

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas  
2 85th General Assembly  
3 Regular Session, 2005  
4

*As Engrossed: H1/24/05*

## A Bill

HOUSE BILL 1176

5 By: Representative T. Hutchinson  
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### For An Act To Be Entitled

9 AN ACT TO CLARIFY THAT THE SENTENCING GUIDELINES  
10 OF THE STATE OF ARKANSAS ARE ENTIRELY VOLUNTARY;  
11 AND FOR OTHER PURPOSES.  
12

### Subtitle

14 AN ACT TO CLARIFY THAT THE SENTENCING  
15 GUIDELINES OF THE STATE OF ARKANSAS ARE  
16 ENTIRELY VOLUNTARY.  
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19 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
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21 SECTION 1. Arkansas Code §§ 16-90-803 and 16-90-804 are amended to  
22 read as follows:

23 16-90-803. Voluntary presumptive standards.

24 (a)(1)(A) When a person charged with a felony enters a plea of guilty  
25 or no contest, enters a negotiated plea, or is found guilty in a trial before  
26 the judge, or when the trial judge is authorized to fix punishment following  
27 an adjudication of guilt by a jury pursuant to § 5-4-103, sentencing ~~shall~~  
28 may follow the procedures provided in this chapter.

29 (B) However, these sentencing procedures do not apply to  
30 probation revocation proceedings.

31 ~~(2)(A) The presumptive sentence shall be determined, but may be~~  
32 ~~departed from pursuant to the procedures outlined in § 16-90-804.~~

33 ~~(B)(i) In a case with multiple counts, the presumptive~~  
34 ~~sentence shall be determined only on the most serious offense if the~~  
35 ~~sentences are to run concurrently.~~

36 ~~(ii) If run consecutively, the presumptive sentence~~



1 ~~should be determined on each count.~~

2           ~~(3)~~(2) The presumptive sentence for any offender of a felony  
3 committed on or after January 1, 1994, ~~is~~ may be determined by locating the  
4 appropriate cell of the sentencing standards grid.

5           (b) The two dimensions of the sentencing standards grid represent the  
6 primary determinants of a sentence: offense seriousness and offender  
7 history.

8           (1) Offense Seriousness. The offense seriousness level is  
9 determined by the offense of conviction or the offense of which the person  
10 was found guilty or to which the person pleaded guilty or nolo contendere.

11           (A) Felony offenses are divided into ten (10) levels of  
12 seriousness, ranging from low, seriousness level I, to high, seriousness  
13 level X.

14           (B) The typical cases for the offenses listed within each  
15 level of seriousness are deemed to be generally equivalent in seriousness.

16           (C) The most frequently occurring offenses within each  
17 seriousness level are listed on the vertical axis of the sentencing standards  
18 grid.

19           (D) The seriousness level for infrequently occurring  
20 offenses can be determined by consulting the offense seriousness reference  
21 table.

22           (E) The seriousness level for inchoate offenses is one (1)  
23 level below the level for substantive offenses.

24           (2) Offender History. An offender's criminal history score  
25 constitutes the horizontal axis of the sentencing standards grid.

26           (A) The offender's criminal history score shall be  
27 computed from the following:

28                   (i) Prior felony records;

29                   (ii) Prior misdemeanor records;

30                   (iii) Prior juvenile records, under certain  
31 circumstances outlined below; and

32                   (iv) Custody status at the time of the offense.

33           (B) The term "records", for the purpose of computing  
34 criminal history scores, shall include:

35                   (i) Convictions;

36                   (ii) Findings of guilt;

- 1 (iii) Acceptance of a plea of guilty or nolo  
2 contendere;
- 3 (iv) Instances where the defendant has been placed  
4 on probation, suspended imposition of sentence, or suspended execution of  
5 sentence;
- 6 (v) Records which have been expunged after August  
7 31, 1994; and
- 8 (vi) Dismissals ordered after August 31, 1994,  
9 pursuant to the First Offender Act, §§ 16-93-301 - 16-93-303.
- 10 (C) The specific weights to be assigned to the various  
11 criteria are as follows:
  - 12 (i) Weight is assigned to prior felony records  
13 according to seriousness level, as follows:
    - 14 (a) Seriousness levels I, II, III, IV, and V =  
15 one-half (.5) point;
    - 16 (b) Seriousness levels VI, VII, VIII, IX, and  
17 X = one (1) point;
  - 18 (ii) Weight is assigned only to Class A  
19 misdemeanors.
    - 20 (a) Each Class A misdemeanor is worth one-  
21 quarter (.25) point.
    - 22 (b) No more than one (1) point may be accrued  
23 from misdemeanor records;
  - 24 (iii) Weight is assigned only to judicial  
25 adjudications of delinquency for offenses for which a juvenile could have  
26 been tried as an adult and which the trial court deems relevant to sentencing  
27 in the current proceeding.
    - 28 (a) Each adjudication is worth one-quarter  
29 (.25) point, except for offenses adjudicated as delinquent which would have  
30 constituted:
      - 31 (i) Capital murder, § 5-10-101;
      - 32 (ii) Murder in the first degree, § 5-10-102;
      - 33 (iii) Murder in the second degree, § 5-10-103;
      - 34 (iv) Kidnapping in the first degree, § 5-11-102;
      - 35 (v) Aggravated robbery, § 5-12-103;
      - 36 (vi) Rape, § 5-14-103; or

1 (vii) Battery in the first degree, § 5-13-201,  
2 if committed by an adult, which are worth one (1) point.

3 (b) No more than one (1) point may be accrued  
4 from juvenile offenses unless one (1) of the offenses adjudicated as  
5 delinquent would have constituted:

6 (i) Capital murder, § 5-10-101;

7 (ii) Murder in the first degree, § 5-10-102;

8 (iii) Murder in the second degree, § 5-10-103;

9 (iv) Kidnapping in the first degree, § 5-11-102;

10 (v) Aggravated robbery, § 5-12-103;

11 (vi) Rape, § 5-14-103; or

12 (vii) Battery in the first degree, § 5-13-201,  
13 if committed by an adult; then, an offender may receive no more than two (2)  
14 points for juvenile offenses;

15 (iv) One (1) point is to be added to an offender's  
16 score if the offender is under any type of criminal justice restraint for a  
17 felony offense at the time that he committed the crime for which he is being  
18 sentenced. Such restraint includes pretrial bond, suspended imposition of  
19 sentence, probation, parole, postprison supervision, and release pending  
20 sentencing for a prior crime;

21 (v)(a) Juvenile offenses must have occurred within  
22 ten (10) years of the time of the offense for which an offender is being  
23 currently sentenced.

24 (b) Misdemeanor offenses must have occurred  
25 within ten (10) years of the time of the offense for which an offender is  
26 currently being sentenced.

27 (c) Felony offenses at seriousness levels I-V  
28 will not be counted if a period of fifteen (15) years has elapsed since the  
29 date of discharge from, or expiration of, the sentence to the date of the  
30 current offense; and

31 (vi) When multiple sentences for a single course of  
32 conduct were imposed, only the offense at the highest seriousness level is  
33 considered.

34 (3)(A)(i) The offense of conviction determines the appropriate  
35 seriousness level on the vertical axis.

36 (ii) The offender's criminal history score

1 determines the appropriate location on the horizontal axis.

2 (B) The presumptive fixed sentence for a felony conviction  
3 is found in the sentencing standards grid cell at the intersection of the  
4 column defined by the criminal history score and the row defined by the  
5 offense seriousness level.

6 (C) The statutory minimum or maximum ranges for a  
7 particular crime shall govern over a presumptive sentence if the presumptive  
8 sentence should fall below or above such ranges.

9 (4) This section shall not apply when a jury has recommended a  
10 sentence to the trial judge.

11 (5) Capital murder is excluded from the sentencing standards and  
12 is subject to the procedures in § 5-4-601 et seq.

13 (c) For all arrests or offenses occurring before July 1, 2005, that  
14 have not reached a final disposition as to judgment in the trial court,  
15 sentencing shall be in accordance with the law in effect at the time the  
16 offense occurred and not under the provisions of this section.

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18 16-90-804. Departures from the standards.

19 (a)~~(1)~~ ~~Effective January 1, 1994, the~~ The trial court may deviate  
20 ~~within a five percent (5%) range below or above~~ from the presumptive sentence  
21 without providing a written justification.

22 ~~(2)(A) For the trial court to depart beyond the five percent~~  
23 ~~(5%) range below or above the presumptive sentence, written justification~~  
24 ~~shall be given for the most serious offense if the sentences are run~~  
25 ~~concurrently or on each offense if the sentences are run consecutively,~~  
26 ~~specifying the reasons for such departure.~~

27 ~~(B) Downward departures from duration presumptions need~~  
28 ~~not be given if there is a lower dispositional recommendation, i.e.,~~  
29 ~~departure reasons need not be given for a lower prison sentence than the~~  
30 ~~presumptive prison sentence if alternative sanctions are also included as a~~  
31 ~~presumptive sentence.~~

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

34 (b)(1) When sentencing is done by the judge following the entry of a  
35 guilty or no contest plea, or a trial before the judge, either or both  
36 parties may present evidence to justify a departure. The judge may allow

1 argument if he or she finds that it would be helpful.

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

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

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

12 ~~(e)(1) When a sentence is imposed after January 1, 1994, which is~~  
13 ~~outside the presumptive range and which is not accompanied by written reasons~~  
14 ~~for the departure, an offender shall be considered for any discretionary~~  
15 ~~release applicable under the law as if he had received the presumptive~~  
16 ~~sentence, and the transfer or releasing authority may review, grant, or deny~~  
17 ~~transfer or release based on any eligibility established by the presumptive~~  
18 ~~sentence term.~~

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

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

23 ~~(d)(c)~~ The following is a nonexclusive list of factors which may be  
24 used considered as reasons for departure:

25 (1) Mitigating factors:

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

28 (B) While falling short of a defense, the offender lacked  
29 substantial capacity for judgment because of physical or mental impairment.

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

31 (C) The offender played a minor or passive role in the  
32 crime;

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

36 (E) The offense was principally accomplished by another

1 person, and the offender manifested extreme caution or sincere concern for  
2 the safety or well-being of the victim;

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

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

9 (H) Before detection in sexual offenses, the offender has  
10 voluntarily admitted the nature and extent of the sexual offense and has  
11 sought and participated in professional treatment or counseling for such  
12 offenses;

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

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

19 (ii) The nature and extent of the defendant's  
20 assistance;

21 (iii) The truthfulness, completeness, and  
22 demonstrable reliability of any information or testimony provided by the  
23 defendant.

24 (2) Aggravating factors:

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

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

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

36 (i) The current offense involved multiple victims or

1 multiple incidents per victim;

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

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

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

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

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

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

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

24 (iii) The offense involved a high degree of  
25 sophistication or planning or occurred over a lengthy period of time or  
26 involved a broad geographic area of disbursement; or

27 (iv) The circumstances of the offense reveal the  
28 offender to have occupied a high position in the drug distribution hierarchy;  
29 or

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

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

36 (E) The offender employed a firearm in the course of or in



1 furtherance of the felony, or in immediate flight therefrom. This factor does  
2 not apply to an offender convicted of a felony, an element of which is:

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

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

6 (iii) Possessing a deadly weapon; or

7 (iv) Furnishing a deadly weapon; or

8 (v) Carrying a deadly weapon;

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

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

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

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

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

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

26 (L) In offenses related to vehicular homicides, the  
27 offender does not have the minimum insurance required by law.

28 ~~(e)~~ (d) This section shall not apply when a jury has recommended a  
29 sentence to the trial judge.

30 (e) For all arrests or offenses occurring before July 1, 2005, that  
31 have not reached a final disposition as to judgment in court, sentencing  
32 should follow the law in effect at the time the offense occurred, and any  
33 defendant is subject to the sentencing guidelines in effect at that time and  
34 not under the provisions of this section.

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1 SECTION 2. Arkansas Code § 16-93-1208 is amended to read as follows:

2 16-93-1208. Post commitment transfer.

3 (a)(1)(A) Upon commitment of an eligible offender to the Department of  
4 Correction, the department will transfer the eligible offender to a community  
5 punishment program, when he reaches his transfer date, in accordance with the  
6 rules and regulations promulgated by the Board of Corrections and conditions  
7 set by the Post Prison Transfer Board.

8 (B) Legal custody of inmates transferred to the Department  
9 of Community Correction shall remain with the Department of Correction unless  
10 altered by court order.

11 ~~(2)(A) When a sentence is given which is outside the presumptive~~  
12 ~~range set in the sentencing standards and which is not accompanied by written~~  
13 ~~reasons for the departure, an offender may be transferred to community~~  
14 ~~punishment or considered for any discretionary release applicable under the~~  
15 ~~law as if he had received the presumptive sentence, and the transfer or~~  
16 ~~releasing authority may review, grant, or deny transfer or release based on~~  
17 ~~any eligibility established by the presumptive sentence term.~~

18 ~~(B) This provision shall apply only to a conviction for~~  
19 ~~the most serious offense in a particular case.~~

20 ~~(C) In the event that such a conviction is vacated, any~~  
21 ~~concurrent conviction in the same case need not have a written departure.~~

22 ~~(3)~~ (2) Persons eligible for release from incarceration on  
23 parole may be placed in community punishment programming while under parole  
24 supervision upon the recommendation of such condition by the releasing  
25 authority.

26 (b)(1) The Board of Corrections and the Department of Correction are  
27 authorized to release medical and psychological data in their possession to a  
28 community punishment service provider concerning an eligible offender  
29 transferred to such community punishment program.

30 (2) The community punishment service provider shall use any  
31 medical or psychological data received from the Department of Correction and  
32 the board in compliance with rules concerning the use of such data as adopted  
33 by the board.

34  
35 SECTION 3. EMERGENCY CLAUSE. It is found and determined by the  
36 General Assembly of the State of Arkansas that the United States Supreme

1 Court has held that the federal sentencing guidelines are unconstitutional;  
2 that the voluntary presumptive standards of the State of Arkansas may be  
3 challenged as unconstitutional; and that this act is immediately necessary in  
4 order to clarify that the sentencing guidelines are merely advisory.  
5 Therefore, an emergency is declared to exist and this act being necessary for  
6 the preservation of the public peace, health, and safety shall become  
7 effective on July 1, 2005.

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*/s/ T. Hutchinson*