



1 conviction of aggravated rape and a Range I sentence of 25  
2 years was granted in part, to consider two of the several  
3 issues decided by the Court of Criminal Appeals, which  
4 affirmed the conviction and the sentence. In those issues,  
5 the appellant insists that the delay in initiating the  
6 prosecution was a violation of his constitutional rights to a  
7 speedy trial and due process and that the sentence imposed is  
8 excessive. The conviction and the sentence are affirmed.<sup>1</sup>

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I

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12 In May 1980, the victim's mother married the  
13 appellant, William Jeffery Carico, and they all began living  
14 together as a family. In May 1985, the victim, who then was  
15 10 years of age, told her school teacher that during the  
16 preceding year the appellant on numerous occasions had fondled  
17 her breasts and genitalia, digitally penetrated her vagina,  
18 forced her to perform fellatio on him and committed other  
19 sexual acts upon her.

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21 This information was given by the school officials  
22 to the Department of Human Services (DHS), which made an  
23 investigation. The DHS employee testified that she  
24 "substantiated" the allegations made by the victim and  
25 reported the results of her investigation to the district

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<sup>1</sup>The decision of the Court of Criminal Appeals on all other issues is affirmed without discussion.

1 attorney general. Before any further action was taken by  
2 State officials, the victim recanted her statement and  
3 explained the acts she had reported were, in fact, dreams.  
4 There was no prosecution at that time.

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6 According to the proof, the appellant committed no  
7 sexual acts upon the victim after 1985.

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9 In 1991, the victim renewed the allegations by  
10 reporting them to her natural father. The appellant admitted  
11 to his wife that the child's statements were true and he  
12 voluntarily obtained counseling.

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14 An arrest warrant was issued on September 3, 1992.  
15 An indictment was returned on January 11, 1993. The trial  
16 began on February 24, 1993 and concluded the next day.

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18 The indictment, in relevant part, charged: "That  
19 William Jeffery Carico on or about the \_\_\_\_\_ day of July 1983  
20 . . . and before the finding of this indictment, did  
21 unlawfully commit the offense of aggravated rape . . . ." The  
22 appellant filed several motions to dismiss, including a motion  
23 asserting the delay in initiating prosecution was a violation  
24 of the constitutional rights to due process and a speedy  
25 trial.<sup>2</sup>

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<sup>2</sup> The appellant claims violations of both the federal and state constitutions:

1                   In response to a motion for a bill of particulars,  
2   the State stated: "The State would allege the offense occurred

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United States Constitution

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Constitution

Article I, Section 8:

That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

Article I, Section 9:

That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

1 on the \_\_\_\_\_ day of January, 1985, on a Sunday at the  
2 residence of the defendant, a white house in Church Hill,  
3 Hawkins County, Tennessee.”

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5 At trial, the appellant denied the allegations of  
6 sexual conduct and explained he made the incriminating  
7 admissions in an effort to maintain his marriage.

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9 The jury found the appellant guilty of aggravated  
10 rape. The trial court found five enhancement factors  
11 applicable and imposed the maximum sentence of 25 years.  
12 Tenn. Code Ann. § 40-35-112(a)(1) (1990).

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14 The Court of Criminal Appeals affirmed the  
15 conviction and, after finding two of the enhancement factors  
16 not applicable, nevertheless, affirmed the sentence.

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## II

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20 Although the appellant asserts the violation of the  
21 Fifth, Sixth, and Fourteenth Amendments to the United States  
22 Constitution and Article I, Sections 8 and 9 of the Tennessee  
23 Constitution, his argument essentially is based on the length  
24 of the time between the commission of the offense and the  
25 trial. He does not address separately the issues of speedy  
26 trial under the Sixth Amendment and Article I, Section 9 and  
27 due process under the Fifth and Fourteenth Amendments and

1 Article I, Section 8. The important distinction between the  
2 issues of speedy trial and due process was noted in State v.  
3 Gray, 917 S.W.2d 668, 671 (Tenn. 1996) (quoting State v.  
4 Dykes, 803 S.W.2d 250, 255 (Tenn. Crim. App. 1990)), where  
5 this Court stated that in Tennessee the law is well settled  
6 that "delay between the commission of an offense and the  
7 commencement of adversarial proceedings does not violate an  
8 accused's constitutional right to a speedy trial," but an  
9 unreasonable delay between the commission of the offense and  
10 the commencement of the prosecution may violate the  
11 constitutional right to due process. Consequently, in  
12 determining if there has been a violation of the  
13 constitutional right to a speedy trial, only the time between  
14 the commencement of adversarial proceedings and the  
15 commencement of the trial will be considered; while, in  
16 determining if there has been a violation of constitutional  
17 due process, the time between the commission of the offense  
18 and the commencement of prosecution will also be considered.

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20 In the case before the Court, the arrest warrant  
21 was issued September 3, 1992, the indictment was returned  
22 January 11, 1993, and the trial began on February 24, 1993.  
23 The elapse of less than six months from arrest to trial does  
24 not violate the right to a speedy trial. See Doggett v.  
25 United States, 505 U.S. 647, 112 S. Ct. 2686, 2691 n. 1  
26 (1992); State v. Bishop, 493 S.W.2d 81, 85 (Tenn. 1973).

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1           However, the delay of more than seven years from  
2 the time the offense was reported to the Department of Human  
3 Services until the prosecution was commenced does implicate  
4 the constitutional right of due process and requires an  
5 analysis of the circumstances upon which the appellant relies  
6 for relief.

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8           In State v. Gray, a case in which the State had no  
9 knowledge of the offense until 42 years after the offense was  
10 committed, the Court declined to follow the three-prong test  
11 utilized by the Court of Criminal Appeals in State v. Dykes.  
12 State v. Gray, 917 S.W.2d at 672. The Court in Gray rejected  
13 the finding in Dykes that one essential condition for relief  
14 is that the State caused the delay. The Court stated:

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16                   Today we articulate a standard by  
17 which to evaluate pre-accusatorial delay  
18 and hold that an untimely prosecution may  
19 be subject to dismissal upon Fifth and  
20 Fourteenth Amendment due process grounds  
21 and under Article I, §§ 8 and 9, of the  
22 Tennessee Constitution even though in the  
23 interim the defendant was neither  
24 formally accused, restrained, nor  
25 incarcerated for the offense. In  
26 determining whether pre-accusatorial  
27 delay violates due process, the trial  
28 court must consider the length of the  
29 delay, the reason for the delay, and the  
30 degree of prejudice, if any, to the  
31 accused.

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35 Id. at 673. The Court found that the delay of 42 years was  
36 "profoundly excessive," that there was no reasonable  
37 explanation for the delay, and that the defendant had made a

1 prima facie showing of prejudice. The Court in Gray dismissed  
2 the prosecution even though the State had no knowledge of the  
3 offense and was in no way responsible for the delay.

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5 The factors deemed determinative in Gray - the  
6 length of the delay, the reason for the delay, and the effect  
7 of the delay on the rights of the accused - applied to the  
8 facts and circumstances of this case, do not show a violation  
9 of the appellant's right to due process.

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11 The circumstance most favorable to the appellant's  
12 claim for relief is the length of the delay. Seven years  
13 perhaps is not "profoundly excessive" as in Gray, but it is  
14 sufficient to require a careful review of the cause and  
15 results of the delay.<sup>3</sup> Even though the State had knowledge of  
16 "substantiated" allegations of criminal acts committed by the  
17 appellant in 1985, the State was not responsible for the delay  
18 in prosecution. The only evidence available to the State was  
19 the testimony of the 10 year old victim. When the victim  
20 recanted the charges and, apparently with the approval if not  
21 the encouragement of her mother, attributed her account of the  
22 sexual conduct to her dreams, the State had no available

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<sup>3</sup>As stated in Gray, a statute of limitations normally is the primary safeguard against infringement upon due process resulting from long delays. Id. at 672 (citing United States v. Marion, 404 U.S. 307, 321-23, 92 S. Ct. 455, 464 (1971)). In this case, as in Gray, there was no statute of limitations for aggravated rape when the offense was committed. The legislature has since enacted a statute limiting the time within which prosecution for aggravated rape of a child must be commenced to the latter of four years after the commission of the offense or the date the child attains the age of majority. Tenn. Code Ann. § 40-2-101(d) (1990).



1 evidence on which to proceed. Even though under Gray the  
2 State need not have caused the delay or even had knowledge of  
3 the criminal acts, the State's conduct is an important factor  
4 in determining if there has been a violation of due process.

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6 The third factor, and the most important though not  
7 determinative in every case, is prejudice to the accused.<sup>4</sup>  
8 None of the problems often associated with delayed prosecution  
9 are present in this case. The victim's testimony regarding  
10 the event on which the conviction is based was not uncertain  
11 or evasive. Instead it was forthright, precise, and credible.  
12 The act itself was described in definite and accurate terms.  
13 She was sufficiently mature at the time to understand and  
14 remember the events. In fact, it was the clear and persistent  
15 memory of the acts which continued to plague her that caused  
16 the renewal of the charges. The place and date of the event  
17 were identified as the residence on a Sunday in January soon  
18 after the Christmas at which she was given a Barbie doll.  
19 Though not the required standard, the victim's testimony was  
20 clear and convincing.

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22 The appellant does not contend that he was denied  
23 the benefit of witnesses who since have become unavailable.

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<sup>4</sup>In Doggett v. United States, 505 U.S. 647, 112 S. Ct. 2686 (1992), the United States Supreme Court commented that "time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" Id. at 656, 112 S. Ct. at 2692-93, and further, "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." Id. Even though Doggett was a speedy trial case, the statements made by the court are relevant to any case in which there is excessive delay.

1 The only prejudice claimed is that because the State did not  
2 respond promptly to his motion for a bill of particulars, he  
3 was unable to prove where he was on the date the offense  
4 occurred. There was no showing on the motion for a new trial  
5 that he could have offered proof inconsistent with the  
6 victim's testimony. Actually, his own admissions, though  
7 recanted at trial, confirm the truthfulness of the victim's  
8 testimony.<sup>5</sup> The conclusion is that the appellant has failed  
9 to demonstrate that he was prejudiced by the delay in  
10 initiating the prosecution.

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12 In summary, although the delay in initiating  
13 adversarial proceedings against the appellant was excessive,  
14 it was not so long that the delay alone entitles the appellant  
15 to relief. In addition, the delay was not caused by any  
16 inappropriate conduct by State agents and the appellant has  
17 not shown that his rights were prejudiced by the delay.  
18 Consequently, there was no denial of due process.

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### III

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22 The appellant insists that the sentence of 25 years  
23 is excessive. Since the offense occurred prior to 1989 and  
24 the sentence was imposed subsequent to 1989, the trial court  
25 was required to calculate the proper sentence under both the

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<sup>5</sup>The sufficiency of the indictment and the admissibility of the appellant's admissions were disposed of by the decision of the Court of Criminal Appeals.

1 1982 and the 1989 sentencing acts and then impose the least  
2 severe sentence. State v. Pearson, 858 S.W.2d 879, 884 (Tenn.  
3 1993). At the time the offense in this case occurred, January  
4 1985, aggravated rape was a class X felony which carried a  
5 range of punishment of 20 years to life. Tenn. Code Ann. §  
6 39-2-603(b) and (c) (1982). In calculating a sentence under  
7 the 1982 Act, a life sentence was "presumed to be sixty (60)  
8 years." Tenn. Code Ann. § 40-35-109(d) (1982). Because the  
9 defendant qualifies as a Range I offender under the 1982 Act,  
10 his sentence range under that Act would be 20 to 40 years.  
11 Tenn. Code Ann. § 40-35-109(a) (1982). Pursuant to Tenn.  
12 Code Ann. § 40-35-118 (1997), an aggravated rape committed  
13 prior to November 1, 1989 is classified as a class A felony  
14 for 1989 sentencing purposes. The defendant qualifies as a  
15 standard offender and would be sentenced as a Range I offender  
16 under the 1989 Act. Therefore, his possible range of  
17 punishment would be 15 to 25 years. Tenn. Code Ann. § 40-35-  
18 112(a)(1) (1997). The trial court properly found that the  
19 1989 Act was applicable and that the sentence range was 15 to  
20 25 years. The trial court sentenced the defendant as a Range  
21 I offender to the maximum sentence of 25 years. Tenn. Code  
22 Ann. § 40-35-118 and 40-35-112(a)(1) (1990).

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24           The trial court found the evidence established five  
25 enhancement factors, Tenn. Code Ann. § 40-35-114(1), (6), (7),  
26 (15), and (16) (1990), and found no mitigating factors.

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1           The Court of Criminal Appeals concluded that the  
2 evidence supports only three of the enhancement factors - (1)  
3 the defendant has a previous history of criminal convictions  
4 or criminal behavior, (7) the offense was committed to gratify  
5 the defendant's desire for pleasure or excitement, and (15)  
6 the defendant abused a position of private trust. It rejected  
7 enhancement factors (6), the personal injuries inflicted on  
8 the victim were particularly great, and (16), the crime was  
9 committed under circumstances under which the potential for  
10 bodily injury was great. The Court of Criminal Appeals,  
11 nevertheless, found that the three enhancement factors  
12 justified a sentence of 25 years and affirmed the judgment of  
13 the trial court.

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15           The standard of review is de novo with a  
16 presumption of correctness. Tenn. Code Ann. § 40-35-402(d)  
17 (1990); State v. Ashby, 823 S.W.2d 166, 167 (Tenn. 1991).

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19           The Court of Criminal Appeals correctly concluded  
20 that the evidence does not support enhancement factors (6) and  
21 (16), which relate to personal injury. The acts committed did  
22 not pose great potential for bodily injury nor were the  
23 personal injuries inflicted upon the victim particularly  
24 great. The act of fellatio for which the appellant was  
25 convicted, and some of the enhancing criminal acts,<sup>6</sup> were  
26 accompanied by force, but the evidence did not show that the

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<sup>6</sup>Supra at \_\_\_\_\_. [Slip op. at 2.]

1 victim, though not a willing participant, sustained  
2 appreciable personal injuries beyond those incidental to the  
3 crime of aggravated rape.

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5 The Court of Criminal Appeals also correctly found  
6 that the evidence supports enhancement factors (7) and (15).  
7 There can be no question that the rape of a child residing in  
8 the family is an abuse of private trust. State v. Adams, 864  
9 S.W.2d 31, 34 (Tenn. 1993). Even though this Court has  
10 observed that not all rapes are committed for the purpose of  
11 pleasure or excitement, id. at 34-35, the facts of this case  
12 indicate clearly that the act upon which the conviction is  
13 based was motivated by the desire for sexual pleasure.

14  
15 Two issues remain - whether the record supports the  
16 finding of enhancement factor (1) and whether the sentence of  
17 25 years is appropriate.

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19 The trial court found that evidence of acts  
20 committed upon the victim by the appellant other than the  
21 specific act on which the conviction is based, is proof of  
22 criminal behavior within the meaning of enhancement factor  
23 (1). Since this Court has not previously considered this  
24 issue, the constitutional aspects of the matter should be  
25 considered first.

26  
27 The United States Supreme Court has held that the

1 Sixth and Fourteenth Amendments to the United States  
2 Constitution do not prohibit a sentencing court from  
3 considering a defendant's previous criminal behavior which  
4 does not result in conviction. The origin of this holding is  
5 found in the case of Williams v. New York, 337 U.S. 241, 69  
6 S. Ct. 1079 (1949).<sup>7</sup> In Williams, the Court affirmed the  
7 trial court's decision to consider evidence from a pre-  
8 sentence report of the defendant's past criminal behavior  
9 including his commission of burglaries not resulting in  
10 conviction and his activities indicating a "morbid sexuality."  
11 Id. at 244, 69 S. Ct. at 1081. Justice Black, delivering the  
12 opinion of the Court, wrote:

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14 A sentencing judge . . . is not confined  
15 to the narrow issue of guilt. His task  
16 within fixed statutory or constitutional  
17 limits is to determine the type and  
18 extent of punishment after the issue of  
19 guilt has been determined. Highly  
20 relevant - if not essential - to his  
21 selection of an appropriate sentence is  
22 the possession of the fullest information  
23 possible concerning the defendant's life  
24 and characteristics.

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27 Id. at 247, 69 S. Ct. at 1083.

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29 Black continues:

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<sup>7</sup>See also United States v. Watts, \_\_\_\_\_ U.S. \_\_\_\_\_, 117 S. Ct. 633 (1997); United State v. Shumway, 112 F.3d 1413, 1428 (10th Cir. 1997); United States v. Chatlin, 51 F.3d 869, 873 (9th Cir. 1995) (citing several cases to support its holding that the Sentencing Guidelines allow a trial court to grant an upward departure based on repetitive criminal conduct not resulting in a conviction).

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The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts - state and federal - from making progressive efforts to improve the administration of criminal justice.

Id. at 251, 69 S. Ct. at 1085. In McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411 (1986), the Supreme Court considered the standard of proof to which the State must be held in admitting evidence during the sentencing phase. The Court rejected the petitioner's claim that the due process clause requires the "clear and convincing evidence" standard in the sentencing phase and affirmed the trial court's decision to consider evidence that the defendant possessed a firearm during the commission of the offense under the preponderance standard. Id. at 91, 106 S. Ct. at 2419. Likewise, the Court of Criminal Appeals has held that "[t]he constitutional rights that attach in a case prior to conviction are much broader than those which attach in a sentencing scheme or hearing." State v. Newsome, 798 S.W.2d 542, 543 (Tenn. Crim. App. 1990); cf. State v. Mackey, 553 S.W.2d 337, 344-45 (Tenn. 1977). These federal and state decisions recognize that the trial court may utilize criminal behavior shown by a preponderance of the evidence to enhance a sentence without violating federal or state due process.

The decision of this Court in State v. Hale, 840

1 S.W.2d 307, 313 (Tenn. 1992), which was based on Article I,  
2 Section 8 of the Tennessee Constitution, does not support the  
3 appellant's claim for relief. In Hale, the Court found that  
4 the crime of first degree murder could not include as an  
5 element of the offense prior incidents of child abuse for  
6 which the defendant had not been convicted. The Court held  
7 that the use of such prior criminal offenses violates due  
8 process guaranteed by the Tennessee Constitution, because  
9 "such an inquiry by a jury can[not] be accompanied by  
10 sufficient safeguards to ensure that a finding of guilt of  
11 prior allegations of abuse is not tainted by the fact of a  
12 child's death." That constitutional problem does not exist  
13 here. The statute excludes from consideration at the  
14 sentencing hearing evidence of the "essential elements of the  
15 offense" and evidence "necessary to establish the appropriate  
16 range" of punishment. Tenn. Code Ann. §§ 40-35-114, 40-35-  
17 114(1). In this case, evidence of the appellant's previous  
18 criminal behavior was not probative of an essential element of  
19 the offense or the range of punishment. Consequently, the  
20 admission of evidence of the sexual acts - other than the  
21 January 1985 incident of fellatio for which the defendant was  
22 convicted - did not violate the appellant's right to due  
23 process under the federal or state constitution or the  
24 statute.

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26 The next issue is whether these prior acts of  
27 sexual conduct, for which there has been no criminal



1 conviction, constitute "criminal behavior." The Court of  
2 Criminal Appeals has properly held that merely being arrested  
3 or charged with a crime is not "criminal behavior" within the  
4 meaning of the statute. State v. Buckmeir, 902 S.W.2d 418,  
5 424 (Tenn. Crim. App. 1995); State v. Marshall, 870 S.W.2d  
6 532, 542 (Tenn. Crim. App. 1993). The phrase "criminal  
7 behavior" has not been defined by this Court for purposes of  
8 the enhancement factor, but, whatever the precise definition  
9 may be, sexual acts with a 10 year old child clearly  
10 constitute criminal behavior. The evidence of the appellant's  
11 prior sexual acts was properly considered by the trial court  
12 as criminal behavior. That evidence supports the finding that  
13 enhancement factor (1) was established in this case.

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15           There remains the matter of the appropriate  
16 sentence. In reviewing this issue, an appellate court must  
17 follow the procedure mandated by the Act and prior decisions.  
18 "The Act, in order to accomplish its 'foremost purpose,' which  
19 is to 'promote justice,' provides that the sentence imposed  
20 must be the least severe necessary to achieve the punishment  
21 justly deserved, to assure fair and consistent treatment of  
22 all defendants, to prevent crime, and to promote respect for  
23 the law." State v. Ashby, 823 S.W.2d at 168.

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25           The nature and extent of the  
26 punishment to be imposed for similar  
27 offenses committed by similar offenders  
28 has been determined by the classification  
29 of offenses according to their  
30 seriousness and the classification of

1 offenders according to their prior  
2 convictions. The only discretion allowed  
3 the sentencing court is to accommodate  
4 variations in the severity of the  
5 offenses and the culpability of the  
6 offenders within the ranges of penalties  
7 set by the legislature. Even this  
8 discretion is restrained under the Act  
9 through the establishment of a  
10 "presumptive sentence" and the mandatory  
11 use of enhancing and mitigating factors.

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13 State v. Jones, 883 S.W.2d 597, 601 (Tenn. 1994). Under the  
14 Act, then, the court must first determine the applicable  
15 classification and range of punishment established by the  
16 legislature, which for aggravated rape, classified as a Range  
17 I offense, is 15 to 25 years. Tenn. Code Ann. §§ 40-35-118;  
18 40-35-112(a)(1)(1990). Where there are both enhancement  
19 factors and mitigating factors, the Act requires that the  
20 court start at the minimum sentence in the range,<sup>8</sup> enhance the  
21 sentence within the range as appropriate for the enhancement  
22 factors, and reduce the sentence within the range as  
23 appropriate for the mitigating factors. Tenn. Code Ann. § 40-  
24 35-210(e) (1990). "The sentence imposed cannot exceed the  
25 minimum sentence in the range unless the State proves  
26 enhancement factors." State v. Jones, 883 S.W.2d at 601.  
27 Furthermore, the Act specifically sets forth the principles  
28 which must govern the imposition of a sentence:

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<sup>8</sup>In 1995, Tenn. Code Ann. § 40-35-210(c) was amended to provide that for a Class A felony such as aggravated rape, the presumptive sentence is the midpoint of the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c) (Supp. 1996). Prior to 1995, the presumptive sentence was the minimum sentence in the range.

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(1) Sentences involving confinement should be based on the following considerations:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant;

(2) The sentence imposed should be no greater than that deserved for the offense committed;

(3) Inequalities in sentences that are unrelated to a purpose of this chapter should be avoided;

(4) The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed;

(5) The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed. . . .

(6) Trial judges are encouraged to use alternatives to incarceration that include requirements of reparation, victim compensation and/or community service.

52 Tenn. Code Ann. § 40-35-103 (1990). "Finally, the

1 appropriate sentence is one which is 'justly deserved in  
2 relation to the seriousness of the offense,' is 'fair and  
3 consistent [with other similar cases],' and 'prevent[s] crime  
4 and promote[s] respect for the law.'" State v. Jones, 883  
5 S.W.2d at 600 (quoting Tenn. Code Ann. § 40-35-102 (1990);  
6 State v. Ashby, 823 S.W.2d at 168.

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8 As previously discussed, the record shows three  
9 enhancement factors in this case - (1) the defendant has a  
10 previous history of criminal behavior, (7) the offense was  
11 committed to gratify the defendant's desire for pleasure or  
12 excitement, and (15) the defendant abused a position of  
13 private trust. Neither the trial court nor the Court of  
14 Criminal Appeals found any mitigating factors, and the facts  
15 and circumstances shown in the record do not support any  
16 statutory mitigating factor.

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18 A majority of the Court, Chief Justice Anderson and  
19 Justices Drowota and Holder affirm the decision of the Court  
20 of Criminal Appeals that the three valid enhancement factors,  
21 in the absence of any mitigating factors, justify the maximum  
22 sentence of 25 years imposed by the trial judge.

23  
24 A minority of the Court composed of Justices Birch  
25 and Reid would find that the following circumstances  
26 constitute non-statutory mitigating factors which would  
27 require that the sentence be reduced to 20 years. The

1 appellant has no prior criminal convictions. His only  
2 criminal acts were those committed against the victim over a  
3 period of less than two years. Those acts ceased soon after  
4 the victim first complained, and the appellant and the victim  
5 thereafter lived in the same household without further  
6 incidents for several years. He voluntarily reported the  
7 criminal acts in an effort to obtain professional help and to  
8 maintain his family. The appellant has a college degree, he  
9 had good employment and has adequately supported his family.  
10 He was at the time of trial an officer in the National Guard,  
11 and he has been active in civic, church, and community  
12 activities. It appears that, except for the acts committed  
13 against his stepdaughter, he has been a productive and law  
14 abiding citizen.

15

16           The three enhancement factors, though not elements  
17 of the offense, are closely related to the offense. The prior  
18 criminal behavior involved acts similar to that for which the  
19 appellant was convicted and were directed at the same victim.  
20 Those same acts establish the second enhancement factor, the  
21 desire for pleasure or excitement and they also constitute the  
22 third enhancement factor, the breach of a private trust. Two  
23 of the enumerated principles of sentencing are implicated by  
24 these circumstances. It does not appear that prolonged  
25 confinement will be necessary to protect society against  
26 further criminal conduct. The appellant apparently did not  
27 constitute a risk to children outside the family, and he

1 refrained from further acts against the victim even while  
2 there appeared to be no threat of criminal prosecution.

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4           The conviction and sentence of 25 years are  
5 affirmed, and the case is remanded to the trial court.

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7           Costs are taxed to the defendant.

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Reid, J.

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Concur:

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Anderson, C.J., Drowota, and Holder, JJ.

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Birch and Reid, Dissenting in Part.