CHAPTER NO. 353

SENATE BILL NO. 2249

By Kyle, Haynes

Substituted for: House Bill No. 2262

By McMillan, Fowlkes, Shaw

AN ACT to amend Tennessee Code Annotated, Title 39, Title 40 and Title 55, relative to the sentencing of persons convicted of criminal offenses.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 40-35-102(6), is amended by deleting the existing language and substituting the following language:

(6) 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. A court shall consider but is not bound by this advisory sentencing guideline.

SECTION 2. Tennessee Code Annotated, Section 40-35-106(b)(4), is amended by deleting the existing language and substituting the following:

(4) Except for convictions whose statutory elements include serious bodily injury, bodily injury or threatened serious bodily injury or bodily injury to the victim or victims, convictions for multiple felonies committed within the same twenty-four (24) hour period constitute one (1) conviction for the purpose of determining prior convictions; and

SECTION 3. Tennessee Code Annotated, Section 40-35-107(b)(4), is amended by deleting the existing language and substituting the following language:

(4) Except for convictions whose statutory elements include serious bodily injury, bodily injury or threatened serious bodily injury or bodily injury to the victim or victims, convictions for multiple felonies committed within the same twenty-four (24) hour period constitute one (1) conviction for the purpose of determining prior convictions; and

SECTION 4. Tennessee Code Annotated, Section 40-35-108(b)(4), is amended by deleting the existing language and substituting the following:

(4) Except for convictions whose statutory elements include serious bodily injury, bodily injury or threatened serious bodily injury or bodily injury to the victim or victims, convictions for multiple felonies committed within the same twenty-four (24) hour period constitute one (1) conviction for the purpose of determining prior convictions; and

SECTION 5. Tennessee Code Annotated, Section 40-35-114, is amended by deleting the section in its entirety and substituting instead the following:

§ 40-35-114. If appropriate for the offense and if not themselves an essential element of the offense, the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence:

(1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

(2) The defendant was a leader in the commission of an offense involving two or more criminal actors;

(3) The offense involved more than one victim;

(4) A victim of the offense was particularly vulnerable because of age or physical or mental disability;

(5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;

(6) The personal injuries inflicted upon, or the amount of damage to property, sustained by or taken from the victim was particularly great;

(7) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;

(8) The defendant, before trial or sentencing, has failed to comply with the conditions of a sentence involving release into the community;

(9) The defendant possessed or employed a firearm, explosive device, or other deadly weapon during the commission of the offense;

(10) The defendant had no hesitation about committing a crime when the risk to human life was high;

(11) The felony resulted in death or serious bodily injury or involved the threat of death or serious bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or serious bodily injury;

(12) During the commission of the felony, the defendant intentionally inflicted serious bodily injury upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim;

(13) At the time the felony was committed, one of the following classifications was applicable to the defendant:

(A) Released on bail or pretrial release, if the defendant is ultimately convicted of such prior misdemeanor or felony;

(B) Released on parole;

(C) Released on probation;

(D) On work release;

(E) On community corrections;

(F) On some form of judicially ordered release;

(G) On any other type of release into the community under the direct or indirect supervision of any state or local governmental authority or a private entity contracting with the state or a local government;

(H) On escape status; or

(I) Incarcerated in any penal institution on a misdemeanor or felony charge or a misdemeanor or felony conviction;

(14) The defendant abused a position of public or private trust, or used a professional license in a manner that significantly facilitated the commission or the fulfillment of the offense;

(15) The defendant committed the offense on the grounds or facilities of a pre-kindergarten through grade twelve public or private institution of learning when minors were present;

(16) The defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult;

(17) The defendant intentionally selected the person against whom the crime was committed or selected the property that was damaged or otherwise affected by the crime in whole or in part because of the defendant's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin, ancestry, or gender of that person or the owner or occupant of that property; however, this subsection should not be construed to permit the enhancement of a sexual offense on the basis of gender selection alone;

(18) The offense was an act of terrorism, or was related to an act of terrorism;

(19) If the defendant is convicted of the offense of aggravated assault pursuant to § 39-13-102, the victim of the aggravated assault was a law enforcement officer, firefighter, correctional officer, youth services officer, probation and parole officer, a state registered security officer/guard, an employee of the department of correction or the department of children's services, an emergency medical or rescue worker, emergency medical technician, or paramedic, whether compensated or acting as a volunteer; provided, that the victim was performing an official duty and the defendant knew or should have known that the victim was such an officer or employee;

(20) If the defendant is convicted of the offenses of rape pursuant to § 39-13-503, sexual battery pursuant to § 39-13-505, or rape of a child pursuant to §

39-13-522, the defendant caused the victim to be mentally incapacitated or physically helpless by use of a controlled substance;

(21) If the defendant is convicted of the offenses of aggravated rape pursuant to § 39-13-502, rape pursuant to § 39-13-503, rape of a child pursuant to § 39-13-522 or statutory rape pursuant to § 39-13-506, the defendant knew or should have known that at the time of the offense such defendant was HIV positive; or

(22)(A) If the defendant is convicted of the offenses of aggravated arson pursuant to § 39-14-302 or vandalism pursuant to § 39-14-408, the damage or destruction was caused to a structure, whether temporary or permanent in nature, used as a place of worship and the defendant knew or should have known that it was a place of worship.

(B) As used in this enhancement factor, "place of worship" means any structure that is:

(i) Approved, or qualified to be approved, by the state board of equalization for property tax exemption pursuant to § 67-5-212, based on ownership and use of the structure by a religious institution; and

(ii) Utilized on a regular basis by such religious institution as the site of congregational services, rites or activities communally undertaken for the purpose of worship.

SECTION 6. Tennessee Code Annotated, Section 40-35-210, is amended by deleting the section in its entirety and substituting instead the following:

§ 40-35-210.

(a) At the conclusion of the sentencing hearing, the court shall first determine the appropriate range of sentence.

(b) To determine the specific sentence and the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider the following:

(1) The evidence, if any, received at the trial and the sentencing hearing;

(2) The presentence report;

(3) The principles of sentencing and arguments as to sentencing alternatives;

(4) The nature and characteristics of the criminal conduct involved;

(5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;

(6) Any statistical information provided by the administrative office of the court as to sentencing practices for similar offenses in Tennessee; and

(7) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

(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:

(1) The minimum sentence within the range of punishment is the sentence which 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.

(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.

(d) The sentence length within the range should be consistent with the purposes and principles of this chapter.

(e) When the court imposes a sentence, it shall place on the record either orally or in writing what enhancement or mitigating factors it considered, if any, as well as the reasons for the sentence in order to ensure fair and consistent sentencing.

(f) A sentence must be based on evidence in the record of the trial, the sentencing hearing, the pre-sentence report, and the record of prior felony convictions filed by the district attorney general with the court as required by § 40-35-202(a).

SECTION 7. Tennessee Code Annotated, Section 40-35-303, is amended by deleting subsection (a) and substituting instead the following:

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

SECTION 8. Tennessee Code Annotated, Section 40-35-401, is amended by deleting the section in its entirety and substituting instead the following:

§ 40-35-401.

(a) The defendant in a criminal case may appeal from the length, range or the manner of service of the sentence imposed by the sentencing court. The defendant may also appeal the imposition of consecutive sentences. An appeal pursuant to this section shall be taken within the same time and in the same manner as other appeals in criminal cases. If there is an appeal of the conviction, the appeal of the sentence shall be taken

at the same time. There is no appellate review of the sentence in a post-conviction or habeas corpus proceeding.

(b) An appeal from a sentence may be on one (1) or more of the following grounds:

(1) The sentence was not imposed in accordance with this chapter;

(2) The sentence is excessive under the sentencing considerations set out in §§ 40-35-103 and 40-35-210; or

(3) The sentence is inconsistent with the purposes of sentencing set out in §§ 40-35-102 and 40-35-103.

(c) If a sentence is appealed, the appellate court may:

(1) Dismiss the appeal;

(2) Affirm, reduce, vacate or set aside the sentence imposed;

(3) Remand the case or direct the entry of an appropriate sentence or order; or

(4) Direct any further proceedings appropriate or required under the circumstances.

(d) When reviewing sentencing issues raised pursuant to subsection (a), including the granting or denial of probation and the length of sentence, the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct.

SECTION 9. Tennessee Code Annotated, Section 40-35-402, is amended by deleting the section in its entirety and substituting instead the following:

§ 40-35-402.

(a) The district attorney general in a criminal case may appeal from the length, range or manner of the service of the sentence imposed by the sentencing court. The district attorney general may also appeal the imposition of concurrent sentences. In addition, the district attorney general may also appeal the amount of fines and restitution imposed by the sentencing court. An appeal pursuant to this section shall be taken within the same time and in the same manner as other appeals in criminal cases. The right of the appeal of the state is independent of the defendant's right of appeal.

(b) An appeal from a sentence is limited to one (1) or more of the following conditions:

(1) The court improperly sentenced the defendant to the wrong sentence range;

(2) The court granted all or part of the sentence on probation;

(3) The court ordered all or part of the sentences to run concurrently;

(4) The court improperly found the defendant to be an especially mitigated offender;

(5) The court failed to impose the fines recommended by the jury;

(6) The court failed to order the defendant to make reasonable restitution; or

(7) The sentence is inconsistent with the purposes or considerations of sentencing set out in §§ 40-35-102 and 40-35-103.

(c) If the sentence is appealed by the state, the appellate court may affirm, vacate, set aside, increase or reduce the sentence imposed or remand the case or direct the entry of an appropriate order.

(d) When reviewing sentencing issues raised pursuant to this section, the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct.

SECTION 10. Tennessee Code Annotated, Section 39-13-102, is amended by deleting subsection (d)(1) in its entirety and substituting instead the following:

(d)(1) Aggravated assault under subdivision (a)(1) or subsection (b) or (c) is a Class C felony. Aggravated assault under subdivision (a)(2) is a Class D felony.

SECTION 11. Tennessee Code Annotated, Section 39-13-503, is amended by deleting subsection (c) in its entirety.

SECTION 12. Tennessee Code Annotated, Section 39-13-505, is amended by deleting subsection (d) in its entirety.

SECTION 13. Tennessee Code Annotated, Section 39-13-521, is amended by deleting subsection (d)(1) and by renumbering subsequent subdivisions of such subsection accordingly.

SECTION 14. Tennessee Code Annotated, Section 39-13-522, is amended by deleting subsection (c) in its entirety.

SECTION 15. Tennessee Code Annotated, Section 39-14-302, is amended by deleting subsection (b) and substituting instead the following:

(b) Aggravated arson is a Class A felony.

SECTION 16. Tennessee Code Annotated, Section 39-14-408, is amended by deleting subsection (c) and substituting instead the following:

(c) Acts of vandalism are to be valued according to the provisions of § 39-11-106(a)(36) and punished as theft under § 39-14-105.

SECTION 17. Tennessee Code Annotated, Section 40-36-106, is amended by adding the following to the end of subsection (e)(4):

Such resentencing shall be conducted in compliance with § 40-35-210.

SECTION 18. This act shall apply to sentencing for criminal offenses committed on or after the effective date of this act. Offenses committed prior thereto shall be governed by prior law, which shall apply in all respects. However, for defendants who are sentenced after the effective date of this act for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of this act by executing a waiver of such defendant's ex post facto protections. Upon executing such a waiver, all provisions of this act shall apply to the defendant.

SECTION 19. This act shall have no application to sentencing for persons convicted of murder in the first degree which shall be governed by the provisions of §§ 39-13-202--39-13-208.

SECTION 20. (a) The Tennessee Code Commission is requested to publish any commentary appended to this bill by the Governor's Task Force on the Use of Enhancement Factors in Criminal Sentencing.

(b) The Tennessee Code Commission is requested to insert a cross reference in §§ 39-13-102, 39-13-502, 39-13-503, 39-13-505, 39-13-506, 39-13-522, 39-14-302 and 39-14-408 to § 40-35-114 stating that the enhancement factor formerly found in each such section was moved to § 40-35-114 so that all enhancement factors are located in one (1) section.

SECTION 21. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 22. This act shall take effect upon becoming a law, the public welfare requiring it and shall apply as provided in Section 18.

PASSED: May 18, 2005

JOHN S. WILDER
SPEAKER OF THE SENATE

JIMMY NAIFEH, *SPEAKER*
HOUSE OF REPRESENTATIVES

APPROVED this 7th day of June 2005

PHIL BREDESEN, GOVERNOR