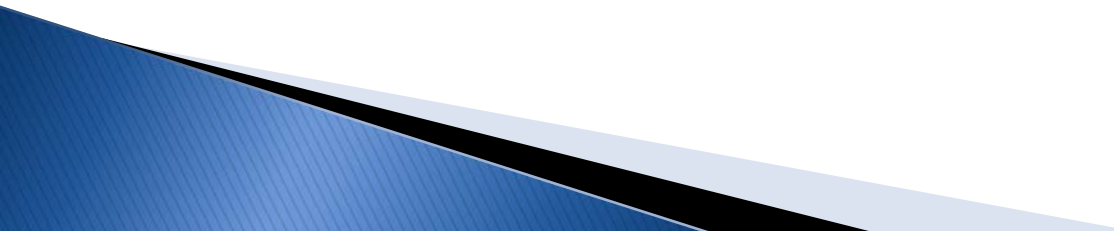


Probation Violations under the New Statute

Judge Jennifer Smith, 20th Judicial District
Leslie E. Price, Senior Deputy Attorney General
Todd Ridley, Assistant Public Defender

TJC Spring Conference
March 9, 2022

Agenda

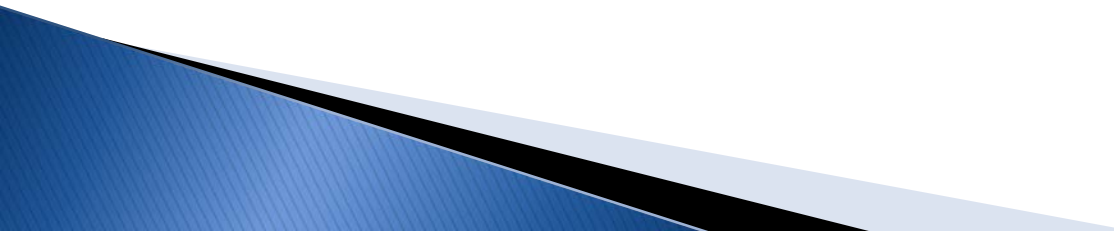
- ▶ Background
 - ▶ Statutory changes and definitions
 - ▶ Graduated sanctions
 - ▶ Emerging issues
 - ▶ Practical considerations
 - ▶ Questions / discussion
- 

Background

Why the Changes?

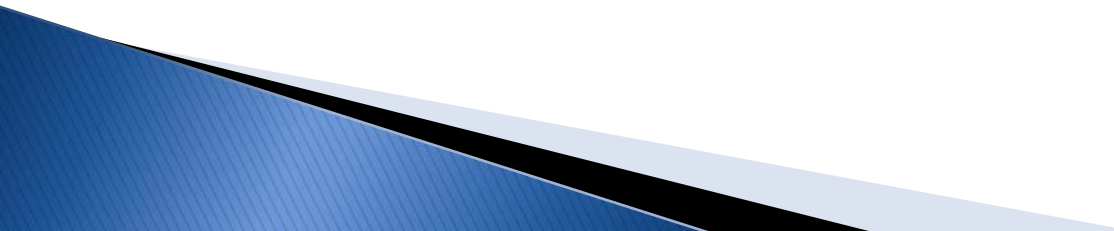
- ▶ In March 2019, Governor Bill Lee created the Tennessee Criminal Justice Investment Task Force to review the state's criminal justice system and make recommendations regarding, among other issues, the growing costs of incarceration and increased recidivism rates.
- ▶ In December 2019, the task force released an interim report.
 - [https://www.tn.gov/content/dam/tn/governoroffice-documents/governorlee-documents/CJInvestmentTaskForceReport.pdf](https://www.tn.gov/content/dam/tn/governoroffice/documents/governorlee-documents/CJInvestmentTaskForceReport.pdf)

Why the Changes?

- ▶ According to the report, increased admissions from individuals after a failure on community supervision, often because of technical violations, contributed to the high incarceration rate.
 - ▶ Based on the findings in the report, CJITF made several recommendations directly related to probation.
- 

Why the Changes?

1. Reduce Probationary Periods

- The initial period a person is on supervision is when he or she is most likely to reoffend or violate the terms of community supervision.
 - The likelihood of violations and the value of ongoing supervision diminish as probationers gain stability and demonstrate longer-term success in the community.
- 

Why the Changes?

2. Apply swift, certain, and proportional sanctions

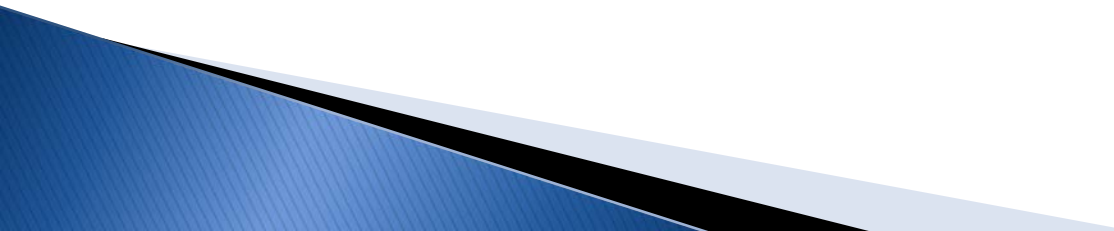
- Responding to violations with immediacy, certainty, and proportionality interrupts negative behavior more effectively than delayed, random, and severe sanctions.

Why the Changes?

3. Limit incarceration times resulting from technical violations

- Just over 50% of prison admissions resulting from a violation of community supervision were for technical violations.

Why the Changes?

- ▶ As a direct result of the findings and recommendations of the task force, the legislature, during the 2021 session, enacted several statutory changes related to the imposition and revocation of probationary sentences.
 - ▶ These changes became effective on July 1, 2021, and “apply to court determinations made on or after that date.”
- 

What's New?

Additional Sentencing Alternatives

- ▶ A trial court *may order* a defendant who is eligible for alternative sentencing to participate in a day reporting center program, a recovery and treatment program (if indicated by a clinical assessment), or another appropriate community-based program.
 - Tenn. Code Ann. § 40-35-104, -303(d)(13).
- ▶ The trial court *shall strongly consider* utilizing available and appropriate sentencing alternatives for any defendant who, as appropriately documented, has a behavioral health need, such as mental illness, or is chemically dependent.

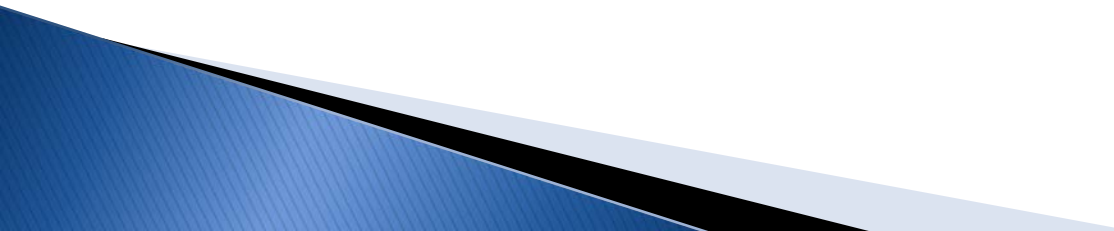
Reduced Probationary Periods

- ▶ A period of probation shall not exceed 8 years for a single conviction or 10 years for multiple convictions.
 - Tenn. Code Ann. § 40-35-303(c)(1).

Reduced Probationary Extensions

- ▶ Upon revocation of a probationary sentence, a trial court may only extend the period of supervision by 1 year.
 - Tenn. Code Ann. § 40-35-308(c)(1).
- ▶ Previously, this term could be increased by 2 years.

To increase the sentence, the court must make additional findings:

- (A) The defendant has repeatedly and intentionally failed to comply with court-ordered treatment programming;
 - (B) The defendant has intentionally violated the conditions of probation regarding contact with the victim or the victim's family; or
 - (C) The defendant has intentionally failed to comply with restitution orders despite having the ability to pay the restitution owed, and extending the period of probation would be more effective than other available options to ensure that the defendant pays the remaining amount of restitution owed.
- 

Increased sentence (cont.)

- ▶ For each subsequent determination that the defendant has violated any of the above provisions, the court may extend probation for an additional period not exceeding one year.

Credit for time served on probation

- ▶ Upon revocation and order of a sentence into effect, a trial court “may give credit against the original judgment by the amount of time the defendant has successfully served on probation and suspension of sentence prior to the violation or a portion of that amount of time.”
 - Tenn. Code Ann. § 40–35–310(a).
- ▶ Previously, the time a defendant served on probation was not counted toward the completion of the sentence unless he or she successfully completed the entire term of probation.
 - *State v. Hunter*, 1 S.W.3d 643, 648 (Tenn. 1999).

Resentencing to probation

- ▶ When suspension of sentence is revoked for a technical violation not involving a new offense, the trial judge may resentence the defendant for the remainder of the unexpired term to a sentence of probation, including the condition of participating in a community-based alternative to incarceration, such as participation in a day reporting center program or a recovery and treatment program.
 - Tenn. Code Ann. § 40-35-310(b)
 - Tenn. Code Ann. § 40-35-311(e)(1)(B)

Limited responses to technical violations

- ▶ “Technical violation” means an act that violates the terms or conditions of probation but does not constitute a new felony, new class A misdemeanor, zero tolerance violation as defined by the department of correction community supervision sanction matrix, or absconding.
 - Tenn. Code Ann. § 40–35–311(d)(3)

Tennessee Department of Correction Community Supervision Sanction Matrix		Supervision Level								
		Standard Level	PSU Transitional	Elevated DRC 3	PSU Intermediate	Restricted DRC 2	PSU Secondary	Special Restricted DRC 1	PSU Primary	
A t t e n d e	Unemployed - Failure to Provide Verification/Seek Employment EMPX	Level 1	8 hours of CSW w/in 14 days-CSW1 Verbal Warning-Officer Intervention-VBW1 Attend Job Readiness w/in 30 business days-AJC1	16 hours of CSW w/in 30 days-CSW2 Written Warning-Officer Intervention-WS2 Attend Job Readiness w/in 20 business days-AJC2						
	Non-payment of Financial Obligation NFWO		Attend Victim Impact-AV1 Payment Plan Established-PPE1 8 hours of CSW w/in 14 days-CSW1 Verbal Warning-Officer Intervention-VBW1	Attend Victim Impact-AV2 Payment Plan Established-PPE2 16 hours of CSW w/in 30 days-CSW2 Written Warning-Officer Intervention-WS2			Curfew for 90 Days-CUR3 Attend Victim Impact-AV3 Payment Plan Established-PPE3 24 hours CSW w/in 45 days-CSW3			
	Failure to Comply with Lawful Instructions/ Special Conditions of Supervision FCLS		Curfew for 30 days-CUR1 Attend Pro-Social Life Skills-PSL1 8 hours of CSW w/in 14 days-CSW1 Increase Supervision Level-30 days-ISL1 Verbal Warning-Officer Intervention-VBW1 GPS Monitoring-30 days-Sex/CIP Offenders-GPM1	Curfew for 60 days-CUR2 Attend Pro-Social Life Skills-PSL2 16 hours of CSW w/in 30 days-CSW2 Increase Supervision Level-60 days-ISL2 Written Warning-Officer Intervention-WS2 GPS Monitoring - 60 days -Sex/CIP Offenders- GPM2			RF Monitoring-RFM3 Curfew for 90 Days-CUR3 24 hours CSW w/in 45 days-CSW3 Attend Pro-Social Life Skills-PSL3 GPS Monitoring - 90 days-Sex/CIP Offenders-GPM3			
	Failure to Report Violations/Criminal Behavior FRVC									
	Failure to attend Programming/Treatment/ Sex Offender FAPT									
	Moved w/o Permission or Notification (excluding sex offenders), Leaving the County w/o Permission, or Violation of Curfew MOPC		Sanctions shall be imposed w/in 3 business days	RF Monitoring-RFM1 Curfew for 30 days-CUR1 Restrict Travel Privilege-30 days-RTP1 Increase Supervision Level-30 days-ISL1 Verbal Warning-Officer Intervention-VBW1 GPS Monitoring-30 days-Sex/CIP Offenders-GPM1	RF Monitoring-RFM2 Curfew for 60 days-CUR2 Restrict Travel Privilege-60 days-RTP2 Increase Supervision Level-60 days-ISL2 Written Warning-Officer Intervention-WS2 GPS Monitoring - 60 days -Sex/CIP Offenders- GPM2			RF Monitoring - RFM3 Curfew for 90 Days-CUR3 Restrict Travel Privilege-90 days-RTP3 Increase Supervision Level-90 days-ISL3 GPS Monitoring - 90 days-Sex/CIP Offenders-GPM3		
	One Positive Drug Screen/Refusal to Submit to Drug Screen (Alcohol use -Sex Offender Only) OPRD			Refer to CRC for evaluation-CRC1 Increase Supervision Level-30 days-ISL1 Submit Weekly Schedule for 30 Days-WSA1 3 Additional Drug Screens w/in 30 days-ADS1 GPS Monitoring-30 days-Sex/CIP Offenders-GPM1 Sch. appointment with FSW w/in business 30 days-SFS1	Refer to CRC for evaluation-CRC2 Increase Supervision Level-60 days-ISL2 Submit Weekly Schedule for 60 Days-WSA2 2 Additional Drug Screens w/in 60 days-ADS2 GPS Monitoring - 60 days -Sex/CIP Offenders- GPM2 Sch. appointment with FSW w/in 20 business days-SFS2			Curfew for 90 Days-CUR3 Refer to CRC for evaluation-DRC3 Increase Supervision Level-90 days-ISL3 3 Additional Drug Screens in 90 days-ADS3 Submit Weekly Schedule for 90 days-WSA3 GPS Monitoring - 90 days-Sex/CIP Offenders-GPM3 Sch. appointment with FSW w/in 15 business days-SFS3		
	Failure to Report as Instructed FALR			Curfew for 30 days-CUR1 Restrict Travel Privilege-30 days-RTP1 Increase Supervision Level-30 days-ISL1 GPS Monitoring-30 days-Sex/CIP Offenders-GPM1	Curfew for 60 days-CUR2 Restrict Travel Privilege-60 days-RTP2 Increase Supervision Level-60 days-ISL2 GPS Monitoring - 60 days -Sex/CIP Offenders- GPM2			RF Monitoring-RFM3 Curfew for 90 Days-CUR3 Restrict Travel Privilege-90 days-RTP3 Increase Supervision Level-90 days-ISL3 GPS Monitoring-90 days-Sex/CIP Offenders-GPM3		
	New Misdemeanor Charge/Citation Class B or below (Do not use for Sex Offender) NMCB		Level 2	RF Monitoring-RFM2 Curfew for 60 days-CUR2 Attend Pro-Social Life Skills-PSL2 Increase Supervision Level-60 days-ISL2 GPS Monitoring - 60 days -Sex/CIP Offenders- GPM2				Curfew for 90 days-CUR3 Attend Pro-Social Life Skills-PSL3 Restrict Travel Privilege-90 days-RTP3 Submit Weekly Schedule -90 Days-WSA3 Increase Supervision Level-90 days-ISL3 GPS Monitoring-90 days-Sex/CIP Offenders-GPM3		
	Terminated from Programming/Treatment/ Non-Compliant Sex Offender Treatment TRPT		Supervisor Approval Sanctions shall be imposed w/in 48 hours	RF Monitoring-RFM2 Curfew for 60 days-CUR2 Restrict Travel Privilege-60 days-RTP2 Submit Weekly Schedule for 60 Days-WSA2 GPS Monitoring - 60 days -Sex/CIP Offenders- GPM2				RF Monitoring-RFM3 Curfew for 90 days-CUR3 Increase Supervision Level - 90 Days - ISL3 GPS Monitoring - 90 days-Sex/CIP Offenders-GPM3		
In a Six Month Period More than one Positive Drug Screen-All Offenders More than one Alcohol use -Sex Offenders Only MPDS		Curfew for 60 days-CUR2 Refer to CRC for evaluation-CRC2 Increase Supervision Level-60 days-ISL2 2 Additional Drug Screens w/in 60 days-ADS2 GPS Monitoring - 60 days -Sex/CIP Offenders- GPM2 Sch. appointment with FSW w/in 20 business days-SFS2	RF Monitoring-RFM3 Refer to DRC for evaluation-DRC3 3 Additional Drug Screens in 90 days-ADS3 Increase Supervision Level - 90 Days - ISL3 GPS Monitoring for 90 days-Sex/CIP Offenders-GPM3 Sch. appointment with FSW w/in business 15 days-SFS3							
Failure to Comply with Sanction FALS	Level 3 Supervisor Approval	RF Monitoring-RFM3 Refer to DRC for evaluation-DRC3								
Consistently Fails to Report/ Failure to comply with Sex Offender Treatment Contract** FALC	Sanctions shall be imposed w/in 24 hours	3 Additional Drug Screens in 90 days-ADS3 Increase Supervision Level - 90 Days - ISL3 GPS Monitoring for 90 days-Sex/CIP Offenders-GPM3 Sch. appointment with FSW w/in business 15 days-SFS3								
Possession of Firearm-WFIR										
Positive Drug Screen for Methamphetamine-ZTPD										
3 or more non-compliance with Level 1 Sanctions in a year-NC31 2 or more non-compliance with Level 2 Sanctions in a year-NC32 Any non-compliance with Level 3 Sanctions in a year-NC33										
3rd Level 2 Sanction applied w/in 6 months on separate instances- MST3	Zero Tolerance 2708									
Refusal to submit to Residence Search-RFRS										
New Criminal Class A Misdemeanor or Felony Arrest/ Conviction (Any arrest/charge for Sex Offenders) NCAC										

Zero Tolerance

Zero Tolerance

Contact notes in the above sanction columns end in the appropriate sanction level (example: Verbal Warning-Officer Intervention VBW1. All sanctions applied shall be entered in TOMIS and closed when completed with either O-Successfully completed or V-Violation Warrant issued.

Zero tolerance violations

- ▶ Possession of a firearm
- ▶ Positive drug screen for methamphetamine
- ▶ Three or more non-compliance in one year with Level 1 sanctions
- ▶ Two or more non-compliance in one year with Level 2 sanctions
- ▶ Non-compliance in one year with Level 3 sanctions
- ▶ Third Level 2 sanction or above violation within a six-month period on separate instances
- ▶ Refusal to submit to residence search
- ▶ New criminal Class A misdemeanor or felony arrest/conviction or any arrest for sex offender

No revocation for 1st technical violation

- ▶ Upon a finding of a probation violation, a trial court shall not revoke probation “based upon one (1) instance of technical violation or violations.”
 - Tenn. Code Ann. § 40-35-311(d)(2).

Limited terms of incarceration for subsequent technical violations

- ▶ Upon a revocation of probation for a second or subsequent technical violation, the trial court is limited to the following terms of incarceration:
 - 15 days for a first revocation
 - 30 days for a second revocation
 - 90 days for a third revocation
 - The remainder of the sentence for a fourth or subsequent revocation.
- ▶ Tenn. Code Ann. § 40-35-311(e)(1)(A).

When can the court order a sentence of incarceration into effect?

- ▶ When a trial court finds by a preponderance of the evidence that the defendant committed any of the following:
 - A new felony
 - A new Class A misdemeanor
 - A zero tolerance violation (as defined by the TDOC matrix)
 - Absconded
- ▶ Tenn. Code Ann. § 40-35-311(e)(2).
- ▶ The court may reduce term by the amount of time the defendant successfully served on probation. Tenn. Code Ann. § 40-35-311(e)(2).

Let's not forget about graduated sanctions . . .

- ▶ As required by statute, the Tennessee Department of Correction adopted a system of graduated sanctions for violations of the conditions of community supervisions.
 - Tenn. Code Ann. § 40-28-303(a).

Let's not forget about graduated sanctions . . .

- ▶ “Graduated sanction” means any of a wide range of non-prison offender accountability measures and programs, including, but not limited to:
 - Electronic supervision tools;
 - Drug and alcohol testing or monitoring;
 - Day or evening reporting centers;
 - Rehabilitative interventions such as substance abuse or mental health treatment;
 - Reporting requirements to probation and parole officers;
 - Community service or work crews; and
 - Residential treatment facilities.

- ▶ Tenn. Code Ann. § 40-28-301(4).

Let's not forget about graduated sanctions . . .

- ▶ “The failure of the supervised individual to comply with a sanction shall constitute a violation of probation, parole, or post-release supervision.”
 - Tenn. Code Ann. § 40-28-305(c).

Let's not forget about graduated sanctions . . .

- ▶ While a trial court may consider an individual's supervision and sanctions history when adjudicating subsequent violations, the court shall not revoke the term of community supervision or impose additional sanctions for a violation upon which a graduated sanction was successfully imposed.
 - Tenn. Code Ann. § 40-28-305(e).

Emerging Issues

Most issues will likely be resolved at the trial level

- ▶ Probation appeals are extraordinarily difficult for defendants to win.
- ▶ Historically, the Court of Criminal Appeals has been very deferential to trial courts when it comes to handling probationers.
- ▶ New Tennessee Supreme Court opinion addressing the standard of review in probation revocation cases:
 - *State v. Craig Dagnan*, __S.W.3d __, 2022 WL 627247, (Tenn. Mar. 4, 2022).

Sessions judges/courts are trial judges/court

- ▶ Tenn. Code Ann. § 16-15-401(b) grants jurisdiction to general sessions courts regarding suspension and revocation of sentences.
 - § 16-15-401 points to title 40, section 29. That provision covered the terms of probation prior to the Sentencing Reform Act of 1989.
 - For whatever reason, 16-15-401 was not updated in 1989, but the intent still runs through that general sessions judges treat the terms of probation the same as a trial court (otherwise they arguably lacked the authority to sentence someone to probation for the last 30+ years).
- ▶ Tenn. Code Ann. § 40-35-311(a): When dealing with issuance of warrants, the statute names general sessions courts (“... whether the warrant is issued by a general sessions court judge or the judge of a court of record....”).

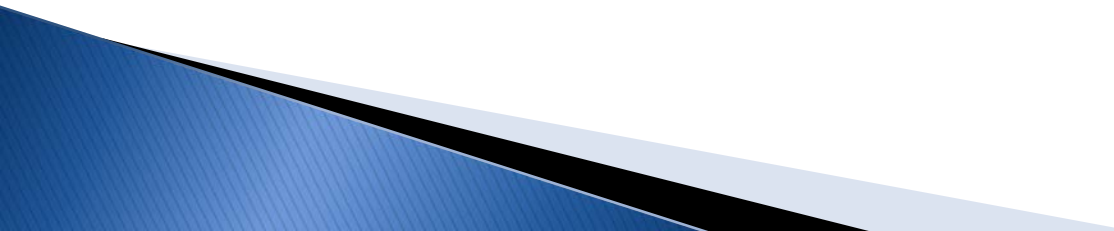
New laws apply to felonies and misdemeanors

- ▶ Tenn. Code Ann. § 40-35-104(a): A defendant convicted of a felony or a misdemeanor in this State shall be sentenced in accordance with this chapter.
 - Section (c)(3): A sentence of confinement that is suspended upon a term of probation supervision that may include community supervision or restitution or both. (probation is an option under this chapter).
- ▶ Tenn. Code Ann. § 40-35-311(a): Regardless of whether the defendant is on probation for a misdemeanor or felony...
 - Subsections (d) and (e) – dealing with technical violations – are also under § 40-35-311.

Proposed Law Change

- ▶ **HB 2118/SB2288**
- ▶ **As introduced, allows a court to revoke a defendant's probation and suspension of sentence for a misdemeanor offense based upon one instance of a technical violation or violations.**
- ▶ **Specifies that the court may revoke the defendant's probation and suspension of sentence, in full or in part, and may sentence the defendant to a sentence of probation for the remainder of the unexpired term.**

Failure to report v. Absconding

- ▶ Failure to Report = Technical Violation
 - ▶ Absconding = Non-Technical Violation
 - ▶ Frequent Issue: Did Defendant fail to report or did he abscond?
- 

Absconding

- ▶ Black's Law Dictionary defines abscond as:
 - 1. *To depart secretly* or suddenly, esp. to avoid arrest, prosecution, or service of process.
 - 2. *To leave a place*, usu. hurriedly, with another's money or property.
- ▶ In *State v. Brookshire* and *State v. Wakefield*, the Court of Criminal Appeals deferred to the Black's Law Dictionary definition of "abscond" in reviewing probation violations/revocations.
 - 2012 WL 627165, at *3 n.4 (Tenn. Crim. App. Feb. 28, 2012) 2003 WL 22848965, at *1 (Tenn. Crim. App. Nov. 25, 2003)

Tenn. Bd. of Probation & Parole, “Community Corrections Program Standards” (approved by TDOC July 1, 2020)

- ▶ “S4.14 Written policy specifies the type of actions required to locate and recover absconders prior to the issuance of a violation warrant. An absconder is defined as an offender with whom no contact has been made for a maximum of thirty (30) days.”
- ▶ Glossary of Terms: “An absconder is: An offender who avoids or flees from supervision by concealing his or her whereabouts. There has been no face-to-face contact for (30) days. *This differs from “failure to report” in that the officer’s investigation reveals that the offender has obviously and most likely left residence, job and geographic area with no intent to voluntarily return.*” (emphasis added)

Case Law

- ▶ *State v. Thomas* implies, though does not explicitly hold, that technical violations include “repeatedly failing to report, . . . failing to provide proof of employment, . . . moving without notifying . . . probation officer, and . . . not having a successful home visit completed.”
 - 2011 WL 6016916, at *2 (Tenn. Crim. App. Dec. 5, 2011).
- ▶ *State v. Ward* describes allegations that defendant “(1) failed to report to his probation officer; (2) failed to pay court costs; (3) failed to attend an administrative case review committee meeting; (4) failed to respond to Board of Probation and Parole letters and telephone calls; and (5) failed to provide verification of employment” all as “technical violations.”
 - 2013 WL 793213, at *1, *4 (Tenn. Crim. App. Mar. 1, 2013).
- ▶ *State v. Potter* agrees with trial court’s acknowledgement “that the failure to report and the failure to attend the counseling meeting . . . were ‘technical violations.’”
 - 2014 WL 689643, at *4 (Tenn. Crim. App. Feb. 21, 2014).

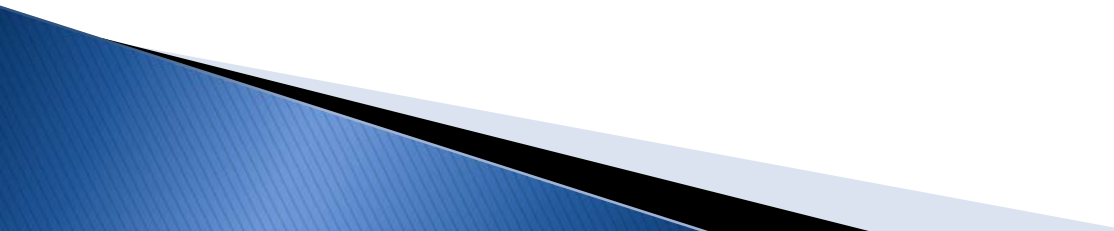
Case Law (cont.)

- ▶ *State v. Brookshire* lists failing to report and absconding as separate allegations in the probation violation report and warrant; the trial court's finding of absconding was affirmed on appeal by referring to the Black's Law Dictionary definition and by detailing proof that the defendant had left the county and state, had failed to report to his probation officer, and had pled guilty to two charges of failure to appear.
 - Takeaway: More than mere failure to report is necessary to find absconder status
 - 2012 WL 627165, at *3 (Tenn. Crim. App. Feb. 28, 2012). (takeaway: more than mere failure to report was necessary to find absconder status)

Bottom Line:

- ▶ Failing to report has historically been considered a technical violation separate and apart from absconding, which is not considered a technical violation.
- ▶ Failing to report is a **passive omission** or failure to comply with conditions, whereas absconding is an **affirmative action** with intent to leave or evade supervision altogether.

Miscellaneous Issues – Plea Agreements

- ▶ Probation Supervision Level in Plea Agreements
 - ▶ Some Plea Agreements call for defendants to be classified at highest level of supervision
 - ▶ This means most violations would be non-technical under the TDOC sanctions matrix
 - ▶ Unclear if those agreements are enforceable
- 

Misc. Issues – Interplay with Graduated Sanctions

- ▶ How do you count the number of technical violations?
 - *Example:* Defendant has two positive drug screens for marijuana which were handled internally by probation officer. After third positive drug screen, a warrant is filed. How many technical violations have there been for purposes of revocation?

Practical Considerations

Release/Bond Pending Revocation Hearing

- ▶ Tenn. R. Crim. P. 32(g) permits a defendant to be released pending a probation revocation hearing.
 - *State v. Burgins*, 464 S.W.3d 298, 304 n.2 (Tenn. 2015)
- ▶ Tenn. Code Ann. § 40-35-311(e)(1) limits terms of incarceration for technical violations of probation.
- ▶ Are standard “open court” or “no bond” probation violation warrants in tension with incarceration limits?
 - Experiences or best practices to date?

Revocation Hearings – Evidence

- ▶ New arrest or indictment, standing alone, may not be used to revoke probation. Presentation of proof “in the usual form of testimony” is required. *State v. Harkins*, 811 S.W.2d 79, 83 (Tenn. 1991).
- ▶ Reliable hearsay is admissible at a revocation hearing if the opposing party is permitted an opportunity to rebut it. *See, e.g.*, Tenn. Code Ann. § 40–35–209(b).
 - Victim’s preliminary hearing testimony admissible over objection only if the trial court finds good cause for its admission and that the evidence is reliable.
 - *State v. Wiley*, No. E2004–01463–CCA–R3–CD, 2005 WL 1130222 (Tenn. Crim. App. May 13, 2005) (no app. filed).

Community-based alternatives to incarceration

- ▶ Tenn. Code Ann. § 40-35-104(c)(9)
 - Treatment programs – Intensive Outpatient
 - Treatment programs – Inpatient
 - Mental health / Recovery courts
 - 4:13 Strong
 - Day Reporting Centers
 - <https://www.tn.gov/correction/redirect---rehabilitation/day-reporting.html>
- ▶ Intensive probation
- ▶ Participation in a “Community Corrections program”
 - *State v. Green*, No. E2008-02576-CCA-R3-CD, 2009 WL 3806126 (Tenn. Crim. App. Nov. 1, 2009).

Ethical considerations for problem-solving courts

- ▶ Rule 2.9, Code of Judicial Conduct, generally prohibits ex parte communications
 - Comment [4] addresses the drug court issue
 - Judges permitted to assume a more “interactive role with parties, treatment providers, probation officers, social workers, and others”
- ▶ Judge may not be truly detached
 - Direct engagement with participants
 - Active role on “therapeutic team”
- ▶ Disqualification may be necessary if ex parte communication “becomes an issue at subsequent adjudicative proceeding”
 - RJC 2.11(A), and (A)(1)
- ▶ Disclosure and waiver provisions of RJC 2.11(C) applicable

Sentencing credit for “successful” probation

- ▶ Upon revocation under Tenn. Code Ann. § 40–35–311, court may order the original judgment to be in full force and effect and **“may give credit against the original judgment by the amount of time the defendant has successfully served on probation [or a portion of that time].”**
 - Tenn. Code Ann. § 40–35–310(a)
 - Experience re: annotation of that time on judgment?

Separation of Powers

- ▶ Sentencing has long been understood to be fundamentally a judicial power.
- ▶ The imposition of sentence, including the terms and conditions of supervised release, is a core judicial function.
 - *State v. Price*, No. W2017-00677-CCA-R3-CD, 2018, at *10-11 (Tenn. Crim. P. Aug. 14, 2018) (case citations included) (rev'd on justiciability grounds)
- ▶ Do the dispositional limitations of Tenn. Code Ann. § 40-35-311(e)(1) impermissibly encroach on the judicial branch of government?

QUESTIONS?

