CRIMINAL DEFENSE IN TENNESSEE

Straight Answers About Your Rights and What to Expect Next

BARNES & FERSTEN
109 S. Northshore Drive, Suite 310
Knoxville, TN 37919
(865) 234-0410
www.knoxcrimdefense.com
questions@knoxcrimdefense.com

Copyright © 2023 John C. Barnes and Brandon D. Fersten

DISCLAIMER: THIS BOOK DOES NOT FORM AN ATTORNEY CLIENT RELATIONSHIP OR RENDER LEGAL ADVICE.

This book is designed to provide information about the subject matter covered. It is distributed with the understanding that the publisher and author are not hereby engaged in rendering legal, psychological or other professional services. If expert assistance is required, the services of a competent professional should be sought. We are available for consultation on a professional basis.

Every effort has been made to make this book as accurate as possible. However, there may be mistakes both typographical and in content. This book contains the opinion of the author. For those reasons, this text should be used only as a general guide.

The purpose of this book is to educate and entertain. The authors and publisher shall have neither liability nor responsibility to any person or entity with respect to any loss or damage caused or alleged to be caused directly or indirectly by the information contained here.

Printed in the United States of America

First Printing 2020

First Edition 2020

10 9 8 7 6 5 4 3 2 1

Can you answer YES to these 5 questions? If so, we may be able to help

1) **Have you been arrested in East Tennessee?**
2) **Will a conviction adversely impact your job, education and/or future?**
3) **Are you willing to let us fight your case and not immediately plead guilty?**
4) **Would having a conviction on your record seriously affect your education, career, family, or other important areas of your life?**
5) **Can you afford to pay a reasonable attorney fee with a down payment and a payment plan?**

If you answered YES to all of these questions then give us a call to discuss how we can help you avoid the worst consequences of a criminal arrest.

BARNES & FERSTEN
109 S. Northshore Drive, Suite 310
Knoxville, TN 37919
(865) 234-0410
www.knoxcrimdefense.com
questions@knoxcrimdefense.com

Table of Contents

Foreward .... *i*

The Way We Approach Criminal Defense Makes The Difference

Chapter 1 .... **1**

Criminal Law Myths You May Have Heard

Chapter 2 .... **3**

What Attorney Should I Contact To Discuss My Case?

Chapter 3 .... **5**

You Have A Meeting With An Accomplished Criminal Lawyer, What Will It Be Like?

Chapter 4 .... **9**

Does Everyone Charged With A Criminal Offense Have To Hire A Lawyer?

Chapter 5 .... **11**

Bail: Paying For Your Freedom During The Pendency Of Your Case And Requesting A Bail Reduction

Chapter 6 .... **14**

Criminal Case Roadmap: I Have Been Arrested And Have A Court Date, What Happens Now?

Chapter 7 .... **18**

Sentencing Ranges:

Chapter 8 .... **23**

Drug Cases

Chapter 9 .... **27**

Violent Crimes Cases:

Chapter 10 .... **29**

Theft Cases

Chapter 11 .... **31**

Federal Law Vs State Law

Chapter 12 34

Appeals: State And Federal Appeals

Chapter 13 36

How Much Is All Of This Going To Cost Me?

Chapter 14 38

Judicial Diversion: What Is It And How Do I Get One?

Chapter 15 40

Defending Against A Criminal Charge: Suppressing Warrantless Searches

Chapter 16 45

Defending Against A Criminal Charge: Suppressing A Confession Or A Statement

Conclusion 49

FOREWARD

THE WAY WE APPROACH CRIMINAL DEFENSE MAKES THE DIFFERENCE

Just about every lawyer who advertises in criminal law will take your case. What happens after the lawyer takes your case will make a huge difference in your stress level, how your case is handled, how good a result you get, and ultimately how this arrest affects your life.

To give each client and their case the attention they deserve, we have chosen not to mass advertise and take in hundreds of cases for very low fees. Instead, every client will get personal attention, each client will be able to reach and speak with an attorney, have their calls returned promptly, and know that every defense, whether legal or factual, has been fully investigated.

Most of all, a lower case load helps us to do battle in the courtroom when negotiated resolutions fail, rather than settling for a plea and moving on to the next dozen cases.

We hope this short book will answer some of your questions about what we think are the best ways to defend a criminal case and what you can expect during yours. If you would like to speak with us about your specific case just give us a call or text message to (865) 805-5703, or email us at questions@knoxcrimdefense.com.

CHAPTER 1

CRIMINAL LAW MYTHS YOU MAY HAVE HEARD

- **The more the lawyer charges the better they must be.**

  - There is a relationship between a lawyer's fee and his expertise, but it is not direct. A fee is influenced by supply and demand, level of expertise and years of experience, and by factors that make no difference to your case such as how much a lawyer spends on offices, staff, and advertising. At the end of the day, you should choose the attorney that makes you feel the most comfortable and confident in fighting for you.

- **The court system treats everyone equally and every case is decided based solely on its merits.**

  - This is ideal but unfortunately it is not reality. Like every other system in the world, the justice system consists of people who are not 100% perfect. Case outcomes depend on many factors and factual guilt or innocence is just one of those.

- **I really am innocent, so I do not need a lawyer.**

  - False. Innocent people get charged with crimes more often than we would like to think. Many are understandably upset at the expense, embarrassment, and inconvenience of being charged with a crime they did not commit. Unfortunately, rarely would these people be able to win their cases without professional representation. A lawyer has the ability to discuss your case with the assistant district attorney assigned to your case to advocate your innocence in a way that will generally be more effective than you speaking to the assistant

district attorney directly or even worse, trying to defend your own case in court.

- **I have never been arrested before, so this will not be that difficult.**

  - Having no prior record is a good thing and can aid an attorney in negotiating your case, but it will not get you very far in winning your case alone.

- **The court will give me a lawyer, so I do not need to hire one.**

  - You have a right to an attorney. The court will give you a lawyer if you qualify. Whether you qualify is up to the judge who would have to find you "indigent" based on your sworn financial statement. There are many good lawyers working as public defenders, but even the best public defenders will have a much larger case load to focus on than most private attorneys. Generally speaking, a private attorney will likely have more time to give you personalized attention and be able to take the time to explain the process to you in more depth.

CHAPTER 2

WHAT ATTORNEY SHOULD I CONTACT TO DISCUSS MY CASE?

Look for a lawyer who focuses a large portion of his or her practice on criminal defense. Check out the lawyer on avvo.com and other review sites, to read what former clients have said and to see what criminal defense credentials are listed. Finally, speak to the lawyer on the phone before scheduling an appointment. You can often tell how comfortable a lawyer is in discussing specific criminal law issues without even going into the office. You can also gauge how your experience might be by how quickly you get a call back, how you are treated by the staff, and how willing the lawyer is to speak with you about your case and the issues you want addressed.

In short, your lawyer should be able to answer your criminal law questions. Your lawyer should fully understand the court process and be able to identify any potential defenses that you may have to your case, even during the initial consultation. Most of all, you should trust your lawyer. Choose a lawyer that makes you feel comfortable in telling them everything about your case and your life. Your lawyer should be able to identify what you may believe are small details to use towards your advantage.

You are the client and thus, every important decision is ultimately your decision, including the initial decision of which lawyer you decide to hire.

Make sure that you hire a lawyer that listens to your concerns and is able to provide you with answers regarding important aspects of your case. You should feel that you are your lawyer's primary concern.

CHAPTER 3

YOU HAVE A MEETING WITH AN ACCOMPLISHED CRIMINAL LAWYER, WHAT WILL IT BE LIKE?

New clients are often nervous about their first meeting with a lawyer, especially when they have never needed a lawyer before. If you are coming to meet with an attorney at Barnes & Fersten there is no need to be nervous. You will be treated and spoken to with respect. You will find a relaxed but professional atmosphere that is designed, not to intimidate or impress you, but to make the process as easy as possible for you. At the end of the day, you are the client and we want to make sure that we relieve some of the stress that you have been having over your recent criminal charges. Whether this is your first criminal offense or you have been previously charged, the attorneys at Barnes & Fersten are here to walk you through the process to make it as easy for you as possible.

Like a job interview, both you and the attorneys at Barnes & Fersten are considering whether a professional relationship would be beneficial. At the end of the day, we want to do everything that we can to help you because you, the client, are the one facing charges that could have a substantial impact on your life. As such, we want to help guide you towards a successful disposition of your case that will help you move forwards with as little consequences, if any, as possible.

During that first meeting, we will spend anywhere from 30 minutes to an hour together. You will be given an opportunity, at the very

beginning of each meeting, to get your questions answered and all of your concerns addressed.

After that the attorneys at Barnes & Fersten will need to get as many details as possible about any prior arrests or convictions, the day leading up to your arrest, how and when the police became involved, your interactions with the police, any statements that you made to the police, any evidence obtained by the police, your medical history, and other details that might relate specifically to your case.

By this point, we will have a good idea what some of our defenses and strategy will be and I will share them with you. Some lawyers will not discuss these potential defenses and strategies with you for fear that you will take his strategy and hire a cheaper lawyer to implement it.

In every meeting, we are asked some version of the question, "what are my odds of winning my case." We cannot and will not make you any guarantees. If a lawyer does that, do not walk out, run. It is an empty promise that no lawyer should make or is even allowed to ethically make to you. But the lawyers at Barnes & Fersten will give you their best professional opinion on the possible outcomes of your case. If we do not believe that you have real defenses or if we do not believe that we can help you, we will not accept your case. We have declined cases in the past and will continue to decline cases where we believe that we cannot accomplish the goals that someone wants and expects us to accomplish.

We, unlike many firms, often allow you to pay your case fee on a payment plan. A down payment is required to start work. The amount varies, but is usually between one-quarter and one-half of the

fee. We will work together on a payment plan that you can afford that will get your fee paid off before the case is concluded.

There is one exception to the above paragraph. If you are indicted by a grand jury resulting in your case being in criminal court and requiring a jury trial, there will be a separate fee that we will discuss far in advance to allow you time to prepare financially. However, most cases are resolved before this need ever arises. For that reason, we charge separately for that service, since it usually consumes many, many hours of attorney preparation and court time. If your case ends up being one of the few that requires a trial, you will know that well ahead of time and we will decide together on what trial fee makes sense, given what has already happened in your case.

CHAPTER 4

DOES EVERYONE CHARGED WITH A CRIMINAL OFFENSE HAVE TO HIRE A LAWYER?

The answer is yes and no. Not everyone charged with a criminal offense strictly has to hire a lawyer. You do have the option to speak directly with the district attorney or even defend the case yourself. I would not recommend it though. While you could probably learn the steps to perform your own appendectomy on YouTube, that does not make doing so a good idea. The same is true of defending your own criminal case.

Only a lawyer who defends criminal cases regularly will be able to recognize what defenses might be available in your case, how the district attorney and the judge are likely to respond to those defenses and will be able to implement a strategy to use them effectively on your behalf. The attorneys at Barnes & Fersten have a significant amount of experience in practicing criminal law and have been successful in negotiating resolutions in difficult cases, trying jury trials, and appeals.

For that reason, it makes the most sense when dealing with a criminal offense to hire counsel who defends these cases for a living.

CHAPTER 5

BAIL: PAYING FOR YOUR FREEDOM DURING THE PENDENCY OF YOUR CASE AND REQUESTING A BAIL REDUCTION

To start, statutory law in Tennessee starts with the presumption that a defendant should be released on his or her recognizance, meaning that the defendant should not have to pay bail.

If you are not released on your own recognizance, every defendant that is accused of a criminal offense is entitled as a matter of both constitutional and statutory right to be released on bail. In short, you are entitled to be released from jail because one of your most fundamental rights as a citizen of the United States is the presumption of innocence and thus, keeping you in jail undermines the idea that you are to be presumed innocent. Additionally, the United State Supreme Court also acknowledged that you can help you lawyer defend your case better if you are out of jail.

Why is my bail for my criminal charge greater than my friend's bail for a similar offense?

That is a great question that frustrates many defendants. Bail has two primary purposes: (1) ensuring the defendant appears in court; and (2) ensuring the safety of the public. As such, if someone is viewed as a larger threat to the public, their bond will be higher than someone who is less of a threat. Similarly, someone who has previously been charged with a failure to appear in court will likely have a higher bail.

Additionally, the court may place you on special pre-trial conditions of bail in addition to your bail amount, or your lawyer can request the addition of pre-trial conditions in an endeavor to request for a lower bail amount. If you have one or more prior convictions, the court will likely order a larger bail or increase the severity of the pre-trial conditions.

I cannot afford bond; will the court lower my bond amount or reduce the conditions of my release?

First, your lawyer should always attempt to get you released on your own recognizance, as that is the presumption as discussed previously.

If the court refuses to release you on your own recognizance, the court is constitutionally required to set bail at an amount that is no higher than an amount that will fulfill the two purposes set forth above. Of course, the dollar amount may be arbitrary.

If you believe that your bond amount is far too high then your lawyer should file a motion to reduce bond. A motion to reduce bond should cover the two purposes of bail set forth above. For example, to prove that you will appear in court, your lawyer should explain your ties to the community to prove that you are not a flight risk and unlikely to miss court.

I violated a bond condition, will my bond be revoked?

Maybe. It is true that your right to bail may be revoked or taken away from you if you violate a condition of your release, commit another criminal offense while out on bond or obstruct the progress of your case. It is also true that a violation of a condition of your release may result in a motion by the state to increase your bond amount, just as you have the right to oppose the motion or move for a reduction.

However, your lawyer will discuss the specific violations of your release with the district attorney and potentially the judge to help avoid your bond being revoked.

CHAPTER 6

CRIMINAL CASE ROADMAP: I HAVE BEEN ARRESTED AND HAVE A COURT DATE, WHAT HAPPENS NOW?

YOUR FIRST TIME IN COURT

Your first court date will not decide your case. Generally, the first court date will consist of: making sure you understand what you are charged with, the court finding out whether you have or will hire a lawyer, or whether you are applying for a public defender, and finally, setting a new court date for either negotiations or a hearing.

Do you need a lawyer for the first court date? Not strictly, but it is a good idea because even at the first court date there are things that can happen that could harm your case. In some circumstances, your lawyer may be able to request a change in your bond conditions on that very first day. In multiple offense cases, or cases where you are on another bond or probation, you definitely should not show up to court alone on your first court date. Even if none of those things apply to you, having a lawyer retained will make the process go much more smoothly and often you will not have to even show up to court at all because your lawyer can handle resetting the case for you and you will already know what statute(s) you are charged with violating.

"STATUS" OR NEGOTIATION DATES

Your second, and sometimes more, court dates will be a time for your lawyer to discuss the case with the district attorney who is prosecuting your case.

By the second court date your lawyer should have most or all of the materials, reports, videos, medical records, etc..., necessary to investigate and defend your case. The district attorney may or may not have also reviewed your case and any video evidence. In some instances, your lawyer may feel confident that the district attorney will eventually offer a better deal which may also result in your case taking additional court dates.

Many cases will be resolved at one of these negotiation dates, either by a negotiated plea that you are happy with or with a dismissal of charges.

PRELIMINARY HEARING

If no agreement can be reached, your case will be set for a “preliminary” hearing. I put preliminary in quotation marks because it can often take six months or more to get to this stage.

At the preliminary hearing court date, the officer who arrested you or some other prosecuting witness will receive a subpoena to appear in court. In most cases, the witness will show up. This is not like a traffic ticket where you can hope that the officer will not show up and the case will get dismissed. That does occasionally happen, but do not bank on it. Even if the officer does not show up on that first court date, the judge will allow the district attorney an additional court date to get their witness to court. However, if multiple court dates occur at which the State cannot produce their witness, then it is more likely that the court may dismiss your case for a failure to prosecute.

More negotiations will likely occur on this date, and if no resolution can be reached, your lawyer and the district attorney will conduct a

hearing on your case in front of the judge. You will not testify. You technically can, but for many reasons that we can discuss in person, it would be the extraordinarily rare case, in which a client would testify at this stage.

The preliminary hearing is extremely important to your defense. Many lawyers "waive," or choose not to have this hearing. Do not let this happen to you unless there is a very good reason to waive this hearing. There sometimes is, but rarely.

The hearing is an opportunity to get the officer under oath, and to have your lawyer cross-examine him about many topics that can be used in your favor and in some cases to get the case dismissed outright.

Even if your case is not dismissed at this stage, the officer's sworn testimony can be used against him in criminal court. For this reason, a good lawyer will understand what he or she must get the officer to admit during the preliminary hearing to set up certain motions to file in criminal court, which will be discussed in more detail in Chapter 11. Moreover, it will help your lawyer figure out ways to ask certain questions to receive the answers that your lawyer wants from the officer in the event that your case goes to trial.

At the end of your hearing the judge will decide whether there is "probable cause" to continue your case on to the next stage of court. Probable cause is not a particularly high level of proof and it is far lower than beyond a reasonable doubt, so many times the judge will find at least some proof of the underlying criminal offense and send the case on to the trial court. However, the judge can also decide legal issues, like whether a stop or arrest was constitutionally made.

If he decides these issues in our favor, he can and will dismiss your case.

Although it is rare, even if the judge in General Sessions Court was to dismiss your case, many people find it remarkable that the State can still decide to proceed to the grand jury. In short, the judge can dismiss your case in general sessions court but that does not prevent the prosecutor from pursuing your case in criminal court through the grand jury indicting you for the charges.

The process described here often takes 4-8 months and several court dates. It occurs in "General Sessions" court, rather than in "Criminal Court." We can discuss the differences in person, but in general, jury trials happen in Criminal Court. Preliminary hearings and negotiated pleas happen in General Sessions Court.

Many criminal cases are resolved during this General Sessions Court process. If yours is a case that may end up in Criminal Court, we will discuss that in detail before we get to the preliminary hearing court date.

CHAPTER 7

SENTENCING RANGES

It is important that you are well aware of the potential consequences of the charges against you at the inception of the case. In order to completely understand the consequences that you may face, including the length of time of any potential sentence, you need an experienced criminal defense lawyer that understands the law on sentencing. As this chapter will more thoroughly explain, the length of your sentence may be impacted by various factors such as any applicable mitigating or enhancement factors, including any prior convictions.

All of the attorneys at Barnes & Fersten have helped individuals receive more favorable sentences than they otherwise would have at sentencing hearings. A sentencing hearing may occur either: (1) through a conviction at trial; or (2) through negotiating a plea deal with the prosecutor that leaves the length or terms of the sentence up to the judge to decide. It is important that your lawyer discusses whether this type of plea deal is an option in your case, if you opt to plead guilty based on the circumstances in your case rather than go to trial. In some instances, the prosecutor may offer a deal that seems favorable but your lawyer may believe that you can receive a better sentence if you leave it up to the judge. In some of these instances, the prosecutors may even request the judge to sentence you to the same amount of time that they offered. As such, your lawyer should discuss this possibility with you.

Sentencing for Felonies:

The minimum and maximum sentences may vary depending on what range offender you fall under. Your range is determined based on the seriousness of the offense and how many prior convictions you have.

Below are the ranges with the minimum and maximum sentences for each one respectively:

Range 1 Offenders: Standard Offenders

1. Class A Felony: 15-25 years
2. Class B Felony: 8-12 years
3. Class C Felony: 3-6 years
4. Class D Felony: 2-4 years
5. Class E Felony: 1-2 years

Range 2 Offenders: Multiple Offenders

1. Class A Felony: 25-40 years
2. Class B Felony: 12-20 years
3. Class C Felony: 6-10 years
4. Class D Felony: 4-8 years
5. Class E Felony: 2-4 years

To be a multiple offender you must either: (1) have received 2-4 prior felony convictions within the conviction class, a higher class, or within 2 lower felony classes from the felony that you are currently

charged; or (2) if your current offense is a Class A or B felony and you have 1 prior Class A felony conviction.

Range 3 Offenders: Persistent Offenders and Career Offenders

1. Class A Felony: 40-60 years
2. Class B Felony: 20-30 years
3. Class C Felony: 10-15 years
4. Class D Felony: 8-12 years
5. Class E Felony: 4-6 years

The attorneys at Barnes & Fersten will help you understand what range you fall in, including whether the Court may consider you a multiple offender, persistent offender, or career offender, and whether there is a way to have any potential sentence reduced below the range that you may be within.

Enhancement or Mitigating Factors:

As it was previously explained, there are a few different ways that you may end up having a sentencing hearing. At the sentencing hearing your lawyers would file a sentencing memorandum that would include every mitigating factor that is applicable to your case. In total there are 13 potential mitigating factors that may be applicable to your case. In sum, your lawyer should make an argument and use previous cases that occurred in Tennessee to show why you deserve the lowest sentence possible under the circumstances. The last mitigating factor is very broad and basically just allows your lawyer to tell your story of who you are as a person and why you do not need to be rehabilitated for an extended period of time.

On the other hand, the State of Tennessee will also attempt to use as many applicable enhancement factors to show the judge why you should receive a lengthier sentence. The State has 28 potential enhancement factors to argue. As such, it is imperative that you hire a lawyer that you have confidence in arguing against the applicability of any of the enhancement factors.

CHAPTER 8

DRUG CASES

Simple Possession or Casual Exchange Charge?

To start, an individual can be found guilty of simple possession if they knowingly possess a controlled substance, unless the substance was obtained directly from, or even pursuant to, a valid prescription or an order by a practitioner while acting in the course of their professional practice.

Casual exchange is a spontaneous distribution of drugs in too small of an amount or which otherwise does not qualify as a felony, for the individual to be guilty of sale and delivery. For marijuana, an individual who distributes less than 14.175 grams of marijuana may be found guilty of casual exchange instead of the more serious crime of sale and delivery. Though drug weight is not the only factor in the difference between a misdemeanor and a felony charge, it is an important one.

Both simple possession and casual exchange are generally a Class A misdemeanor; meaning that the maximum sentence is 11 months and 29 days. There are exceptions to this general rule such as where an adult sells any amount of marijuana to an individual that the person knows is a minor. Under such a scenario, the offense turns from a Class A misdemeanor into a felony charge.

On the other hand, for methamphetamines, there is a mandatory minimum of 30 days of confinement at 100% regardless of the amount of methamphetamine. However, even if you think that you

may not have a defense available to you, your lawyer can still either through a plea deal or through a sentencing hearing get you to participate in a drug or recovery court for up to 30 days of your sentence, rather than you serving it in confinement.

Sale, Delivery or Possession with the Intent to Manufacture, Sell or Deliver.

These are very common offenses that many people who may only be guilty of simple possession may be charged with committing. This charge can constitute as a Class E Felony all the way up to a Class A Felony. What you are charged with depends on the amount of the drug and the type of drug. Regardless, the State would have to prove that you: (1) knowingly; (2) either manufactured, delivered, sold, or possessed a controlled substance with the intent to manufacture, deliver or sell the substance.

In some cases, it is difficult for the State to prove that a sale took place. As such, the State uses circumstantial evidence to show a jury that you may have had the intent to deliver or sell. For example, simply having a large amount of a drug on you can potentially be used by the State to prove that there is no way that it was for personal usage. Similarly, if the police find a scale, a large amount of money or multiple bags, these items may be used to show a jury that you had the intent to deliver or sell the controlled substance. A good lawyer will be able to explain these pieces of circumstantial evidence to prove that you did not have such intent.

Drug Free School Zones: Can I really be punished more for sale in a school zone when I was not on school grounds?

Yes. In fact, even a conspiracy to manufacture, sale, deliver or possess with such intent that either occurs on the grounds or facilities of any school or within 1,000 feet of the real property that comprises of a public or private elementary school, middle school, secondary school, preschool, child care agency, or public library, recreational center or park will be punished 1 classification higher than they otherwise would be punished. Thus, a Class B Felony becomes a Class A Felony if it violates the drug free school zone law. It is important to realize that it does not matter whether you had actual knowledge that you were within one of the designated zones. Even if your apartment or house is within one of the designated zones, you can and will be punished at one classification higher if your case goes to the grand jury.

Additionally, there is also a mandatory fine involved with such a sale. For example, a conviction of a Class E Felony holds a fine of $10,000, whereas a conviction of a Class A Felony will have a mandatory minimum fine of $100,000.

One exception is if the manufacture, sale, delivery or possession with an intent to do any of those things occurred within 1,000 feet of either a preschool, childcare center, public library, recreational center or park, then you will be subject to an additional fine but not the additional incarceration. In short, if the charge occurred as a result of being within 1,000 feet of any of the aforementioned places then you will not be punished at 1 classification higher.

CHAPTER 9

VIOLENT CRIMES CASES

Simple Assault and Domestic Assault

The State may prove assault or domestic assault in 1 of 3 ways: (1) that you intentionally, knowingly, or recklessly caused bodily injury to another; (2) that you intentionally or knowingly caused another to reasonably fear imminent bodily injury; or (3) that you intentionally or knowingly caused physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

One common misconception with assault and domestic assault cases is that the victim decides whether to bring charges against you or drop the charges against you. This is 100% an inaccurate statement. It is up to the State to decide whether to proceed with the charges against you. In fact, there are many instances where the victim wants to drop the charges, but the State will still subpoena the witness in an endeavor to ask them questions and still prosecute the defendant.

On the other hand, the reason that the misconception exists is because it can be difficult to prosecute of assault or domestic assault without the cooperation of the victim. That is partly because each of the 3 ways that you can be found guilty of assault or domestic assault includes the element of “another” individual who is the victim that actually was injured, feared imminent bodily injury or was physically touched in a way that a reasonable person would regard as extremely offensive or provocative.

The main difference between domestic assault and simple assault is how the defendant is related to the victim. Also, domestic assault carries a mandatory minimum of 30 days of incarceration for a second offense. A third offense or more carries a minimum of 90 days incarcerated. One important detail to note is that the offenses must occur within 10 years of each other to count as a second or subsequent offense. As such, you may be incorrectly charged and may plead guilty to a 2nd or 3rd offense domestic assault if you do not hire a lawyer that understands the law and knows to check the details of any potential past domestic assaults in your history.

Simple assault and simple domestic assault are both a Class A Misdemeanor and is judicial diversion eligible, which will be discussed in a later chapter.

Aggravated Assault and Aggravated Domestic Assault

The charge can go from being simple assault or domestic assault to aggravated if you committed assault and the assault: (1) results in serious bodily injury to another; (2) results in the death of another; (3) involved the use or display of a deadly weapon.

Additionally, you can be charged with aggravated for an intentional or knowing assault that involved strangulation or attempted strangulation.

Aggravated assault or domestic assault is punishable as either a Class C or D Felony and it is not eligible for diversion.

CHAPTER 10

THEFT CASES

Theft cases are largely dependent on the value of the property allegedly stolen. If less than $1,00 is stolen then the theft will be a Class A Misdemeanor. There are ways for your case to be negotiated down to attempted theft to lower it to a Class B Misdemeanor as well. Similar to assault, theft of under $1,000 may be eligible for diversion, as it will be discussed in a later chapter.

If the property stolen is worth more than $1,000 then it becomes a felony charge. What felony classification you are charged under depends once again on the amount stolen. $1,001-$2,499 is a Class E felony; $2,500-9,999 is a Class D felony; $10,000-59,999 is a Class C felony; $60,000-249,999 is a Class B felony; and $250,000 or more is a Class A misdemeanor.

However, it is important to know that a prosecutor may charge multiple criminal acts over an extended period of time against one or more victims as a single count if the criminal acts arise from a common scheme, purpose, intent or enterprise. This means that the prosecutor can aggregate or add the amount from multiple different acts so that instead of having multiple charges of a lower classification, for example, you can be charged with a higher and more serious offense. Thus, it is important that if the prosecutor is attempting to do this that your lawyer argues for the charges to be divided into multiple smaller offenses based on an applicable defense or the acts failing to arise under a common scheme, purpose, intent or enterprise.

Some affirmative defenses that allow a defendant to avoid liability include: (1) acting under a honest claim of right to the property or service involved; (2) acting in the honest belief that the person had the right to obtain or exercise control over the property or service as the person did; or (3) obtaining or exercising control over property or services honestly believing that the owner, if present, would have consented.

CHAPTER 11

FEDERAL LAW VS STATE LAW

Federal courts handle cases that involve crimes under federal law, that occur on federal property or that occurred in two or more states. For example, if an individual crosses state borders with illegal drugs. Similarly, crimes that occur on federal land, such as federal parks, can be charged in federal court.

It is possible that you may be charged in both federal and state court for one crime that you allegedly committed. Thus, it is important to hire an attorney who is not just licensed in federal court but who actually understands federal law, the federal court system and the federal rules of criminal procedure. All of these rules and laws are far different in federal court from state court so you want to hire a lawyer that practices frequently in federal court.

The prosecution knows the ins-and-outs of the federal court system intimately and will use this knowledge to their advantage. In order to defend yourself, you need someone on your side who also understands the system and can use procedural tactics to your advantage. At Barnes & Fersten, we understand that procedure can make the difference in your case, and we use our knowledge of the federal system to get you the best possible result.

Sentencing Guidelines

The best possible outcome in any criminal case is a dismissal of the charges or an acquittal at trial. Unfortunately, this is not an option in

every case, and so a discussion of what happens if you are convicted may be appropriate.

In order to reduce sentencing disparities throughout the federal court system, Congress created the United States Sentencing Commission. In turn, the Commission developed the federal sentencing guidelines. These guidelines will apply to any felony crime and serious misdemeanors, and will focus on two factors in determining a prison sentence following a conviction:

1. The conduct associated with the crime; and
2. The defendant's criminal history.

The conduct associated with the crime determines what is referred to as the "offense level." Under the federal sentencing guidelines, there are 43 separate offense levels. The offense level, together with the defendant's criminal history, then determines the range or zone of your sentence. All of this is laid out in the sentencing table, an integral part of the federal sentencing guidelines.

Fortunately, federal sentencing isn't completely formulaic. The guidelines do allow for certain adjustments and departures to either increase or decrease the sentence, but you need to know what factors may entitle you to a more lenient sentence. Also, you need to know what arguments to make in your favor to persuade the court that these factors should be considered. The prosecutors will not make these arguments for you, and in fact, may be arguing for your sentence to be increased. An experienced federal criminal defense attorney can protect you from overaggressive prosecution tactics and make sure the court considers all the circumstances of your case when determining your sentence.

CHAPTER 12

APPEALS: State and federal appeals

In the event that you had an unsuccessful result in your case and need an attorney to help with the appellate process, the attorneys at Barnes & Fersten routinely file appeals with the Court of Appeals, Tennessee Supreme Court, and the Court of Appeals for the Sixth Circuit.

The appeals process starts with filing a notice of appeal in a timely fashion. Sometimes, if you miss the deadline, our attorneys may be able to file a late notice of appeal and request that the court still grant you an appeal, but meeting appropriate deadlines is extremely important in appellate practice.

Once the notice of appeal is filed, we will file a transcript with the trial court or a statement explaining to the trial court what should be included in the technical record. Next, the clerk of the court will put together the technical record within 45 days. In short, the technical record includes every document that may have been introduced at your trial and will include the full transcript of your trial, as well as other proceedings that took place in your case.

After the technical record is put together your attorney will have 30 days to draft the appellate brief. Sometimes, depending on the size of the technical record, your lawyer may need an extension of time or multiple extensions. The appellate process is just that, a process. You want to hire a lawyer who will spend countless hours looking through the technical record and who understands what they should be looking for when searching through the technical record.

The reason this is so important is because you cannot just appeal anything in an appeal. Your lawyer must be able to recognize issues that may be the basis for an appeal then your lawyer will research to develop the argument, based on the facts of your case and appeal, to develop a persuasive brief.

The appellate process is complex and requires both skill and experience to navigate. With each successive appeal your avenues to overturn your convictions are narrowed. There are strict time limits that can affect or bar your case, so immediate action should be taken when an appeal is a possibility.

We take pride in the advice and execution of appeals before the Tennessee Court of Criminal Appeals, the Tennessee Supreme Court, and the United States Court of Appeals for the Sixth Circuit.

CHAPTER 13

How much is all of this going to cost me?

Most criminal charges carry with it a fine that must be paid if convicted. Similarly, if convicted, even if you plead guilty to a lower offense, you will have to pay court costs. Court costs are calculated based on standard rates set by the court and taxes imposed by lawmakers. Of course, it is our goal to get your case dismissed, which in turn would help you avoid these additional costs. However, it is important that you know about these costs, and our attorneys will let you know what any potential fine is for the criminal charges you are facing.

For some, even more significant than fines, court costs and attorney fees are the indirect costs that many people suffer, including higher insurance premiums for years, the loss of a job or being skipped over for a promotion or not hired for a new job due to a criminal record. Unfortunately, if it comes down to hiring one of the two best candidates for a job and one has a criminal conviction and the other does not, the person with the record will often lose out. A conviction can also affect professional licenses and close out highly profitable opportunities in some fields.

Lawyers' fees vary greatly from lawyer to lawyer and also based on the facts of each case. In criminal cases we enter into a contract for a fixed rate with our clients. That means that you will know the entire cost of the representation at the first meeting, whether the case takes 3 months or 2 years to resolve. The one exception to that is if a case goes to trial, we do not charge a fee for trial up front since we know

that most cases will be resolved before trial and it does not make sense to charge a fee to cover many hours of trial preparation and a day or two of trial if we do not yet know if that will be necessary. With just a little information about your case we can usually quote you a fee, even over the phone, which many lawyers will not do. Many lawyers require you to come in to find out the cost, with the goal of selling you on their services once you are there.

We will never be the most expensive criminal lawyers in our area, but we will not be the cheapest either. We know that legal fees are unexpected and can cause a hardship. Even so, a good representation requires time, expense, and expertise, and therefore will not be cheap.

Unlike many firms, we do offer payment plans that allow a client to make payments on the fee. These payment plans require a down payment, usually between 1/4 and 1/2 of the total fee, and the remaining balance can be paid in monthly, bi-weekly, or weekly payments, depending on what works best for each particular client.

While not everyone can afford to have us represent them, we do try to keep fees reasonable enough so that the majority of our east Tennesseans can afford a high-quality criminal defense when they need it.

CHAPTER 14

JUDICIAL DIVERSION: WHAT IS IT AND HOW DO I GET ONE?

Judicial diversion is essentially a one-time only opportunity for qualified individuals to get their charges dismissed and expunged. If you achieve a diversion in your case, you will have to sign a guilty plea, however, the judgment will not be entered against you. Instead, the court holds onto your guilty plea in the file and will dismiss the case if you abide by the conditions of the judicial diversion. If you fail to abide by each condition, the guilty plea will become effective, and you will be convicted.

Whether an individual qualifies for judicial diversion or not depends on their criminal history and the offense charged.

If you have been previously granted a judicial diversion or previously convicted of a felony or a Class A misdemeanor where you served any amount of time in jail, then you will not qualify for judicial diversion.

Additionally, many offenses do not qualify for judicial diversion. For example, sexual offenses, DUI, vehicular assault, and Class A or B felonies do not qualify for judicial diversion. This means that a judicial diversion cannot be part of a plea deal for any of these offenses.

On the other hand, if the offense that you are alleged to have committed does not qualify for diversion, it is possible for your lawyer to negotiate with the prosecutor in an endeavor to get them to reduce the charge so that you can enter into diversion on an offense that is

judicial diversion eligible. For example, an aggravated assault may be pled down to simple assault with a plea of guilty under a judicial diversion. This is why it is important to discuss your criminal history with your attorney as early as the initial consultation so that your lawyer knows if diversion is a possibility in your case.

It is important that your lawyer talks to you about your criminal history to see if you may be eligible for judicial diversion.

CHAPTER 15

Defending Against a Criminal Charge: Suppressing Warrantless Searches

Suppressing a Warrantless Search

A police officer cannot search your residence or vehicle for any reason whatsoever. Generally speaking, an officer must have a warrant to search your property because you have an expectation of privacy in your private property.

As such, Tennessee courts begin with the presumption that a warrantless search of your property was illegal. Consistent with that notion, just like the burden of proving you guilty beyond a reasonable doubt is on the State, the burden of proving that a warrantless search of your vehicle fits into one of the numerous exceptions of the warrant requirement is on the State as well.

Although there are many exceptions to the requirement for a police officer to have a warrant before searching your property, there are 3 primary exceptions that apply to criminal cases. Your lawyer should strictly scrutinize any warrantless search that resulted you being charged with a criminal offense.

Common Exceptions to the Warrant Requirement:

(1) <u>Search Incident to Arrest</u>

A widely used exception is the search incident to arrest exception. This exception may only be used to find evidence against you in limited circumstances including: (1) you, the arrestee, being within reaching distance of the property at the time of the search; or (2) it is

reasonable for the officer to believe that your property contains evidence of the offense of your arrest.

The first circumstance is justified by courts based on the belief that you can reach in the compartment, your bag or other property to obtain a firearm, making you a threat to the officer, or you can hide the evidence of the offense.

The second circumstance is justified by courts only in limited ways. This is extremely fact specific which your lawyer must strictly evaluate as well. For example, if your vehicle or residence, rather than your body and breath, smells like an illegal substance, the officer may search your vehicle or residence under this exception because it is reasonable for the officer to believe that there is an open container or marijuana within your vehicle.

Once again, the burden is on the State to prove that this exception is applicable to justify the officer's warrantless search of your vehicle. The officer's suspicion that there is evidence of the crime within your vehicle must be based on specific reasonable inferences, rather than simply a hunch.

Just for being arrested, an officer cannot claim that he or she was searching your vehicle to find evidence of the crime. The officer must have specific suspicion based on the circumstances of your individual case. An officer cannot simply speculate that there is illegal evidence in the vehicle or your house.

Moreover, the officer cannot search your entire vehicle based on this exception. Instead, the officer may only search areas that the officer can reasonably believe may contain evidence of the crime. For example, if an officer smells beer and is looking for an open container

in the vehicle, the officer cannot open your trunk to find the open container, unless he or she has specific information that makes the officer believe that there is evidence within the trunk.

(2) Plain View Exception

An officer may search your property if evidence of a crime is in plain view. This means that if the officer observes illegal substances or activity in your residence or your vehicle, the officer may search if the officer can clearly delineate what he saw.

Additionally, if you are pulled over for a traffic violation, a police officer may ask you to step out of your vehicle. When you step outside of your vehicle, if illegal contraband falls out of your vehicle or is in plain view when you open your door, the officer may also rely on this exception.

Although this exception is usually upheld more broadly by courts than the other exceptions, there are still defenses from the plain view exception. For example, if the officer did not have a reason to be at your residence or to pull you over in the first place then the officer would have never saw the illegal contraband in plain view. Thus, the evidence would be subject to suppression.

(3) Inventory Searches

Lastly, an inventory search is an exception that is used when police officers arrest you while you are in your vehicle causing the officer to tow your vehicle. This most commonly occurs in DUI cases, but also occurs in drug cases and felony cases as well. This exception applies to allow a police officer to search your vehicle without a warrant

whenever the officer has probable cause to arrest you for a crime that enables them to take your vehicle into custody.

In short, whenever a police officer arrests you for a criminal offense involving your vehicle, the officer will not leave your vehicle on the side of the road. Instead, the officer will call a tow truck company to tow your vehicle for you. Before the tow truck company tows your vehicle, an officer will search your vehicle to "inventory" the vehicle, or make a list of all of your personal belongings within the vehicle, in an endeavor to protect your personal belongings.

Although an officer may inventory search your vehicle before towing it, the burden is on the State to prove that there was not a reasonable alternative to the officer seizing and towing your vehicle. It is important that your lawyer evaluates every aspect and every justification provided for an inventory search.

For example, a police officer is required to ask you, the individual being arrested, whether you can call someone to pick up your vehicle in a reasonable period of time. If you can have a loved one or a friend, or call a towing company yourself, you should be provided that opportunity, even if you do not have a passenger present that can safely operate your vehicle for you.

Additionally, other defenses may exist that your lawyer should discuss with you to determine if they can suppress any illegal evidence found during an inventory search.

Overall, whenever an officer searches your residence or vehicle and finds evidence of the crime, it is important to question the officer on which exception he or she relied on to conduct a warrantless search.

It is also important to question the officer to determine if a defense is applicable to suppress the evidence.

If any defenses to an illegal search are applicable in your case, it is important that your lawyer discusses the defenses with you. Your lawyer should question the officer vigorously on the search either at a preliminary hearing or at a motion to suppress hearing to argue that the facts of your case made the exception inapplicable. And remember, the burden of proving that the search was valid is on the State, not you and your lawyer to prove that it was invalid.

CHAPTER 16

Defending Against a Criminal Charge: Suppressing a Confession or a Statement

Just like with a motion to suppress a search, the burden is on the State to prove by a preponderance of the evidence that you waived your rights. Your waiver of your Miranda rights must be made voluntarily after being made fully aware of the nature of the right being abandoned and the consequences of the decision to abandon that right. Thus, this is why when an officer reads you your Miranda rights the officer must inform you that anything you say may be used against you in court.

When must Miranda rights be given?

An officer does not need to mirandize you immediately upon questioning you. For example, in a DUI case, police officers do not have to mirandize you even during field sobriety tests because they are considered by the courts to be non-testimonial, which is not subject to suppression for a failure to mirandize.

There are two requirements to proving that you were entitled to be advised of your Miranda rights: (1) that you were in custody; and (2) that you were being interrogated. If both conditions are met, the officer's failure to mirandize you makes any statements you made subject to suppression.

(1) Custody requirement

Your lawyer should focus on the facts specific to your case to prove that you were in custody any time that you made any statements against your interest or any admissions.

You are "in custody" when, under the totality of the circumstances, a reasonable person in your position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest. Most obviously, if you are being questioned in an interrogation room, courts will find that you were in custody. Also, if the police officer retains your driver's license during the traffic stop then for Miranda purposes you are considered in custody because no reasonable person would believe that he or she could simply terminate the encounter by asking the officer to return your license and because driving without your license is an additional traffic violation.

(2) Interrogation requirement

This requirement does not mean that you were in a room alone with the officer for hours being interrogated. Instead, you are the subject of an "interrogation" whenever a police officer asks questions that is reasonably likely to elicit incriminating information while you are also in custody.

If you make any admissions to the officer during the investigation your lawyer should evaluate whether a Miranda issue exists. Your lawyer should understand Miranda and the ways to skillfully and persuasively argue that you were entitled to Miranda rights before your incriminating statement was made by you.

Did I properly invoke my Miranda rights?

I told the officer that I was invoking my right to remain silent then later on I made incriminating statements, they cannot use those statements against me, right?

(1) Right to remain silent

This is a situation that is extremely fact specific. Generally, once you invoke your right to remain silent, you cannot be asked questions that are likely to elicit an incriminating response for the full time that you are in custody plus an additional 14 hours. However, there are some exceptions to this rule. For example, if you invoke your right to remain silent but then later begin speaking to the officer on your own, without being interrogated, then the statements may or may not be subject to suppression.

(2) Right to a lawyer

Similarly, if you invoke your right to a lawyer, you cannot be questioned about the specific crime that you were arrested for committing without your lawyer present, after you are advised of your Miranda rights. However, exceptions to this rule exist as well. For example, an officer may question you about another crime separate from the crime that caused you to be in custody without there being a violation. In these instances, it is important that your lawyer analyzes the facts to determine whether a breach that entitles you to suppression exists.

<u>I asked for a lawyer, but the officer continued to interrogate me, they cannot use my statements against me right?</u>

Once you state **unequivocally** that you want a lawyer, all questioning must stop. An issue exists where you make statements such as "I think I need a lawyer now." You must clearly and unequivocally state "I want a lawyer" for questioning to stop.

Overall, you may be entitled to a suppression of statements that you made even before you were mirandized. As such, your lawyer must always be weary of the circumstances under which you made your admission or statement against interest.

CONCLUSION

We hope that this short book has given you some answer to your questions. We also hope that with the additional information you are feeling at least a little better about the criminal charge you are facing. Of course, this book did not cover every potential criminal offense you may have been charged with but our attorneys over their careers have defended individuals with a wide variety of crimes from homicide to simple assault. Much of the fear in this situation comes from the unknown.

Finally, we'd like to speak with you about your case and what we can do to help. Please give us a call to discuss your case. You can also text or email. Our number is (865) 805-5703.