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In *State of Tennessee v. Christopher Minor*, the Tennessee Supreme Court thoroughly detailed the plain error doctrine and held that that “new rules apply retroactively to cases pending on direct review but do so subject to other jurisprudential concepts, such as appellate review preservation requirements and the plain error doctrine.”<sup>1</sup> The Court’s holding correctly applied long held doctrines of Tennessee law and reversed the decision by the Court of Criminal Appeals that did not address the retroactive application of new rules.<sup>2</sup> The facts of this case are straightforward.

Christopher Minor was acting at the behest of the leader of the Black P-Stone Nation – the criminal gang to which Mr. Minor also owed his allegiance – when Rico Swift was murdered, and Julie Frye was injured during a robbery perpetrated by Mr. Minor and fellow members of the gang.<sup>3</sup> Ms. Frye positively identified, through a photo array, Mr. Minor as the person who attacked Mr. Swift and then pistol-whipped her into unconsciousness.<sup>4</sup> Mr. Minor vehemently denied Ms. Frye’s accusations, insisting instead that he was merely a scout who had only accepted his portion of the proceeds from the robbery under penalty of gang discipline.<sup>5</sup>

Mr. Minor was subsequently indicted on sixteen counts, including two felony murder counts and seven counts for violating *Tennessee Code Annotated* §40-35-121(b), the Criminal Gang Statute, the violation of which qualified Mr. Minor for sentencing one classification higher than the charged offenses.<sup>6</sup> The trial judge bifurcated the proceedings: one trial determined guilt as to felony murder, aggravated robbery, aggravated burglary, aggravated assault, and employing a firearm in the commission of a dangerous felony while the other trial determined guilt as to the seven counts for violating the Criminal Gang Statute.<sup>7</sup>

At sentencing, the trial court merged several of the defendant's convictions and imposed a total effective sentence of life plus twenty years with at least ten years of the defendant's effective sentence resulting from enhancement under the criminal gang offense statute.<sup>8</sup> Additionally, the trial court recorded the defendant's convictions of aggravated robbery, aggravated burglary, aggravated assault, and felon in possession of a handgun as one classification higher than the classifications established by the statutes creating the offenses, as authorized by the criminal gang offense statute.<sup>9</sup>

Following the defendant's trial and sentencing but during the pendency of his appeal, the Court of Criminal Appeals handed down *State v. Bonds*, declaring the “Criminal Gang Statute” unconstitutional on grounds that *Tennessee Code Annotated* §40-35-121(b) violated the Due Process Clause of the Fourteenth Amendment for lack of a nexus requirement between the underlying offenses and the gang affiliation.<sup>10</sup>

Mr. Minor relied on *Bonds* in his own appeal to the Court of Criminal Appeals, but the Court held that that the defendant had waived his constitutional challenge to the statute by failing to raise the issue in the trial court and that the defendant was not entitled to relief on his constitutional claim via the plain error doctrine.<sup>11</sup>

The Court of Criminal Appeals noted that the gang enhancement statute was not found unconstitutional until after the defendant's trial beginning and the imposition of his sentence.<sup>12</sup> That Court further noted that “[e]very act of the General Assembly is presumptively constitutional until condemned by judicial pronouncement.”<sup>13</sup> Because the Criminal Gang Statute was still in effect at the time of sentencing, a clear and unequivocal rule of law was not breached. Therefore, the trial court had not made plain error.<sup>14</sup> The Tennessee Supreme Court accepted certiorari “to clarify the interplay among appellate review preservation requirements, the plain error doctrine, and the retroactive application of new rules.”<sup>15</sup>

As to the retroactive application of new rules, the Supreme Court noted that, generally, “appellate courts apply new constitutional rules retroactively to all cases pending on direct review when the new rule was announced.”<sup>16</sup> However, this application is not unconstrained.<sup>17</sup> When determining whether to apply new rules retroactively to cases pending on direct review, such cases are subject to appellate review preservation requirements and the plain error doctrine.<sup>18</sup>

The Supreme Court noted that the “obligation to preserve issues for appellate review applies to constitutional issues and issues of ‘any other sort.’”<sup>19</sup> Appellate review is generally limited to issues that a party properly preserves for review by raising the issues in the trial court and on appeal.<sup>20</sup> However, the “plain error doctrine has long been recognized as a necessary exception to [those] requirements, which affords appellate courts discretion to review unpreserved errors and grant relief when fairness and justice demand.”<sup>21</sup> Because Mr. Minor failed to preserve the issue of the constitutionality of the Criminal Gang Statute, the issue could only be considered under the plain error doctrine.<sup>22</sup>

To find plain error, an appellate court must find:

- (1) the record clearly establishes what occurred in the trial court;
- (2) a clear and unequivocal rule of law was breached;
- (3) a substantial right of the accused was adversely affected;
- (4) the issue was not waived for tactical reasons; and
- (5) consideration of the error is necessary to do substantial justice.<sup>23</sup>

Though the appellate courts are empowered to find plain error, such authority must be “sparingly exercised.”<sup>24</sup>

Because the Defendant did not preserve for appeal the issue of the constitutionality of the Criminal Gang Statute, Defendant could only seek review under the plain error doctrine. The primary issue on appeal was whether “a clear and unequivocal rule of law was breached” because that was the ground on which the Court of Criminal Appeals rejected the plain error doctrine.<sup>25</sup> The Tennessee Supreme Court analyzed the *Olano*, *Johnson*, and *Henderson* trifecta, as decided by the Supreme Court of the United States.

In *Olano*, the United States Supreme Court held “that an error is not ‘plain’ for purposes of the plain error doctrine unless the error is clear under current law.”<sup>26</sup> In *Johnson*, the Court held that “where the law at the time of trial was settled and clearly contrary to the law at the time of appeal . . . it is enough that an error be ‘plain’ at the time of appellate consideration.”<sup>27</sup> In *Henderson*, the Court held that an appellate court must “apply the law in effect at the time it renders its decision.”<sup>28</sup> That rule, harkens back to the earliest days of jurisprudence in the United States when Chief Justice Marshall wrote that “if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed.”<sup>29</sup>

The Tennessee Supreme Court held that *Henderson* did not need to be adopted or addressed, finding that “the circumstances of this case lie somewhere between *Johnson* and *Henderson* but resemble slightly more closely those of *Johnson*,” and on those grounds *Johnson* was found to control.<sup>30</sup> The Court held that the “law at the time of the defendant’s trial concerning the constitutionality of the criminal gang offense statute cannot be characterized as unsettled,” but rather “the issue was simply undecided because no court had addressed it.”<sup>31</sup>

Pursuant to *Johnson*, the Criminal Gang Statute was still in effect at the time of Mr. Minor’s trial, but the Criminal Gang Statute was no longer in effect at the time of direct appeal, rendering the extant law on appeal clearly contrary to the law at the time of trial. The Court held that “the defendant’s convictions and enhanced sentencing under the unconstitutional criminal gang offense statute violate a clear and unequivocal rule of law.”

The Court briefly discussed the other elements of the plain error doctrine before reversing and remanding for “resentencing in accordance with the sentencing classification ranges established by the specific statutes creating the offenses, without any classification or sentence enhancement pursuant to the criminal gang offense statute.”<sup>32</sup>

The Tennessee Supreme Court’s decision was both prudent and correct, though the concurring opinion disagrees. The concurring opinion argues for the adoption of *Henderson* to hold that “an appellate court, when determining whether a defendant is entitled to plain error relief, should apply the law in effect at the time of its review.”<sup>33</sup> The adoption of *Henderson* was not necessary, and the Court correctly declined to address it.

The Court applied *Johnson*, which the Court had adopted in 2005.<sup>34</sup> The Court addressed only the issues before it by Mr. Minor and was able to resolve those issues within existing legal precedent. Tennessee has long applied the doctrine of *stare decisis*.<sup>35</sup> The Tennessee Supreme Court held over one-hundred and fifty years ago that it is “more important to adhere to precedent, and uniformity of decision, than to change that which is settled.”<sup>36</sup>

*Stare decisis* “only arises in respect of decisions directly upon the points in issue.”<sup>37</sup> In *Minor*, *Johnson* was the law governing at the time of the appeals, and *Johnson* was applicable to the issues on appeal. It may behoove the Court to adopt *Henderson* at some later date, but *Johnson*’s holding was sufficient to address these issues, and *Henderson* did not need to be addressed.

The concurring opinion states that *Henderson* would simplify “appellate practice by sparing lawyers and judges the ‘temporal ping-pong’ that results from focusing on the law at the time of trial—law that changes after trial and may be obsolete by the time of appeal.”<sup>38</sup> *Johnson* does not require “temporal ping-pong;” for relief under *Johnson*, settled law applied at trial must be essentially cast aside and a contrary position adopted at the time of appeal. The law at the time of appeal must be clearly contrary for *Johnson* to apply, and that determination is relatively straightforward. In *Minor*, law in effect at the time of trial was no longer in effect at the time of appeal: a simple yes or no determination for appellate courts. Applying *Johnson* is far more akin to Chinese checkers than ping-pong. The Court properly declined to adopt *Henderson*.

Because of this scheme, a legal practitioner must keep abreast of new developments in the law. An attorney must remain informed of any and all changes in the law to effectively represent clients. An attorney must take the time to scour the advance sheets and slip opinions, published daily by the appellate courts, to remain informed of new legal developments and changes in the

law. An attorney must update research and Shepardize citations every time a form motion is to be used. An attorney must know the law, not merely concepts and theories and history, but the very statutes and precedent that effect matters pending in all courts.

Further, as *Minor* notes, an attorney must preserve a record on appeal and cannot rely on the doctrines such as plain error to provide relief for clients. Without properly preserved objections, a record on appeal will be deficient and non-reviewable. Plain error applies only in the narrowest of circumstances and cannot be relied on as the primary grounds for appellate relief.

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<sup>1</sup> *State v. Minor*, 546 S.W.3d 59, 75 (Tenn. 2018).

<sup>2</sup> See *State v. Minor*, No. W2016-00348-CCA-R3-CD, 2017 Tenn. Crim. App. LEXIS 102, at \*26-27 (Crim. App. Feb. 16, 2017).

<sup>3</sup> *Minor*, 546 S.W.3d 59, 62 (Tenn. 2018).

<sup>4</sup> *Id.* at 63.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 64.

<sup>9</sup> *Id.*

<sup>10</sup> See *State v. Bonds*, 502 S.W.3d 118, 167 (Tenn. Crim. App. 2016).

<sup>11</sup> *State v. Minor*, 546 S.W.3d 59, 64 (Tenn. 2018)(citing *State v. Minor*, No. W2016-00348-CCA-R3-CD, 2017 Tenn. Crim. App. LEXIS 102, at \*27 (Crim. App. Feb. 16, 2017).

<sup>12</sup> *State v. Minor* at \*27 (Crim. App.)(citing *State v. Jermaine Stripling*, No. 2015-01554-CCA-R3-CD, 2016 Tenn. Crim. App. LEXIS 443, 2016 WL 3462134 at \*8 (Tenn. Crim. App. June 16, 2016).

<sup>13</sup> *State v. Minor* at \*27 (Crim. App.) (citing *Taylor v. State*, 995 S.W.2d 78, 85 n7 (Tenn. 1999).

<sup>14</sup> *State v. Minor* at \*27 (Crim. App.)

<sup>15</sup> *State v. Minor*, 546 S.W.3d 59, 62 (Tenn. 2018).

<sup>16</sup> *Id.* at 68 (citing *Griffith v. Kentucky*, 479 U.S. 314, 326-28 (1987); *State v. Gomez* 163 S.W.3d 632, 643 (2005)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 65 (citing *United States v. Olano*, 507 U.S. 725, 731 (1993)).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (citing *Olano*, 507 U.S.732).

<sup>22</sup> See *State v. Bledsoe*, 226 S.W.3d 349, 354 (Tenn. 2007); Tennessee Rules of Appellate Procedure Rule 36.

<sup>23</sup> *Minor*, 546 S.W.3d at 67 (citing *Tenn. R. App. P.* 36(b); *State v. Martin*, 505 S.W.3d 492, 504).

<sup>24</sup> *Minor*, 546 S.W.3d at 67.

<sup>25</sup> *Id.* at 64.

<sup>26</sup> *Id.* at 71 (citing *United States v. Olano* 507 U.S., 266, 275 (1993)).

<sup>27</sup> *Id.* (citing *U.S. v. Johnson* 520 U.S. 461, 466 (1997)).

<sup>28</sup> *Minor*, 546 S.W.3d at 72 (citing *U.S. v. Henderson* Id. at 271 (quoting *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281(1969))).

<sup>29</sup> *Minor*, 546 S.W.3d at 72 (citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L. Ed. 49 (1801).

<sup>30</sup> *Minor*, 546 S.W.3d at 74.

<sup>31</sup> *Id.*

<sup>32</sup> *Minor*, 546 S.W.3d 75.

<sup>33</sup> *Minor*, 546 S.W.3d 76.

<sup>34</sup> See *State v. Gomez*, 163 S.W.3d 632, 636 (Tenn. 2005)(vacated on other grounds)

<sup>35</sup> *Memphis v. Overton*, 216 Tenn. 293, 297, 392 S.W.2d 98, 100 (1965) (citing *Sherfy v. Argenbright*, 48 Tenn. 128 (1870); *Foster v. Roberts*, 142 Tenn. 350, 219 S.W. 729 (1919); *Staten v. State*, 191 Tenn. 157, 232 S.W.2d 18 (1950).

<sup>36</sup> *Sullivan v. Ivey*, 34 Tenn. 487, 488 (1855).

<sup>37</sup> *Memphis v. Overton*, 216 Tenn. 298, 392 S.W.2d 98 at 101 (citing *State ex rel. v. Nashville Baseball Club*, 127 Tenn. at 307, 154 S.W. at 1155 (1912).

