For The Defense

April—June 2016

Volume 30—Number 2

Expert Spotlight

Q&A with the author of *Tennessee Criminal Law* and TACDL member David Raybin

TACDL

...wherever justice demands

Tennessee Association of Criminal Defense Lawyers

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In this Issue:

From the President

Paul J. Bruno

Fellow TACDL members,

As my time as President of TACDL comes to an end, I want to first and foremost thank you for the opportunity to lead TACDL during the last year. It has been a privilege and an honor. Next, I want to state how proud I am to be a member of an organization of fighters, leaders, teachers, and friends. I have known many of you for years. I have come to know many more of you over the last year. Thank you for your help and your support.

I am so excited about the upcoming year for TACDL. TACDL's next President is Sara Compher-Rice. For those of you who know her, you know that TACDL will be led by a great lawyer, a great leader, and a great person. For those of you who do not yet know Sara, you need to get to know her, and you too will see what an incredible person she is and what an incredible asset for TACDL she is. TACDL really has a lot to look forward to during the next year.

We work in a difficult profession. It is only with the help and support of each other that we can be the best criminal defense lawyers we can be. We need to teach each other, share our experiences with each other, and encourage each other. No matter how long you have been a lawyer or a member of TACDL, you have something to offer everyone else. Share on the listserv, teach a CLE, attend a Roundtable, join a TACDL committee, and step up and help another lawyer.

Now…...Let's get ready to party! Be there: Annual Meeting, Knoxville, Tennessee, August 5-6, 2016. The CLE and socializing will be great! The Annual Meeting is where we celebrate TACDL, get to know other TACDL members, and recognize how great this organization and its members are. I challenge each of you to attend the Annual Meeting, walk up to TACDL's next President, Sara Compher-Rice, and tell her how you want to get involved with TACDL. I will be the first!

Next request: The Indigent Representation Task Force will be in Nashville, Tennessee on Friday, July 29, 2016, as part of its listening tour. You need to sign up in advance and reserve a spot to speak. TACDL and the Task Force want and need you to share your indigent representation experiences and your input on ways to improve our present indigent representation structure.

Final request: Tell a criminal defense lawyer, investigator, or expert why he or she needs to be a member of TACDL and get him or her to contact me or Executive Director Suanne Bone to sign up as a member. I firmly believe that if you are a criminal defense lawyer or if you otherwise work on behalf of a citizen accused of a crime, you need TACDL as much as TACDL needs you.

TACDL is strong! TACDL can remain strong only with your involvement. Contact me at 615-251-9500 or at paul@brunonewsom.com, or contact Executive Director Suanne Bone at suannebone@tacdl.com and let us know how you want to get involved. I look forward to hearing from you. Thank you again for the opportunity to serve as TACDL's President. See you at the Annual Meeting!

Paul Bruno

TACDL President

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

TACDL's 43rd Annual Meeting & CLE Seminar

August 5-6, 2016

"Innovations in Criminal Defense"

Holiday Inn World's Fair Park, Knoxville, TN 37902

Thursday, August 4th - Welcome Reception at *The Sunsphere* 6-8 PM

Friday, August 5th

8:00 Registration-Breakfast

8:30 Welcome *Sara Compher-Rice*

8:45 Cannabis and Cars *George Bianchi*

9:45 Sex, Lies, and Social Media: Subpoenaing Electronic Evidence in Criminal Cases (1 dual) *Stephen Ross Johnson*

10:45 Break

11:00 Under the Microscope: Focusing on the FBI Hair Comparison Review and Beyond *Vanessa Antoun and Amelia Maxfield*

12:00 Lunch (on your own) and TACDL Board of Directors Meeting

1:15 Protecting Client Communications in a Mobile World *Ben Vincent*

2:15 Real Life Repercussions of Trial Publicity (1 dual) *Tonya Craft*

3:15 Break

3:30 How to Make Your Voice Heard in the Legislative Process *Representatives Andrew Farmer, Tilman Goins, William Lamberth*

4:30 Adjourn

5:00 Reception Sponsored by: TENNESSEE RECOVERY & MONITORING — SOLUTIONS • RECOVERY • POSSIBILITIES

Saturday, August 6th

8:00 Registration

8:30 Cross Examination Techniques to Help you Find Your Voice *Rich and Kevin McGee*

10:00 Break

10:15 *Brady* 2.0: Navigating the Aftermath of Prosecutorial Misconduct (.50 dual) *Valerie Corder*

10:45 Evidentiary Issues for the Criminal Defense Practitioner *Penny White*

11:45 Annual Meeting and Lunch: Celebrating 43 years of TACDL

1:30 Techniques for Delivering Winning Openings and Closings *Jay Steed*

2:30 Sentencing Hearings: Preparing for the Worst *Jeff Cherry*

3:30 "Outside the Jury Box" Voir Dire *Paul Bruno and Inese Neiders*

4:30 Adjourn

(pending) Approved by the TN CLE Commission for a maximum of 12.00 hours of CLE credit: 9.50 general & 2.50 dual/ethics

HOTEL ACCOMMODATIONS:

TACDL reserved a block of rooms with the Holiday Inn World's Fair Park, 525 Henley Street in Knoxville, TN. If you are interested in a room, please contact the hotel ASAP at 800-264-1579, code TAC, or visit www.ihg.com/holidayinn/hotel/us/en/knoxville/tysec/hoteldetail. The rate is $109/night. The rate is not guaranteed past July 5, 2016.

Contact the TACDL office at 615/329-1338 or visit www.tacdl.com to register for the 43rd Annual Meeting & CLE Seminar!

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

lmfdefend@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

From Capitol Hill

Nathan Ridley

"Make friends before you need them." Lyndon Baines Johnson, 36th President of the United States.

All Done For This Year With the adoption of SJR 844 by Mark Norris the 109th General Assembly adjourned sine die at the close of business on April 22, 2016. Sine die is a Latin phrase meaning "without a day" to return. Barring two highly unlikely events, a call for an extraordinary session by Governor Bill Haslam or 2/3's of both houses agreeing to reconvene, formal legislative work is all done for the 109th General Assembly.

The 110th General Assembly will convene after the 2016 election cycle, in an organizational session at noon on Tuesday, January, 10, 2017.

On the TACDL Front, Speaking of that 2016 election cycle, all 99 state house districts will be up, and the even numbered state senate districts will be up for election this summer and fall. The Senate is assured of having one new member in January because Speaker Ron Ramsey will not seek reelection to his senate district 4 seat. The House is assured of having at least five new members because Jon Lundberg (R of Sullivan County, District 1), Rick Womick R of Rutherford County, District 34), David Shepard (D of Dickson County, District 69), Billy Spivey (R of Marshall County, District 92), and Jamie Jenkins (R of Fayette County, District 94) will not seek reelection to the House.

Top Five 2016 Legislative Enactments

Chapter 758, the Appropriations Act funds state government services for the July 1, 2016 - June 30, 2017 fiscal year;

Chapter 869 restructures the governance of the state's six four year board of regents institutions;

Chapter 1061 permits handgun carry permit holders who are state college employees to carry handguns on state college campuses;

Chapter 1064 reduce the Hall Income Tax rate from 6% to 5%, and abolishes the tax by 2022; and

Chapter 787 eases the permitting and delivery process so that wine will be sold in retail food stores beginning July 1, 2016.

(Bonus: SJR 467 directs the state attorney general to sue the federal government concerning refugee resettlement.)

Top Five 2016 Criminal Justice Enactments

Chapter 906, the Governor's Public Safety Act, addresses domestic violence, sentence increases for certain offenses, such as aggravated burglary, revises the grading of theft offenses, and authorizes new sanctions for probation and parole violations;

Chapter 876 increases the penalty for DUI 6th offenses and reduces the penalty for simple drug possession offenses;

Chapter 960 expands the list of conviction offenses which are eligible for expunction;

Chapter 1077 makes driving while texting a moving violation rather than a nonmoving violation and sets sanctions;

Several handgun carry permit bills were enacted, but notably, Chapter 875 reduces the lifetime handgun permit fee from $500 to $300.

(Bonus: Chapter 978 legalizes and taxes fantasy gambling in Tennessee.)

Checklist for June.

Call your elected state legislative officials and thank them for their willingness to serve, particularly the six members listed above who are not seeking reelection. It's also a good time to be on the lookout for the successors.

Be sure all your colleagues and employees are registered to vote. The deadline to submit a new registration is July 5, 2016 for the August 4, 2016 election. It's a big year for Tennessee state and federal elections in 2016 with the fall election being on Tuesday, November 8, 2016.

Engage with the Tennessee Supreme Court's Indigent Representation Task Force at their listening tours or by written comment.

Register for TACDL's 43rd Annual Meeting & CLE Seminar August 5-6 in Knoxville at the Holiday Inn World's Fair Park.

Calendar Notes. State offices will be closed on Monday, July 4, for the Independence 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@bradley.com

State Case Law Update

Chelsea Nicholson

Court of Criminal Appeals

DUE PROCESS

State of Tennessee v. Brady P. Smithson, M2015-00310-CCA-R3-CD, Williamson Co., 4/18/16, The State of Tennessee appealed the trial court's granting the Defendant's Motion to Dismiss an Indictment for two counts of vehicular assault, a Class D felony. On appeal, the State contended that the trial court misapplied the factors in State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999). The CCA affirmed the ruling of the trial court. The CCA affirmed that the State failed to preserve the video of the crash scene, and that this could have been potentially exculpable.

DUI

State of Tennessee v. Kenneth Epperson, E2015-00478-CCA-R3-CD, Sullivan Co., 5/18/16, The Defendant was charged by affidavit of complaint on November 28, 2012, for driving under the influence (DUI) second offense, violation of the open container law, violation of the implied consent law, driving on a revoked license, and improper display of a license plate. Epperson entered guilty pleas to improper display of a license plate and violating the open container law and was convicted by a jury as to the remaining charges. On appeal, Epperson contended that the affidavit of complaint made against him was void, and that the State therefore failed to initiate a prosecution against him within the statutory period. The CCA concluded that the State failed to initiate a prosecution against him within the statutory period. Accordingly, the CCA reversed the judgments of the trial court and vacated Epperson's convictions.

State of Tennessee v. Anthony John Silva, M2015-00121-CCA-R3-CD, Williamson Co., 3/3/16, The Defendant was arrested on suspicion of DUI. He filed a motion to suppress the evidence, which the trial court granted. The State appealed, arguing that the Defendant's arrest was sufficiently supported by probable cause. The CCA reversed the judgment of the trial court granting the Defendant's motion to suppress and remanded for further proceedings. The Defendant submitted, and the trial court found, that the Defendant did not exhibit characteristics of impairment which rose to the level of probable cause to believe the Defendant was DUI. The CCA reversed finding, "However, as our supreme court recognized, "a motorist need not exhibit every known sign of intoxication in order to support a determination of probable cause."" State v. *Bell*, 429 S.W.3d (Tenn. 2014). The CCA found that enough signs of intoxication were present for probable cause.

JURY INSTRUCTIONS/DELIBERATIONS

State of Tennessee v. Michael Bonsky, W2014-00675-CCA-R3-CD, Shelby Co., 4/27/16, The Defendant was convicted of second degree murder, attempted second degree murder, and especially aggravated robbery. On appeal, the Defendant raised among many issues: whether the trial court erred by drafting its own jury instruction regarding diminished capacity. The CCA concluded that the trial court's instruction to the jury regarding diminished capacity was error, and that the error was not harmless. Therefore, the convictions were reversed, and the case was remanded for a new trial.

State of Tennessee v. Ricky Duvil Lunsford, W2014-01926-CCA-R3-CD, Madison Co., 4/29/16, The Defendant was convicted of attempted voluntary manslaughter and employing a deadly weapon during the commission of a dangerous felony. On appeal, the Defendant contended that the trial court erred when it failed to properly instruct the jury of self-defense. The CCA concluded that the trial court erred when it failed to instruct the jury as to self-defense. The CCA reversed the judgments of conviction and remanded for a new trial.

State of Tennessee v. Susan Jo Walls, M2014-01972-CCA-R3-CD, Bedford Co., 4/7/16, The Defendant was convicted by a jury of being criminally responsible for the first-degree premeditated murder of her husband and of conspiring with others to commit said murder. The trial court imposed an effective sentence of life imprisonment for these convictions. On appeal, the Defendant argued among many arguments that the trial court erred by modifying the jury instructions in response to a jury question that was presented after deliberations had commenced. The CCA held the trial court erred by allowing jury deliberations to continue into the late-night hours, the CCA reversed the judgments of the trial court and remanded this case for a new trial.

POST-CONVICTION

State of Tennessee v. Gerald Davis Thomas, E2014-01157-CCA-R3-CD, Loundon Co., 3/28/16, The Defendant was convicted of one count of first degree premeditated murder. The trial court sentenced the Defendant to life imprisonment, which was to be served consecutively to a separate federal sentence. On appeal, the Defendant raised many issues, specifically, (7) whether the trial court erred in denying his motion for additional DNA testing. The CCA remanded this matter to the trial court for entry of an order for additional DNA testing; specifically, the interior of the FUBU pants alleged to have been worn by the Defendant on the night the victim was killed and the substance recovered from underneath the victim's nails.

SEARCH AND SEIZURE

State of Tennessee v. Helkie Nathan Carter, M2015-00280-CCA-R9-CD, Davidson Co., 5/20/16, The Defendant was indicted for the following counts: (1)DUI third offense; (2) driving with a blood alcohol concentration ("BAC") of .08 or more DUI per se third offense; (3) violation of the habitual motor vehicle offender statute; and (4) driving on a revoked license. The Defendant's motion to suppress evidence obtained during a mandatory blood draw was granted by the trial court. The State sought and was granted permission to appeal, arguing that the Defendant gave both actual and implied consent to the blood draw and that, if the good-faith exception is adopted in Tennessee, it should apply to this case. The CCA concluded that the Defendant's actual consent was not freely and voluntarily given; Tennessee's implied consent law does not, by itself, operate as an exception to the warrant requirement; and no exception to the warrant requirement justified the blood draw. The CCA declined to adopt a good-faith exception. The judgment of the trial court suppressing the results of the warrantless blood draw was affirmed.

State of Tennessee v. Robert Merle Coblentz, E2015-01643-CCA-R9-CD, Blount Co., 6/10/16, The Defendant was charged with one count of sexual exploitation of a minor. This is an interlocutory appeal filed by the State from the trial court's order granting Defendant's motion to suppress evidence obtained from his computer pursuant to a search warrant. The CCA held that the search warrant authorized the search of Defendant's computer despite the fact that he was not named in the search warrant or affidavit as an occupant of the residence to be searched or as an owner of the items to be seized. The CCA reversed the judgment of the trial court and remanded the case for further proceedings. The CCA submitted, "At the time of the search, the officers were in possession of a warrant that specifically provided for the seizure of computers to examine and retrieve evidence of sexual exploitation of a minor. The warrant specifically contemplated not only the seizure of the computer, but also the search of its contents."

State of Tennessee v. Angela Faye Daniel, M2015-01073-CCA-R9-CD, Williamson Co., 3/29/16, In this interlocutory appeal, the State of Tennessee appealed the trial court's order granting a motion to suppress evidence. The State claimed that the trial court erroneously concluded that a police officer's failure to deliver a copy of a search warrant to the appellee was not a "clerical error" under Tennessee Code Annotated section 40-6-108, the Exclusionary Rule Reform Act. The CCA affirmed the order of the trial court's order of suppression.

State of Tennessee v. June Anne Wascher, E2015-00961-CCA-R3-CD, Sevier Co., 6/6/16, The Defendant entered a guilty plea to DUI. As a condition of her plea, Wascher reserved a certified question of law challenging the denial of her motion to suppress, which was based upon an alleged unconstitutional seizure. The CCA reversed,

vacated the judgment of the trial court and dismissed the case. The CCA held that the officer did not have reasonable suspicion sufficient to justify the detention in this case because the BOLO tip was not reliable in its assertion of illegality, and his one-minute interaction with Wascher prior to seizing her due to taking her driver's license did not remedy this defect.

State of Tennessee v. Christopher Wilson, W2015-00699-CCA-R9-CD, Shelby Co., 4/21/16, The Defendant filed a Rule 9 interlocutory appeal seeking review of the trial court's denial of his motion to suppress evidence against him. The Defendant filed a motion to suppress the results of his blood alcohol test based upon a violation of Missouri v. McNeely, 133 S. Ct. 1552 (2013). The trial court conducted an evidentiary hearing and found that a "good faith exception" to the Defendant's forced blood draw existed and denied the Defendant's motion. The Defendant filed an application for an interlocutory appeal, which the trial court granted. On appeal, the Defendant contended that the trial court erred when it denied the Defendant's motion to suppress based upon a "good faith exception" to the exclusionary rule. The CCA concluded that the trial court erred when it denied the Defendant's motion to suppress. The CCA reversed the trial court's judgment and remanded this case for proceedings consistent with this opinion.

SENTENCING

State of Tennessee v. Preston Rashad Royal, W2015-01334-CCA-R3-CD, Madison Co., 4/12/16, The Defendant pleaded guilty to thirteen counts of burglary of an automobile and received an effective sentence of six years to be served on supervised probation after one year of confinement in the custody of the TDOC. The Defendant argued that his sentence is illegal because it directly contravenes Tenn. Code Ann. § 40-35-122(a). The State conceded error. The CCA concluded that Defendant's sentence was illegal, vacated the judgments of the trial court, and remanded the case for a new sentencing hearing.

SUFFICIENCY OF THE EVIDENCE

State of Tennessee v. Christopher Hammack, M2015-00898-CCA-R3-CD, Wayne Co., 3/31/16, The Defendant was indicted for one count of initiation of the process to manufacture methamphetamine (Count 1), one count of possession of a firearm during the commission of or attempt to commit a dangerous felony (Count 2), and one count of convicted felon in possession of a firearm (Count 3). The Defendant was convicted by a jury of the lesser included offense of facilitation of initiation of the process to manufacture methamphetamine in Count 1 and as charged in Count 2. A judgment of conviction was entered by the trial court in Count 3. The Defendant challenged the sufficiency of the evidence underlying his convictions in Counts 1 and 2. The CCA concluded that there was insufficient evidence to support the Defendant's convictions for Counts 1 and 2. Additionally, the CCA concluded that the Defendant did not effectively waive his right to a jury trial or enter a plea of guilty in Count 3. The judgments of the trial court were reversed and the charges were dismissed. The CCA submitted, "In this case, there was not sufficient evidence to show that the Defendant "furnished substantial assistance" in initiating the process to manufacture methamphetamine. The Defendant was discovered, alone, inside Mr. McClain's house. All of the evidence related to methamphetamine production was discovered in a separate shed located on the property, and the police testified that the lab appeared to be two days old. There was no evidence that the Defendant ever entered the shed or that the Defendant was present at Mr. McClain's house when the lab was active."

Tennessee Supreme Court

POST-CONVICTION

Rashe Moore v. State of Tennessee, W2013-00674-SC-R11-PC, Shelby Co., 3/16/16, In this post-conviction case, the TNSC clarified the appropriate prejudice analysis for ineffective assistance of counsel claims arising from the failure to properly request jury instructions on lesser-included offenses where, as here, the jury was given no option to convict of any lesser-included offense. The jury convicted the petitioner as charged of one count of aggravated burglary and multiple counts of aggravated rape, especially aggravated kidnapping, and aggravated robbery in connection with a home invasion. On direct appeal, the CCA affirmed the convictions and declined to address

the trial court's failure to instruct the jury on lesser-included offenses because the petitioner's trial counsel did not request the instructions in writing as required by statute. Thereafter, the post-conviction court denied relief. On appeal, a majority of the CCA granted a new trial on the especially aggravated kidnapping charges based on ineffective assistance of counsel. The TNSC held that the CCA erred in concluding that the petitioner was prejudiced by his trial counsel's failure to request a jury instruction on aggravated kidnapping as a lesser-included offense of especially aggravated kidnapping. The TNSC concluded that no reasonable probability exists that a properly instructed jury would have convicted the petitioner of any of his asserted lesser-included offenses instead of the charged offenses. Because the petitioner suffered no prejudice, he did not receive ineffective assistance of counsel as to any of his convictions. The TNSC reversed the CCA's judgment granting a new trial on the especially aggravated kidnapping charges.

SEARCH AND SEIZURE

State of Tennessee v. Kenneth McCormick, M2013-02189-SC-R11-CD, White Co., 5/10/16, TNSC granted this appeal to reconsider our decision in State v. Moats, 403 S.W.3d 170 (Tenn. 2013), which held that the community caretaking doctrine is not an exception to the federal and state constitutional warrant requirements. Having concluded that Moats was wrongly decided, the TNSC overruled Moats and held that the community caretaking doctrine is analytically distinct from consensual police-citizen encounters and is instead an exception to the state and federal constitutional warrant requirements which may be invoked to validate as reasonable a warrantless seizure of an automobile. To establish that the community caretaking exception applies, the State must show that (1) the officer possessed specific and articulable facts, which, viewed objectively and in the totality of the circumstances, reasonably warranted a conclusion that a community caretaking action was needed; and (2) the officer's behavior and the scope of the intrusion were reasonably restrained and tailored to the community caretaking need. The TNSC concluded, based on the proof, that the community caretaking exception applied in this case. The judgments of the trial court and CCA declining to grant the defendant's motion to suppress were affirmed.

This is my last case law update. I just want to give a special thank you to everyone that has come up to me over the years and thanked me for this article. I hope it has aided everyone in their practice as much as it has me. After six (6) years, I feel like it is time to pass on the torch. Thank you TACDL members.

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

Membership Benefits

Amicus: Members monitor the appellate courts and file briefs on issues concerning criminal law.

Continuing Legal Education: Provides 80+ hours of CLE across the state annually.

Criminal Justice Policy: Members serve on the Judicial Selection Commission, Judicial Evaluation Commission, Bench-Bar Relations Commission, and various short-term task groups to represent the criminal defense bar.

Forensic Experts: Database of expert witnesses for use by members.

Legislative: Employs a lobbyist to monitor and work with legislative committees, who informs members of issues in the Legislature and other policy-making bodies.

Resource Library: Educational materials and videos available for purchase from past seminars.

Member Network: Members provide assistance to each other in practicing criminal law through the Members-Only listserv. Also, a new attorney mentoring program is available upon request.

Publications: Publishes a quarterly newsletter entitled ***For the Defense***, a weekly on-line newsletter entitled ***The Weekly Writ*** and Tennessee death penalty manuals.

Strike Force: Specifically designated members provide free counsel to other members facing criminal contempt charges in the courts for "zealously" representing clients' rights.

Website: Information pertaining to TACDL, its Board of Directors, current membership list, a listing of all CLE seminars for the year and links to research sources.

TACDL Membership Dues

$5,000 – Life Member (One-time payment): Free CLE, pay for handouts & extras

$1,000 – Sustaining (Free Annual Mtg., converts to Life Membership after five years)

$225 – Regular (Private attorney), **Affiliate** (Non-attorney defense professional) & **Federal Public Defender** (public attorneys or staff not under special contract)

$85—Special Contract (paid by State Public Defender Conference)

$50—New Member (First two years of criminal defense practice) &

$25—Law Student (Enrolled in law school)

Supreme Court Update

Jonathan Harwell and Denise Faili

A wide variety of Supreme Court cases in this crop. Defense attorneys will be heartened, as a matter of principle or as a matter of pecuniary interest, by the Court's decision in Luis *limiting the Government's power to freeze assets, prior to trial and unrelated to any crime, that could be used to hire an attorney. Retroactive application of* Johnson *is also a significant development. Beyond that, many of these decisions were either relatively predictable or of limited interest. Unless the Court was simply going to do away with* Batson *(or punt on some procedural ground),* Foster *was a straightforword case. However, presumably few of us will ever confront a case where the prosecution was so blatant in identifying every black juror (with highlighting, and large "B"s) and fabricating reasons to challenge them.* Ocasio *is intriguing if one wants to ponder the curious notion of people extorting themselves. The Supreme Court in* Woods v. Etherton *continues to chastise the Sixth Circuit for its defendant-friendly application of the AEDPA standards.*

The standout opinion from a writerly perspective is surely Justice Kagan's dissent in Lockhart. *The majority's decision in dealing with an awkwardly worded and unclear statute is disappointing. If ever there were a case where the rule of lenity should apply, this was surely it – the subtext perhaps being that the rule of lenity just doesn't apply in child pornography cases. Justice Kagan persuasively responds to the majority's reasoning, and then concludes with a paragraph that both summarizes the different strands of her argument and does so in a clever way that itself reinforces that argument. It is worth reading in full.*

***Betterman v. Montana*, 136 S. Ct. 1609 (2016)**

No speedy trial right implicated by post-plea, pre-sentencing delay.

The defendant was charged with bail jumping and pleaded guilty. He was held for over 14 months awaiting his sentencing, due to various administrative delays. He filed a motion to dismiss for delay, which was denied. He was finally sentenced to seven years of imprisonment, with four years suspended. On appeal, he argued that the delay prior to sentencing violated his right to a speedy trial. The Montana Supreme Court affirmed his conviction.

The Supreme Court, in an opinion written by Justice Ginsberg, affirmed, holding that the Sixth Amendment right to a speedy trial does not apply to delayed sentencing. It noted that, "as a measure protecting the presumptively innocent," the right to a speedy trial, like other rights, "loses force upon conviction." The Court reasoned that the historical underpinnings of the speedy trial right focused on the determination of guilt and innocence. It also noted that the remedy for a speedy trial violation – dismissal of charges – would be "an unjustified windfall" for a defendant already found to be guilty. The Court rejected the defendant's claim that, in the modern justice system, so many defendants plead guilty that it is the sentencing, not the trial, that is the primary forum for dispute resolution. The Court finally noted that it was not addressing any due process concerns, and expressed "no opinion on how [the defendant] might fare under that more pliable standard."

Justice Thomas, joined by Justice Alito, concurred, as did Justice Sotomayor, separately. They addressed the question, which they agreed remained open, of whether and how due process could apply to pre-sentencing delay.

***Foster v. Chatman*, No. 14-8349, 2016 WL 2945233 (U.S. May 23, 2016)**

***Batson* violation in case where prosecutors' memos indicated a desire to avoid black jurors and where explanations of peremptory challenges were contradicted by record.**

The defendant was convicted of capital murder and sentenced to death. The State exercised peremptory strikes on all four qualified prospective black jurors; the court overruled a contemporaneous *Batson* challenge. While a state habeas petition was pending after conviction, the defendant obtained documents used by the prosecution during jury selection. These included, among other suspicious things, a list of prospective jurors in which the names of the black jurors were highlighted and marked with "B." A draft affidavit, prepared in connection with a motion for new trial, included a prosecutor's evaluation of which was the best juror "if we had to pick a black juror." The defendant's state habeas petition was denied, and affirmed by the Georgia Supreme Court.

The Supreme Court, in an opinion written by Chief Justice Roberts, first found that the Court had jurisdiction (on a direct appeal from the state habeas petition), as the decision of the Georgia Supreme Court was not independent of the merits of his constitutional challenge. The Court then outlined the *Batson* three-step process (prima facie showing of peremptory challenge based on race; requirement of race-neutral explanation; finding of whether purposeful discrimination occurred). The Court focused on challenges relating to two potential jurors. It noted that the lengthy justifications for the strikes given by the trial prosecutors were contrary to the record, such as the prosecutor explaining that one strike was a last-minute decision of a juror whom the prosecution closely considered keeping, when in fact that juror was listed as a "definite NO" (along with other black jurors) in the documentation. The Court noted that other justifications for the strikes applied equally to other, white jurors who were not struck by the prosecution. The Court concluded:

> As we explained in *Miller–El v. Dretke*, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). With respect to both Garrett and Hood [the two potential jurors in question], such evidence is compelling. But that is not all. There are also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file. Considering all of the circumstantial evidence that "bear[s] upon the issue of racial animosity," we are left with the firm conviction that the strikes of Garrett and Hood were "motivated in substantial part by discriminatory intent."

The Supreme Court thus reversed and remanded.

Justice Alito concurred, agreeing with the Court that there was a *Batson* violation but asserting that it remained for the Georgia court, given the *res judicata* issues at play, to determine the consequences of this violation. Justice Thomas dissented, arguing that it was not clear that the Georgia Supreme Court's decision was based on federal law. He also criticized the Court for making credibility determinations at odds with those of the state courts.

***Johnson v. Lee*, No. 15-789, 2016 WL 3041051 (U.S. May 31, 2016)**

State procedural bar for claims that could have been raised on direct appeal is "adequate" under federal habeas standard.

In a short *per curiam* opinion, the Court found that California's "*Dixon* bar," under which a claim raised for the first time on collateral review is procedurally defaulted if it could have been, but was not, raised on direct appeal (a bar similar to that applied in most states), is "adequate" for purposes of barring habeas review. It rejected the argument that, because of a few instances in which *Dixon* was not cited by the courts (and arguably should have been), it was not regularly followed.

***Lockhart v. United States*, 136 S. Ct. 958 (2016)**

Interpreting phrase in sentencing statute identifying prior convictions "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"; limiting language regarding minors applies only to "abusive sexual conduct" and not to "sexual abuse" or "aggravated sexual abuse."

The defendant pled guilty to possession of child pornography. He was sentenced to a ten-year mandatory minimum sentence based on a statutory provision that applies to defendants who have "a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." He had a sexual abuse conviction involving an adult, and argued that the words "involving a minor or ward" applied to all three clauses, and thus he was not subject to the ten-year minimum. The District Court rejected that argument, finding that the mandatory minimum applied, and the Second Circuit affirmed the sentence.

The Supreme Court, in an opinion written by Justice Sotomayor, affirmed. It stated: "We hold that 'involving a minor or ward' modifies only 'abusive sexual conduct', the antecedent immediately preceding it." In doing so, it applied the "rule of the last antecedent," a canon of statutory interpretation. It also pointed to another section of the code where similar language appears in successive statutes (18 U.S.C. § 2241, aggregated sexual abuse; 2242, sexual abuse; and, 2243, sexual abuse of a minor ward), and where only the third relates to children.

Further, it argued that the defendant's preferred reading would result in differential treatment for similar state and federal predicates (prior convictions under 2241, 2242, and 2243 all trigger the ten-year mandatory minimum), with no indication that Congress intended to treat them differently. Finally, it summarily rejected any application of the rule of lenity: "the arguable availability of multiple, divergent principles of statutory construction cannot automatically trigger the rule of lenity."

Justice Kagan, joined by Justice Breyer, dissented. She argued that ordinary use of language would apply the phrase "involving a minor or ward" to all three types of predicates. She wrote:

> Imagine a friend told you that she hoped to meet "an actor, director, or producer involved with the new Star Wars movie." You would know immediately that she wanted to meet an actor from the Star Wars cast—not an actor in, for example, the latest Zoolander. Suppose a real estate agent promised to find a client "a house, condo, or apartment in New York." Wouldn't the potential buyer be annoyed if the agent sent him information about condos in Maryland or California?

She concluded: "That ordinary understanding of how English works, in speech and writing alike, should decide this case." She highlighted the applicability of the rule of lenity. After rebutting the arguments of the majority, she ended:

> Consider the following sentence, summarizing various points made above: "The series-qualifier principle, the legislative history, and the rule of lenity discussed in this opinion all point in the same direction." Now answer the following question: Has only the rule of lenity been discussed in this opinion, or have the series-qualifier principle and the legislative history been discussed as well? Even had you not read the preceding 16–plus pages, you would know the right answer—because of the ordinary way all of us use language. That, in the end, is why Lockhart should win.

***Luis v. United States*, 136 S. Ct. 1083 (2016)**

Sixth Amendment precludes pre-trial freeze on defendants' assets (thus precluding hiring of defense counsel) where those assets, while potentially forfeitable or available for use to pay fine after conviction, are not traceable to any criminal offense.

The defendant was charged with health care fraud. The Government contended that she had improperly obtained $45 million, and had spent most of that. It sought and obtained a pretrial order preventing her from further dissipating her assets, under a statute that allows pretrial freezing of "property of equivalent value" which could later be used for payment or restitution or forfeiture. The practical effect was that she was prevented from using untainted funds (funds not connected with any crime) to hire defense counsel. The Eleventh Circuit affirmed this order.

The Supreme Court reversed. The plurality opinion, written by Justice Breyer and joined by Chief Justice Roberts, Justice Ginsburg, and Justice Sotomayor, began by noting that the right to counsel is "fundamental," an engine for protecting the innocent, guaranteed for the indigent, and the deprivation of which constitutes structural error. The Court stated that the fact that the assets in question were "untainted" makes a significant difference. It noted that, as a matter of law, a defendant's rights in improperly-obtained assets (such as stolen funds) are "imperfect," and by force of statute certain property passes automatically to the Government when used in connection with a crime. It continued: "The distinction that we have discussed is thus an important one, not a technicality. It is the difference between what is yours and what is mine."

The Court noted that the right to counsel is of constitutional stature, unlike the interest in obtaining forfeitures or restitution. "[D]espite their importance, compared to the right to counsel of choice, these interests would seem to lie somewhat further from the heart of a fair, effective criminal justice system." It noted the lack of historical support for the Government's position. It observed that the Government's position could lead to a slippery slope, as the legislature could make more assets forfeitable and therefore subject to pretrial freezing. Further, it argued that the Government's position would render more individuals indigent, and increase the workload of already-overworked public defenders.

Justice Thomas issued a concurring opinion. He took issue with the plurality's "balancing" approach, basing his decision in the mandate of the the Sixth Amendment. "The right 'to have the Assistance of Counsel', … thus implies the right to use lawfully owned property to pay for an attorney. Otherwise the right to counsel—originally understood to protect only the right to hire counsel of choice—would be meaningless."

Justice Kennedy, joined by Justice Alito, dissented, noting in part the fungible nature of money. He

wrote: "That unprecedented holding rewards criminals who hurry to spend, conceal, or launder stolen property by assuring them that they may use their own funds to pay for an attorney after they have dissipated the proceeds of their crime."

Justice Kagan issued a separate dissent. She stated that she believes one of the key precedents, *Monsanto*, to be "disturbing," but finds it controlling in the absence of any request that it be overruled. She agreed with the dissent on the arbitrary nature of the plurality's decision: "The thief who immediately dissipates his ill-gotten gains and thereby preserves his other assets is no more deserving of chosen counsel than the one who spends those two pots of money in reverse order. Yet the plurality would enable only the first defendant, and not the second, to hire the lawyer he wants."

***Lynch v. Arizona*, No. 15-8366, 2016 WL 3041088 (U.S. May 31, 2016)**

Jury must be informed, in capital case, that under state law the only alternative to death is life imprisonment without parole. This requirement is not removed by possibility of executive clemency.

The defendant was convicted of first-degree murder and other charges. Before the penalty phase of his trial, the State successfully moved the Court to preclude the defense from informing the jury that the only alternative to the death penalty was life without parole. He was sentenced to death.

The Supreme Court, in a *per curiam* decision, reversed and vacated the sentence, relying on the holding in the 1994 case of *Simmons v. South Carolina*. It rejected the argument that *Simmons* was distinguishable merely because Lynch could have received release after executive clemency (the state statute provided for a possibility of "release" after 25 years, but the only kind of release available in that situation under state law was through clemency, not through parole), as well as the argument that the legislature could change the law in the future.

Justice Thomas, joined by Justice Alito, dissented, criticizing *Simmons*.

***Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016)**

Error in calculating criminal history category generally qualifies as plain error. No requirement that defendant prove, from the record, that sentence would have been different.

The defendant was convicted of being unlawfully present in the United States after having been deported after an aggravated felony. The presentence report calculated him as a Range VI offender. The District Court sentenced him to the low end of the applicable guidelines.

On appeal, the defendant raised for the first time a challenge to the calculation of his criminal history. He argued that he was properly only a Range V offender, and thus the sentence imposed was at the middle (rather than the bottom) of the applicable guideline range. The Fifth Circuit evaluated this claim for plain error, and concluded that where the resulting sentence was still within the correct sentencing range, the Court would not assume that any error was prejudicial. It placed a burden on the defendant to identify "additional evidence" in the record that the sentencing court would have imposed a lesser sentence had it properly calculated the guideline range.

The Supreme Court, in an opinion written by Justice Kennedy, reversed. It concluded that:

> When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.

It based this holding on the "central role" that the guidelines play in sentencing, which makes any error in calculating them "particularly serious." It noted the statistical evidence showing that judges continue to impose guideline sentences even under the advisory guidelines. The Court emphasized that, in most cases, such an error would constitute plain error, although there could be situations in which it would not – such as when the District Court made it clear that the sentence was selected irrespective of the Guidelines. It also noted that, as many judges give little explanation of the role of the guidelines in the sentence imposed, the Fifth Circuit's rule would make relief under the plain error standard extremely difficult to obtain

Justice Alito, joined by Justice Thomas, issued a concurring opinion, stating that he would not "speculate" about how often the plain error test would be met in future cases.

***Nichols v. United States*, 136 S. Ct. 1113 (2016)**

Interpreting terms in federal sex offender statute.

The defendant, a registered sex offender living in Kansas City, abruptly moved to Manila, Philippines, without updating his registration information to reflect that move. He was charged and convicted with the federal crime of knowingly failing to update his registration.

The Supreme Court, in a unanimous opinion written by Justice Alito, reversed. It noted that the statutory scheme requires that changes in residence be reported, within three days after a move, to one of three "jurisdictions involved": "where the offender resides, where the offender is an employee, and where the offender is a student." The Court observed that no foreign country is a "jurisdiction" for SORNA purposes. Further, once the defendant moved, he no longer resided, was an employee, or was a student in any jurisdiction covered by SORNA. "It follows that once Nichols moved to Manila, he was no longer required to appear in person in Kansas to update his registration, for Kansas was no longer a 'jurisdiction involved'." (The Court explained that the defendant could still be prosecuted under other laws, such as the state registry laws.)

***Ocasio v. United States*, 136 S. Ct. 1423, 1427 (2016)**

A kickback scheme can constitute a conspiracy to extort money under color of official right, rejecting claim that non-officials could never so conspire if the money was coming from them.

The defendant was a Baltimore Police Department officer. He participated in a kickback scheme whereby, when responding to automobile accidents, he and other officers persuaded owners to have their cars towed to a certain repair shop. That shop gave the officers kickbacks in return. He was convicted of Hobbs Act violations, including a conspiracy to violate the Hobbs Act, based on obtaining money from the repair shop owner under color of official right.

The defendant argued, both at trial and on appeal, that his conspiracy conviction could not be based on obtaining money from a co-conspirator (the repair shop owner), but required proof of obtaining money from someone outside the conspiracy. The District Court and the Fourth Circuit rejected this argument. In the Supreme Court, he refined this argument to say that the repair shop owners were incapable of conspiring to take money under cover of official of law *from themselves*. They were the only individuals he was proved to have conspired with, and he thus argued that his conviction was invalid.

The Supreme Court, in an opinion written by Justice Alito, affirmed. The Court began by discussing the history of the concept of conspiracy, including its development in Mann Act cases (where a transported woman could potentially be convicted of conspiracy) which it concluded "make perfectly clear that a person may be convicted of conspiring to commit a substantive offense that he or she cannot personally commit." Thus, the Court reasoned, the repair shop owners could properly be convicted of conspiracy even though they could not personally have committed the substantive offense. It stated: "The criminal objective on which petitioner, [and the shop owners] agreed was that petitioner and other Baltimore officers would commit substantive violations of this nature." The Court rejected, in light of its prior Hobbs Act precedents, the argument that its interpretation was improperly creating a national antibribery law. It clarified that only bribery arrangements where the non-official was not merely responding to an official demand would constitute conspiracy.

Justice Breyer concurred, noting that he believed prior precedent holding that bribery qualified as "extortion" for Hobbs Act purposes may well have been wrongly decided. Justice Thomas dissented, repeating his prior position that bribery cannot constitute extortion. "Under a correct understanding of Hobbs Act extortion, it is illogical and wrong to say that two people conspired to extort one of themselves." Justice Sotomayor, joined by Chief Justice Roberts, also dissented. She wrote: "A conspiracy to commit extortion by obtaining property 'from another' in violation of the Hobbs Act should exist only when the conspirators agree to obtain property from someone outside the conspiracy."

***Wearry v. Cain*, 136 S. Ct. 1002 (2016)**

***Brady* violated where prosecution withheld evidence that cast doubt on credibility of primary trial witness.**

The defendant was convicted of capital murder and sentenced to death, after a trial involving testimony from a witness who was incarcerated. The defendant offered an alibi defense.

During post-conviction proceedings, the defendant produced "belatedly revealed" information that cast doubt on the credibility of that witness, including information that the witness had said that he wanted to "make sure" the defendant got "the needle cause he jacked over me." Another inmate had been solicited by the same witness to falsely inculpate the defendant. The state's other main witness, who the prosecutor had told the jury was testifying without having asked for anything from the State, was discovered to have sought on two occasions a sentence reduction in exchange for his testimony. In addition, the State had failed to turn over medical records (relating to whether a certain participant could have done the things that the State claimed he did on that date, due to a recent knee surgery). The state courts denied relief under *Brady v. Maryland*.

The Supreme Court, in a *per curiam* opinion, reversed. It stated: "Beyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry's conviction. The State's trial evidence resembles a house of cards, built on the jury crediting Scott's [the witness's] account rather than Wearry's alibi." It noted that the state postconviction court had erred in considering each piece of undisclosed information in isolation rather than cumulatively. The Court noted that, contrary to the dissent, it was appropriate to decide these issues in the direct appeal of the state's post-conviction proceeding, rather than requiring the defendant to litigate them in a federal habeas action.

Justice Alito, joined by Justice Thomas, dissented, observing that the case was decided without briefing or argument. He reasoned that the issue was not as "open and shut" as the *per curiam* believed, and thus should not have been decided in summary fashion.

***Welch v. United States*, 136 S. Ct. 1257 (2016)**

***Johnson*, finding residual clause of ACCA unconstitutionally vague, applies retroactively.**

The defendant was sentenced for being a felon in possession. Under the Armed Career Criminal Act, a prior conviction for "strong-arm robbery" was counted as a violent felony conviction under the residual clause of § 924(e)(2)(B)(ii). The defendant's sentence, as an armed career criminal, was upheld on appeal.

He then filed a post-conviction challenge to his sentence. While that was pending, the Supreme Court decided *Johnson v. United States*, which held that the residual clause was unconstitutionally vague. The defendant's § 2255 was denied, as was his request for a certificate of appealability. The Supreme Court granted *certiorari* to determine whether *Johnson* was retroactive (and therefore whether the certificate of appealability should have issued).

The Court, in an opinion written by Justice Kennedy, reversed. It noted that, under *Teague v. Lane*, new rules are ordinarily not retroactive, unless they are substantive rules or "watershed rules" implicating the fundamental fairness and accuracy of proceedings. The parties (both the defendant and the Government agreed) argued that *Johnson* was a "substantive" rule and therefore should be applied retroactively. The Court also agreed. It noted that a rule is substantive if it "alters the range of conduct or class of persons that the law punishes." It concluded that *Johnson* limited the substantive reach of the ACCA, it had nothing to do with the "range of permissible methods" to be used in court, and thus it was substantive. The Court rejected the argument presented by *amicus* that because *Johnson* – holding that the residual clause was void-for-vagueness based on due process – was based on a procedural right, that it cannot be applied retroactively. The Court stated:

> The *Teague* balance thus does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive. It depends instead on whether the new rule itself has a procedural function or a substantive function—that is, whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or class of persons that the law punishes.

The Court also rejected the argument that "substantive" decisions were only those that placed certain conduct or persons beyond the power of Congress.

Justice Thomas dissented. He argued that the issue was not properly presented in the unusual procedural context of review of the denial of a certificate of appealability, when the defendant had never directly raised a vagueness challenge below. Justice Thomas also concluded that *Johnson* was not a substantive rule.

***Woods v. Etherton*, 136 S. Ct. 1149 (2016)**

Supreme Court Update

Sixth Circuit improperly applied doubly-deferential AEDPA standard for ineffective assistance of counsel case.

In a short *per curiam* opinion, the Supreme Court found that the Sixth Circuit had been improperly deferential, under AEDPA, in granting the defendant's habeas petition on grounds of ineffective assistance of counsel. The Court emphasized that courts must be "double deferential" in evaluating ineffective claims in habeas cases. Here, the claim related to admission of an anonymous tip that the defendant was one of two men in a car that was possibly carrying cocaine. The tip was admitted at trial to explain why the car was stopped. Particularly given that the tip was not inconsistent with the trial defense – that there was indeed cocaine in the car, but that it belonged to the other occupant – the Supreme Court held that a "fairminded" judge could conclude that counsel's failure to raise the issue was not ineffective, and thus that habeas relief should have been denied under AEDPA.

Jonathan Harwell and Denise Faili are Assistant Public Defenders in Knoxville. Jonathan can be reached at jpharwell@gmail.com and Denise at dmfaili@gmail.com.

Understanding Community Corrections

Mary Kathryn Harcombe

The Community Corrections Act is one of the most widely misunderstood options in Tennessee sentencing. Unfortunately, the misinformation and misunderstanding are spread among all parties: defendants, prosecutors, defense attorneys, and even judges. While there is a vast body of litigation surrounding Community Corrections, this article is designed to give you, as a criminal defense attorney, a basic understanding of how the program works and how to advocate for your client.

Community Corrections (CC) was developed to reduce the prison population,[1] increase community-based treatment, and, ultimately, save the state money. The purpose, as stated in TCA 40-36-103 is "to punish selected, nonviolent felony offenders in front-end community based alternatives to incarceration, thereby reserving secure confinement facilities for violent felony offenders." CC is created and governed by statute in Chapter 36, Title 40, and it is worth referring to the statute as you advocate for clients to be accepted into CC or in violation hearings. Of most use are TCA 40-36-104, which lists seven distinct goals for CC, and TCA 40-36-106, which lists the eligibility requirements and procedures for violations.

Community Corrections is often described as "super-intense probation", but the program is actually very different. Unlike state probation or parole, CC is run and administered by individual courts and counties, not by the Board of Probation and Parole (BOPP). The CC officers are local county employees and are not affiliated with or supervised by BOPP. Each local CC program is funded by the Tennessee Department of Corrections (TDOC), which awards grants to individual counties. This grant money is then managed and budgeted by each county's CC program. Approximately 80% of Tennessee counties have some sort of CC option.[2] Since one of the purposes of CC is to save money, local CC programs are encouraged to keep statistics about the number of people who avoided incarceration and the income earned by CC participants in the community.

Some counties have special programs under the CC umbrella, such as felony drug courts. In Davidson County, we have DC4 (drug court) and DDS (a dual diagnosis program). The specialty treatment programs comply with all the statutory CC regulations and are funded through the CC grants, but they may have additional eligibility or participation requirements from the regular CC programs.

How to get your client into Community Corrections – Eligibility & Advocacy

The statutory eligibility requirements for CC are laid out in TCA 40-36-106(a). The statute emphasizes that the defendant must be convicted of a non-violent felony and have no history of convictions for violent crimes. While this sounds exceedingly limited, don't lose heart. Ultimately, there are only two requirements for Community Corrections: 1) a felony conviction, and 2) a judicial order sentencing the defendant to Community Corrections. Unlike regular TDOC sentences, Community Corrections sentences are not reviewed (and potentially rejected) by a higher authority. This gives local courts significant flexibility in how and when to utilize CC. Additionally, the statute provides a fantastic "special needs exception" in TCA 40-36-106(c), which states that a defendant with special needs due to significant substance abuse or mental health problems may be eligible even if he/she doesn't fit under the requirements of subsection (a).[3] And really, how many of our clients *don't* have significant A&D or mental health issues?

Importantly, CC may often be granted in situations where a defendant is statutorily not eligible for probation. This covers defendants who have a sentence over the 10 year probation limit and also people convicted of statutorily non-probatable crimes.[4] So your client with an eleven year sentence, or who has a conviction for a schedule I drug, is still eligible for an alternative sentence through CC. This is true for all non-violent offenses where CC is granted under the primary eligibility requirements in TCA 40-36-106(a). A defendant granted CC under the special needs exception in subsection (c), however, must be statutorily eligible for probation. Thus, a

person convicted of a violent crime or a crime against a person may only be eligible for CC if the statute of conviction allows for a probation sentence.[5] Finally, note that, sex offenders are not barred from Community Corrections; as long as the statute of conviction allows for a probation sentence, a defendant with a history of sex offenses or a current sex crime conviction can still qualify for CC.[6]

For involvement in specific treatment programs like Drug Court, a defendant must be screened and accepted by that program and also be sentenced to CC by a judge. For regular Community Corrections, however, all you need is the judge's order. This means you can get anyone into Community Corrections if you can convince your DA and/or your judge to sentence the person accordingly. When advocating for a client to receive a CC sentence, there are several things to remember. First is that the whole point of CC is to help people who are not appropriate or eligible for probation. CC is for the folks who have "flunked out" of probation or are "too bad" to receive probation. The program was designed, not as an alternative to probation, but for people who would otherwise have to be in prison. It is an alternative to prison. As the Tennessee Court of Appeals has stated, "a good community corrections program is more of a punishment to the offender than actually going to the Department of Correction and being paroled shortly thereafter." *State v. Cummings*, 868 S.W.2d 661, 667 (Tenn. Crim. App. 1992).

As a prison alternative, Community Corrections is remarkably effective at saving money for the state. You may be able to get statistics from your local Community Corrections program relating to how much income their defendants earn (and thus pay taxes on) vs how much it would cost to incarcerate that same person. CC puts a heavy emphasis on work and giving back to the community – and there are statistics to show that the program succeeds. If you have a judge or DA who is open to financial or "good of the community" arguments, you could emphasize the cost savings and the track record of the CC program.

Finally, as I will discuss in the next section, Community Corrections both provides incredibly intense supervision and gives the judge a big "hammer" for defendants who do not succeed. Unlike probation, a defendant on CC may have his or her sentence *increased*, sometimes quite dramatically, upon being found in violation. If your judge or DA is worried that CC would be too lenient a sentence, you can assure them that this is not the case.[7] If your client doesn't comply with CC, he or she faces even more time in TDOC custody.

The Nuts & Bolts of a Community Corrections Sentence

So, your client asks, what does Community Corrections actually mean for me? A client who is sentenced to CC must work the different stages of the program until he or she completes all the requirements and "graduates". Upon graduation, your client will be removed from CC supervision and will be placed on regular probation for the remainder of his/her sentence. The minimum period of time on CC is twelve months, but most defendants graduate after sixteen to eighteen months. In order to graduate, the defendant must complete at least three of the four possible levels and must perform 240 hours of community service work (CSW). The four levels (stages) of CC allow the defendant gradually increasing levels of freedom. The first two levels take a minimum of 90 days; the fourth level is frequently not used. If a defendant starts having problems in level 2 or 3, the CC officer can move him/her back up to level 1 instead of filing a violation warrant.

For at least the first two levels, defendants must report to their officer, in person, a minimum of once a week (sometimes more). The defendant must also attend at least one weekly treatment class and must find and maintain full time employment. Until the person is able to find work, he or she must attend the employment development class. While CC does not provide any direct employment placement, often CC officers can direct the defendants toward job opportunities. Employment is strongly emphasized on CC, but exceptions may be made for people with physical or mental disabilities.

Throughout all levels of CC, the defendant must take random and frequent screens for drugs and alcohol. Individuals are also subject to a curfew. On level 1, the curfew is from 7:00pm to 6:00am. The CC officers conduct regular home and curfew checks, both by calling and by making in-person visits to the defendant's residence. The officers also may contact family members to verify that the defendant is complying with the curfew and other

rules. While the curfew is an important part of CC, most officers will make allowances for work schedules.

All defendants on CC are required to complete 16 hours a month of community service work. A person cannot graduate from CC until he or she has provided proof of 240 hours of community service work. This is often the limiting factor causing defendants to stay on CC for longer periods of time, so it's worth encouraging your clients to take this requirement seriously and get it done as fast as possible. For clients with serious disabilities, the CC officer may still be able to place them in some sort of CSW. If not, this requirement can be waived by the judge.

Like all other programs, Community Corrections has monthly fee requirements. By statute, there is a $15 fee that goes to the local program and a $30 fee that goes to the state. Many CC offices also require that defendants pay at least $15 a month toward court costs. Depending on the county, the $30 state fee can be waived if the defendant is on disability, has to pay for GPS or SCRAM, or has large amounts of restitution to make.

Jail Credit & Re-sentencing

Perhaps the most important difference between Community Corrections and probation is that a sentence can be increased if a defendant violates Community Corrections. It is absolutely critical to warn your clients about this fact before they accept a Community Corrections sentence. A sentence can be increased "up to the maximum sentence provided for the offense committed". TCA 40-36-106(e)(4). In practice, this means that the judge can increase the number of years to the top of the range of the original sentence[8] and can stack charges that were originally concurrent. For example, let's say your client pleaded guilty to two C felonies, Range II, concurrent, for a total sentence of 7 years. The judge could increase your client's sentence to 10 years on each count and could run the two counts consecutively, for a total of 20 years. The judge could then leave the defendant on Community Corrections, or send him/her to prison for the full 20 years. Additionally, the judge can run the sentence consecutive to any other unrelated sentence, even if the original Community Corrections sentence was concurrent.[9]

Before a sentence is increased, a Community Corrections officer must complete a Pre-Sentence Report and provide a copy to all parties. The court must then hold a re-sentencing hearing. In altering the sentence, the judge must adhere to standard sentencing guidelines as detailed in TCA 40-35-210, but the judge has the same discretion and sentencing powers as he or she did in the original sentencing hearing.[10] Just as with a regular sentencing hearing, however, a re-sentencing hearing after a Community Corrections violation may be appealed and may be the basis for a post-conviction petition.[11]

The one bit of good news is that a defendant on Community Corrections is entitled to jail credit for the time spent on CC, regardless of how well the defendant complied with the program requirements. This jail credit is mandatory, not left to the discretion of the judge.[12] The defendant gets day-for-day credit for each day up until the community corrections officer files the warrant to revoke. Once the revocation warrant is filed, the sentencing credits begin to toll.[13] Please note that many defendants believe they are entitled to credits up until the day they are arrested on the community corrections violation. This is not correct. Credits stop when the warrant is filed, regardless of when the warrant is actually served.

Finally, be warned that sometimes a defendant is sentenced to probation, but required to either attend CC classes or be supervised by the CC program. The case law is very clear that if the actual sentence is for probation, your client will not get any jail credit for "street time", regardless of who does the supervising.[14] Of course, the flip side is that your client can't have his or her sentence increased. It is not uncommon for judges to find that a defendant violated his or her probation and require that a defendant henceforth be supervised by Community Corrections. This is impermissible; where the original sentence is for probation, the judge lacks jurisdiction to convert that to a Community Corrections sentence after a probation violation.[15]

Community Corrections is an important option for many of our clients and can provide a beneficial alternative to prison. It is critical, however, that both you and your client understand the risks involved. Community Corrections provides significant support for defendants, but it is also difficult and restrictive. Clients need to know

that if they violate, their sentences can be increased, often by a large amount. As always, your client needs all of the information in order to make the best decision, and it is your job, as a competent criminal defense attorney, to provide this information.

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.

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[1] *See State v. Cummings*, 868 S.W.2d 661, 667 (Tenn. Crim. App. 1992).
[2] Community Corrections supervision can be transferred from one county to any other county that has a Community Corrections program. A community corrections sentence cannot, however, be transferred out of state until the defendant has graduated and been moved to regular probation.
[3] Case law indicates that in order to award community corrections under the special needs provision, a court should find that the defendant is eligible for probation and " that (1) the offender has a history of chronic alcohol, drug abuse, or mental health problems; (2) these factors were reasonably related to and contributed to the offender's criminal conduct; (3) the identifiable special need(s) are treatable, and (4) the treatment of the special need could be best served in the community rather than in a correctional institution." *State v. Grigsby*, 957 S.W.2d 541, 546-547(Tenn. Crim. App. 1997). Remember, though, ultimately all you need is a felony conviction and a court order sentencing your client to CC.

[4] See TCA 40-35-303 for a list of offenses that are not eligible for probation even when the sentence is less than 10 years.
[5] For example, Sexual Battery by an Authority Figure, TCA 39-13-527, and Statutory Rape by an Authority Figure, TCA 39-13-532, are both "crimes against a person" and thus do not qualify for community corrections under subsection (a)(1). Pursuant to TCA 40-35-303, the stat rape charge is statutorily non-probatable, so a defendant convicted under that statute could not receive a community corrections sentence under the special needs exception. The sexual battery statute, however, does allow for probation, and thus the defendant may qualify for community corrections under the special needs exception. *See State v. Cowan*, 40 S.W.3d 85 (Tenn. Crim. App. 2000); *See also State v. Ghormley*, 2015 Tenn. Crim. App. LEXIS 756 (Tenn. Crim. App. Sept. 21, 2015).

[6] Sex offenses are "crimes against the person" and thus may only qualify for community corrections under the special needs provision. As such, the statute of conviction must qualify for probation.
[7] Again, see discussion in *State v. Cummings*, 868 S.W.2d 661 (Tenn. Crim. App. 1992).
[8] "[I]t is clear that a trial judge imposing a new sentence as a result of community corrections failure is bound to sentence the defendant within the range of the original sentence." *State v. Patty*, 922 S.W.2d 102, 104 (Tenn. 1995).

[9] *State v. Samuels*, 44 S.W.3d 489 (Tenn. 2001).
[10] *Carpenter v. State*, 136 S.W.3d 608 (Tenn. 2004).
[11] Note that the time period for filing a PCR on a community corrections revocation and re-sentencing does not start to run until the re-sentence becomes final. *Carpenter v. State*, 136 S.W.3d 608, 612-613 (Tenn. 2004).
[12] "The award of credit for time served on community corrections is mandatory, and the trial court has no authority to deny credit no matter how lackluster or unsuccessful the defendant's performance." *Jackson v. Parker*, 366 S.W.3d 186, 190 (Tenn. Crim. App. 2011).

[13] *State v. McNack,* 356 S.W.3d 906 (Tenn. 2011). Please note that many defendants believe they are entitled to credits up until the day they are arrested on the community corrections violation. This is not correct. Credits stop when the warrant is filed, regardless of when the warrant is actually served.
[14] *State v. Schurman*, 2012 Tenn. Crim. App. LEXIS 300 (Tenn. Crim. App. May 10, 2012).

[15] *See State v. Bowling*, 958 S.W.2d 362 (Tenn. Crim. App. 1997); *see also State v. Taylor*, 992 S.W.2d 941 (Tenn. 1999). When a judge "re-sentences" defendant to Community Corrections after a probation violation has been filed, the CC is merely deemed to be a condition of probation. Thus, a subsequent violation cannot be used to increase the original sentence, but neither is the defendant entitled to any jail credit for the time spent being supervised by Community Corrections.

Member Spotlight: David Raybin

Mike Working

David Raybin is a renaissance man. Lawyer, author, and sword fighter, he is a man of many hats. We recently talked about law, lobbying, client management, and mental patients in a Nashville meat and three. We discussed David Raybin's "Life in Court."

FTD - You were just talking about writing a memoir?

DR - I was inspired to be an attorney when I was about seventeen years old. I was really sick for several weeks, and my father brought home some books for me to read. He brought me fantastic books about fighter pilots in WWII. He also brought Louis Nizer's My Life in Court, which is a fabulous book. It was one of the first lawyer memoir books. I decided I was going to be a fighter pilot or a lawyer, but I decided there really wasn't a difference between the two. A good trial lawyer is basically in combat all the time.

The other inspiration was my Virginia military high school fencing team. Fencing is very fast, one-on-one combat. Military school is highly regimented with rules and regulations – like the law, and it all came together about being an attorney in some way. I didn't know a lot of folks that had lawyers in their families and I had no lawyers in my family. I just did this on my own, because it seemed interesting. I had a tremendous interest in history, and I wanted to be a history teacher. When I learned what history teachers were paid, I decided that was not the way to go.

FTD- I am married to a history teacher, and that's still true.

DR- Our military school in Virginia – which is closed now -- was started by a soldier in Jeb Stuart's cavalry unit. Virginia is nothing if not the Civil War. There was a girl's school in Virginia, where we dated, started by Jeb Stuart's widow.

[Just then our meal of fried chicken, black-eyed peas, collard greens, and corn arrives with refills of tea. Oh, how the South has changed.]

DR- I went to UT law school, and back then, UT law school had this philosophy of accepting just about anybody, and flunking out two-thirds of the class. I am sure you have heard this story before, where you are in law school and they say, "Turn to the left. Turn to the right. Only one of you will be here come graduation." That was true. Back then, they had the quarter system, instead of semesters, so I went nine quarters straight. I didn't want to take off because I couldn't afford to support myself for a summer. It was the baby boom, and there were no jobs anyway.

I just really, really, really enjoy the law. I enjoy writing about the law, and I enjoy the history of the law. That's where my love of history came in. I wrote several law review articles about the history of Tennessee criminal law, and the lead article was about the proposed 1973 criminal code. That formed the basis of the 1989 criminal code which we used when I later served on the sentencing commission.

Anyway, as I was graduating UT, the Attorney General's office needed more lawyers. The entire office had maybe twenty lawyers. The number of appeals was increasing dramatically, and they needed more young kids to do those appeals. They read my law review article and decided they would offer me a job at the AG's office here in Nashville.

FTD - And you stayed in Nashville ever since?

DR - Yes. The AG's office was like a post-graduate degree in law because I had to write all those briefs. I argued a lot of appellate cases, and really enjoyed the advocacy.

FTD - Because you have written legal treatises and had such success in the appellate courts, many people consider you an appellate lawyer, but you have said twice during lunch you are a trial lawyer. Do you consider yourself one or the other? Or just a lawyer?

DR - I started out as an appellate lawyer, and I wrote all these law books, and I still do my share of appeals, but most of what I do is trial work. It just makes me a better trial lawyer to have that appellate expertise, so that I know what the heck I am doing. When I am in the trial court, it gives me an edge on my motions. Particularly on my motions.

FTD - Do you think it creates problems in the legal system when district attorneys, don't perform appellate work, and just stay inside their own bubble? Is it a problem if we have assembly line justice and district attorneys don't see the bigger picture of the system?

DR - Damn. That's a good question.

FTD – I'm pretty sure no one has ever said that before, so thank you.

DR - That's how I ended up in the District Attorney's office. I did two things up there. First, nobody wanted the death penalty cases, because so much was going on, so they gave them to me. Here I am at age 28 doing death penalty litigation. The first case I draw is the Supreme Court reviewing the constitutionality of the mandatory death penalty. Of course the mandatory death penalty is illegal, but I researched it, and argued as hard as I could even though I knew I would lose. When it was declared unconstitutional, the legislature says "Attorney General, you need to write a death penalty statute that is going to stand up in court." The Attorney General said "Come here Raybin, and write the law since you are supposed to know this stuff." I flew all over the country consulting with lawyers and prosecutors who were in the same boat. We came up with a *Gregg vs. Georgia* statute like we have now, but I drafted the Tennessee version. One of the aggravating factors was killing an assistant state attorney general. I put myself in the statue, so if somebody killed me, they would get the death penalty for it.

To actually answer your question, the other thing that I did was contact the DAs and on significant cases say, "I need to meet with you to discuss this case." I realized that the district attorneys were completely disconnected from appeals. That just shocked them, because nobody in the AG's office had ever picked up a phone and called them.

FTD - I had a prosecutor in the trial court recently argue in the trial court that a case stood for a certain position, and I thought, "Jesus, I know that's not true. I have that issue pending now." I went and looked up the case the ADA was talking about. The specific issue was never even raised on appeal. I'm thinking, "How the hell can you sit there and argue that?" But I know they just don't have any idea what is happening elsewhere.

DR - Right. I got assigned the famous String Bean murder case. He was a country music singer killed in Nashville along with his wife, and it was one of the worse homicides in the community. I call up DA Tom Shriver, and I said, "You need to come up here when I argue this case. You need to sit next to me in the Court of Criminal Appeals as I am arguing the case." He was just amazed that I asked him to do that. I said, "You need to help me, this is your case. I want to do the best I can, so I'll need you to be here." I won the appeal. Six months later, Shriver calls me up and says, "I've got an opening. Get your butt down here and try to win some lawsuits." I went down to the DA's office in Nashville for seven years. My appellate experience helped me tremendously from keeping the judge from falling into error. I don't think any case that I prosecuted ever got reversed.

FTD - TACDL is putting a lot of money into lobbying lately, but I notice sometimes the legislature brings you up there independently from TACDL to speak on the law. It seems to be an honorable and elevated position. Does that date back to your time with the AG?

DR - It goes back to my days in the Attorney General's Office. When I am speaking on behalf of TACDL and talking in front of those conservatives, about the fifth line in my presentation, I'll remind them that, "I have been here in front of you for so many years. Some of you may recall that I talked to you about the Death Penalty statute that I drafted." It gives me some connectivity to the past. I want to appear objective about what the law should be, so it helps me. Those contacts that I made in the Attorney General's office 30 years ago still help me to this day. It a tremendous experience, I really enjoy doing that.

FTD - What piece of advice would you give to a young lawyer learning appellate work?

DR - Go to Westlaw. Westlaw has all the appellate briefs online right now for the most recent cases. Go read as many appellate briefs as you can to see how it's done. Read the cases where the attorney won. If you're a trial lawyer, the best way to learn, aside from trying cases yourself, is watching other lawyers do it. To learn about appeals, get yourself up to the appellate court to watch some oral arguments.

FTD - When do you decide to request an oral argument?

DR - I always request an oral argument. If the case is worthy of me being the lawyer, it's worthy of me standing up and arguing on behalf of my client. There is no question that oral argument does bring the appellate judges around. I am absolutely convinced that happened in some of my appeals. Now is that true in every case? No. I just think it is malpractice to have an appellate case and not argue your client's position. Appellate briefs are wonderful, but get in there and play hard.

My other advice is figure out how to write a motion for new trial. If you don't know how to do a motion for new trial, you are worthless as an appellate lawyer, because that is your appeal. Another thing, always be prepared to argue an issue that your client wants presented unless it's absolutely frivolous. My son had an appointed case in the Supreme Court dealing with forfeiture of a house. He worked and worked on the issue, and the client suggested argument on a procedural problem. They gave the client constructive notice, but they didn't give him actual notice. To prevail on that the Court would have to overturn fifty years of case law. The client was *pro se*, and Ben had been appointed by the Supreme Court to present the client's arguments. It wasn't totally frivolous, so Ben presented it. The opinion came out, and they overruled fifty years of case law. Ben won on this obscure procedural point that the client wanted briefed. Great result. Great lesson learned.

And write the Rule 11 Application for permission to Appeal in the Supreme Court. That poor devil is sitting in prison. He has got sixty days running, and he doesn't know what to do, and his time lapses. I don't care who you are, paid or not. There is a moral duty to do it. Your client is absolutely out there all alone.

FTD - I feel the same way. I don't think I've ever been paid on a Rule 11. By the way, I have a perfect appellate record with the Court of Appeals, and on Rule 11 applications.

DR – [chuckles] Well just keep swinging, That's all.

FTD - I happened to be up here about a year ago when you spoke at the Roundtable. One of the ideas you suggested is that we should change to 13-point font in briefs and pleadings. I do that now, and I am amazed how much more the judges are aware of my argument in trial courts. It seems like even when I lose on appeal, I've had some nice comments in the opinion.

DR - As a lawyer, you become a lot smarter once you go to 13-point font.

FTD - I've had much better success at suppression motions because now my motion is a page turner!! It probably is just not as hard on their eyes.

DR - I try to write as distinctly as I can with very short paragraphs, very short bullets, and very short themes. Bang, bang, bang, and thank you. Judges are smart people. They get it.

FTD – You also had some interesting positions on client communications.

DR - In twenty-percent of my cases, I am the lawyer because the client had another lawyer but that other lawyer wouldn't communicate with the client. So the client fires the first lawyer and hires me. Now that is crazy when a lawyer loses a client because of a lack of communication. Lawyers won't call the client back, and that is inexcusable. It makes no sense. Why would you not communicate with your own client?

FTD - I have been getting wonderful results from your 10-minute phone call rule. I now have a timer on my phone, to manage many clients that are high maintenance. Ten minutes isn't really a big ask of a lawyer. I am shocked about how many more people I can communicate with during the day.

DR - The 10-minute rule: unless I am talking to the DA about a death penalty case. I may give him 20 minutes. That's it, ten minutes. If it's longer than 10 minutes, I will send an email, or bring them in for a meeting. You are just wasting time, because then you make yourself inaccessible to anybody else. None of these points in my PowerPoint presentation were my idea by the way. They are all my wife's idea. She is not a lawyer. She is a psychologist. I am yelling, "The client is late to court." She said, "Tell them to be there at eight, and they will show there on time at nine."

FTD – What is your proudest moment in court?

DR - Without a doubt when I got my son sworn in as an attorney in the Supreme Court. I thought I was going to burst. And I remembered myself being sworn in by the Supreme Court. I was in the Attorney General's Office, and I passed the bar. The Attorney General said "by the way, the Supreme Court is sitting downstairs." We went downstairs and got sworn in under the exact same spot I now argue my appeals. One of the Supreme Court Judges turned to me said, "now that I have sworn you in, go out there and do justice." I said "Yes, sir!" When Ben got sworn in, they just granted the motion and there were dozens of lawyers there and no time for a personal word to each person. So, I put my arms around him, and I said "Ben, go out there and do justice." Having my son in my practice is like starting all over again for me. I am just thrilled to have him there with me. I have learned more from him than he has learned from me. It's just wonderful.

FTD - I think the swearing in line I remember most was from Cornelia Clark. She said as a lawyer the most precious currency is your reputation. I remember that almost daily.

DR - I had a conversation the other day where the DA has called me complaining about some lawyer. He said that lawyer used to be in the DA's office and I used to respect that lawyer, but now that lawyer has gone into court and

done some damn fool thing. I have always learned that you can do 10,000 good things as a lawyer, and screw it up with one bad thing especially with shortcuts. That shortcut can carry the appearance of impropriety that sticks with you. The bar has a long memory. They have a long damn memory. If you screw up, they will remember it for the rest of your career, and maybe beyond.

FTD -Your partner and mentor Mr. John Hollins Sr. passed this year.

DR - He was retired. It was a very short illness. He had been practicing for 56 years. He was the most ferocious lawyer I've ever seen in the courtroom. He was like a bear.

FTD - I think you called him a lion when *the Tennessean* interviewed you.

DR - He was a lion. He was an absolute lion. He would yell at anything that moved. He was not a bully, but he got away with yelling. He was one of those power lawyers who knew how to be gentle, and when to be persuasive. He was very loyal to his allies and just broke his adversaries. There was a famous story about John Hollins. In my conference room, you may have noticed that the conference table had glass on it. It's because John Hollins turned out to be one of the best divorce lawyers in the city and could eat husbands alive. So he was taking a deposition of this husband and crucified the man. They took a break but when they came back, the husband was gone. Scratched into the wooden tabletop was "Fuck John Hollins." We had to get that sanded down, and added a glass top so that wouldn't happen again. John was so proud of that he wanted to leave it in there!

FTD - Do you feel any different being the senior member of your firm?

DR - No. I don't feel any different at all. I do have the benefit of experience, but that is a great asset. But I don't feel old. Rob McKinney and I were sitting around talking one day. He said the shelf life of a trial lawyer is about 40-45 years, because of the intensity of how hard you have to work. Constantly. Well, some burn out before then.

FTD – I'll never last that long.

DR - I am close to that time. I am 67-years old. I have been doing this since 1974. But I have a 10-year window in there since I was a DA. My defense trial work didn't really start until Ben was born, so I can measure my shelf life by his age.

FTD - Do you feel more pressure when you prepare as a defense attorney then as a DA?

DR - Absolutely not. I was ferocious. Some cases you just couldn't prepare. The ones you think are going to trial plead out, and you are left with some dog cases. I can't say that I prepared all my cases with the same diligence I do now. But as a prosecutor, I worked my butt off to prepare. It was how I learned that you can't win without any investigators. It's crazy. I can't do it all myself. And I am a firm believer in a team defense. It's a good idea having multiple lawyers, have investigators to help you. That always gives you more insight on a case that you didn't know before.

FTD - What makes TACDL important?

DR - The most obvious advantage is the listserv. It truly is a wonderful thing. I put something up on the listserv, and within a few hours or a day at most, I get an answer back. We just share information. If TACDL did nothing else, it's a benefit that you would want to have, but the obvious benefit is the camaraderie and the exchanging of ideas. You cannot be a good lawyer at the trial level or the appellate level unless you have vetted your cases with another lawyer, for purposes of getting a reality check. That's what TACDL does. It gives you an opportunity to talk to someone who just won four cases on forfeiture. I am going to call that person and find out how they did it. It's great. You win a few cases, and suddenly you are an expert. The prosecutors and police meet. They get this flow of information, why shouldn't we meet and talk to each other about these things? The Trial College that Bill Massey puts on. My God, that is just a fantastic thing.

FTD – I am a hat man, and see that you also wear hats often. I think I wear them from playing football, and I need helmet for the game. Why do you wear hats?

DR – Because I have less hair than I used to!

FTD – What is the funniest thing you see in a courtroom?

DR - [Reflects for a moment over his pecan pie and coffee] I see it all the time: asking the stupid question and getting killed. Once I was trying to put on a mental patient as a critical defense witness. The DA objects, claiming the fellow is incompetent. The judge tells the DA to voir dire my witness to establish incompetence. "OK" says the DA as he marches up to the podium with the witness now on the stand. "So!" asks the DA in a dramatic flair, "isn't it true that you are in a state of confusion?" "No sir," the fellow answers, "I am in the State of Tennessee!" The judge explodes with laughter, and the DA crawls back to his seat. It is moments like that which I will put in my memoirs. The famous trial lawyer, Jim Neal, once said that a law degree is a ticket to a great career. Absolutely right; I love it.

Mike Working is the Owner of the Working Law Firm in Memphis where he enjoys the blues and shopping for blue suede shoes. He is also the Chair of TACDL's Membership Committee. If you have any ideas about increasing membership or featuring a current member in this column, he would welcome the suggestion.

TACDL

Tennessee Association of Criminal Defense Lawyers
530 Church Street, Suite 300
Nashville, TN 37219