



# SENTENCING

How to impose a sentence  
and not abuse your  
discretion.

Presented by

Judge John W. Campbell  
Court of Criminal Appeals  
Western Section

# Purpose

## T.C.A. §40-35-102

- The foremost purpose of this chapter is to promote justice, as manifested by § 40-35-103. In so doing, the following principles are adopted:
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  - (1) Every defendant shall be punished by the imposition of a sentence justly deserved in relation to the seriousness of the offense;
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    - (2) This chapter is to assure fair and consistent treatment of all defendants by eliminating unjustified disparity in sentencing and providing a fair sense of predictability of the criminal law and its sanctions;
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      - (3) Punishment shall be imposed to prevent crime and promote respect for the law by:
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        - (A) Providing an effective general deterrent to those likely to violate the criminal laws of this state;
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          - (B) Restraining defendants with a lengthy history of criminal conduct;
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# Purpose

- (C) Encouraging effective rehabilitation of those defendants, where reasonably feasible, by promoting the use of alternative sentencing and correctional programs that elicit voluntary cooperation of defendants; and
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- (D) Encouraging restitution to victims where appropriate;
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- (4) Sentencing should exclude all considerations respecting race, gender, creed, religion, national origin and social status of the individual;
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- (5) In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration; and
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# Purpose

- (6)(A) A defendant who does not fall within the parameters of subdivision (5), and who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary; however, a defendant's prior convictions shall be considered evidence to the contrary and, therefore, a defendant who is being sentenced for a third or subsequent felony conviction involving separate periods of incarceration or supervision shall not be considered a favorable candidate for alternative sentencing;
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- (B) As used in subdivision (6)(A), "separate periods of incarceration or supervision" means that the defendant serves and is released or discharged from a period of incarceration or supervision for the commission of a felony prior to committing another felony;
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- (C) If a defendant with at least three (3) felony convictions is otherwise eligible, that defendant may still be considered a favorable candidate for any alternative sentencing that is within the jurisdiction of and deemed appropriate by a drug court;
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- (D) A court shall consider, but is not bound by, the advisory sentencing guideline in this subdivision (6).

# Sentencing Policy

T. C. A. § 40-35-103

- To implement the purposes of this chapter, the following principles apply:
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  - (1) Sentences involving confinement should be based on the following considerations:
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# Sentencing Policy

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
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- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant;



# Sentencing Policy

- (2) The sentence imposed should be no greater than that deserved for the offense committed;
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- (3) Inequalities in sentences that are unrelated to a purpose of this chapter should be avoided;
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- (4) The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed;
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- (5) The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed. The length of a term of probation may reflect the length of a treatment or rehabilitation program in which participation is a condition of the sentence; and
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- (6) Trial judges are encouraged to use alternatives to incarceration that include requirements of reparation, victim compensation, community service or all of these.

# Sentence Alternatives

- (1) Payment of a fine either alone or in addition to any other sentence authorized by this subsection (c);
- (2) Payment of restitution to the victim or victims either alone or in addition to any other sentence authorized by this subsection (c);
- (3) A sentence of confinement that is suspended upon a term of probation supervision that may include community service or restitution, or both;
- (4) A sentence of periodic confinement that may be served in a local jail or workhouse in conjunction with a term of probation;
- (5) A sentence of continuous confinement to be served in a local jail or workhouse in conjunction with a term of probation;
- (6) A sentence of continuous confinement in a local jail or workhouse;
- (7) Work release in accordance with § 40-35-315;

# Sentence Alternatives

- (8) A sentence of continuous confinement in the department of correction if the conviction is for a felony and the sentence is at least one (1) year, unless:
  - (A) The sentence is prohibited by subsection (b); or
  - (B) The defendant is convicted of a violation of § 39-14-103, involving property valued at less than two thousand five hundred dollars (\$2,500), and the defendant is sentenced as an especially mitigated offender as defined in § 40-35-109 or a standard offender as defined in § 40-35-105; or
- (9) A sentence to a community based alternative to incarceration in accordance with the provisions, including eligibility requirements, of chapter 36 of this title.
- (d) This chapter does not deprive a court of any authority conferred by law, including, but not limited to, § 40-35-313, to decree a forfeiture of property, suspend or cancel a license, remove a person from office or impose costs and other monetary obligations if specifically authorized by law.
- (e) This chapter does not prevent a court from imposing a sentence of death specifically authorized by law.

# Standard Offender

- (a) A standard offender is a defendant not sentenced as:
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  - (1) A multiple offender, as defined by § 40-35-106;
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  - (2) A persistent offender, as defined by § 40-35-107;
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  - (3) A career offender, as defined by § 40-35-108;
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  - (4) An especially mitigated offender, as defined by § 40-35-109; or
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# Multiple Offender

## T.C.A. §40-35-106

- (a) A multiple offender is a defendant who has received:
  - (1) A minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes, where applicable; or
  - (2) One (1) Class A prior felony conviction if the defendant's conviction offense is a Class A or B felony.

# Multiple Offender

- (c) A defendant who is found by the court beyond a reasonable doubt to be a multiple offender shall be sentenced within the applicable range of punishment in Range II.
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- (d) The finding that a defendant is or is not a career offender is appealable by either party.

# Persistent Offender

T.C.A. §40-35-107

- (a) A persistent offender is a defendant who has received:
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  - (1) Any combination of five (5) or more prior felony convictions within the conviction class or higher or within the next two (2) lower felony classes, where applicable; or
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  - (2) At least two (2) Class A or any combination of three (3) Class A or Class B felony convictions if the defendant's conviction offense is a Class A or B felony.
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# Persistent Offender

- (c) A defendant who is found by the court beyond a reasonable doubt to be a persistent offender shall be sentenced within the applicable range of punishment in Range III.
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- (d) The finding that a defendant is or is not a persistent offender is appealable by either party.



# Career Offender

## T.C.A. §40-35-108

- (a) A career offender is a defendant who has received:
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  - (1) Any combination of six (6) or more Class A, B or C prior felony convictions, and the defendant's conviction offense is a Class A, B or C felony;
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  - (2) At least three (3) Class A or any combination of four (4) Class A or Class B felony convictions if the defendant's conviction offense is a Class A or B felony; or
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  - (3) At least six (6) prior felony convictions of any classification if the defendant's conviction offense is a Class D or E felony.
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# Career Offender

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- (c) A defendant who is found by the court beyond a reasonable doubt to be a career offender shall receive the maximum sentence within the applicable Range III.
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- (d) The finding that a defendant is or is not a career offender is appealable by either party.

# Prior Convictions

- In determining the number of prior convictions a defendant has received:
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  - (1) “Prior conviction” means a conviction for an offense occurring prior to the commission of the offense for which the defendant is being sentenced;
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  - (2) All prior felony convictions, including those occurring prior to November 1, 1989, are included;
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  - (3)(A) A finding or adjudication that a defendant committed an act as a juvenile that would constitute a felony if committed by an adult and that resulted in a transfer of the juvenile to criminal court pursuant to § 37-1-134 or similar statutes of other states or jurisdictions shall not be considered as a prior conviction for the purposes of this section unless the juvenile was convicted of a felony in a criminal court;
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  - (B) Notwithstanding subdivision (b)(3)(A), a finding or adjudication that a defendant committed an act as a juvenile that would constitute a Class A or Class B felony if committed by an adult shall be considered as a prior conviction for the purposes of this section, regardless of whether the juvenile was transferred to criminal court pursuant to § 37-1-134, or similar statutes of other states or jurisdictions;

# Prior Convictions

- (4) Except for convictions for which the statutory elements include serious bodily injury, bodily injury, threatened serious bodily injury or threatened bodily injury to the victim or victims or convictions for the offense of aggravated burglary under § 39-14-403, convictions for multiple felonies committed within the same twenty-four-hour period constitute one (1) conviction for the purpose of determining prior convictions; and
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- (5) Prior convictions includes convictions under the laws of any other state, government or country that, if committed in this state, would have constituted an offense cognizable by the laws of this state. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used by the Tennessee court to determine what classification the offense is given.
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# Major Changes

- *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).
- *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).
- T.C.A. §40-35-210



## *State v. Gomez (II)*

239 S.W.3d 733 (Tenn. 2007)

- Based on *Apprendi* and *Blakely*, the Tennessee sentencing scheme was unconstitutional as written. For crimes occurring prior to April 2005 the court could only impose the presumptive sentence and only enhance by the defendant's criminal record, enhancers proven at trial or admitted by the defendant during the sentencing hearing.

# T.C.A. §40-35-210

- (c) The court shall impose a sentence within the range of punishment, determined by whether the defendant is a mitigated, standard, persistent, career or repeat violent offender. In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines:
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  - (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
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  - (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.
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# T.C.A. §40-35-210

- (d) The sentence length within the range should be consistent with the purposes and principles of this chapter.
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- (e) See amendment that became effective 7/1/2022
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- (f) A sentence must be based on evidence in the record of the trial, the sentencing hearing, the presentence report, the validated risk and needs assessment, and the record of prior felony convictions filed by the district attorney general with the court, as required by § 40-35-202(a).

# T.C.A. §40-35-210(e)

- (1) In order to ensure fair and consistent sentencing, at a sentencing
- hearing the court shall place on the record, either orally or in writing, the
- following:
- (A) What enhancing or mitigating factors were considered, if any;
- (B) The reasons for the sentence; and
- (C) For a sentence of continuous confinement, the estimated
- number of years and months the defendant will serve before becoming eligible for release.

# T.C.A. §40-35-210(e)

- (2) The department of correction shall provide the court with a form to
- assist in determining the estimation referenced in subdivision (e)(1)(C).
- (3) The estimation provided pursuant to subdivision ( e )( 1 )(C) is not a
- basis for post-conviction relief or for a direct appeal of the defendant's sentence.
- SECTION 3. This act takes effect July 1, 2022, the public welfare requiring it and applies
- to sentencing hearings conducted on or after that date.

# How to Impose a Sentence

- Must have a pre-sentence report prepared by the Department of Corrections that contains the social, mental, and criminal history of the defendant as well as any risk-assessment information.
- Must conduct a hearing wherein each party can be heard regarding the appropriate sentence.
- The defendant is given an opportunity to be heard.

# Sentencing Considerations

- The use of Enhancement Factors.
- The use of Mitigating Factors.
- The use of facts adduced at trial.
- Information from witnesses called at the hearing.
- Use of mental health information including sex offender screening.

# Enhancement Factors

- T.C.A. §40-35-114 sets out 29 enhancement factors.
- The Court is to identify what enhancement factor exists and the reason the Court finds that it exists.
- The Court is to state how much weight it is attributing to a particular enhancement factor.

# Enhancement Factors

- Some enhancement factors can not be used if they mirror some element of the indicted offense.
  - Possession or employment of a firearm.
  - Offenses having more than one victim.
  - Inflicting serious bodily injury on a victim.

# Mitigating Factors

- Mitigating factors are listed in T.C.A. §40-35-114.
  - As part of sentencing hearing the Court must state what mitigating factor it is considering or why the Court does not feel mitigating factors apply.
  - If the Court does not make findings, can be found to have abused its discretion.



# Consecutive Sentencing

- Mandatory Consecutive Sentencing
- The defendant committed a felony while on parole or other release program.
- The defendant committed a felony while on bail for a felony for which the defendant was ultimately convicted.
- The defendant committed an escape or a felony committed while on escape.

# Discretionary Consecutive Sentence

- The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
- The defendant is an offender whose record of criminal activity is extensive;
- The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

# Discretionary Consecutive Sentence

- The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high; and both of the following factors apply:
- (a) the circumstances surrounding the commission of the offense are aggravated, and
- (b) the aggregate length of the sentences reasonably relates to the offense of which the defendant stands convicted.
- The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- The defendant is sentenced for an offense committed while on probation; or
- The defendant is sentenced for criminal contempt.
- The defendant has additional sentences not yet fully served.

# Sentencing Order

- Included in the materials is a copy of a sentencing order that has been updated to conform to changes made during the last legislative session.

# REVIEW

- The trial court must state on the record the statutory factors it considered and the reasons for the ordered sentence. T.C.A. § 40-35-210(e); *Bise*, 380 S.W.3d at 705-06.

# APPELLATE REVIEW

- It is well settled that this court reviews within-range sentences and alternative sentences imposed by the trial court under an abuse of discretion standard with a presumption of reasonableness. *State v. Bise*, 380 S.W. 3d 682, 707 (Tenn. 2012)

# PRESUMPTIVE PROBATION

- The 2005 revised sentencing statutes advise that a defendant is no longer presumed to be a favorable candidate for alternative sentencing. Carter, 254 S.W.3d at 347; T.C.A. § 40-35-102(6).

# ADVISORY ONLY

- Instead, the “advisory” sentencing guidelines provide that a defendant “who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” T.C.A. § 40-35-102(6).



# Probation Considerations

- The presentence report, if not waived.
- The defendant's physical/mental condition and social history.
- The facts and circumstances surrounding the offense, and the nature and circumstances of the criminal conduct involved.
- The prior criminal history of the defendant, or lack thereof.
- The previous actions and character of the defendant.
- Whether or not the defendant might reasonably be expected to be rehabilitated, and the defendant's potential or lack of potential for rehabilitation, including the risk that during the period of probation the defendant will commit another crime.

# Probation Considerations

- Whether or not it reasonably appears that the defendant will abide by the terms of probation.
- Whether or not the interests of society in being protected from possible future criminal conduct of the defendant are great.
- Whether or not measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.
- Whether or not a sentence of full probation would unduly depreciate the seriousness of the offense.
- Whether or not confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses.
- Whether or not the offense was particularly enormous, gross or heinous.

# Probation Considerations

## T.C.A. §40-35-303

- (a) A defendant shall be eligible for probation under this chapter if the sentence actually imposed upon the defendant is ten (10) years or less; however, no defendant shall be eligible for probation under this chapter if convicted of a violation of § 39-13-213(a)(2), § 39-13-304, § 39-13-402, § 39-13-504, § 39-13-532, § 39-15-402, § 39-17-417(b) or (i), § 39-17-1003, § 39-17-1004 or § 39-17-1005. A defendant shall also be eligible for probation pursuant to § 40-36-106(e)(3).

# Probation Consideration

- T.C.A. §40-35-102
- (6)(A) A defendant who does not fall within the parameters of subdivision (5), and who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary; however, a defendant's prior convictions shall be considered evidence to the contrary and, therefore, a defendant who is being sentenced for a third or subsequent felony conviction involving separate periods of incarceration or supervision shall not be considered a favorable candidate for alternative sentencing;

# Probation Considerations

- Must set out on the record that factors that apply.
- Must set out on the record the factors you find disqualify the defendant from probation.
- Can use part suspension where appropriate.
- Cannot impose a probation period beyond the range of punishment of the conviction class.

# Diversion

- Must be a “C” felony or less that is not statutorily prohibited from probation.
- Must have a clean TBI report.
  - TBI report just shows there is no prior criminal history that would disqualify a person. Does not mean the person is cleared for diversion.
  - Must have a hearing and consider all the factors in granting or denying diversion.

# Diversion Factors

*State v. Parker* 932 S.W.2d 945 (Tenn.Crim.App.1996)

- The accused amenability to correction.
- The circumstances of the offense.
- The accused criminal record.
- The accused's social history.
- The accused's physical and mental health.
- The deterrence value to the accused and others.
- Would diversion serve the interests of the public as well as the accused.

# Diversion

- The record must reflect that the court has weighed all the previous factors in reaching its determination. *State v. Bonestel*, 932 S.W.2d 163 (Tenn.Crim.App. 1993)
- Refusal to admit guilt is not a good reason to deny diversion. *State v. Lewis*, 978 S.W.2d 558 (Tenn.Crim.App. 1997).



# Revocation

- The State must file a petitioner to revoke to put parties on notice.
- Can issue a fiat to get the defendant to answer to the violation, but:
- Only a warrant will toll the running of the probation.

# Revocation

- The defendant is entitled to a hearing to establish that he violated the terms of the release.
- A finding of probable cause at a preliminary hearing can not be used by the trial court to find that the petitioner has committed a new offense. *Practy v. State, 525 S.W.2d 677 (Tenn.Crim.App. 1974).*
- State must prove the allegations by a preponderance of the evidence.

- When revoking probation the trial court should articulate, on the record what factors the court is considering and the support for those factors just like what is required for imposing a sentence under *Bise*.

**FINI**