

Stricken language would be deleted from present law. Underlined language would be added to present law.

1 State of Arkansas  
2 81st General Assembly  
3 Regular Session, 1997

As Engrossed: H1/29/97

## A Bill

HOUSE BILL 1066

4 By: Representatives Flanagan, Lynn, Broadway, Capps, Choate, Cunningham, Curran, Davis, Dietz, Faris, Ferguson, Ferrell, Goodwin, Hogue, Johnson, Jones,  
5 Kidd, Madison, McGehee, McGinnis, Miller, Molinaro, Pollan, Rorie, Schexnayder, Simmons, Judy Smith, Terry Smith, Stalnaker, Teague, Thicksten, Trammel,  
6 Wagner, Willems, Wilkinson, Wren, Wooldridge, *Bennett, Horn, Ingram, Laverty, Roberts, and Wallis*

### For An Act To Be Entitled

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10 "AN ACT TO AMEND ARKANSAS CODE 16-90-804 TO ADD TO THE  
11 LIST OF AGGRAVATING FACTORS USED IN DEPARTING FROM THE  
12 SENTENCING GRID SEXUAL OFFENSES INVOLVING VIOLENCE OR THE  
13 THREAT OF VIOLENCE WHERE THE VICTIM OF THE OFFENSE WAS  
14 EIGHTEEN YEARS OF AGE OR LESS; AND FOR OTHER PURPOSES."

### Subtitle

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17 "TO ADD TO THE LIST OF AGGRAVATING  
18 FACTORS USED IN DEPARTING FROM THE  
19 SENTENCING GRID SEXUAL OFFENSES  
20 INVOLVING VIOLENCE OR THE THREAT OF  
21 VIOLENCE WHERE THE VICTIM OF THE OFFENSE  
22 WAS EIGHTEEN YEARS OF AGE OR LESS"

23  
24 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

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26 SECTION 1. Arkansas Code 16-90-804 is amended to read as follows:

27 "16-90-804. Departures from the standards.

28 (a)(1) Effective January 1, 1994, the trial court may deviate within a  
29 five percent (5%) range below or above the presumptive sentence without  
30 providing a written justification.

31 (2)(A) For the trial court to depart beyond the five percent (5%)  
32 range below or above the presumptive sentence, written justification shall be  
33 given for the most serious offense if the sentences are run concurrently or on  
34 each offense if the sentences are run consecutively, specifying the reasons  
35 for such departure.

36 (B) Downward departures from duration presumptions need not

1 be given if there is a lower dispositional recommendation, i.e., departure  
2 reasons need not be given for a lower prison sentence than the presumptive  
3 prison sentence if alternative sanctions are also included as a presumptive  
4 sentence.

5 (3) A copy of the written reasons shall be attached to the  
6 commitment and another copy forwarded to the Arkansas Sentencing Commission.

7 (b)(1) When sentencing is done by the judge following the entry of a  
8 guilty or no contest plea, or a trial before the judge, either or both parties  
9 may present evidence to justify a departure. The judge may allow argument if  
10 he finds that it would be helpful.

11 (2)(A) If both sides agree on a recommended sentence, the judge  
12 may choose to accept or reject the agreement based upon the facts of the case  
13 and whether those facts support the presumptive sentence or a departure  
14 different from any recommendation.

15 (B) If there is an agreed departure from the presumptive  
16 sentence, written reasons shall be supplied by the parties to the court to  
17 attach to the commitment and to forward to the Arkansas Sentencing Commission.

18 (C) If the judge rejects the agreement, the defendant shall  
19 be allowed to withdraw his plea.

20 (c)(1) When a sentence is imposed after January 1, 1994, which is  
21 outside the presumptive range and which is not accompanied by written reasons  
22 for the departure, an offender shall be considered for any discretionary  
23 release applicable under the law as if he had received the presumptive  
24 sentence, and the transfer or releasing authority may review, grant, or deny  
25 transfer or release based on any eligibility established by the presumptive  
26 sentence term.

27 (2) This provision shall only apply to a conviction for the most  
28 serious offense in a particular case.

29 (3) In the event that such a conviction is vacated, any  
30 concurrent conviction in the same case need not have a written departure.

31 (d) The following is a nonexclusive list of factors which may be used  
32 as reasons for departure:

33 (1) Mitigating factors:

34 (A) While falling short of a defense, the victim played an  
35 aggressive role in the incident or provoked or willingly participated in it;

36 (B) While falling short of a defense, the offender lacked

1 substantial capacity for judgment because of physical or mental impairment.

2 Voluntary use of drugs or alcohol does not fall within this factor;

3 (C) The offender played a minor or passive role in the  
4 crime;

5 (D) Before detection, the offender compensated or made a  
6 good faith effort to compensate the victim for any damage or injury sustained;

7 (E) The offense was principally accomplished by another  
8 person, and the offender manifested extreme caution or sincere concern for the  
9 safety or well-being of the victim;

10 (F) The offender or the offender's children suffered a  
11 continuing pattern of physical or sexual abuse by the victim of the offense,  
12 and the offense is a response to that abuse;

13 (G) The operation of the multiple offense policy results in  
14 a presumptive sentence that is clearly excessive in light of the purpose of  
15 this chapter;

16 (H) Before detection in sexual offenses, the offender has  
17 voluntarily admitted the nature and extent of the sexual offense and has  
18 sought and participated in professional treatment or counseling for such  
19 offenses;

20 (I) Upon motion of the state stating that the defendant has  
21 made a good faith effort to provide substantial assistance to the  
22 investigation or prosecution of another person who has committed an offense,  
23 the circumstances listed below may be weighed as mitigating factors with  
24 respect to the defendant's offense:

25 (i) The timeliness of the defendant's assistance;

26 (ii) The nature and extent of the defendant's  
27 assistance;

28 (iii) The truthfulness, completeness, and  
29 demonstrable reliability of any information or testimony provided by the  
30 defendant.

31 (2) Aggravating factors:

32 (A) The offender's conduct during the commission of the  
33 current offense manifested deliberate cruelty to the victim exhibited by  
34 degrading, gratuitous, vicious, torturous, and demeaning physical or verbal  
35 abuse, unusual pain, or violence in excess of that necessary to accomplish the  
36 criminal purpose;

1 (B) The offender knew or should have known that the victim  
2 was particularly vulnerable or incapable of resistance due to extreme youth,  
3 advanced age, disability, or ill health;

4 (C) The current offense was a major economic offense or  
5 series of offenses, so identified by a consideration of any of the following  
6 factors:

7 (i) The current offense involved multiple victims or  
8 multiple incidents per victim;

9 (ii) The current offense involved attempted or actual  
10 monetary loss substantially greater than typical for the offense;

11 (iii) The current offense involved a high degree of  
12 sophistication or planning or occurred over a lengthy period of time;

13 (iv) The defendant used his or her position of trust,  
14 confidence, or fiduciary responsibility to facilitate the commission of the  
15 current offense. This factor does not apply if it constitutes an element of  
16 the crime;

17 (v) The defendant has been involved in other conduct  
18 similar to the current offense as evidenced by the findings of civil or  
19 administrative law proceedings or the imposition of professional sanctions;

20 (D) The offense was a major controlled substance offense,  
21 identified as an offense or series of offenses related to trafficking in  
22 controlled substances under circumstances more onerous than the usual offense.  
23 The presence of two (2) or more of the circumstances listed below is an  
24 aggravating factor with respect to the offense:

25 (i) The offense involved at least three (3) separate  
26 transactions wherein controlled substances were sold, transferred, or  
27 possessed with intent to do so; or

28 (ii) The offense involved an attempted or actual sale  
29 or transfer of controlled substances in amounts substantially larger than the  
30 statutory minimum which defines the offense; or

31 (iii) The offense involved a high degree of  
32 sophistication or planning or occurred over a lengthy period of time or  
33 involved a broad geographic area of disbursement; or

34 (iv) The circumstances of the offense reveal the  
35 offender to have occupied a high position in the drug distribution hierarchy;  
36 or

1 (v) The offender used his position or status to  
2 facilitate the commission of the offense, including positions of trust,  
3 confidence, or fiduciary relationships, e.g., a pharmacist, physician, or  
4 other medical professional; or

5 (vi) The offender has received substantial income or  
6 resources from his involvement in drug trafficking;

7 (E) The offender employed a firearm in the course of or in  
8 furtherance of the felony, or in immediate flight therefrom. This factor does  
9 not apply to an offender convicted of a felony, an element of which is:

10 (i) Employing or using, or threatening or attempting  
11 to employ or use, a deadly weapon; or

12 (ii) Being armed with a deadly weapon; or

13 (iii) Possessing a deadly weapon; or

14 (iv) Furnishing a deadly weapon; or

15 (v) Carrying a deadly weapon;

16 (F) The offense was a sexual offense and was part of a  
17 pattern of criminal behavior with the same or different victims under the age  
18 of eighteen (18) years manifested by multiple incidents over a prolonged  
19 period of time;

20 (G) The operation of the multiple offense policy results in  
21 a presumptive sentence that is clearly too lenient in light of the purpose of  
22 this chapter;

23 (H) The offense was committed in a manner that exposed risk  
24 of injury to individuals other than the victim or victims, e.g., shooting into  
25 a crowd;

26 (I) The offense was a violent or sexual offense committed  
27 in the victim's zone of privacy, e.g., his home or the curtilage thereof;

28 (J) The offender attempts to cover the offense by  
29 intimidation of witnesses, destruction or tampering with evidence, or  
30 purposely misleading authorities;

31 (K) The offense was committed for the purpose of avoiding  
32 or preventing an arrest or effecting an escape from custody; ~~or~~

33 (L) In offenses related to vehicular homicides, the  
34 offender does not have the minimum insurance required by law;

35 (M) The offense was a sexual offense involving violence or  
36 the threat of violence and the victim of the offense was eighteen years of age

1 or less. For purposes of this subdivision (M), a crime involves violence or  
2 the threat of violence if the victim sustains serious bodily injury, or the  
3 offender is armed with and uses a deadly weapon, or threatens by word or  
4 gesture to use a deadly weapon, or otherwise threatens to inflict serious  
5 physical injury.

6 (e) This section shall not apply when a jury has recommended a sentence  
7 to the trial judge."  
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9 SECTION 2. All provisions of this act of a general and permanent nature  
10 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code  
11 Revision Commission shall incorporate the same in the Code.  
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13 SECTION 3. If any provision of this act or the application thereof to  
14 any person or circumstance is held invalid, such invalidity shall not affect  
15 other provisions or applications of the act which can be given effect without  
16 the invalid provision or application, and to this end the provisions of this  
17 act are declared to be severable.  
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19 SECTION 4. All laws and parts of laws in conflict with this act are  
20 hereby repealed.

21 /s/Rep. Flanagan, et al  
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