S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

April 29, 2013

Opinion No. 13-35

Proposed Criminal Offense of Continuous Sexual Abuse of a Child

QUESTIONS

1. Would a conviction under House Bill 1293/Senate Bill 1362, 108th General Assembly, 1st Session (2013), as amended by House Criminal Justice Committee Amendment No. 1 and Senate Judiciary Committee Amendment No. 1 (hereinafter "HB1293"),[1] which creates the criminal offense of "continuous sexual abuse of a child," be defensible where a jury is not unanimous as to what acts constitute the elements of the offense but is unanimous in determining that the requisite number of acts took place?

2. If enacted, would HB1293 constitutionally enable prosecution in any county in which an element of the offense occurred?

3. Would any other provision of the Tennessee or United States Constitutions invalidate HB1293?

OPINIONS

1. Yes. While the Tennessee Constitution requires the unanimity of twelve jurors in criminal cases, it does not require that a jury unanimously agree to the facts supporting a particular element of a crime so long as the jury agrees that the defendant is guilty of the crime charged.

2. Yes. If enacted, HB1293 would allow for prosecution of the offense of continuous sexual abuse of a child in any county in which an element of the offense occurred without raising constitutional concerns. However, under HB1293 as amended, any conviction for an individual incident of sexual abuse that took place outside of the county in which the charges were filed would violate the Tennessee Constitution.

[1] This Office was requested to render an opinion on these three questions regarding the original version of HB1293. However, since the bill has been amended, this Office is opining on the bill as amended. Although initially this Office was also asked to determine whether there was any constitutional prohibition on a portion of the original bill that would have created a new rule of evidence, this question is not addressed because HB1293 as amended no longer contains that proposal. HB1293 was not enacted during the 1st Session of the 108th General Assembly. *See* http://www.legislature.state.tn.us/.

3. HB1293 is defensible against a challenge that it violates the *ex post facto* prohibition contained in the Tennessee and United States Constitutions. HB1293 mandates that at least one of the predicate acts of sexual abuse must take place after the effective date of the legislation. Thus, as a continuing offense, the crime would not be completed until after the date the legislation goes into effect. This Office is unaware of any other constitutional deficiency with HB1293.

ANALYSIS

HB1293, designated the "Child Protection Act," creates the crime of continuous sexual abuse of a child. Under HB1293, the criminal offense of continuous sexual abuse of a child takes place when a person engages in multiple acts of sexual abuse of one or more children over a defined period of time. HB1293, § 2 (§ 39-13-533 (a)). HB1293 establishes penalties for the commission of this crime, HB1293 § 2 (§ 39-13-533(c)), defines how notice of the elements of the crime are presented to the court and the defendant, *id*. (§ 39-13-533(d)), identifies the elements of the crime upon which a jury must unanimously agree, *id*. (§ 39-13-533(e)), and alters the release eligibility for a person convicted of the crime of continuous sexual abuse of a child, HB1293 § 3. A copy of the amendment to HB1293, which rewrites HB1293 as originally filed, as well as the original HB1293 are attached to this opinion.

1. HB1293 is defensible against a claim that its provisions violate federal and Tennessee constitutional requirements for jury unanimity. Although the Fourteenth Amendment does not impose upon the states the United States Constitution's requirement of jury unanimity, "there should be no question that the unanimity of twelve jurors is required in criminal cases under our state constitution." *State v. Brown*, 823 S.W.2d 576, 583 (Tenn. Crim. App. 1991) (citing *State v. Brown*, 762 S.W.2d 135, 137 (Tenn. 1988) and Tenn. Const. art. I, § 6). Thus, the jury may not render a "patchwork verdict" based upon different offenses in evidence. *Id*. (quoting *United States v. Duncan*, 850 F.2d 1104, 1110 (6th Cir. 1988)). However, Tennessee "cases have not required that a jury unanimously agree as to facts supporting a particular element of a crime so long as the jury agrees that the appellant is guilty of the crime charged." *State v. Adams*, 24 S.W.3d 289, 297 (Tenn. 2000). "It is only when the evidence can be placed in 'distinct conceptual groupings,' of which each would constitute a crime under the same count, does the concern for unanimity arise." *Brown*, 823 S.W.2d at 583-84 (quoting *United States v. Gipson*, 553 F.2d 453, 458 (5th Cir. 1977)). For instance, where the State has presented evidence of multiple instances of touching to support a single charge of aggravated sexual battery, so long as the jurors agree that a defendant engaged in sexual contact on the date charged, a defendant has been afforded his constitutional right to juror unanimity "even though some of the jurors may have based their finding on one touching, and others may have based their finding on the other touching." *State v. Johnson*, 53 S.W.3d 628, 633 (Tenn. 2001).

Tennessee courts have treated continuing offenses differently in the context of the unanimity requirement. That a single offense involves "numerous discrete parts does not put the defendant at risk of a non-unanimous jury verdict . . . .[W]hen the only offense charged requires proof of a continuous course of conduct, the election requirement does not apply." *State v. Hoxie*, 963 S.W.2d 737, 743 (Tenn. 1998). For example, where the State presents evidence of numerous predicate acts to the offenses of telephone harassment or stalking, it does not need to

elect the incidents relied upon because the charged offenses require proof of a continuous course of conduct made up of repetitive acts. *Id*. Even though continuing offenses "can be committed by multiple discrete acts over a period of time," they "generally stem from a single motivation or scheme." *State v. Adams*, 24 S.W.3d 289, 294 (Tenn. 2000). "An offense punishes a continuing course of conduct only when 'the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that [the legislature] must assuredly have intended that it be treated as a continuing one.'" *Id*. at 295 (quoting *State v. Legg*, 9 S.W.3d 111, 116 (Tenn. 1999)). Therefore, courts "will look to the statutory elements of the offense and determine whether the elements of the crime themselves contemplate punishment of a continuing course of conduct." *Id*.

In *Richardson v. United States*, 526 U.S. 813 (1999), the United States Supreme Court held that a jury must agree unanimously about which specific violations make up the federal offense of engaging in a continuing criminal enterprise. However, in its discussion, the Court distinguished "state statutes making criminal such crimes as sexual abuse of a minor" that permit jury disagreement about the underlying incidents. *Id*. at 821. The Court noted that the United States Constitution does not impose a jury-unanimity requirement upon the states and that "state practice may well respond to special difficulties of proving individual underlying criminal acts, which difficulties are absent here." *Id*. Since *Richardson*, state statutes similar to HB1293 have generally survived judicial scrutiny. *See State v. Ramsey*, 124 P.3d 756 (Ariz. Ct. App. 2005) (holding that *Richardson*'s analysis serves "to uphold, not invalidate" the Arizona statute creating the offense of continuous sexual abuse of a child); *State v. Sleeper*, 846 A.2d 545 (N.H. 2004) (distinguishing New Hampshire's statute based upon its treatment of the underlying acts of sexual abuse as well as the "special circumstances" of offenses based on a pattern of sexual assaults); *Martin v. State*, 335 S.W.3d 867 (Tex. App. 2011) (holding constitutional the criminal offense of continuous sexual abuse of a young child so long as the jury unanimously agrees upon the number of acts committed); *State v. Johnson*, 627 N.W.2d 455 (Wis. 2001) (finding that the Supreme Court's analysis in *Richardson* does not require that a jury unanimously agree to "the predicate acts of sexual assault"). *But see State v. Rabbago*, 81 P.3d 1151 (Haw. 2003) (holding offense of continuous sexual assault of a minor not a "continuing offense" arising from continuous course of conduct, and thus juror unanimity required as to criminal acts alleged), *superseded by constitutional amendment*, Haw. Const. art. I, § 25.

HB1293 merely requires that the jury unanimously find that a requisite number of acts of sexual abuse of one or more children occur within a defined time frame. *See* HB1293, § 2 (§ 39-13-533 (2)). Thus, if the crime as charged alleged five separate incidents of sexual abuse of five minor children occurred over a period of ninety days or more, the jury could convict under HB1293, § 2 (§ 39-13-533 (2)(B) & (b)(1)) if the jury unanimously found that three separate incidents of sexual abuse of three minor children occurred over a period of ninety days or more *even* if the jury were not unanimous on which three of the five separate incidents occurred. *See Richardson v. United States*, 526 U.S. at 821; *State v. Hoxie*, 963 S.W.2d at 743. Because the predicate acts of abuse serve as an element of the proposed offense and the legislation contemplates the punishment of a continuing course of conduct, the requirement of jury unanimity does not preclude a conviction where the jury does not agree as to which acts took place so long as it unanimously agrees that the defendant performed the requisite number of acts during the necessary time period.

While the scenario contemplated by HB1293 presents no unanimity problem for the offense of continuing sexual abuse of a child, a constitutional problem could arise should the jury return multiple convictions for the offenses based on the predicate acts (e.g. rape of a child, aggravated sexual battery, etc.). In that situation, a jury must agree as to which course of conduct constitutes each individual offense. *See Brown*, 823 S.W.2d at 583.

2. The Tennessee Constitution provides criminal defendants with the right to a jury trial in the county of the commission of the offense. Tenn. Const. art. I, § 9; *State v. Young*, 196 S.W.3d 85, 101 (Tenn. 2006). "[W]here different elements of the same offense are committed in different counties, 'the offense may be prosecuted in either county.'" *Young*, 196 S.W.3d at 102 (quoting Tenn. R. Crim. P. 18(b)). Thus, so long as any element of the offense takes place in a county, prosecution within that county is permissible.

However, HB1293 as amended may create a constitutional problem of venue for the individual incidents of sexual abuse charged as separate violations. As initially proposed, HB1293 allowed the State to charge separately only the individual incidents of abuse "committed within the county in which the charges are filed." HB1293 as originally filed, § 2 (§39-13-533(g)). HB1293 as amended removes this language and thus allows the jury to return a conviction for an individual incident of sexual abuse for which no element took place in the county where the charges were filed. HB1293, §2 (§39-13-533(f)). For example, a defendant could be charged in one county with continuous sexual abuse of a child where some predicate instances of abuse took place in that county and some took place in another county. The bill as amended allows the State to charge the defendant for the individual instances of abuse from the other county despite no element of the offense having occurred in that county. Any conviction for an offense that took place entirely in a county other than the one in which the offense was charged would violate Article I, Section 9 of the Tennessee Constitution.

3. The proposed legislation requires that one of the incidents of sexual abuse of a child occur on or after July 1, 2013. Both the Tennessee Constitution and the Constitution of the United States prohibit *ex post facto* laws. U.S. Const. art. I, § 10, cl. 1; Tenn. Const. art. 1, § 11. *Ex post facto* laws are those that make an act criminal that was not criminal at the time a person committed it. *Miller v. State*, 584 S.W.2d 758, 761 (Tenn. 1979). "It is well-settled that when a statute is concerned with a continuing offense, 'the Ex Post Facto clause is not violated by application of a statute to an enterprise that began prior to, but continued after, the effective date of [the statute].'" *United States v. Harris*, 79 F.3d 223 (2d Cir. 1996) (quoting *United States v. Torres*, 901 F.2d 205, 226 (2d Cir. 1990)); *see also Agee v. State*, 111 S.W.3d 571 (Tenn. Crim. App. 2003) (finding that because conspiracy is a continuing offense, application of the amended conspiracy statute did not violate the *ex post facto* prohibition where the conspiracy continued past the statute's enactment). Because HB1293 requires that one of the incidents of sexual abuse occur on or after the effective date of the legislation, *see* HB1293, § 2 (§ HB1293, § 39-13-533 (2)), it is defensible against *ex post facto* claims. This Office is unaware of any other constitutional deficiency with HB1293.

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

BENJAMIN A. BALL
Assistant Attorney General

Requested by:

The Honorable Tony Shipley
State Representative
114 War Memorial Building
Nashville, Tennessee 37243-0122

James W. Kirby
Executive Director
Tennessee District Attorneys General Conference
226 Capitol Boulevard, Suite 800
Nashville, Tennessee 37243-0890

SENATE BILL 1362
By Yager

HOUSE BILL 1293

By Dean

AN ACT to amend Tennessee Code Annotated, Title 39 and Title 40, relative to criminal law.

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

SECTION 1. This act shall be known and may be cited as the "Child Protection Act".

SECTION 2. Tennessee Code Annotated, Title 39, Chapter 13, Part 5, is amended to add the following new, appropriately designated section:

39-13-533

(a) As used in this section:

(1) "Sexual abuse of a child" means to commit an act upon a minor child that is a violation of:

(A) § 39-13-502, if the child is more than thirteen (13) but less than eighteen (18) years of age;

(B) § 39-13-503, if the child is more than thirteen (13) but less than eighteen (18) years of age;

(C) § 39-13-504;

(D) § 39-13-522;

(E) § 39-13-527;

(F) § 39-13-529(a);

(G) § 39-13-531; or

(H) § 39-13-532.

(2)"Multiple acts of sexual abuse of a child" means:

(A) Engaging in at least one incident of sexual abuse of a child upon three (3) or more different minor children on separate occasions, provided that at least one such incident occurred within the county in which the charge is filed and that one (1) such incident occurred on or after July 1, 2013;

(B) Engaging in three (3) or more incidents of sexual abuse of a child involving the same minor child on separate occasions, provided that at least one such incident occurred within the county in which the charge is filed and that one (1) such incident occurred after July 1, 2013; or

(C) Engaging in five (5) or more incidents of sexual abuse of a child involving two (2) or more different minor children on separate occasions provided that at least one (1) such incident occurred within the county in which the charge is filed and that one such incident occurred on or after July 1, 2013.

(b) A person commits continuous sexual abuse of a child who:

(1) Over a period of ninety (90) days or more, engages in multiple acts of sexual abuse of a child as defined in subdivision (a)(2)(A) or (B); or

(2) Over a period of less than ninety (90) days, engages in multiple acts of sexual abuse of a child as defined in subdivision (a)(2)(C).

(c)

(1) A violation of subsection (b) is a Class A felony if at least three (3) of the acts of sexual abuse of a child constitute a violation of the following:

(A) § 39-13-502, if the child is more than thirteen (13) but less than eighteen (18) years of age;

(B) § 39-13-503, if the child is more than thirteen (13) but less than eighteeen (18) years of age;

(C) § 39-13-504;

(D) §39-13-522;

(E) §, 39-13-529(a); or

(F) § 39-13-531.

(2) A violation of subsection (b) is a Class B felony if at least three (3) of the acts of sexual abuse of a child constitute a violation of the following:

(A) § 39-13-527; or

(B) §39-13-532.

(3) A violation of subsection (b) is a Class B felony if there are less than three (3) acts of sexual abuse of a child under subsection (c)(1) but there are at least three (3) acts under any combination of subsection (c)(1) and (c)(2).

(d) In a prosecution under this section, the state may file the charge in any county in which one of the multiple acts of sexual abuse occurred.

(e) At least thirty (30) days prior to trial, the state shall file with the court a written notice identifying the multiple acts of sexual abuse of a

child upon which the violation of this section is based. The notice should include the identity of the victim, the statutory offense violated and the jurisdiction in which the crime occurred. If the separate incidents of sexual abuse of a child include incidents occurring within another judicial district, the notice shall be endorsed in writing by the appropriate district attorney general signifying consent to join such incident occurring in that judicial district within the charge of continuous sexual abuse of a child. When jeopardy has attached for a violation of this section, the inclusion of any incident in the notice which occurred outside the county where the charge is filed shall operate as a bar to prosecution of the incident in another county as a separate offense. Upon good cause, and where the defendant was unaware of the predicate offenses listed in the notice, the trial court may grant a continuance to facilitate proper notification of the incidents of sexual abuse of a child and for preparation by the defense of such incidents specified in the statement.

(f) If more incidents of sexual abuse are included in the notice than required by this section, a jury is not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant. The jury must agree unanimously that the defendant:

(1) During a period of ninety (90) or more days in duration, committed three (3) or more acts of sexual abuse of a child; or

(2) During a period of less than ninety (90) days in duration, committed five (5) or more acts of sexual abuse of a child against at least two (2) different children.

(g) The state may charge alternative violations of this section and of the separate offenses committed within the county in which the charges are filed and described in the notice filed by the district attorney occurring within the same time period. The separate incidents shall be alleged in separate counts and joined in the same action. A person may be convicted either of one (1) criminal violation of this section, or for one (1) or more of the separate incidents of sexual abuse of a child committed within the county in which the charges were filed, but not both. The state shall not be required to elect submission to the jury of the several counts. The jury shall be instructed to return a verdict on all counts in the indictment. In the event that a verdict of guilty is returned on a separate count that was included in the notice of separate incidents of sexual abuse of a child and the jury returns a verdict of guilty for a violation of this section, at the sentencing hearing the trial judge shall merge the separate count into the conviction under this section and only impose a sentence under this section. A conviction for a violation of this section bars the prosecution of the individual incidents of sexual abuse of a child as separate offenses described in the pre-trial notice filed by the state and presented to the jury. A prosecution for a violation of this section does not bar a prosecution in the same action for individual incidents of sexual abuse not identified in the state's pre-trial notice. The state shall be required to elect as to those individual incidents of sexual abuse not contained in the pre-trial notice prior to submission to the jury. A conviction for such elected offenses shall not be subject to merger at sentencing.

(h) Notwithstanding any other law to the contrary, a person convicted of a violation of this section shall be punished by imprisonment and shall be sentenced from within the full range of punishment for the offense, between Ranges I—III. In addition to the factors listed in §§ 40-35-113—114, the court shall consider the following:

(1) The need for deterrence;

(2) The number of victims;

(3) The number of incidents of sexual abuse committed by the defendant upon the victim;

(4) The impact of the offense upon the victim;

(5) The gravity of the offense; and

(6) Any other factor that justice requires.

SECTION 3 Tennessee Code Annotated, Section 40-35-501, is amended by adding the following new subsection (l) and by redesignating all subsequent subsections accordingly:

(l)

(1) There shall be no release eligibility for a person committing continuous sexual abuse of a child as defined § 39-13-533 on or after July 1, 2013 until the person has served the entire sentence imposed by the court undiminished by any sentence reduction credits the person may be eligible for or earn. Such person shall be permitted to earn any credits for which the person is eligible and the credits may be used for the purpose of increased privileges, reduced security classification, or for any purpose other than the reduction of the sentence imposed by the court.

(2) In addition to the punishment authorized by this section, a person sentenced under § 39-13-533 shall, upon release, receive a sentence of community supervision for life under §39-13-524.

SECTION 4. Tennessee Code Annotated, Title 40, Chapter 18, Part 1 is amended to add the following new section:

40-18-119

(a) Notwithstanding any statute or rule to the contrary, in all cases involving a violation of § 39-13-533; § 39-13-502; § 39-13-503; § 39-13-504; § 39-13-522; § 39-13-527; § 39-13-529(a); § 39-13-531; or 39-13-532, the following rule of evidence adopted from the Federal Rules of Evidence shall apply:

(b) In a criminal case in which the defendant is accused of any of the above referenced offenses, the court may admit evidence that the defendant committed any other offense that would constitute a violation of, or an attempt to commit a violation of, the above referenced offenses. The evidence may be considered on any matter to which it is relevant subject to the provisions of Tennessee Rules of Evidence, 401, 402 and 403.

(c) If the state intends to offer this evidence, the prosecutor must disclose it in writing to the defendant, including witnesses' statements or a summary of the expected testimony at least fifteen (15) days before trial or at a later time the court permits for good cause.

SECTION 5. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or

applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 6. This act shall take effect July 1, 2013, the public welfare requiring it.

Criminal Justice Committee 1

Amendment No. 1 to HB1293

Watson
Signature of Sponsor

AMEND Senate Bill No. 1362* House Bill No. 1293

by deleting all language after the enacting clause and by substituting instead the following:

SECTION 1. This act shall be known and may be cited as the "Child Protection Act".

SECTION 2. Tennessee Code Annotated, Title 39, Chapter 13, Part 5, is amended to add the following new, appropriately designated section:

39-13-533.

(a) As used in this section:

(1) "Sexual abuse of a child" means to commit an act upon a minor child that is a violation of:

(A) § 39-13-502, if the child is more than thirteen (13) but less than eighteen (18) years of age;

(B) § 39-13-503, if the child is more than thirteen (13) but less than eighteen (18) years of age;

(C) § 39-13-504;

(D) § 39-13-522;

(E) § 39-13-527;

(F) § 39-13-529(a);

(G) § 39-13-531; or

(H) § 39-13-532.

(2)" Multiple acts of sexual abuse of a child" means:

(A) Engaging in three (3) or more incidents of sexual abuse of a child involving the same minor child on separate occasions, provided that

Amendment No. 1 to HB1293

Watson
Signature of Sponsor

AMEND Senate Bill No. 1362* House Bill No. 1293

at least one such incident occurred within the county in which the charge is filed and that one (1) such incident occurred after July 1, 2013.

(B) Engaging in at least one incident of sexual abuse of a child upon three (3) or more different minor children on separate occasions, provided that at least one such incident occurred within the county in which the charge is filed and that one (1) such incident occurred on or after July 1, 2013; or

(C) Engaging in five (5) or more incidents of sexual abuse of a child involving two (2) or more different minor children on separate occasions provided that at least one (1) such incident occurred within the county in which the charge is filed and that one such incident occurred on or after July 1, 2013; and

(D) The victims of the incidents of sexual abuse of a child share distinctive, common characteristics, qualities or circumstances with respect to each other or to the person committing the offenses, or there are common methods or characteristics in the commission of the offense, allowing otherwise individual offenses to merge into a single continuing offense involving a pattern of criminal activity against similar victims. Common characteristics, qualities or circumstances for purposes of this subdivision (2)(D) include, but are not limited to:

(i) The victims are related to the defendant by blood or marriage;

(ii) The victims reside with the defendant; or

(iii) The defendant was an authority figure, as defined in § 39-13-527(a)(3), to the victims and the victims knew each other.

(b) A person commits continuous sexual abuse of a child who:

(1) Over a period of ninety (90) days or more, engages in multiple acts of sexual abuse of a child as defined in subdivision (a)(2)(A) or (B); or

(2) Over a period of less than ninety (90) days, engages in multiple acts of sexual abuse of a child as defined in subdivision (a)(2)(C).

(c)

(1) A violation of subsection (b) is a Class A felony if at least three (3) of the acts of sexual abuse of a child constitute a violation of the following:

(A) § 39-13-502, if the child is more than thirteen (13) but less than eighteen (18) years of age;

(B) § 39-13-503, if the child is more than thirteen (13) but less than eighteen (18) years of age;

(C) § 39-13-504;

(D) §39-13-522;

(E) §, 39-13-529(a); or

(F) § 39-13-531.

(2) A violation of subsection (b) is a Class B felony if at least three (3) of the acts of sexual abuse of a child constitute a violation of the following:

(A) § 39-13-527; or

(B) §39-13-532.

(3) A violation of subsection (b) is a Class B felony if there are less than three (3) acts of sexual abuse of a child under subsection (c)(1) but there are at least three (3) acts under any combination of subsection (c)(1) and (c)(2).

(d) At least thirty (30) days prior to trial, the state shall file with the court a written notice identifying the multiple acts of sexual abuse of a child upon which the violation of this section is based. The notice shall include the identity of the victim and the statutory offense violated. Upon good cause, and where the defendant was unaware of the predicate offenses listed in the notice, the trial court may grant a continuance to facilitate proper notification of the incidents of sexual abuse of a child and for preparation by the defense of such incidents specified in the statement.

(e) The jury must agree unanimously that the defendant:

(1) During a period of ninety (90) or more days in duration, committed three (3) or more acts of sexual abuse of a child; or

(2) During a period of less than ninety (90) days in duration, committed five (5) or more acts of sexual abuse of a child against at least two (2) different children; and

(3) Committed at least three (3) of the same specific acts of sexual abuse within the specified time period if prosecution is under subdivision (1) and at least five (5) of the same specific acts of sexual abuse within the specified time period if prosecution is under subdivision (2).

(f) The state may charge alternative violations of this section and of the separate offenses committed within the same time period. The separate incidents shall be alleged in separate counts and joined in the same action. A person may be convicted either of one (1) criminal violation of this section, or for one (1) or more of the separate incidents of sexual abuse of a child. The state shall not be required to elect submission to the jury of the several counts. The jury shall be instructed to return a verdict on all counts in the indictment. In the event that a verdict of guilty is returned on a separate count that was included in the notice of separate incidents of sexual abuse of a child and the jury returns a verdict of guilty for a violation of this section, at the sentencing hearing

the trial judge shall merge the separate count into the conviction under this section and only impose a sentence under this section. A conviction for a violation of this section bars the prosecution of the individual incidents of sexual abuse of a child as separate offenses described in the pre-trial notice filed by the state and presented to the jury. A prosecution for a violation of this section does not bar a prosecution in the same action for individual incidents of sexual abuse not identified in the state's pre-trial notice. The state shall be required to elect as to those individual incidents of sexual abuse not contained in the pre-trial notice prior to submission to the jury. A conviction for such elected offenses shall not be subject to merger at sentencing.

(g) Notwithstanding any other law to the contrary, a person convicted of a violation of this section shall be punished by imprisonment and shall be sentenced from within the full range of punishment for the offense, between Ranges II—III.

SECTION 3. Tennessee Code Annotated, Section 40-35-501, is amended by adding the following new subsection (l) and by redesignating all subsequent subsections accordingly:

(l)

(1) There shall be no release eligibility for a person committing continuous sexual abuse of a child as defined § 39-13-533 on or after July 1, 2013 until the person has served the entire sentence imposed by the court undiminished by any sentence reduction credits the person may be eligible for or earn. Such person shall be permitted to earn any credits for which the person is eligible and the credits may be used for the purpose of increased privileges, reduced security classification, or for any purpose other than the reduction of the sentence imposed by the court.

(2) In addition to the punishment authorized by this section, a person sentenced under § 39-13-533 shall, upon release, receive a sentence of community supervision for life pursuant to § 39-13-524.

SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 5. This act shall take effect July 1, 2013, the public welfare requiring it.