

THE CLASS X FELONIES ACT OF 1979; AN ANALYSIS

By David L. Raybin

I.

INTRODUCTION

The Class X Felonies Act of 1979, which will take effect on September 1, 1979, deals with the trial and sentencing of those convicted of the most serious felonies. The Act is designed to impose mandatory minimum sentencing for certain crimes, restrict plea bargaining, eliminate bail after conviction, and prohibit the early release of those convicted.¹ Since the law is best analyzed in three parts, this article will first discuss the crimes which are affected by the Act; second, its application to trial procedure and lastly, the alterations in the service of the actual sentence within the custody of the Department of Corrections.

II.

CRIMES INCLUDED IN THE ACT

The Act distinguishes eleven separate crimes which are denominated as class X felonies.² Some of the provisions of the Act merely label a present statute as a class X crime while other provisions either repeal or supercede existing legislation and create new criminal offenses.

a. *Murder in the first and second degree.* Sections 4 and 5 of the Act designate murder in the first and second degree as class X felonies. Obviously, since murder in the first degree carries a punishment of the death penalty or life imprisonment, it is the imprisonment portion which is to be given special incarceration treatment. The statute has no effect on the existing death penalty provision of the law. While murder in the second degree is also a class X crime, the Act limits vehicular homicide (T.C.A. Section 39-2412) as being exempted from class X treatment. Actually, this latter provision is unnecessary since vehicular homicide is a separate and distinct felony from second degree murder.

b. *Criminal sexual conduct, first degree.* T.C.A. Section 39-3703 which deals with aggravated rape and related sexual offenses is now a class X felony.³ Note, however, that under the existing law if the victim is seriously injured, the defendant is ineligible for parole, probation or any other type of work release program during the entire period of his sentence. The class X Act does not affect this provision. In trials under statute,

presumably, the jury would render a special verdict as to whether a serious injury was present which would trigger the additional provisions of the existing law.

c. *Aggravated kidnapping.* T.C.A. Section 39-2603 is amended by the Act by repealing the existing kidnapping for ransom statute which is replaced with a new crime called aggravated kidnapping; a class X felony. If an individual abducts another and one of four additional factors are present, then the crime of simple kidnapping is elevated to aggravated kidnapping.

First, if the victim is under the age of twelve, then this in and of itself would constitute aggravated kidnapping. However, a seizure or kidnapping of a child by a parent is not a class X felony.⁴

The second aggravating circumstance is when the victim suffers serious bodily harm or is the victim of any felony committed while being held. The first portion of this sub-section would cover a situation, for example, where an individual was seriously injured. The second part of this sub-section applies when the kidnapped individual is the victim of any felony committed while being held. This broadens the scope of the prior kidnapping for ransom statute which limited the felonies to extortion or robbery.⁵

The third aggravating circumstance occurs when the kidnapping is committed by a defendant armed with a deadly weapon. This is similar to the distinction between simple and armed robbery where the presence of a deadly weapon enhances the punishment.⁶

Lastly, if the kidnapping is for the purposes of obtaining a ransom from any person, then sufficient aggravation is established for a prosecution under the new statute. Since the act deals with a ransom from "any" person, this would also include the individual kidnapped. This follows the scope of former T.C.A. Section 39-2603.

d. *Armed robbery.* Section 8 of the Act denominates armed robbery as a class X felony. There is no change in

either the definition of the crime or its punishment.

e. *Aggravated arson.* Section 9 of the Act creates the new offense of aggravated arson, a class X felony punishable by a determinate sentence of not less than ten years nor more than life. If an individual "damages, partially or totally, any building or structure, including any adjacent building or structure" by means of fire or explosives, and one of three factors is present, then the offense is complete. The aggravating factors are (1) if the defendant knows or reasonably should know, that one or more persons are present in the structure, (2) if any person suffers serious bodily injury as a result of the fire or explosion, or (3) if a fireman or policeman who is present at the scene acting in the line of duty, suffers serious bodily injury. It should be noted that the third aggravating circumstance also deals with resulting harm caused by the fire or explosion. In other words, if a fireman, in an attempt to put out the fire, caused by the defendant, is injured this would constitute aggravated arson.

f. *Conspiracy.* Section 10 of the Act amends T.C.A. Section 39-1104 by classifying two of three felonies within the statute as class X crimes. Under prior law if an individual conspired with another to indict or prosecute an innocent person for a felony, knowing the person to be innocent, then the punishment is not less than two nor more than ten years. The Act retains this provision of law which is *not* a class X crime. However, if the conspiracy is to take human life or commit a felony on the person of another, the class X provisions apply with an increased punishment of not less than five nor more than fifteen years.

g. *Assault with intent to commit murder in the first degree.* T.C.A. Section 39-604 is amended by the Act to create two different grades of assault with intent to commit murder in the first degree. The first grade is assault with intent to commit murder in the first degree where no bodily injury occurs.

This grade follows the language of the existing statute but increases the punishment to not less than five nor more than twenty-five years. However, under the Act, the sentence is an indeterminate punishment and is not a class X crime. If, however, the jury finds that bodily injury to the victim occurred as a result of the assault, then the punishment is not less than five years nor more than life, which is a determinate sentence and is a class X felony. Obviously, when drafting an indictment under the Act to prosecute under the second grade of assault with intent to commit murder in the first degree, bodily injury must be alleged in the indictment.

h. *Drug offenses.* The Act creates two new sections to T.C.A. Section 52-1432 concerning the possession with intent to sell, selling or distributing controlled substances. The first crime created deals with the amount of the drug possessed by the defendant, while the second new crime deals with the number of times an individual sells the drug.

T.C.A. Section 52-1432 is amended by the Act to add a new sub-section (c). If a defendant, either individually or with another in the form of a conspiracy, possesses with intent to sell or actually sells any schedule I or II controlled substance

over the specified weight limits of the statute, then the punishment is enhanced to not less than ten years nor more than life with a possible fine of up to two hundred thousand dollars.⁷

T.C.A. Section 52-1432 is further amended by a new subsection that creates an offense of an "habitual drug offender," which is defined as one who "engages in the protracted and repeated manufacturing, delivering, selling, possession with intent to manufacture, deliver or sell" any controlled substance. In addition, this sub-section applies to a conspiracy of individuals who jointly engage in drug traffic. Under the Act, the state must prove either one of two separate types of drug transactions. First, if the defendant sells or possesses with intent to sell any schedule I, II or III controlled substance on three or more separate occasions, occurring at least one day apart, this would constitute proof of an "habitual drug offender." Alternatively, if the state established five or more sales or possession with intent to sell of any schedule I, II, III, IV, V or VI controlled substance, occurring at least one day apart, the defendant would be an "habitual drug offender." Under either sub-section combinations of drugs under any of the pro-

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Note: The views expressed do not necessarily represent the opinion of the District attorney general of the 10th Judicial District or of the State of Tennessee.

hibited schedules constitute the crime. For example, if a defendant sells a schedule I drug on Monday, a schedule II drug on Wednesday, and a schedule III drug on Friday, then this would be a violation of the first sub-section of the law. An example of the second sub-section would involve the case where an individual sold marihuana on five separate occasions. Under either case the "habitual drug offender" is a class X felony punished by not less than ten years nor more than life with a possible fine of up to two hundred thousand dollars.

i. *Wilful injury by explosives.* T.C.A. Section 39-1412 is amended by Section 13 of the Act to make the crime of wilful injury by explosives a class X felony. The Act does not alter the penalty or the definition of the crime.

j. *Assault from ambush with a deadly weapon.* T.C.A. Section 39-614 is amended by section 14 is amended by section 14 of the Act and provides that assault from ambush while the defendant is armed with a deadly weapon is a class X felony. The Act does not alter the definition of the crime or change the punishment.

III. TRIAL PROCEDURE UNDER THE ACT

The Class X Felonies Act of 1979 has an impact on the procedural rules of trial of the specified felonies. The following discussion will analyze the alteration in trial procedure in sequential order from indictment through sentencing.

a. *Indictment.* Other than the creation of the new felonies listed in the Act, there is a minimal effect on indictment practice. Prosecutors should *not* specify anywhere in the indictment that the crime involves a class X felony since the indictment will be given to the jury for purposes of their deliberations. Specifically, Section 25 of the Act prohibits the trial court or the attorneys from disclosing to the jury that the trial involves a class X felony.

Prosecutors should be aware that many of the new felonies have separate sub-sections which require proof of additional aggravating circumstances in order to constitute the crime, and these should be stated as elements of the offense. For example, if an individual is indicted for assault with intent to kill, an allegation of bodily injury should be made, if appropriate, to bring the crime within the class X criteria and the enhanced punishment. Indictments for an "habitual drug offender" under the provisions of T.C.A. Section 52-1432(d)(3), as amended, should specify each separate transaction as separate overt acts within the *same* count of the indictment. The statute specifically allows the separate overt acts to be charged as separate and additional offenses in different counts. No election is required, but the defendant may only be convicted as an habitual drug offender or of committing one or more of the separate transactions, but not both.

b. *Setting of Trial.* T.C.A. Section 40-2503 is amended by Section 19 of the Act and requires that all class X felony cases be tried within one hundred and fifty days following arraignment after indictment. There are additional provisions that allow for continuances which may only be obtained upon the filing of an affidavit by the party seeking the continuance demonstrating that a manifest injustice will occur if the action is not continued. Since failure to comply with the one hundred and fifty day rule does not require the dismissal of the charges, it would appear that the speedy trial provisions of the Act are primarily directory in nature. The real value, however, is in the apparent limitation on the right of continuance.

c. *Plea bargaining.* While the Act places no restrictions on the right of negotiated settlements of cases, the Act requires that any dismissal or reduction of charges of a class X felony be explained by the district attorney in the form of a certified statement filed with the clerk of the court. This statement is

public record and such proposed reductions or dismissals are subject to the trial court's approval. While the charging function is within the exclusive discretion of the district attorney, once an indictment is returned, any reduction or alternation of the charge becomes, ultimately, a judicial function. See *Dearborne v. State*, 575 S.W.2d 259 (Tenn. 1978). It is obvious that the intention of the legislature in enacting the plea bargaining provision of the Act is to hold prosecutors publicly accountable for their decisions to reduce charges. While the prosecutor may have good reason to reduce a charge in a particular case such as a deficiency of evidence or other extenuating circumstances, caution should be exercised in the initial charging function so that only valid class X cases are presented in criminal court. By the same token, a prosecutor can now validly decline to reduce a class X felony for plea bargaining purposes due to the mandate of the legislation.

d. *Trial and sentencing.* Other than the creation of new crimes by the Act, the only alteration in actual criminal trial procedure will be the restriction by Section 25 of the Act which prohibits the judge or the attorneys from disclosing to the jury that the trial involves a class X felony. Such disclosure could cut both ways and have a detrimental effect on either the state or the defense in that the jury, believing there was no parole for the class X crime, could give a shorter sentence. Alternatively, the jury might feel that since it is a "class X" crime, a higher sentence should be given. It is for these reasons that the prohibition of disclosure was included in the Act.

One of the primary attributes of a conviction under any of the class X felonies is that the sentence is determinate in nature. Thus, the entire range of punishment is permissible for conviction of any crime classified as a class X felony. Many of the crimes already carried determinate sentences, but the effective enhancement of the range of punishment allows for potentially greater sentences

for serious crimes.

e. *Bail after conviction.* With the exception of the offense of murder in the second degree, there is no bail following a conviction for any class X felony. It should be noted that this provision is not limited to a restriction on bail after the motion for a new trial is overruled or while the case is on appeal, but rather eliminates bail *immediately* upon the jury's return of a verdict of guilt. Similar provisions under the Tennessee Drug Law have been upheld since there is no right to bail after conviction under either the United States or Tennessee Constitutions. *Swain v. State*, 572 S.W.2d 119 (Tenn. 1975).

f. *Probation.* T.C.A. Section 40-2901 is amended by Section 17 of the Act and prohibits a suspended sentence for a conviction for any class X felony. Related to this provision is the amendment to T.C.A. Section 40-2907 which states that a person who is on suspended sentence for any crime who is *charged* with a class X felony, must have the revocation of probation hearing promptly, notwithstanding the pendency of the trial of the new class X crime. If the defendant's initial suspended sentence is revoked, based on allegations of the commission of a new offense which would constitute a class X felony, then there is no bail during the appeal process of the revocation, if any. It should be noted that this section only applies to acts *committed* after September 1, 1979 which would constitute class X crimes.

IV.

SERVICE OF THE SENTENCE

Once an individual is convicted of a class X felony, the service of the sentence within the Department of Corrections and possible release under supervision, is specifically set forth in the Act. In general, a prisoner is responsible to the Department of Corrections for his full and complete sentence with no good, honor or incentive time credits of any

sort. He must serve the first forty percent of the sentence in a maximum security institution and then will be eligible for a graduated release program.

a. *Prior parole law.* To discuss the new law it might be best to digress into an explanation of the present law as to the service of a sentence within the Department of Corrections. Under present law an individual with, for example, a thirty-five year determinate sentence is eligible for regular parole after serving one-half of the sentence. Probationary parole may be granted one year prior to the regular parole date.⁸ Good and honor time, under present law, reduces the sentence so that the term will expire or be "built" under a specific schedule of sentence credits. However, good conduct credits do not affect the sentence for parole purposes. *McFadden v. State*, 532 S.W.2d 944 (Tenn. Cr. App., 1975). The sentence computation for indeterminate sentences is far more complicated. Under present law it is difficult, if not impossible, to properly calculate the "real" sentence for any individual under a determinate sentence in Tennessee.⁹

b. *New parole provisions.* In contrast, the class X sentencing scheme states quite simply that a prisoner sentenced to, say, ten years, is responsible to the Department of Corrections for the entire ten year time and the sentence expires "only after service of the entire sentence, day for day, under the control and supervision of the State of Tennessee."¹⁰ To assist the Department of Corrections in properly classifying prisoners, the Act requires that all persons convicted of class X felonies have their files prominently marked to signify a conviction for a class X felony.

Section 20 of the Act, creates the eligibility procedure for possible release. Initially, the prisoner must serve at least forty percent of the sentence actually imposed by the court in a maximum security institution and during this period of time is "ineligible for work release, trusteeship status, furlough of any sort, educational or recreational

release or any other program whereby the prisoner's term of imprisonment may be reduced, or whereby the prisoner may participate in supervised or unsupervised release into the community."¹¹

In short, a prisoner can expect to serve at least forty percent of his sentence "behind the walls" and society can expect that the individual will be off the streets for at least this period of time.

The Act provides that eligibility for release classification status will occur after serving forty percent of a single conviction for a class X felony. A conviction carrying more than seventy-five years has a cutoff of thirty years of service prior to release classification eligibility status. Similarly, a single life sentence also requires thirty years in maximum confinement. Following the rule in *Howell v. State*, 569 S.W.2d 428 (Tenn. 1978), multiple class X sentences require an addition of the status dates of both offenses. Thus, a prisoner who receives two eighty-year class X felony sentences running consecutively will have a release classification date of sixty years.

c. *Enhancement of release date.* Since, under present law, there is no practical way to affect the prisoner's parole date for infractions to the rules of the prison for individuals serving a determinate sentence, the Act allows the Commissioner of Corrections to advance the release classification eligibility date.¹² Section 20(h) states that for a violation of any of the rules of the Department of Corrections, the Commissioner of Corrections, following a hearing, may defer the release classification date for any amount of time up to the maximum term of sentence. For example, if a prisoner has a ten year sentence, he is eligible for release consideration after serving four years. However, if he violates a prison rule, the Commissioner could advance the eligibility date up to and including the full ten year period.

Simply because an individual becomes eligible for release does not mean an automatic parole. The Act states that

release classification status is a privilege, and the parole board may actually grant release classification status only after a hearing. Four specific guidelines are set out in the Act which limit the parole board's discretion in granting release classification. Moreover, the parole board must notify the district attorney and the trial judge at least fifteen days prior to the hearing and a decision granting release classification status must be in writing and becomes public record.

D. *Alternative programs.* Once a person is granted release classification by the parole board, the board has the authority to place the individual in one of three programs. First, the defendant may be transferred to a minimum security institution where he would become eligible for work release and various other types of programs. Second, institutional releases are permissible, but there is a limited three-day supervised release provision under this sub-section. Third, the board may authorize a full-time supervised community release which is similar to parole under existing statutes.

The Act is designed to allow the board authority to reintegrate the prisoner into society slowly under supervision. Obviously, since it would be inappropriate, in most circumstances, to immediately transfer a person from a maximum security institution to parole status, the better procedure would be to transfer the individual to a minimum security facility and allow the individual limited freedom under work release and/or educational release programs. Then, when the individual has established some record of reliability, a full release might be appropriate. The statute does not specifically require a limited re-entry, but this transitional program will depend largely on future programs of the Department of Corrections and the parole board.

Once the parole board determines that a supervised community release is appropriate, the board is required to

maintain supervision for a minimum of three years. Thereafter an individual may be relieved from reporting directly to an assigned counselor. Since the statute does away with good and honor time, a person is responsible for his entire sentence. Thus, lengthy periods of parole are possible under the law.¹³ To conserve the limited staff available for supervision purposes, a release from reporting after a period of time is appropriate. As the staff increases this period could be lengthened in the discretion of the board, as well as in individual cases, depending on the need for direct supervision.

e. *Revocation.* At any time during the period of supervised community release, a violation of the rules of the parole board or a new violation of the law will constitute a revocation of supervised release and a return to prison. The existing rules for revocation of parole apply to the revocation of supervised community release under the Act.¹⁴ One alteration, however, is that the time a person actually spent on supervised community release does not count toward the service of the sentence. This is similar to revocations of probation in the trial court. See *Young v. State*, 539 S.W.2d 850 (Tenn. Cr. App. 1976).

V.

CONCLUSION

The obvious goal of the Class X Felonies Act of 1979 is for swift and certain punishment for those committing the most serious crimes. This is accomplished through a speedy trial provision and a specific determinate sentence upon conviction with no deduction of good and honor credits. The Act recognizes that some traditional felonies such as arson, kidnapping, and assault with intent to kill, should be punished more severely when certain aggravating factors are present. Similarly, individuals who engage in protracted drug traffic or who deal in large quantities of drugs, can receive as much as a life sentence. The system is strengthened by the abolition

of bail immediately upon conviction. It does no good to give an individual a speedy trial, with all its safeguards, and then allow the individual to remain at large for years while his appeal is pending since there is no certainty or deterrent in this. A restriction on plea bargaining in the prosecutor's office and a limitation on the discretion of the parole board assure some measure of uniformity in punishment for those committing similar crimes.

While the possible range of punishment and its consequences are more severe, the Act actually reduces the required amount of time to be served prior to the first expectation for parole release. Thus, an individual with a ten year sentence for armed robbery under the old law would have his earliest release date at approximately four and one-half years, while under the class X structure this could be as early as four years. The difference, however, is that under the latter system there is no question as to where the initial time will be served and exactly when the individual will be eligible for release, whereas under the former multitudes of variables and decision-making bodies render a release determination inexact at best.

This article has discussed the various changes in the law which will be effective September 1, 1979, as altered by the Class X Felonies Act of 1979. While changes in this law may become necessary in the future as experience dictates, the new Act will hopefully serve as a deterrent to crime for some and will seek to protect the public from those few individuals who decide to commit the most serious offenses against our society.

FOOTNOTES

1. Radio address of then candidate for Governor, Lamar Alexander, October 8, 1978.

2. Public Acts of 1979, Chapter 318, Section 2.

3. On June 5, 1979, and effective on that date, the Governor signed into law the "Sexual Offenses Law of 1979" which repeals, among other things, T.C.A. Section 39-3702. The "Sexual Offenses Law of 1979" covers virtually the same conduct under

its definition of "aggravated rape" as "criminal sexual conduct in the first degree," save that the former has a higher punishment.

4. Public Acts of 1979, Chapter 318, Section 7(c). See T.C.A. Section 39-2602 and *Hicks v. State*, 158 Tenn. 204, 12 S.W.2d 385(1928).

5. Other jurisdictions have recognized the limitations of similar statutes and have amended their kidnapping for ransom statute to include other felonies committed during the abduction. See, for example, 18 U.S.C.A. Section 1201, *United States v. Parker*, 103 F.2d 857 (3rd Cir., 1939), and *State v. Williams*, 526 P.2d 1244 (Ariz. 1974). Reference should be made to *Brown v. State*, 574 S.W.2d 57 (Tenn. Cr. App. 1978), where the Court discussed a conviction for kidnapping and the commission of a felony committed during the kidnapping

"If the facts on which the kidnapping charged is based are an integral part or essential element of the other felony being committed, then a separate conviction for the two offenses cannot be had. . . . if the facts of the kidnapping are separate and apart from the other felony and are not an integral part or essential element of the other felony, then two convictions may be had."

See also 43 ALR 699, *Seizure or Detention for Purpose of Rape, Robbery or similar offenses as constituting separate crime of kidnapping*.

6. *State ex rel Anderson v. Winsett*, 217 Tenn. 564, 399 S.W.2d 741 (1965). Obviously if a defendant, armed with a deadly weapon, kidnaps an individual, he could not be prosecuted for both aggravated kidnapping under sub-section (a)(3) and T.C.A. Section 39-4914 since the latter is merged into the former; see *State v. Hudson*, 562 S.W.2d 416 (Tenn. 1978).

7. Public Acts of 1979, Chapter 318, Section 12(c)(1), (A) through (H) lists the various amounts required under each type of drug.

8. See *Howell v. State*, 569 S.W.2d 428 (Tenn. 1978) for a discussion of parole eligibility for a determinate sentence. See also 4 Judicial Newsletter, No. 2, 21 for a chart for computation of prison terms in Tennessee for all types of sentences.

9. The current scheme of sentencing computation was criticized in *Farris v. State*, 535 S.W.2d 608 (Tenn. 1976). The above discussion does not even get into questions of work release, furlough and infinite other sentence programs.

10. Public Acts of 1979, Chapter 318, Section 3(3).

11. Public Acts of 1979, Chapter 318, Section 20(c). The Department of Correction reports that of its several institutions, Brushy Mountain and the main prison in Nashville will be classified as "maximum security" for the purpose of this Act.

12. "Good and honor time affects the flat release date but does not count toward parole eligibility." *Howell v. State*, 569 S.W.2d 428, 433, n.6 (Tenn. 1978).

13. Under prior law a person with a single 70