



Defending Against the Charge of Indecent Exposure

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Disclaimer

The content in this book is intended to be general legal information for unrepresented defendants. I do not know the specifics of your case, and this book is not legal advice based upon the particular details of your case. I do not automatically become your attorney just because you are reading this book. If you are already represented by an attorney, then you should listen to him or her. With that out of the way, happy reading!

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Question #1: How much trouble am I in?

As with many sex crime offenses, the greatest penalty of a conviction may not be not the actual potential jail time, but the social stigma it can cause. Imagine that a potential employer does a background check on you, and he or she learns that you were convicted for exposing your genitals! So whether you actually have to serve jail time on it or not, your primary focus should be trying to avoid a conviction altogether.

Depending on the facts of the case, a conviction for this offense could result in jail, placement on the Sex Offense Registry (in some cases), a felony on your record, loss of your marriage, child visitation, employment, immigration status, loss of car or house (in some cases), and many more.

You are about to have to make a very difficult decision – do you have the heart for the battle to come? It will be very tempting to plead guilty rather than go to trial because it's cheaper, quicker, and easier ... but you will be wearing a scarlet letter forevermore.

Question #2: Do I have a good chance at trial?

I can only give general advice here without having read the specific facts in your case, but I can say this – as you read this guide, you will probably be surprised at how many things you would like to present at trial but cannot.

The **first** thing you need to understand about the offense of indecent exposure is that it can only occur in a public place, the private premises of another, or near enough to either so as to be seen from their private premises – but that term is much broader than the way we might use it in everyday language.

The term "public place" is further defined under Tenn. Code Ann. § 39-11-106 as "a place to which the public or a group of persons has access and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, places of business, playgrounds and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. An act is

deemed to occur in a public place if it produces its offensive or proscribed consequences in a public place." Tenn. Code Ann. 39-11-106.

(Notice the "includes, but is not limited to," which signifies that this is not an exhaustive list. These are the only specific locations, but the analysis is more than just seeing if it fits on this list due to that language.)

A recent Indecent Exposure case applies the term "public place" more generally as "a place to which the public or a group of persons has access." Tenn. Code Ann. § 39-11-106(a)(29). *State v. Frederick*, 2015 Tenn. Crim. App. LEXIS 829 (Tenn. Crim. App. Oct. 12, 2015). This definition is so broad that it basically includes everything except your own bedroom closet.

Confused yet? As you can see, this is pretty open to interpretation. For example, what if you and your co-worker were flirting around in the file room at your office and you expose yourself, only to find out that the feeling was not mutual? Since the room is about the size of a closet and the door was closed, you might think, "There is no way that this could be considered a public place," but according to the statute, it probably would be. My point is that you don't have to be walking

around in a sports stadium with your genitals hanging out to have satisfied the 'public place' element of the offense.

Although this language isn't specifically included in the definition, courts will likely refer to the "reasonable expectation of privacy" distinction to determine whether Fourth Amendment protection applies, and whether a person had an objective, legitimate expectation of privacy. Examples of such places include public restrooms, phone booths, and obviously a person's home. *Katz v. United States*, 389 U.S. 347 (1967). The tougher calls are places like your office at work, lockers at school, etc., which most courts have routinely held as public spaces.

Is my car a public place for Indecent Exposure cases?

Probably not, according to a recent Indecent Exposure case, where a police officer observed a defendant wearing only a T-shirt and fishnet stockings, with a spiked leather strap wrapped around his testicles. The defendant was sitting in his car, with the door open, in a Nashville public park.

The defendant argued that since the police officer had to shine his flashlight in

defendant's car to see inside the car, the search should have been ruled as unreasonable.

The appellate court held that the use of the flashlight did not make the search unreasonable. The court also made special mention that the defendant's car door was open when his genitals were exposed. *State v. Eddinger*, 112 S.W.3d 148 (Tenn. Crim. App. 2002).

So as you can see, if a person were sitting in the park in the dark and had the door closed, it might have made a bit of a difference, but that's probably not a chance worth taking.

The **second** thing you need to know about this offense is that you must “intentionally” expose yourself, so if your pants fall down when you remove your belt at the TSA station at the airport, you have not committed a criminal act.

The statute lists “genitals or buttocks,” so mooning someone – even though you thought it would be taken as a silly joke – would meet the requirements of Indecent Exposure.

What if I wasn't aroused?

You don't have to be, according to this recent Indecent Exposure case, where a father

and his ten-year-old twin daughters were at a Michael's craft store in Nashville, when the father noticed that a Defendant in an electronic wheelchair stopped at the "end counter" facing where his daughter was standing in the aisle.

The man noticed that the Defendant was facing his daughter's backside and called his daughter away, but the Defendant returned and was again aimed right at the daughter's backside.

The man then snuck behind the Defendant, and noticed that the Defendant had his hand under a blanket and down his pants and was rubbing himself while staring at the man's daughter. Mr. Eggers saw the Defendant's penis in the Defendant's hand.

During the trial, the Defendant testified that he had been paralyzed from the chest down for thirty-one years as a result of a motorcycle accident. He said that he had no ability to have an erection since the accident. The Defendant further said that he frequently had urinary tract issues and had to change his catheter frequently.

The Defendant was found guilty, and argued on appeal that the evidence was insufficient to sustain his conviction because

the State did not prove that the touching could be reasonably construed as being for the purpose of sexual arousal or gratification or that the Defendant reasonably expected the alleged act or acts to be viewed by another. He questioned whether the father actually saw his penis at all, and further maintained that he is physically incapable of having an erection.

The trial court clearly credited Mr. Eggers's account of the events, and the appellate court held that the Defendant's ability to have an erection is not an element of the offense. *State v. Little*, 2015 Tenn. Crim. App. LEXIS 776 (Tenn. Crim. App. Sept. 28, 2015).

The **third** thing you need about Indecent Exposure is that the statute doesn't just apply to an individual flashing himself or herself – it also includes situations where two (or more) people are engaging in sexual activity in public. 'Sexual activity' does not have to go as far as actual penetration. The statute only requires "sexual contact or sexual penetration."

When those acts could be reasonably expected to offend the ordinary viewer, or are being displayed for the purpose of sexual arousal and gratification of the defendant, the statutory requirements are met to charge the

Defendants with Indecent Exposure. Tenn. Code Ann. § 39-13-511.

Question #3: What facts can make the charge more serious?

Indecent Exposure is a Class B misdemeanor. The range of punishment for a Class B misdemeanor is “not greater than six (6) months or a fine not to exceed five hundred dollars (\$500).” Tenn. Code Ann. § 40-35-111.

There are three heightened versions of Indecent Exposure with additional elements and greater punishments, which include:

If the defendant is eighteen (18) years of age or older and the victim is under thirteen (13) years of age, indecent exposure is a Class A misdemeanor.

The range of punishment for a Class A misdemeanor is "not greater than eleven (11) months, twenty-nine (29) days or a fine not to

exceed two thousand five hundred dollars (\$2,500)." Tenn. Code Ann. § 40-35-111.

If the defendant is eighteen (18) years of age or older and the victim is under thirteen (13) years of age, and the defendant has any combination of two (2) or more prior convictions under this section or § 39-13-517, or is a sexual offender, violent sexual offender or violent juvenile sexual offender, as defined in § 40-39-202, the offense is a Class E felony.

If the defendant is eighteen (18) years of age or older and the victim is under thirteen (13) years of age, and the offense occurs on the property of any public school, private or parochial school, licensed day care center or other child care facility during a time at which a child or children are likely to be present on the property, the offense is a Class E felony.
Tenn. Code Ann. § 39-13-511

The range of punishment for a Class E felony is "not less than one (1) year nor more than six (6) years. In addition, the jury may assess a fine not to exceed three thousand dollars (\$3,000)." Tenn. Code Ann. § 40-35-111.

Question #4: Could this charge put me on the Sex Offender Registry?

Indecent Exposure will place a criminal defendant onto the Sex Offender Registry as a Sexual Offender, upon a third or subsequent conviction. Tenn. Code Ann. § 40-39-202.

Question #5: Can I get a diversion on this offense?

If you've done some research online (perhaps on my website, which is located at MemphisDiversions.com), then you know

that judicial diversion is a wonderful program that allows individuals with little to no criminal background to enter a guilty plea in a manner that avoids future jail time and the eventual expunction of the criminal charge upon the successful completion of a probationary period. Tenn. Code Ann. § 40-35-313.

After the criminal defendant enters a guilty plea, the sentence is suspended and the charge would show on a criminal background check as a pending offense (not a conviction). If the criminal defendant is successful, he or she has achieved the same result as winning at trial.

Indecent Exposure is eligible for diversion.

Question #6: What defenses are unavailable?

The most obvious defense is that the alleged offense never happened. This offense rarely leaves forensic evidence, so in the absence of eye witnesses, the result of the trial will turn mostly on your testimony (assuming that you testify) in comparison to the testimony of the alleged witness – whoever is more credible will prevail.

There is also a potential defense regarding the elements above, i.e., that it did not occur in a public place. Be aware from the analysis above that the arguments of “You didn’t see my private parts,” “I wasn’t aroused,” “I was covered by a blanket,” and “A reasonable person wouldn’t have been offended by this” are not likely to be successful arguments based on case precedents and common sense.

Question #7: What is the Rape Shield Law and how will it affect the case?

The Rape Shield law is a rule of evidence that determines the admissibility of the alleged victim's sexual behavior when a defendant is charged with certain sexual offenses. See Tennessee Rule of Evidence 412.

Generally speaking, reputation testimony, opinion testimony, and specific instances of a victim's sexual behavior are all 'shielded,' or inadmissible from court proceedings. This means that the jury will not be able to hear any of this information regarding the victim's sexual behavior. The rule makes a distinction between evidence of sexual activity between the alleged victim and the defendant and evidence of sexual activity between the alleged victim and other sexual partners.

Why does it exist? This rule was put into effect because some defendants might introduce this evidence in an attempt to shame the victim or make the victim's morality the central issue in the case. Additionally, the rule may make more victims hesitant to report sexual offenses for fear that their personal sex lives will become public. One can certainly

understand that a rape victim who has had multiple sexual partners in his or her personal life should not fear that such information would be made public during the rape trial when it has nothing to do with whether or not a rape occurred.

Does it go too far? While this rule achieves positive social aims, some people feel that the rule goes too far when it denies the jury from being able to hear whether the victim has made false accusations in the past, as this might certainly be relevant in determining whether the alleged victim is making a false claim in the present case. Other people do not believe that the rule goes too far and believe that it should be even more expansive.

When does it apply? This rule applies not only to the actual trial, but also to the preliminary hearing, depositions, and other proceedings. This rule applies when a defendant is accused of certain sexual offenses, as listed below. In the few exceptions where evidence of the victim's sexual behavior is admissible, there are additional conditions that must be met. The defense attorney must comply with a pre-trial procedure if this testimony is to be admitted, wherein the court

can determine whether the evidence will be used for a permissible purpose.

Tennessee Rule of Evidence 412: Sex Offense Cases; Relevance of Victim’s Sexual Behavior.

“Notwithstanding any other provision of law, in a criminal trial, preliminary hearing, deposition, or other proceeding in which a person is accused of ... 39-13-506 [statutory rape] ..., or the attempt to commit any such offense, the following rules apply:

(a) Definition of sexual behavior. In this rule “sexual behavior” means sexual activity of the alleged victim other than the sexual act at issue in the case.

(b) Reputation or opinion. Reputation or opinion evidence of the sexual behavior of an alleged victim of such offense is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this Rule and required by the Tennessee or United States Constitution.

(c) Specific instances of conduct. Evidence of specific instances of a victim’s sexual behavior is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this rule, and the evidence is:

(1) Required by the Tennessee or United States Constitution, or

(2) Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim's sexual behavior, and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim, or

(3) If the sexual behavior was with the accused, on the issue of consent, or

(4) If the sexual behavior was with persons other than the accused,

(i) to rebut or explain scientific or medical evidence, or

(ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or

(iii) to prove consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the accused's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented."

Question #8: Could law enforcement seize my house or car over this?

Yes. If a criminal defendant was found to have committed a sexual battery against a minor, the real or personal property is subject to judicial forfeiture. The offense must be committed against a person under eighteen (18) years of age on or after July 1, 2006. Tenn. Code Ann. § 39-13-530.

Indecent Exposure Statute

Indecent Exposure

Tenn. Code Ann. 39-13-511. Indecent Exposure.

(a) (1) A person commits the offense of Indecent Exposure who:

(A) In a public place, as defined in § 39-11-106, or on the private premises of another, or so near thereto as to be seen from the private premises:

(i) Intentionally:

(a) Exposes the person's genitals or buttocks to another; or

(b) Engages in sexual contact or sexual penetration as defined in § 39-13-501; and

(ii) Reasonably expects that the acts will be viewed by another and the acts:

(a) Will offend an ordinary viewer; or

(b) Are for the purpose of sexual arousal and gratification of the defendant; or

(B) (i) Knowingly invites, entices or fraudulently induces the child of another into the person's residence for the purpose of attaining sexual arousal or gratification by intentionally engaging in the following conduct in the presence of the child:

(a) Exposure of such person's genitals, buttocks or female breasts; or

(b) Masturbation; or

(ii) Knowingly engages in the person's own residence, in the intended presence of any child, for the defendant's sexual arousal or gratification the following intentional conduct:

(a) Exposure of the person's genitals, buttocks or female breasts; or

(b) Masturbation.

(2) No prosecution shall be commenced for a violation of subdivision (a)(1)(B)(ii)(a) based solely upon the uncorroborated testimony of a witness who shares with the accused any of the relationships described in § 36-3-601(5).

(3) For subdivision (a)(1)(B)(i) or (a)(1)(B)(ii) to apply, the defendant must be eighteen (18) years of age or older and the child victim must be less than thirteen (13) years of age.

(b) (1) “Indecent exposure”, as defined in subsection (a), is a Class B misdemeanor, unless subdivision (b)(2), (b)(3) or (b)(4) applies.

(2) If the defendant is eighteen (18) years of age or older and the victim is under thirteen (13) years of age, indecent exposure is a Class A misdemeanor.

(3) If the defendant is eighteen (18) years of age or older and the victim is under thirteen (13) years of age, and the defendant has any combination of two (2) or more prior convictions under this section or § 39-13-517, or is a sexual offender, violent sexual offender or violent juvenile sexual offender, as defined in § 40-39-202, the offense is a Class E felony.

(4) If the defendant is eighteen (18) years of age or older and the victim is under thirteen (13) years of age, and the offense occurs on the property of any public school, private or parochial school, licensed day care center or other child care facility during a time at which a child or children are likely to be present on the property, the offense is a Class E felony.

(c) (1) A person confined in a penal institution, as defined in § 39-16-601, commits the offense of indecent exposure who with the intent to abuse, torment, harass or embarrass a guard:

(A) Intentionally exposes the person's genitals or buttocks to the guard; or

(B) Engages in sexual contact as defined in § 39-13-501.

(2) For purposes of this subsection (c), "guard" means any sheriff, jailer, guard, correctional officer or other authorized personnel charged with the custody of the person.

(3) Notwithstanding subsection (b), a violation of this subsection (c) is a Class A misdemeanor.

(d) This section does not apply to a mother who is breastfeeding her child in any location, public or private.

Notes

Booking and processing date: _____

Court date: _____

Court division: _____

Potential favorable witnesses: _____

Questions for the attorney: _____

Special Offer

If you found this consumer guide to be helpful and would like to read more, please contact me using the information below to request my book, 10 Mistakes that Can Sabotage Your Criminal Case.

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About the Author

J. Jeffrey Lee is one of only five Certified Criminal Trial Specialists in Memphis, Tennessee. He has been certified as a Criminal Trial Specialist by the Tennessee Commission on C.L.E. and Specialization and Certified as a Criminal Trial Specialist by the National Board of Trial Advocacy.

He has attended the Tennessee Criminal Defense College on numerous occasions, along with the renowned National Criminal Defense College in Macon, Georgia. He was recently inducted into The National Trial Lawyers Top 100 Trial Lawyers. He has also been selected as a 2015 Mid-South Rising Star by Super Lawyers. However, the distinction that gives J. Jeffrey Lee the greatest pleasure is the Client's Choice award from AVVO, and the "10 Best" Client Satisfaction Award from the American Institute of Criminal Law Attorneys, because that means that his clients are pleased with the representation he provides. He is a member of TACDL (Tennessee Association of Criminal Defense Lawyers) and NACDL (National Association of Criminal Defense Lawyers).

Mr. Lee began as an Assistant Public Defender in the 25th Judicial District of Tennessee (Lauderdale, Tipton, Fayette, Hardeman, and McNairy Counties). His responsibilities included representing the indigent accused in General Sessions Court, Circuit Court, and the Court of Criminal Appeals. He performed a variety of matters, including preliminary hearings, suppression hearings, jury and bench trials, appeals, revocation hearings, and post-conviction hearings.

After working as a public defender, he formed his own law practice and he has recently narrowed and focused his practice in the area of serious felonies and sex crimes in an effort to serve an underrepresented and marginalized group of defendants who desperately need a first-rate defense.

The Law Office of J. Jeffrey Lee primarily serves the greater Memphis area. If you or someone you love needs legal representation, please contact the author.

Testimonials

“Mr. Lee was an astounding criminal defense lawyer for my needs. He was professional, prompt, available, dependable, and reliable. He kept me informed and responsive throughout the court dates and situations. He was able to deliver better results than I imagined! Thank you for your dedicated service!”

— Mrs. M Y

“Very Good Person to be around and make you feel comfortable, very knowledgeable and professional. I would definitely use his services again if needed and would recommend him to future clients.”

— Kandice

“I actually got his contact information from a close friend of mine and he had suggested Jeff right off the bat. The first time talking to Jeff he knew exactly what needed to be done for this court date to go smoothly and well in my favor. His knowledge and calm collective way of handling my case was exactly what I was

looking for. Thanks again Jeff I really appreciate your help!”

— Kris

“This attorney provides services that are of a high caliber. He has handled two different cases for me over the past couple of years. He kept me informed of each step involved with this case. Additionally, he explained the worst case outcome and the best case outcome. Thanks to his tenacity, we came out with the best case outcome! I recommended him to several people during the course of my legal case.”

— Federal Crime Client

“Mr. Lee impressed me from the moment I retained him...actually before I gave him any payment at all!! He was accessible throughout my entire legal issue. He not only got my case dismissed, he helped me get my case expunged. I never even had the chance to be nervous that he would not show up on time. He always showed up early and was extremely prompt with all of my paperwork. I trust Mr. Lee and am very comfortable and confident to recommend him to anyone facing any type of

legal issue. I am also happy to say that I found a friend in Jeff and did not feel like just another client. :-)"

— Anonymous

"Jeff took good care of my case. Right from the onset he told me I could get a diversion, and that is what eventually happened. He took care of paperwork effectively, met me promptly at court appointments, and helped me out in court when the judge was pondering why a higher-level offence wasn't issued. He knows what he's doing, and if he didn't know something I would trust him to become knowledgeable in order to help a client."

— Aaron

"Mr. Lee helped me make the best of a very stressful situation. I was simultaneously facing college graduation and jail time (not that they are related.) I was on the fence between being on top of the world and losing it all. Mr. Lee pushed me back towards the former I would definitely hire him again!"

— Adam

Awards



CLIENT SATISFACTION AWARD

American Institute of
Criminal Law Attorneys™



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National Board of Legal Specialty Certification



Still have questions?

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