated section 55-8-123(1), that the Defendant crossed the line fully while driving within his lane of travel. Accordingly, the judgment of the trial court was reversed.

**JURY INSTRUCTIONS**

**State of Tennessee v. Jerome Maurice Teats**, M2014-01171-CCA-R3-CD, Davidson Co., 7/27/15, The Defendant appealed his Davidson County Criminal Court jury conviction of aggravated child neglect, claiming among many arguments that the evidence was insufficient to support his conviction. Because the evidence adduced at trial was insufficient to support the defendant’s conviction of aggravated child neglect, the conviction was reversed, and the charge was dismissed. Because the Defendant had no legal duty or relationship to the child, the evidence was insufficient to find him guilty of aggravated child neglect.

**State of Tennessee v. Donald W. Higgins, III**, M2014-01171-CCA-R3-CD, Davidson Co., 7/14/15, This appeal also presents the issue of whether a trial judge is required to give a jury instruction based on our decision in **State v. White**, 362 S.W.3d 559 (Tenn. 2012), when a defendant is tried on charges of kidnapping and robbery of different victims. The Defendant and an accomplice forced their way into the back door of a restaurant, threatened the employees at gunpoint, and ordered them into a back storage area. While the accomplice guarded these employees, the Defendant forced the restaurant manager to take him to the cash drawer, where he took the restaurant’s money. The Defendant was indicted for aggravated robbery of the store manager and four counts of especially aggravated kidnapping of the other four employees. A jury convicted the defendant of all charges. On appeal, the Defendant asserted that the trial judge’s failure to give the White jury instruction was reversible error. The CCA affirmed the convictions. The TNSC held that a White jury instruction was neither requested nor
The jury convicted the Defendant of numerous charges, including five counts of especially aggravated kidnapping of the husband, wife, and three children; aggravated burglary of the husband’s residence; and two counts of aggravated robbery of the husband and wife. The CCA affirmed the convictions for especially aggravated kidnapping, aggravated burglary, and one count of aggravated robbery as to the husband and modified the conviction of aggravated robbery of the wife to aggravated assault. On review, the TNSC remanded the case for consideration in light of White. The CCA affirmed the convictions of especially aggravated kidnapping as to the three children, but, in light of White and State v. Cecil, 409 S.W.3d 599 (Tenn. 2013), reversed the convictions of especially aggravated kidnapping as to the husband and wife and remanded those charges for a new trial. In this appeal, the Defendant asserted that the trial court’s failure to give a White jury instruction as to the remaining three convictions for the especially aggravated kidnapping of the children constituted reversible error. In accordance with our opinion in State v. Teats, No. M2012-01232 SC R11 CD (Tenn. 2015) released contemporaneously with this opinion, the TNSC held that the White jury instruction was not required as to the offenses of especially aggravated kidnapping of the three children.

Chelsea Nicholson is a criminal defense lawyer, who practices in Nashville, Tennessee. She can be reached at chelsea@cnicholsonlaw.com or 615-913-3932.

Upcoming CLEs

Juvenile Defense Seminar & Training
Chattanooga, TN
September 18, 2015

DUI Defense Seminar & Training
Tunica, MS
October 22-23, 2015

Davidson County General Sessions Training
Nashville, TN
November 24, 2015

Reserve your space at any CLE by visiting www.TACDL.com today!
Supreme Court Update
Jonathan Harwell and Denise M. Faili

The end of the Supreme Court term produced a number of opinions in criminal cases. There are few earth-shaking developments doctrinally, as a number of the decisions were on relatively limited grounds. The Confrontation Clause decision in Clark may be of greatest consequence, although it was perhaps a predictable outcome. The Johnson decision, finding with the residual clause of the violent felony definition in the Armed Career Criminal Acts to be vague, is an interesting application of the vagueness doctrine and no doubt is of great relief to the lower courts that have burdened with a stream of these cases. The Facebook threats case, Elonis, was decided on statutory grounds and avoided the First Amendment issues that will surely have to be decided some day.

As has been commented on elsewhere, much of the energy and tension in these opinions are not in the holdings but in the back-and-forth between the justices on side issues. Justice Breyer’s vigorous attack on the death penalty in Glossip (joined by Justice Ginsburg) offers some hope for future developments, but provoked an extraordinary personal attack by Justice Scalia. Justice Kennedy’s musings on solitary confinement in Ayala, prompted by a comment at oral argument rather than any legal issue, led to a very pointed response by Justice Thomas. And, perhaps most exceptionally, Justice Thomas’ dissent in Brumfield (which, among other things, included a photograph of the victim in the opinion itself) went so far afield that even the two justices who joined with him felt the need to distance themselves from a portion of his decision (which they characterized as inspiring and perhaps beneficial but immaterial to the legal analysis). It is hard to recall a set of recent opinions where so much energy was spent on side issues and purely rhetorical arguments. Or, to put it another way, in these decisions there is often little effort to conceal the fact that, in determining (some of) the justices’ votes, legal doctrine is playing a relatively small role indeed.

We will catch back up with the Sixth Circuit in the next issue.

Brumfield was convicted of first-degree murder of a police officer and sentenced to death in Louisiana. Following Atkins v. Virginia, 536 U.S. 304 (2002), he sought to amend a pending state post-conviction petition to raise a claim that he was intellectually disabled, pointing to an IQ test of 75 and his school history, and sought expert funds. That petition was dismissed without hearing. On habeas review, the District Court found that this rejection was contrary to, or an unreasonable application of, Supreme Court precedent, and based on an unreasonable determination of the facts. The Fifth Circuit reversed.

The Supreme Court, in an opinion written by Justice Sotomayor, reversed, finding an unreasonable determination of the facts under § 2254(d)(2). In particular, the Court looked at two factual determinations: that Brumfield's IQ score was inconsistent with a diagnosis of intellectual disability and that he had presented no evidence of adaptive impairment. As to the IQ score, the Court found that 75 was within the margin of error (with a 70 being the cutoff for being significantly subaverage). The Court noted that, after Hall v. Florida, 572 U.S. ---- (2014), it is unconstitutional to foreclose further inquiry merely because a defendant has an IQ above 70. The Court also found that it was unreasonable to determine that he had not raised any question as to his adaptive impairment. The state court record indicated that Brumfield had been placed in special education and multiple mental health facilities, and had been prescribed antipsychotics and sedatives. Expert evaluation indicated that he had “learning characteristics that make it more difficult for him to acquire new information.” The Court noted that this information was provided even without an opportunity to further develop the record.

Justice Thomas, joined in part by Chief Justice Roberts and Justices Scalia and Alito, dissented. He began with a lengthy description of the crime itself and the trial. He argued that the state court’s conclusions were supported by the record. He also argued that the decision was not contrary to, or involved an unreasonable application of, Supreme Court precedent, given that the Court had not confronted this set of facts before.
What is perhaps more disheartening than the majority’s disregard for both AEDPA and our prece-
dents is its disregard for the human cost of its decision. It spares not a thought for the 20 years of
judicial proceedings that its decision so casually extends. It spares no more than a sentence to
describe the crime for which a Louisiana jury sentenced Brumfield to death. It barely spares the
two words necessary to identify Brumfield’s victim, Betty Smothers, by name. She and her fami-
ly—not to mention our legal system—deserve better.

He appended a photograph of the victim.

In the middle of his dissent, Justice Thomas discussed the contrast between the defendant and the son of
the murdered police officer, a football player named Warrick Dunn, explaining Dunn’s accomplishments at length.
Justice Alito, joined by Chief Justice Roberts, did not join that portion. They wrote, as to that section: “The story
recounted in that Part is inspiring and will serve a very beneficial purpose if widely read, but I do not want to sug-
gest that it is essential to the legal analysis in this case.”

Ayala, a Hispanic man, was convicted of a triple murder and was sentenced to death by a California jury.
During jury selection, which lasted three months, the prosecution used seven peremptory challenges to exclude
judge allowed the prosecution to provide its reasons for the strikes without defense counsel present so as to avoid
disclosing trial strategy. The trial judge determined that the prosecution had provided valid, race-neutral, reasons
for the strikes.

On appeal, the state courts found that it was error to exclude the defense from the ex parte hearing where
the prosecution provided its reasons. However, the state court held that the error was harmless under California
law and that if error occurred under federal law that such error was harmless beyond a reasonable doubt. On habe-
as review, the Ninth Circuit granted Ayala relief, holding that the ex parte proceeding violated Ayala’s constitu-
tional rights and that, pursuant to Brecht v. Abrahamson, 507 U.S. 619 (1993), such error was not harmless to at
least three of the stricken jurors.

The Supreme Court, in an opinion written by Justice Alito, did not decide whether there was constitution-
al error. It explained that, for a collateral proceeding, the test for harmlessness was whether the petitioners could
establish “actual prejudice” under Brecht. The Brecht test “subsumes” the 2254(d)(2) analysis of the state court’s
harmlessness ruling.

It noted that, under AEDPA, if a claim was adjudicated on the merits, then a highly deferential standard
applies. In this case, the Court reasoned, the California Supreme Court found that the error was harmless beyond a
reasonable doubt under Chapman. Under AEDPA, this decision cannot be overturned unless Chapman was ap-
plied in an objectively unreasonable manner:

When a Chapman decision is reviewed under AEDPA, “a federal court may not award habeas relief under § 2254 unless the harmless determination itself was unreasonable.”…And a
state-court decision is not unreasonable if “‘fairminded jurists could disagree’ on [its] correct-
ness.”

The Court summarized this interaction between the standards: “a prisoner who seeks federal habeas corpus relief
must satisfy Brecht, and if the state court adjudicated his claim on the merits, the Brecht test subsumes the limita-
tions imposed by AEDPA.”

The Court considered each of the peremptory challenges at issue, criticizing the Ninth Circuit for its eval-
uation of the record and “substitut[ing] its own opinions for the determination made on the scene by the trial
judge.” It found that the Brecht standard had not been met as to any of them.

Justice Kennedy concurred, stating that the decision was “complete and correct in all respects.” He went
on, however, to discuss the fact that the defendant had been in solitary confinement for much of his twenty-five
years in prison. After a survey, he wrote:

But research still confirms what this Court suggested over a century ago: Years on end of near-
total isolation exact a terrible price. See, e.g., Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash. U.J.L. & Pol'y 325 (2006) (common side-effects of solitary confinement include
anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors).
In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and
authority, to determine whether workable alternative systems for long-term confinement exist,
and, if so, whether a correctional system should be required to adopt them.

Justice Thomas concurred, writing separately only to respond to Justice Kennedy. He stated: “[T]he accommoda-
tions in which Ayala is housed are a far sight more spacious than those in which his victims … now rest. And, given that his victims were all 31 years of age or under, Ayala will soon have had as much or more time to enjoy those accommodations as his victims had time to enjoy this Earth.”

Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, dissented. Justice Sotomayor argued that the defense did not argue that its Batson challenges were wrongly rejected, but rather that the defense was excluded from the Batson hearings; had counsel been present, it is possible that counsel would have been able to call into question the credibility for the race-neutral justification for the strikes. Thus, the exclusion of defense counsel prevented Ayala from making his “strongest arguments before the person best situated to assess their merit.”


Anthony Elonis was convicted of transmitting a threat in interstate commerce based on posts he made to Facebook which included violent rap lyrics, the script of a sketch, and other aggressive statements. These were ostensibly aimed at his ex-wife and various other individuals that had crossed him. In one, he stated: “Y'all think it's too dark and foggy to secure your facility from a man as mad as me?” In another, he responded to a restraining order taken out by his ex-wife: “Fold up your [protection-from-abuse order] and put it in your pocket…. Is it thick enough to stop a bullet?” On another occasion, he wrote: “I'm checking out and making a name for myself…. Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined…. And hell hath no fury like a crazy man in a Kindergarten class.” Interestingly, some of these explicitly engaged with issues of legality and free speech:

Did you know that it's illegal for me to say I want to kill my wife? ...
It's one of the only sentences that I'm not allowed to say....
Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife....
Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife....
Interspersed within these were other posts on more innocuous subjects, disclaimers that the lyrics were “fictitious,” and a statement that his writing was “therapeutic.” Below one post, he wrote: “Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?”

At trial, his ex-wife and others testified that they had viewed these posts and were afraid. Elonis testified that he was emulating the rap lyrics of Eminem. He requested a jury instruction requiring the jury to find that he “intended to communicate a true threat.” The trial court instead instructed that a true threat was one made in circumstances “wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.” Consequently, in closing argument, the prosecution argued that it was irrelevant whether Elonis intended for his statements to be threats. The Fourth Circuit upheld his conviction, over a challenge that this objective test was erroneous.

The Supreme Court, in an opinion written by Justice Roberts, reversed. It reasoned, first, that the statute itself, 18 U.S.C. § 875(c), does not specify any required mental state. This does not mean that none is necessary, however. The general rule, the Court said, “is that a guilty mind is ‘a necessary element in the indictment and proof of every crime’.” This means, usually, that while ignorance of the law is no defense, a defendant “generally must ‘know the facts that make his conduct fit the definition of the offense’.”

In the context of Section 875(c), the Court concluded that “the crucial element separating legal innocence from wrongful conduct” is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains a threat.” Elonis’ conviction, however, was based solely on how a reasonable person would understand his communication, which is akin to a civil negligence standard. The Court found this was error, and reversed his conviction. It declined to say whether a recklessness standard would be adequate, given that that question was not briefed. It also declined to reach the significant First Amendment issues presented in the case.

Justice Alito concurred in part and dissented in part, criticizing the majority for its failure to provide a precise standard for future cases, and arguing that a recklessness standard would be adequate. Justice Thomas dissented, stating that the trial court’s instructions were consistent with proof of general intent, which was all that was necessary.

Death-row inmates in Oklahoma filed a civil-rights action alleging that Oklahoma’s three-drug lethal injection protocol violates the Eight Amendment. In particular, they argued that midazolam, the first drug administered, fails to render a person “insensate to pain.” After an evidentiary hearing, the District Court ruled against their request for a preliminary injunction, which was affirmed by the Court of Appeals.

The Supreme Court, in an opinion written by Justice Alito, affirmed. It began by tracing the history of capital punishment in this country, from hanging to electrocution to lethal gas to lethal injection. It noted that, in Baze v. Rees, 128 S.Ct. 1520 (2008), the Court had approved a specific three-drug cocktail including, as the first drug administered, sodium thiopental. It noted that its decisions “have been animated in part by the recognition that because it is settled that capital punishment is constitutional, ‘[i]t necessarily follows that there must be a [constitutional] means of carrying it out’.” It noted that “the Constitution does not require the avoidance of all risk of pain.”

The Court then observed that, due to pressure applied by “anti-death penalty advocates,” sodium thiopental ceased to be available. Consequently, states shifted to the use of pentobarbital, before it, too, became unavailable. Some states have now turned to midazolam. The Court noted that, after a flawed execution of Clayton Lockett, where after having been deemed unconscious Mr. Lockett began to move and speak, Oklahoma had investigated and adopted a new protocol, still including midazolam.

The Court gave two independent bases for its decision. First, it held that the petitioners had failed to show that the risk of harm of this procedure was substantial “when compared to a known and available alternative method of execution.” The Court reiterated what it said was held in Baze, that the Eighth Amendment requires “a prisoner to plead and prove a known and available alternative.” The Court stated: “Readers can judge for themselves how much distance there is between the principal dissent's argument against requiring prisoners to identify an alternative and the view, now announced by Justices BREYER and GINSBURG, that the death penalty is categorically unconstitutional.”

Second, the Court concluded that the District Court had not clearly erred in concluding that midazolam is highly likely to render a person unable to feel pain. It noted the deferential standard of review; the burden on the petitioners; the holdings of other lower and intermediate courts; and an institutional desire to keep federal courts out of “ongoing scientific controversies beyond their expertise.” The Court also rejected several fact-specific arguments based on the competing testimony of experts at the trial level about the specific effects of midazolam, as well as the argument that, because only four states used midazolam, it was therefore of doubtful constitutionality. It also rejected the argument that the Lockett execution indicated problems with midazolam. Finally, the opinion concluded:

[We] find it appropriate to respond to the principal dissent's groundless suggestion that our decision is tantamount to allowing prisoners to be “drawn and quartered, slowly tortured to death, or actually burned at the stake.” Post, at 2795. That is simply not true, and the principal dissent's resort to this outlandish rhetoric reveals the weakness of its legal arguments.

Justice Scalia, joined by Justice Thomas, who both joined the majority opinion, wrote a separate concurrence, “to respond to Justice BREYER’s plea for judicial abolition of the death penalty.” He began: “Welcome to Groundhog Day,” before responding to Justice Breyer’s arguments one-by-one and somewhat ad hominem. He concluded:

Capital punishment presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia. The Framers of our Constitution disagreed bitterly on the matter. For that reason, they handled it the same way they handled many other controversial issues: they left it to the People to decide. By arrogating to himself the power to overturn that decision, Justice BREYER does not just reject the death penalty, he rejects the Enlightenment.

Justice Thomas, joined by Justice Scalia, also wrote separately to respond to Justice Breyer. He criticized the studies relied upon by Justice Breyer to argue that capital punishment is administered arbitrarily. He noted that “In my decades on the Court, I have not seen a capital crime that could not be considered sufficiently ‘blameworthy’ to merit a death sentence,” before outlining the facts of a number of particularly heinous murders. He concluded: “To the extent that we are ill at ease with these disparate outcomes, it seems to me that the best solution is for the Court to stop making up Eighth Amendment claims in its ceaseless quest to end the death penalty through undemocratic means.”

Justice Breyer, joined by Justice Ginsburg, dissented. He began:

[R]ather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.

He argued, in turn, that the death penalty “as now applied lacks th[e] requisite reliability,” citing instances
of innocent individuals executed, or at least sentenced to death. He wrote:

[A]t a minimum, [research and statistics] suggest a serious problem of reliability. They suggest that there are too many instances in which courts sentence defendants to death without complying with the necessary procedures; and they suggest that, in a significant number of cases, the death sentence is imposed on a person who did not commit the crime.

He argued, second, that the death penalty is arbitrary, as studies “show that circumstances that ought not to affect application of the death penalty, such as race, gender, or geography, often do.” Third, he argued that there are excessive delays in capital cases. Those delays, while necessary, can themselves be cruel, and also undermine the “penological rationale” (deterrence and retribution) of the death penalty. He noted:

And that fact creates a dilemma: A death penalty system that seeks procedural fairness and reliability brings with it delays that severely aggravate the cruelty of capital punishment and significantly undermine the rationale for imposing a sentence of death in the first place.

Fourth, he argued that the death penalty has become increasingly unusual. He concluded, finally, “I believe it highly likely that the death penalty violates the Eighth Amendment.”

Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, also dissented on more factual grounds. She argued that the majority opinion “leaves petitioners exposed to what may well be the chemical equivalent of being burned at the stake.” She discussed in detail the conflicting testimony regarding the effects of midazolam. She criticized the state’s expert’s testimony, summarizing:

Dr. Evans' conclusions were entirely unsupported by any study or third-party source, contradicted by the extrinsic evidence proffered by petitioners, inconsistent with the scientific understanding of midazolam's properties, and apparently premised on basic logical errors.

She noted episodes of flawed executions using midazolam.

Justice Sotomayor also disputed the Court’s reasoning that the petitioner’s claim failed because they could not identify a legal alternative means. She noted that the portion of Baze relied upon was merely a plurality opinion, and rejected the Court’s interpretation of that portion. She concluded:

If a State wishes to carry out an execution, it must do so subject to the constraints that our Constitution imposes on it, including the obligation to ensure that its chosen method is not cruel and unusual. Certainly the condemned has no duty to devise or pick a constitutional instrument of his or her own death.


Tony Henderson was charged and convicted with a drug crime. He was ordered to surrender his firearms while on pretrial release, and he did so. The guns were taken by the FBI. After being convicted, he was therefore barred by § 922(g) from possessing any firearms. Following his release from prison, he sought to have the FBI transfer the guns to a third party who was willing to purchase them from him. The FBI refused, arguing that this transfer would amount to constructive possession. The District Court and the Eleventh Circuit agreed.

The Supreme Court, in an opinion written by Justice Kagan, reversed. It noted that, by its terms, § 922(g) does not prohibit the ownership of firearms, but only the possession of them. To be sure, possession has been construed broadly, and encompasses constructive possession, which exists when a person “has the power and intent to exercise control over the object.” The Court noted that the Government conceded that the owner had the right to select a firearms dealer to sell the guns and to receive the profits. The Court concluded that merely nominating the recipient of the transfer does not amount to a “possessory interest,” but rather “a naked right of alienation – the capacity to sell or transfer his guns, unaccompanied by any control over them.” It concluded: “What matters instead is whether the felon will have the ability to use or direct the use of his firearms after the transfer. That is what gives the felon constructive possession.” Thus, a lower court may approve such a sale to a specific person, at least when it has adequate assurances that the guns will not be returned to the felon.


Samuel Johnson had a prior conviction for unlawful possession of a short-barreled shotgun. He was charged and convicted of being a felon in possession of a firearm. The Government sought an enhanced sentence under the Armed Career Criminal Act. It contended that the shotgun offense qualified as a “violent felony” for purposes of the Act, under the so-called “residual clause,” for a felony that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” The District Court sentenced him to an enhanced sentence, which the Court of Appeals affirmed.

The Supreme Court, in an opinion written by Justice Scalia, reversed, holding that the residual clause is
unconstitutionally vague. It first surveyed its prior jurisprudence on the categorical approach to ACCA predicates and the residual clause. It summarized: “Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in ‘the ordinary case’, and to judge whether that abstraction presents a serious potential risk of physical injury.” It contended that there were two reasons the statute was unconstitutionally vague. First, the residual clause “leaves grave uncertainty about how to estimate the risk posed by a crime,” because it is based on a “judicially imagined” ordinary case. Further, it “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.” The statute mandates comparison to the enumerated offenses of burglary, arson, extortion, and crimes involving explosives, but those offenses pose uncertain and differing levels of risk. The Court concluded: “By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.”

The Court noted that it had made numerous prior attempts to establish a workable standard, without success. “Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.” In response to the argument that some offenses surely qualify under any meaning of the residual clause, the Court held that such was not sufficient to save the statute, rejecting “the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.”

As to stare decisis, the Court noted that it was free to revisit its prior decisions. It argued: Experience is all the more instructive when the decision in question rejected a claim of unconstitutional vagueness. Unlike other judicial mistakes that need correction, the error of having rejected a vagueness challenge manifests itself precisely in subsequent judicial decisions: the inability of later opinions to impart the predictability that the earlier opinion forecast. Here, the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause.

The Court noted that it was not calling into question the validity of the ACCA as to the enumerated offenses or other aspects of the definition of a violent felony. Justice Kennedy concurred, finding the residual clause valid but the defendant’s conviction not a violent felony. Justice Thomas concurred, reasoning that the defendant’s conviction was not a violent felony. He expressed concerns about the vagueness doctrine itself, which he characterized as “shar[ing] an uncomfortably similar history with substantive due process, a judicially created doctrine lacking any basis in the Constitution.” Under his approach, based on a survey of history, vagueness concerns should not be used to strike down laws in all their applications but rather to refuse to apply them in specific situations.

Justice Alito dissented, arguing based on stare decisis as well as a proposed construction of the residual clause as applying to “real-world conduct” (i.e., inquiry based on the conduct in the actual offense of conviction) instead of the idealized ordinary iteration of a crime required under the categorical approach.

**McFadden v. United States, 135 S.Ct. 2298 (2015):**

McFadden was charged in a federal district court with violating the Controlled Substance Analogue Enforcement Act. It was alleged that McFadden distributed “bath salts.” The Analogue Act provides that courts, for purposes of prosecution, are to treat analogues as Schedule I substances if they are “substantially similar” to the federally controlled substances listed under §802 and are “intended for human consumption.”

McFadden argued that he did not know bath salts were federally regulated as “analogues.” Therefore, the defense sought a jury instruction that would prevent the jury from finding him guilty unless the government showed that he “knew” the substances he distributed “possessed the characteristics of controlled substance analogues including their chemical structures and effects on the central nervous system.” McFadden did not receive the jury instruction he requested and he was ultimately convicted. McFadden appealed and the Fourth Circuit held that under the Analogue Act, the government is only required to prove, as to intent, that the defendant intended the substance be for human consumption.

The Supreme Court, in a decision written by Justice Thomas, disagreed. It began by discussing the intent requirement of the Controlled Substance Act. It concluded that § 841 “requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules.” That requirement can be met even if the defendant is unsure of exactly which of several illegal substance he possesses, or if a defendant knows he possesses heroin (even if he is unaware that doing so is illegal).

The Court then turned to the Analogue Act. Noting that § 841(a)(1) requires that a defendant know that he is dealing with a “controlled substance,” the Court reasoned that, in the analogue context, the Government still must make the same showing. This can be met in two ways.
First, it can be established by proof that the defendant knew that he was dealing with a controlled substance or analogue, even if he was not sure of the exact identity thereof. Second, it can be established by proof that the defendant knew the specific analogue he was dealing with, regardless of whether he knew of its legal status as an analogue. In the analogue context, as analogues are defined by reference to their features (substantially similar chemical structure; stimulant, depressant, or hallucinogenic effect similar or greater to a controlled substance), this means that “A defendant who possesses a substance with knowledge of those features knows all of the facts that make his conduct illegal, just as a defendant who knows he possesses heroin knows all of the facts that make his conduct illegal.” The Court therefore vacated and remanded.

Chief Justice Roberts concurred in part and in the judgment. He reasoned that it was necessary that the defendant be shown to have known that the substance was controlled.

Ohio v. Clark, 135 S.Ct. 2173 (2015):

Darius Clark was charged with having physically abused two children. One was a three-year-old boy who had implicated Clark when questioned by his preschool teacher regarding several red marks on his skin. When asked who had done it to him, he said “Dee Dee,” and clarified that “Dee is big.” At trial, the court ruled that the boy was incompetent to testify. The prosecution introduced his statements to his teachers as evidence against Clark, over a confrontation objection. The state appellate courts found this to be error.

The Supreme Court, in a decision written by Justice Alito, disagreed. It surveyed prior case law after Crawford v. Washington, 541 U.S. 36 (2004), and the development of the “primary purpose” test in determining whether a statement is testimonial. It noted that such a test takes into account “all of the relevant circumstances,” which includes, but is not limited to, whether there was an ongoing emergency. It also includes the “informality of the situation and the interrogation.” The ultimate question is whether the “primary purpose” of the conversation is “to create an out-of-court substitute for trial testimony.” It noted also that some statements that would be excluded by the primary purpose test might still be admissible if they were admissible in a criminal case at the time of the founding.

The Court concluded that the statements in this case were not testimonial. While not adopting a per se rule, it reasoned that statements to individuals other than law enforcement are “much less likely” to be testimonial. The Court noted that the boy’s statements were made in the course of “an ongoing emergency involving suspected child abuse.” “[T]he immediate concern [of the teachers] was to protect a vulnerable child who needed help.” It concluded that there was “no indication” that the teachers were trying to generate evidence against the defendant; further, this was an informal and spontaneous conversation. Finally, the Court noted that “Statements by very young children will rarely, if ever, implicate the Confrontation Clause,” given that small children do not understand the legal system and would not have in mind a substitute for in-court testimony.

The Court rejected the defense argument that, because preschool teachers are mandated reporters, they should be equated with law enforcement officers.

Justice Scalia, joined by Justice Ginsberg, concurred. He agreed that the victim’s “primary purpose here was certainly not to invoke the coercive machinery of the State against Clark.” He went on, however, to “protest the Court's shoveling of fresh dirt upon the Sixth Amendment right of confrontation.” He argued that the majority was wrongly indicating that a statement that met the primary purpose test might nonetheless be admissible, and was wrong in putting the burden on a defendant to show that a statement would not have been admitted at the time of the founding.

Justice Thomas also concurred, repeating his long-held but idiosyncratic view that the Confrontation Clause only bars statements with sufficient “indicia of solemnity.”

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Back to Basics:
Guide to Time Computation for Felony Sentences

Mary-Kathryn Harcombe

We have all had clients who want to know exactly how much time they will serve on a TDOC sentence – and we have all felt the frustration of not having a good answer. The goal of this article is to give you the tools to generally estimate how a TDOC sentence will be calculated and understand how the time computation process works. You can NEVER give an exact answer to a client about a felony sentence unless the sentence is 100% to serve; the Tennessee Department of Corrections (TDOC) has the final word on time computation. It is helpful, however, to have a basic understanding of the system and the factors that affect how much time your client will actually serve.

Determinate Release - TCA § 40-35-501(a)(3)

Determinate Release (DTR) is an automatic early-release measure that applies to all cumulative felony sentences between one and two years. Once DTR is granted, the inmate is released to state probation for the remainder of the sentence. If that probation is violated, then the client will have to serve out the sentence; you can only receive DTR once on any given sentence. When looking at DTR eligibility, you need to consider the sentence as a whole. For example, if the client has two consecutive 1 year sentences (total 2 year sentence), then DTR will apply. If the client has a 1 consecutive to a 2 (total 3 year sentence), then DTR will not apply, even though the first sentence is just 2 years.

Computation of DTR is one of the most widely misunderstood factors in sentencing, and you simply cannot give a precise release-date to a client. The amount of time prior to release on DTR depends on how much jail credit your client can earn at the facility where he is being held. As a rule of thumb, it is usually safe to tell clients:

- 2 year sentence (add about a month for a 35% sentence)
- With 2 for 1 credits à DTR at about 5 – 6 months
- Without reduction credits à DTR at about 7 – 8 months
- 1 year sentence à usually DR at 3 – 4 months (regardless of credits)

This rule of thumb does NOT apply if your client has significant pre-trial jail credit. It takes TDOC about 2 months to process DTR. If your client has 8 months of pretrial credit and then pleads to a 2 year sentence, it will still take approximately 2 more months for your client to be released on DTR, even though he/she has already reached the eligibility point.

Sentence Reduction Credits – TCA § 41-21-236

Sentence reduction credits are “extra credit” days that operate to decrease the total time an inmate serves in custody. You will hear clients say the days are “taken off the back end” of their sentences. This means that when the credits are applied, the sentence end date and parole eligibility date both move forward. For example, if your expiration date is July 31st, and you earn 16 “good-time days”, then your expiration date will move up to July 15th.

By statute, all TDOC facilities (not including the county facilities) offer a maximum of 16 days of reduction credits per month. These credits do not start accruing until the sentence is in effect, and an inmate must have served at least 75% of the calendar month at TDOC in order to get the credits for that month. The credits are not calculated and applied until the end of each month. Of the maximum 16 reduction credits available at TDOC, 8 depend on good behavior and the other 8 depend on participation in work or rehabilitation programs.

When estimating how much time a client will serve, you can never count on your client earning all 16 days per month. Inmates often receive partial credit depending on the program or work they are involved in (i.e. 12 days a month). The maximum 16 days are not available to every TDOC inmate. For example, some inmates may be at facilities that do not have enough rehabilitation programs available. Additionally, some inmates may have a security classification (points) that is too high for the rehabilitation programs. Finally, inmates do not earn credits for months in which they receive a class A disciplinary infraction or spend time in segregation.
In addition to the post-disposition credits, TDOC also gives some pretrial credits. For every calendar month served pre-disposition, the inmate should earn 8 days of behavior credit. See TCA §41-21-236(e)(2). Each inmate automatically earns this credit unless he or she receives disciplinary write-ups. This credit is usually earned while the inmate is still in the local jail, but the credits aren’t applied until TDOC receives the judgment. This pre-disposition credit should be taken into account in TDOC’s initial calculation of the expiration and parole eligibility (RED) dates.

Note that an inmate does not get any sentence reduction credits for “street-time.” In some situations (i.e. parole or community corrections), a defendant may be eligible to get jail credit for “street-time” (time not in custody). This is purely day-for-day time; there are never any sentence reduction credits earned during street-time. Remember also that there is no jail credit granted for time the defendant is on bond or on probation.

Parole Eligibility Percentages and REDs – TCA § 40-35-302(d)

Clients often erroneously believe that the percentage of a sentence (i.e. 8 at 30%) refers to how much time they will serve. Unfortunately, the percentage only applies to parole eligibility (i.e. the Release Eligibility Date or RED). There is absolutely no guarantee if parole will be granted or when parole will be granted. Often, the parole board may refuse parole and set another date in a year. Alternatively, the parole board may tell your client that he can get out on parole after he completes a certain rehabilitation class. There is simply no way to tell a client when he will be released on parole. It is advisable to always warn clients that they probably won’t make parole or be released as soon as they become eligible.

Parole eligibility is also called the “release eligibility date”, or RED. The “sentence end date” or “expiration date” reflects when the client will be released if he is denied parole and earns no additional sentence reduction credits. You can find the RED and expiration dates for your clients through the Felony Offender Information Lookup (FOIL) at https://apps.tn.gov/foil-app/search.jsp. The easiest way to look up a client on FOIL is with the TOMIS number (TDOC ID number).

Both the RED and the expiration date will move forward as the client earns sentence reduction credits. For example, let’s say your client has a 10 at 30% and a starting RED of July 1st, 2018. If your client earns 10 reduction days a month, then after two months, the RED would move back to June 11, 2018. In this way, if your client earned an average of 10 days for each month, he could be eligible for parole on a 10 at 30% after 2 years and 3 months. The expiration date will move up in the same manner.

The only way an inmate can be released prior to the RED is if the parole board is letting people out via the “safety valve.” The safety valve program has been in effect since 1985, but the parole board only uses it sparingly and sporadically. Safety valve only applies to some categories of crimes, as determined by the governor. Roughly speaking, safety valve allows release after an inmate has served 60% of the time between the sentencing date and the RED.

Concurrent / Consecutive Sentences – Tenn. R. Crim. Pro. 32(c)

As we all know, clients often have sentences from multiple cases and multiple counties. In general, if the judgments are silent as to consecutive or concurrent then TDOC will run the sentences concurrently. The exception to this rule is crimes or sentences that are mandatorily consecutive under Rule 32 or the criminal statute.

When the judgment is silent on a mandatorily consecutive sentence, TDOC will usually automatically run the sentence consecutive. If the judgment explicitly states the sentence is concurrent, however then TDOC will usually contact the court to correct the illegal sentence. TDOC will not, on its own, simply convert an explicitly concurrent sentence to a consecutive one. Note, however, that TDOC doesn’t usually know whether a defendant was on bond, so they don’t catch cases that should be mandatorily consecutive pursuant to Rule 32(c)(3)(C). Thus, “bond on bond” cases where the judgment is silent or says “concurrent” will, in practice, almost always be run concurrently, despite the requirement in Rule 32(c)(3)(C).

When two sentences are run consecutively, TDOC usually adds them together and treats them as one long sentence, even if the sentences are from different indictments or counties. For example, if your client has a 6 year at 30% sentence and then pleads guilty to 4 years at 30% consecutive, TDOC (and the statute) will consider that to be a 10 year at 30% sentence. The RED will be 3 years minus any reduction credits earned. If the sentences are at different percentages, then the RED times are simply added. For example, if the client has a 10 at 35% stacked on a 10 at 30%, the total RED will be 6.5 years (3 + 3.5) minus any reduction credits earned. In these situations, the RED is calculated by TDOC, not the parole board.
In some situations, such as the crooks with guns law (TCA §39-17-1324), an inmate may have a 100% sentence which is consecutive to a sentence at a regular percentage. In these circumstances, TDOC relies on the parole board rather than simply adding the RED dates together. When the RED for the first sentence is met, the parole board will then decide whether to do a “custodial parole” to the second sentence. Thus, if you have a 10 at 30% followed by a 5 at 100%, there is no automatic RED of 8 years. Instead, after 3 years (the RED on the 10), TDOC will send the case to the parole board to determine whether the inmate can be “paroled” to the 5 year sentence.

When an inmate has a misdemeanor sentence consecutive to a TDOC sentence, the inmate will be transported back to the county jail upon “release” from TDOC. The RED functions as usual, but if parole is granted, the inmate will be returned to the county jail to serve the misdemeanor sentence. A TDOC inmate with a consecutive misdemeanor will have a “commitment detainer” for the entirety of his TDOC stay. This detainer adds points to the security classification, and thus can limit an inmate’s access to privileges and programs. This in turn may decrease the number of program credits an inmate can earn each month. It is usually a bad idea to run a misdemeanor sentence consecutively to a TDOC sentence; most times, the client would actually do less time if the second sentence is 1 year at 30% instead of 11 months and 29 days.

**Felony Sentences in Local Facilities**

In certain situations, inmates serving felony sentences may be housed in local facilities. When overcrowding becomes a problem at TDOC, local jails may be used as “overflow” facilities for TDOC inmates. For example, a person with a 10 year sentence from Davidson County could be sent to Fayette County Jail if there are no beds available at TDOC facilities. In this situation, the inmate may not be able to earn the full 16 days a month of sentence reduction credits. Behavior credits (up to 8 days a month) are still controlled by TDOC, but local facilities are responsible for awarding work and program credits. The availability of work and rehabilitation programs at local facilities varies greatly.

Both Nashville and Memphis have contracts with TDOC wherein they house their own TDOC inmates for sentences of up to a certain length. For example, in Nashville, an inmate serving any felony sentence between 1 and 6 years will be housed at the Metro Detention Facility (MDF / CCA). While technically a prison, MDF/CCA is not a TDOC facility, so the local courts retain jurisdiction. Once an inmate goes to TDOC custody, the local courts lose jurisdiction, but an inmate at MDF/CCA may still file motions, such as a suspended sentence petition, in the Davidson County Criminal Court. MDF/CCA also utilizes a different jail credit policy than does TDOC. As with all inmates serving felony sentences, TDOC awards up to 8 days a month in behavior credits, but MDF/CCA offers significant sentence reduction credits above and beyond the TDOC minimum.

Ultimately, there’s no way to tell your client exactly how much time he or she will serve at TDOC. A lot depends on luck and the mysteries of parole. Many lawyers make a policy of not giving estimates about time calculations because they can’t guarantee accuracy. I do usually give estimates, because I know I would want one if I were a criminal defendant. You should do what you feel comfortable with. If you do give estimates, here are three rules to help protect yourself. First, emphasize (and re-emphasize and re-emphasize) that this is just what you think will happen, but that you cannot guarantee what TDOC will do. Ultimately, TDOC makes the official calculations, not you. Second, give a conservative estimate and build in some cushion. For example, if I think a client will serve 20 months if he earns all available credit, I will tell him to expect to serve 22 to 25 months, and that he may serve as little as 20 if he is extremely lucky. Third, always, always, always write down the estimate that you give a client. That way, when the client calls in a year and says, “You told me I’d be out by now,” you can look up in your notes and see what you actually told the client.

Every lawyer has his or her own approach the dreaded question (“But how much time will I actually serve?”). Whatever approach you choose, hopefully this article will help you understand the basics of TDOC time computation. Good luck!

**B2B blurb:**

This article is part of our regular Back2Basics series. If you would like to write a Back2Basics article, or have suggestions for topics you would like to see covered, please contact Mary Kathryn Harcombe at maryharcombe@jis.nashville.org.
1In Davidson County, DTR is widely known as “144 day kick-out”, and inmates will swear up and down that they should get out after 144 days. Unfortunately, that’s not how it works.
2A state probation officer will meet with the client in jail prior to release. If your client prefers to simply flatten the sentence, he can refuse Determinate Release.
3Each week, TDOC runs a report of everyone eligible for Determinate Release who has a release eligibility date (RED) in the next 2 months. Once an inmate appears on the report, that RED date is fixed for purposes of DR, so it stops moving forward when the inmate earns good-time credits. This is why the calculations don’t make much sense.
4Once the court sends the judgment to TDOC, there are still several steps. The inmate’s name has to appear on the weekly eligibility report (this can take several weeks). Community Supervision then has approximately 2 weeks to process a notification to the DA’s office and waits another two weeks for any response.
5Also known as “good-time credits”. Can include behavior credits and program/work credits.
6This means either after the plea / finding of guilt or after a probation violation is sustained.
7If the sentence goes into effect on May 1, you get all your credit days for May. If it goes into effect on May 10, you don’t get reduction credits until June.
8On 85% crimes (see TCA §40-35-501(c)(1)), the percentage is an expiration date, not a RED. The 85% crimes are specifically ineligible for parole.
9It is never safe to assume a client will get 16 days per month every month. I find that my “well-behaved” clients usually average about 11 days a month. There will always be some months at the start when the client is in classification and will not earn any reduction credits.
10Per Rule of Criminal Procedure 32 (c)(2)(ii), a silent judgment shall be deemed consecutive if the prior sentence is “not called to the attention” of the court. In reality, TDOC assumes that all prior sentences are known and thus runs all convictions concurrently unless explicitly instructed otherwise.
11The most common statutory mandatory consecutive crime is use of gun during a dangerous felony – TCA §39-17-1324.
12It is generally believed that an inmate has a reduced chance of making parole if he has a consecutive misdemeanor sentence, but this has not been confirmed.
13At MDF/CCA in Nashville, a defendant will receive 2-for-1 credit from the facility plus 8 days a month in behavior credits from TDOC. Thus, for a 30-day month, an inmate can earn 68 days of credit. There are a few caveats to this bounty. An inmate won’t get the reduction credits (i.e. the extra 38 days) unless he or she spends the entire calendar month at MDF. If an inmate is transported to another county for a few days for court, the reduction credits aren’t applied for that month. Similarly, if the sentence goes into effect after the 3rd day of the month, the inmate won’t start earning the reduction credits until the following month. The credits aren’t calculated until the end of the month, so if an inmate is released in the middle of a month, he or she won’t receive reduction credits for that month.
Tennessee’s Troublesome Possessing With Intent To Go Armed Or Employing A Firearm During The Commission Of A Dangerous Felony Law

Eugene L. Belenitsky

In 2007, Tennessee legislature enacted T.C.A. 39-17-1324, codifying a new offense and different layers of punishment for acts of possessing with intent to go armed or employing a firearm during a commission of listed dangerous felonies. Despite multiple legislative amendments, many struggles exist with the law’s application. As of the middle of 2015, Tennessee Criminal Court of Appeals decisions already include reversals for flawed indictments, improper jury instructions, and address arguments of double jeopardy. So far, reversal include either dismissals of the firearm count of the indictment or a new trial on that one count. Still, this law is a potential goldmine for informed post-trial counsel. A closer look at the Statute, recent decisions and pending decisions examined in this article will provide a summary guide and good place to start to any criminal law practitioner.

I. The Statute Defined: T.C.A. 39-17-1324

The name of the law itself is misleading in that “dangerous felony” definition excludes a number of felonies that are inherently “dangerous”. For example, crimes such as first degree murder, robbery and aggravated assault are not “dangerous felonies”. The law’s definition of a “prior conviction” must also be read carefully, “prior convictions” are defined as ones for a “dangerous felony”. A summary of the Statute is provided below.

The Prohibited Acts Defined: Subsections (a) & (b). Subsection (a) of the law bans possession of a firearm, with intent to go armed, during commission or attempt to commit a “dangerous felony.” Intuitively, one might think that words “to go armed” should prohibit the use of this law in cases of accused drug dealers or growers who had a gun somewhere in the home. However, cases have interpreted “to go armed” more broadly than one would expect and convictions for possession of a firearm in a home were upheld in cases where the State could show a nexus between the firearm and the seized contraband. Subsection (b) bans employment of a firearm during commission, attempt to commit, flight or escape from commission or attempt to commit a “dangerous felony.”

“Dangerous Felony” Defined: Subsection (i). A “Dangerous Felony” is defined as:

(A) Attempt to commit first degree murder, as defined in Sec. 39-12-101 and 39-13-202;
(B) Attempt to commit second degree murder, as defined in Sec. 39-13-210 and 39-12-101;
(C) Voluntary manslaughter, as defined in Sec. 39-13-211;
(D) Carjacking, as defined in Sec. 39-13-404;
(E) Especially aggravated kidnapping, as defined in Sec. 39-13-305;
(F) Aggravated kidnapping, as defined in Sec. 39-13-304;
(G) Especially aggravated burglary, as defined in Sec. 39-14-404;
(H) Aggravated burglary, as defined in Sec. 39-14-403;
(I) Especially aggravated stalking, as defined in Sec. 39-17-315(d);
(J) Aggravated stalking, as defined in Sec. 39-17-315(e);
(K) Initiating the process to manufacture methamphetamine, as defined in Sec. 39-17-435;
(L) A felony involving the sale, manufacture, distribution or possession with intent to sell, manufacture or distribute a controlled substance or controlled substance analogue defined in part 4 of this chapter; or
(M) Any attempt, as defined in Sec. 39-12-101, to commit a dangerous felony;

Punishment Subsections (e), (g), (h) and (j). The punishment is set out in subsections (e), (g), (h) and (j). The punishment requires mandatory consecutive sentencing without eligibility for any probation or alternative out-of-prison sentence. Possession of a firearm with intent to go armed is a Class D felony, carrying a minimum of (3) three years at 100%, (5) five years if Defendant has a “prior conviction.” Employment is a Class C felony, car-
ry a minimum of (6) six years at 100%, (10) ten if Defendant has a “prior conviction”. Sentencing is further enhanced to (15) fifteen years at 100% if Defendant has a prior conviction under this Statute.iii

**Double Jeopardy Avoidance: Subsection (c).** This subsection attempts to avoid double jeopardy violations by clarifying that this law cannot apply if possession or employment of a firearm is an essential element of the underlying felony. “A person may not be charged with a violation of subsection (a) or (b) if possessing or employing a firearm is an essential element of the underlying dangerous felony as charged.” The exact language of subsection (c) should be noted, specifically the “as charged” phrase, because it is interpreted as a source of legislative intent and was cited in some of the reversals discussed below.

**No Severance and Mandatory Bifurcation Provisions: Subsection (d) & (f).** Subsection (d) requires the offense be indicted and tried at the same time and before the same jury as the underlying dangerous felony. “Same jury” and “same time” phrases resulted in inability for the State to proceed when the firearm count of the indictment is remanded on appeal, as discussed below. Subsection (f) requires bifurcation where the State seeks an enhancement for those with a “prior conviction” on their record.

**II. Problems Where Indictments Fail To List Predicate Dangerous Felony**

In any event, [three recent decisions of this Court] reflect this court’s concern with the prosecution’s practice to indict a defendant for a violation of Code section 39-17-1324 without identifying the underlying dangerous felony and without providing any indication of which dangerous felony it will rely upon at a trial.


Indictment counts of Section 39-17-1324 that fail to list the underlying dangerous felony are invalid when there are potentially multiple predicate dangerous felonies and the indictment’s failure to specify the felony creates ambiguity within the indictment. This example of an indictment, prosecuted in 2009 in Shelby County, read:

The Grand Jurors of the State of Tennessee, duly selected, empaneled, sworn and charged to inquire for the body of the county of Shelby, Tennessee, upon their oath, present that: “NAME” between “DATE 1” and “DATE 2” in Shelby County, Tennessee, and before the finding of this indictment, did unlawfully and knowingly employ a firearm during the commission of an offense as defined in T.C.A. 39-17-1324(i) (1), in violation of T.C.A. 39-17-1324(b), against the peace and dignity of the State of Tennessee.

Though facially appearing to be valid because it lists the definition subsection (i) of 39-17-1324, this is a potentially invalid indictment. Oftentimes, a number of qualifying dangerous felonies are contained within the indictment. The failure to identify the predicate felony would then not provide notice to the Defendant and leave him guessing which one the State will rely on. The critical problem is notice. Failure to put the Defendant on notice of during which felony the gun was actually possessed or employed, deprives him or her of opportunity to prepare to rebut the allegation.

Under both the United States and Tennessee Constitutions, an accused is guaranteed the right to be informed of the nature and cause of the accusation. To satisfy this constitutional requirement, an indictment must include sufficient information to “1) provide notice to the accused of the offense charged; 2) provide the court with an adequate ground upon which a proper judgment may be entered; and 3) provide the defendant with protection against double jeopardy.”lv If an indictment fails to include an essential element of the offense, the trial court never had subject matter jurisdiction to enter the conviction. v

In a 2014 opinion State v. Duncan, Criminal Court of Appeals at Jackson held an indictment was “fatally flawed” and lacked an “essential element” of the offense where the indictment did not list the predicate felony.vi In Duncan, the employing a firearm indictment was preceded by counts of both aggravated burglary and especially aggravated kidnapping, both are defined in the list of qualifying dangerous felonies under T.C.A. 39-17-1324(i).
The predicate felony was not identified within the indictment. The especially aggravated kidnapping count of the indictment used the “deadly weapon” language and did not directly mention a “firearm.”

The State argued that the indictment was not fatally defective because only the aggravated burglary charge could have properly served as the predicate felony. The State argued especially aggravated kidnapping required proof of a deadly weapon – a firearm was used during the offense in that case – and could not be used as a predicate felony pursuant to T.C.A. § 39-17-1324(c). Subsection (c) does not allow a conviction under T.C.A. 39-17-1324 “if possessing or employing a firearm is an essential element of the underlying dangerous felony as charged.” The Court disagreed. Duncan was accepted and is on appeal to the Tennessee Supreme Court.

***Practice tip: as this argument dismisses the indictment, it is important to check the statute of limitations. However, the statute of limitations not expiring does not end the analysis because the statute requires the firearm charge be tried together with the predicate felony. Even if the State decides to re-indict the client, a good legal argument can be made that the firearm count cannot be retried pursuant to T.C.A. 39-17-1324(d). A footnote in the Duncan opinion supports this argument.

***Ethics practice tip: if you are the trial counsel and you notice that the indictment is potentially invalid and does not provide your client notice as discussed above, consider what your ethical obligations are to your client and to the court. On the one hand, lawyers have a duty to investigate and prepare a defense. Having notice of which felony the firearm was connected with is critical in preparing a defense. On the other hand, notifying the prosecution of their error will result in the indictment being swiftly amended and a good appellate and post-conviction issue for your client will be taken away. These are ethical issues that need to be considered and are not within the scope of this article.

In the most recent opinion that came out in July of 2015, the Court of Appeals held that a lesser-included felony could not be used as the predicate felony for conviction under T.C.A. 39-17-1324 where the Defendant was indicted of first degree murder and convicted of voluntary manslaughter. The State argued the same logic it tried in Duncan, supra, that the Defendant was provided sufficient notice of the underlying dangerous felony because that is the only possible felony for which the conviction could be sustained. The Court again disagreed, citing Duncan as support. “In the context of sufficiency of an indictment, we are not permitted to examine the evidence presented at the trial to determine what offense might apply to the firearm violation.” The only issue before it, the Court held, was whether the indictment sufficiently provided notice of the charges by fully stating the offense charged.

***Practice tip: So can a guilty plea to T.C.A. 39-17-1324 be attacked where an indictment fails to list a “dangerous felony”? There is an appellate decision from 2014, Thomas v. Lester, which suggests just that. Under State v. Nixon, the Court has no subject matter jurisdiction over an indictment that is missing an “essential element.” Lack of subject matter jurisdiction cannot be waived by the defendant. In Thomas v. Lester, the Court denied habeas based on a procedural failure of the Petitioner to attach his guilty plea transcript. The Court held that without the transcript, it could not decide whether subject matter jurisdiction existed.

III. Problems With Jury Instructions

Problems arose when the State’s jury instructions did not elect a predicate felony or instructed jurors on using multiple predicate felonies. So far opinions which considered the issue, reversed the conviction for lack of clear and proper jury instructions. However, the jury instruction error has not yet gotten the case dismissed like the fatally flawed indictment error discussed above.

"It is well-settled that a defendant has a constitutional right to a complete and correct charge of the law so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions.” It was held that when the indictment charges multiple dangerous felonies, the State must elect one in its jury instructions. It was also held that it is error to include felonies in the instruction not permitted to be included by Subsection(c) – felonies elements of which contain use or possession of a firearm. In all such cases the Court remands to the trial court with instructions for a new trial on the firearm count of the indictment.
***Practice tip: notice the difference between the outcomes in cases with invalid indictments and bad jury instructions. If client wants a new trial on the predicate felony and the firearm count gets reversed, you can try and argue that the new trial on the firearm count of the indictment requires a new trial of the underlying predicate felony because of the requirement in T.C.A. 39-17-1324(d). See the footnote in the Duncan opinion.xv

Another problem with jury instruction errors occurs where the Court does not charge the possession of the firearm as a lesser included offense of employing the firearm. This was determined to be an error in a 2014 opinion from the Tennessee Supreme Court case State v. Fayne.xvi In Fayne, the defendant was charged and convicted of an aggravated burglary and employment of a firearm during commission of a dangerous felony. The trial attorney did not request that possession of the firearm be included as a lesser included jury instruction. In affirming the conviction, the Court held the Defendant waived the lesser included jury instruction issue by not requesting one at the time of his trial and he was not entitled to plain error review.

***Practice tip: even though Mr. Fayne was denied plain error review, in making its ruling the Court, in footnote 6, left room to re-argue the plain error issue at a later day when it commented that “In this case… the parties have not briefed or relied upon Henderson. Accordingly, we leave for a future case the question of whether the ruling in Henderson applies under Tennessee law” referring to Henderson v. United States, 133 S. Ct. 1121 (2013). xvii

IV. Double Jeopardy Issues

The double jeopardy clauses of the United States and Tennessee Constitutions protect an accused from … (3) multiple punishments for the same offense.viii When a defendant complains that multiple offenses under different statutes punish the same offense, then a court must employ the Blockburger analysis, as adopted by our supreme court in Watkins. “[I]f each offense includes an element that the other does not, the statutes do not define the ‘same offense’ for double jeopardy purposes,” and courts “will presume that the Legislature intended to permit multiple punishments.xix

There are potentially two types of double jeopardy problems contained within 39-17-1324. First double jeopardy problem arises where the predicate felony “as charged” alleges use of a firearm or a deadly weapon. This is prohibited directly in Subsection(c) and by Double Jeopardy Principles. The more interesting issue comes up in cases where the State charges the indictment and jury instructions of the predicate felony with the alternative “by force or intimidation” language or “by use of a deadly weapon” language rather than “by use of a firearm” to avoid the Double Jeopardy issues. Second layer of double jeopardy issues arises where the State attempts to convict the Defendant under subsections (h)(2), (g)(2) or (j), those subsections enhance punishment for “prior convictions”, and of the convicted felon in possession of a handgun law.

A. T.C.A. 39-17-1324 Double Jeopardy Problems Involving Predicate Felonies

The issue here is whether or not the State can convict someone under the firearm law and for a felony that involved use of firearm. Specifically, whether the State can get a dual conviction if it avoids the words “firearm” in its indictment and jury instructions.

While the law is still developing, perhaps one safe conclusion is that double jeopardy grounds, alternatively provisions of T.C.A. 39-17-1324(c), will not be grounds for reversal so long as the State stays away from relying on the word “firearm” or “deadly weapon” in the indictment and jury instructions.vx That seems to be the case even if the State provides ample proof of the firearm and how it was used at trial and there is no other weapon used or alleged to be used other than the firearm. xvi However, it appears that a double jeopardy violation will occur where the State instructs the jury that the underlying felony was committed by use of a “deadly weapon” or a “firearm.”xxii
B. T.C.A. 39-17-1324 Double Jeopardy Problems Involving Convicted Felons

The other double jeopardy problem is where the State gets a conviction on both the T.C.A. 39-17-1324 subsections (h)(2) or (g)(2) or (j) and T.C.A. 39-17-1307, Tennessee’s convicted felon in possession of a handgun law. For punishment purposes, T.C.A. 39-17-1324 provides stiffer penalties for those with a “prior felony”, more specifically a prior “dangerous felony” conviction. Logically, it is double punishment for having a felony conviction in that T.C.A. 39-17-1324 punishes the defendant for “a prior dangerous felony” whereas T.C.A. 39-17-1307 punishes the defendant for “any prior felony conviction.”

The only opinion found by this author, unpublished, involving T.C.A. 39-17-1324 double jeopardy issues with convicted felons indicates such argument will be rejected. In State v. Boyce, the Court of Appeals at Jackson held that the State could get a conviction on both counts without violating double jeopardy principles. The Court reasoned that both statutes require an additional element. The Court also reasoned that the “prior dangerous felony conviction” was not an element of T.C.A. 39-17-1324 and was only there for enhanced sentencing purposes.

***Practice tip: Explaining to a client why he was convicted under both T.C.A. 39-17-1324 and T.C.A. 39-17-1307 convicted felon in possession of a handgun is probably something you want to in writing or risk hearing “but how can they do that?” for a long time.

Conclusion

Given potential for error, post-trial defense lawyers can benefit their client by carefully scrutinizing the technical requirements contained within T.C.A. 39-13-1724 and by following any new opinions as they continue defining this new area of Tennessee criminal law.

Author would like to thank talented Memphis lawyers who graciously agreed to review or offer comments on this article: Joseph Ozment, Lorna McClusky and William R. Bruce.

State v. Trusty, No. W2012-02445-CCA-R3-CD, at *3 (Tenn. Crim. App., 2013) (rejecting insufficiency of the evidence argument as to the intent and reasoning that "The fact that the firearm was holstered, loaded, and within the immediate proximity of the contraband established the defendant's intent to go armed and demonstrated a nexus between the firearm and the drugs.").

"Prior conviction" means that the person serves and is released or discharged from, or is serving, a separate period of incarceration or supervision for the commission of a dangerous felony prior to or at the time of committing a dangerous felony on or after January 1, 2008;

"Prior conviction" includes convictions under the laws of any other state, government or country that, if committed in this state, would constitute a dangerous felony. If a felony offense in a jurisdiction other than Tennessee is not identified as a dangerous felony in this state, it shall be considered a prior conviction if the elements of the felony are the same as the elements for a dangerous felony; and

"Separate period of incarceration or supervision" includes a sentence to any of the sentencing alternatives set out in Sec. 40-35-104(c)(3)-(9). A dangerous felony shall be considered as having been committed after a separate period of incarceration or supervision if the dangerous felony is committed while the person was:

(A) On probation, parole or community correction supervision for a dangerous felony;

(B) Incarcerated for a dangerous felony;

(C) Assigned to a program whereby the person enjoys the privilege of supervised release into the community, including, but not limited to, work release, educational release, restitution release or medical furlough for a dangerous felony; or

(D) On escape status from any correctional institution when incarcerated for a dangerous felony.


Id.

“Thomas v. Lester, No. W2013-02522-CCA-R3-HC (Tenn. Crim. App. 2014) (“We note that the petitioner failed to attach to his petition the
indictments or a transcript of the guilty plea hearing. Thus, we are unable to discern whether count four actually alleged a predicate felony or
whether the aggravated robbery counts alleged the essential element of possession of a firearm.”).

If the indictment fails to include an essential element of the offense, no crime is charged and, therefore, no offense is before the court. State v.

“State v. Dorantes, 331 S.W.3d 370, 390 (Tenn. 2011). See e.g. Jeremiah Dawson, 2012 WL 1572214, at *8 (holding that the State is required
to elect when multiple dangerous felonies are alleged in indictment for violation of section 39-17-1324); State v. Michael L. Powell and Ran-
court not to instruct the jury as to which dangerous felony charge was based on); State v. Trutonio Yancey and Bernard McThune, No. W2011-
01543-CCA-R3-CD, 2012 WL 4057369, at *9 (Tenn. Crim. App. Sept. 17, 2012) (it was plain error to not require election of the dangerous
felony in the jury instruction).

include predicate felonies not permitted by section 39-17-1324(c) in the jury instruction).


rejecting plain error argument). This case is currently on appeal to the Tennessee Supreme Court and the Court took the case for review.


“Id. at 557.

firearm during a carjacking where the indictment and jury instructions relied on “force or intimidation” even though the proof at trial relied
heavily on use of a firearm).

(Tenn. Sept. 20, 2012) (double jeopardy argument rejected where defendant had dual convictions for carjacking and employing a firearm dur-
ing the commission of a dangerous felony because he was charged with carjacking by force or intimidation rather than by use or display of a
deadly weapon).

indicted for committing the underlying dangerous felony by use of a deadly weapon, and the State argued that there was a substantive distinc-
tion between "deadly weapon" and "firearm").

the prior felony under (b)(2) (g)(2) is not an element of the offense T.C.A. 39-13-1724 and a “prior dangerous felony” was an element not
contained in the convicted felon in possession of a handgun statute).
DUI Defense Seminar
October 22-23, 2015
Caesars Entertainment Hotels ~ Horseshoe & Tunica Roadhouse
Tunica, MS  38664

Wednesday, October 21
6:00 Welcome Reception
sponsored by:

Thursday, October 22 @Road House
8:15  Case Analysis (1.00 general)
      Rich McGee & Lisa Naylor

9:15  Case Theory & Theme
      James A.H. Bell (1.00 general)

10:15 Break

10:30  Tips on Reviewing DUI Video Tapes (1.00 general)
       Sara Compher-Rice

11:30  Preparing for the Preliminary Hearing (1.00 general)
       Nate Evans

12:30 Lunch (provided)

1:30  Voir Dire (1.00 dual)
      Ray Fraley

2:30  Opening Statements (1.00 general)
      Tim Huey

3:30  Break

3:45  Closing Statements (1.00 dual)
      Samuel L. Perkins

4:45  HGN (1.00 general)
      Tony Corroto

6:00  TACDL BOD Meeting
Friday, October 23 @Road House

7:30 Ethics at Sunrise: What you Can & Cannot Say to a D.A. (1.00 dual)

_Grover Collins_

8:30 Drugged Driving (1.50 general)

_Drs. Jimmie & Carrie Valentine_

10:00 Break

10:15 Uncertainty in the Test Results

_Ted Vosk_ (1.50 general)

11:45 Lunch (on your own)

1:00 Breath Test Defense (1.00 general)

_Dr. Ron Henson_

2:00 Retrograde Extrapolation

_Michael Kessler_ (1.00 general)

3:00 Break

3:15 Motion Hearing Advocacy

_Frank Lannom_ (1.00 general)

4:15 Adjourn

Approved by the TN CLE Commission for 15.00 credit hours (12.00 gen, 3.00 dual)

*****Early Bird Special*****

Register before October 1st and take $100 off of your registration fee.

TACDL reserved a block of rooms with the Horseshoe Tunica Hotel—1021 Casino Center Drive, Tunica, MS 38664. If you are interested in a room, please contact the hotel at 866-635-7095 before October 1, 2015 and advise the hotel you are with the Tennessee Association of Criminal Defense Lawyers, using Group ID_S 10 TAC 5 for the group rate. The rate is $69/day.

All materials will be provided via Drop Box. Bring your lap top or tablet! Paper materials are not available. Seminar materials will be emailed to all attendees in advance of the CLE.

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<th></th>
<th>1 day</th>
<th>Both</th>
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Make Plans to Join Us for
TACDL’s DUI Seminar & CLE
Tunica, MS
October 22-23, 2015