

# **The Arkansas Law Enforcement and Prosecutors Manual on Child Exploitation Crimes**

## **Statutory and Case Law**



**NATIONAL LAW CENTER  
FOR CHILDREN AND FAMILIES**



## **National Law Center for Children and Families' Preface to the 2008 Second Edition**

It is our honor at the National Law Center for Children and Families to provide this second edition of the Arkansas State Manual. This manual is an update and refinement of the state legal manual produced by the National Center for Missing and Exploited Children (NCMEC) in 2004.

The National Law Center is a non-profit law center formed in 1991 and based in Alexandria, Virginia. It has since served as an agent of change and education in the area of child sexual exploitation. The NLC is proud to continue that service today in seminars and through its website, [www.nationallawcenter.org](http://www.nationallawcenter.org). In addition to these projects, the National Law Center has entered into a partnership with the NCMEC to update these existing 25 manuals used. Over the next few years we will update these existing manuals and create new manuals for prosecutors and law enforcement professionals to use in the defense of children and families.

Additionally, the manual would not have been completed were it not for the support of NCMEC's Legal Staff and L.J. Decker, NLC Law Clerk (3L Georgetown University Law Center), Christien Oliver, (JD George Washington School of Law 2008) and Tara Steinnerd (3L Catholic University School of Law).

The Editors,

National Law Center for Children and Families  
June 2008

This Manual has been prepared for educational and information purposes only. It does not constitute legal advice or legal opinion on any specific matter. Dissemination or transmission of the information contained herein is not intended to create, and receipt does not constitute, a lawyer-client relationship between the National Law Center for Children and Families® (NLC), The National Center for Missing and Exploited Children (NCMEC), their respective boards, employees or agents and the reader. The reader should not act upon this information without seeking professional counsel. No person should act or fail to act on any legal matter based on the contents of this Manual.

Copyright 1999 - 2006 by the National Law Center for Children and Families® and the National Center for Missing and Exploited Children

All rights reserved. No part of this publication may be used or reproduced in any manner whatsoever, in any form or by any electronic or mechanical means, including information storage and retrieval systems, without permission in writing from the National Law Center for Children and Families® and the National Center for Missing and Exploited Children, except in the case of brief quotations embodied in news articles, critical articles, or reviews, if the context is preserved and credit is given. NLC and NCMEC request notification in the event of reproduction. The views expressed in this publication are those of the contributing authors and do not necessarily reflect the views of the editors, staffs, officers or boards of directors of NLC or NCMEC.

The National Law Center for Children and Families® is a registered trademark.

# ARKANSAS

## *Topic Outline*

### **I. OFFENSES DEFINED**

#### **A. Carnal Abuse in the Third Degree**

#### **B. Child Pornography**

##### 1. Offenses

- a. Engaging Children in Sexually Explicit Conduct for Use in a Visual or Print Medium
  - i. Elements
  - ii. Definitions
    - (a) “Sexually Explicit Conduct”
    - (b) “Producing”
- b. Pandering or Possessing a Visual or Print Medium Depicting Sexually Explicit Conduct Involving a Child
  - i. Elements
  - ii. “Sexual Conduct” Defined
- c. Employing a Child in a Sexual Performance
  - i. Elements
  - ii. Definitions
    - (a) “Performance”
    - (b) “Sexual Performance”
    - (c) “Sexual Conduct”
- d. Producing, Directing, or Promoting a Sexual Performance
  - i. Elements
  - ii. Definitions
    - (a) “Performance”
    - (b) “Sexual Conduct”
- e. Distributing, Possessing, or Viewing Matter Depicting Sexually Explicit Conduct Involving a Child
- f. Virtual/Simulated Child Pornography

##### 2. Lewd and Lascivious

- a. Definitions
  - i. “Lewd”
  - ii. “Indecent”
- b. Lascivious Exhibition

**C. Rape**

1. Elements
  - a. Completed Offense
  - b. Attempted Rape
2. Definitions
  - a. “Sexual Intercourse”
  - b. “Deviate Sexual Activity”
  - c. “Physically Helpless”
3. Force
  - a. Factors to Consider
  - b. Evidence of Forcible Compulsion
4. Circumstantial Evidence of Penetration
5. Lesser-Included Offenses: What Is Not a Lesser-Included Offense of Rape?
6. Juvenile Offenders

**D. Sexual Abuse in the First Degree**

*(NOTE: Sexual Abuse Law repealed in 2001; crime of Sexual Abuse no longer exists. See SEXUAL ASSAULT.)*

1. Elements
2. Sexual Contact
  - a. Defined
  - b. Proving Sexual Gratification

**E. Sexual Assault in the First Degree**

**F. Sexual Misconduct**

*(NOTE: Sexual Misconduct Law repealed in 2001.)*

**G. Sexual Solicitation**

1. Elements
2. Online Enticement/Solicitation for Travel with the Intent to Engage in Sex with a Minor

**H. Transporting a Minor for the Purposes of Prostitution**

**I. Violation of Minor**

*(NOTE: The crime Violation of a Minor no longer exists. Ark. Code Ann. §5-14-120, concerning violation of a minor in the first degree, was repealed by Acts 2001, No. 1738, § 12. Ark. Code Ann. §5-14-121, concerning violation of a minor in the second degree, was repealed by Acts 2001, No. 1738, § 13.)*

1. First Degree
  - a. Elements
  - b. “Guardian” Defined
2. Second Degree
  - a. Elements
  - b. Definitions
    - i. “Sexual Contact”
    - ii. “Sexual Gratification”

## **II. MANDATORY REPORTING: CHILD MALTREATMENT ACT**

*(NOTE: Child Abuse Reporting Act, Ark. Code Ann. § 12-12-507(c), was amended; now called “Child Maltreatment Act”.)*

### **A. Purpose of the Child Maltreatment Act**

### **B. Admissibility of Reports**

1. Generally
2. Privilege

### **C. “Abuse”**

1. Definition
2. Physical Discipline
  - a. Reasonable or Moderate
  - b. Factors to Consider

## **III. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE**

### **A. Search Warrants**

1. Probable Cause
  - a. Affidavits
    - i. Time Element
      - (a) Generally
      - (b) Inference
      - (c) Good-Faith Exception
      - (d) Circumstantial Evidence
      - (e) Suppression
    - ii. False Information: The Defendant’s Burden
  - b. Appellate Review
2. Scope
3. Staleness
  - a. General Rule
  - b. Exception to the General Rule

- i. Requirements for Nighttime Searches
- ii. Erroneous Issuance of a Nighttime Search Warrant
  - (a) Failure to Justify a Nighttime Search
  - (b) Invalidation of a Nighttime Search Warrant
  - (c) Good-Faith Exception
- c. Delay in Applying for a Search Warrant
- d. Delay in Executing a Search Warrant

**B. Anticipatory Warrants**

**C. Types of Searches**

- 1. Consent Searches
  - a. Test for Valid Consent
  - b. Standard for Measuring the Scope of Consent
  - c. Withdrawal or Limitation of Consent
- 2. Employer Searches
- 3. Private (Civilian) Searches
- 4. University-Campus Searches

**D. Methods of Searching**

**E. Computer-Technician/Repairperson Discoveries**

**F. Photo-Development Discoveries**

**G. Custodial Interrogation: Waiver of *Miranda* Rights**

- 1. Voluntariness of Waiver
- 2. Validity of Waiver
- 3. Burden
- 4. Appellate Review

**H. Criminal Forfeiture**

**I. Disciplinary Hearings for Federal and State Officers**

**J. Probation and Parolee Rights**

**IV. JURISDICTION AND NEXUS**

**A. Jurisdictional Nexus**

**B. Internet Nexus**

**C. State Jurisdiction, Federal Jurisdiction, and Concurrent Jurisdiction**

1. State Jurisdiction
2. Federal Jurisdiction
3. Concurrent Jurisdiction

**D. Interstate Possession of Child Pornography**

**V. DISCOVERY AND EVIDENCE**

**A. Timely Review of Evidence**

**B. Accusatory Instruments**

1. Information
  - a. Requirements
  - b. Bill of Particulars
  - c. Time of the Offense
2. Juvenile Proceedings
  - a. Charging Instrument
  - b. Bill of Particulars
  - c. Time of the Offense

**C. Defense Requests for Copies of Child Pornography**

**D. Introduction of E-mails into Evidence**

1. Hearsay/Authentication Issues
2. Circumstantial Evidence
3. Technical Aspects of Electronic Evidence Regarding Admissibility

**E. Text-Only Evidence**

1. Introduction into Evidence
2. Relevance

**F. Evidence Obtained from Internet Service Providers**

1. Electronic Communications Privacy Act
2. Cable Act
3. Patriot Act
  - a. National Trap and Trace Authority
  - b. State-Court-Judge Jurisdictional Limits

**G. Admissibility of Photographs and Videotapes**

1. Photographs
2. Videotapes

**H. Prior Bad Acts**

1. Inadmissible
2. Admissible
  - a. Balancing Test
  - b. Relevant to Main Issue of Guilt or Innocence
  - c. Character Evidence
  - d. Motive, Opportunity, Intent, Preparation, Plan, Knowledge, Identity, Absence of Mistake, Absence of Accident
    - i. Generally
    - ii. Sexual Abuse of a Child
  - e. Pedophile Exception
    - i. Character
    - ii. Motive
    - iii. Intimate Relationship
    - iv. Same Household
3. Appellate Review

**I. Simultaneous Bad Acts: Intentional Pattern of Abusive Behavior**

**J. Subsequent Sexual Misconduct**

**K. Prior Acts of the Victim: Rape-Shield Laws**

1. Admissibility
2. "Prior Sexual Conduct" Defined
3. Determination of Relevant Evidence
4. Appellate Review

**L. Witnesses and Testimony**

1. Competency
  - a. Presumption
  - b. Criteria for Determining Competency
  - c. Child Witnesses
  - d. Burden of Persuasion
  - e. Discretion of the Trial Court
  - f. Appellate Review
2. Child Victims: Videotaped Depositions
  - a. Requirements
  - b. Discretion of the Trial Court



3. Sexual-Assault and Sexual-Abuse Victims
  - a. Substantial Evidence
  - b. Uncorroborated Testimony
  - c. Minor Victim
  - d. Inconsistent Testimony
  - e. Admission of Hearsay Testimony: Harmless Error
4. Expert Testimony
  - a. General Test for Expert Testimony
  - b. Relevance of Expert Testimony
  - c. Child-Abuse Syndrome
  - d. Appellate Review
5. Non-Expert Testimony
6. Preparation of Witnesses
7. Exclusion of Witnesses
  - a. Generally
  - b. Crime Victim
8. Impeachment of a Witness by a Prior Juvenile Adjudication

**M. Scientific Evidence**

1. Polygraphs and Truth-Serum Tests: Inadmissible
2. Scientific Acceptance or Recognition

**N. Hearsay Exceptions**

1. A Child's Statement of Sexual Abuse
  - a. No Rule to Prohibit the Child from Testifying
  - b. Factors to Determine Trustworthiness
  - c. Reasonable Notice
  - d. Videotaped Statements
2. Spontaneous Statements

**O. Privileges**

1. Marital Privilege: Inapplicable
2. Social-Worker Privilege

**VI. AGE OF THE CHILD VICTIM**

**A. Proving the Age of the Child Depicted**

**B. The Defendant's Knowledge of the Age of the Child Depicted**

## **VII. MULTIPLE COUNTS**

### **A. What Constitutes an Item of Child Pornography?**

### **B. Issues of Double Jeopardy**

1. Previous Prosecution in Another Jurisdiction
2. Same Offense
3. Mistrial

### **C. Multiplicity**

1. Rape
2. Sexual Abuse

### **D. Joinder**

### **E. Severance**

1. Factors Favoring Severance
2. Right to Severance of Offenses
3. Refusal to Sever Cases

## **VIII. DEFENSES**

### **A. Age of the Defendant**

### **B. Consent**

1. Under-Aged Victim
2. Incest

### **C. Diminished Capacity**

1. Addiction to the Internet
2. Insanity

### **D. First Amendment**

### **E. Impossibility**

1. Factual: Attempt Crimes
2. Legal

- F. Manufacturing Jurisdiction**
- G. Mistake of Fact: The Victim's Age and Child-Pornography Offenses**
- H. Outrageous Conduct**
- I. Researcher**
- J. Sexual Orientation**
- K. Statute of Limitations**
  - 1. General Rules
    - a. Rape
    - b. Sexual Abuse
  - 2. Limited Exception
  - 3. Tolling

**IX. SENTENCING ISSUES**

**A. Bifurcated Sentencing**

- 1. Procedure**
- 2. Alternative Sentencing**

**B. Sentencing Imposition**

- 1. Broad Inquiry
- 2. Evidence
  - a. Other Crimes or Wrongs
  - b. Attempted Crimes
  - c. Pardoned Offenses
  - d. Uncharged Offenses
  - e. Victim-Impact Evidence
  - f. Aggravating Factors
    - i. Age of Victim
    - ii. Distribution/Intent to Traffic
    - iii. Number of Images
    - iv. Pattern of Activity for Sexual Exploitation
    - v. Sadistic, Masochistic, or Violent Material
    - vi. Use of Computers
- 3. Consecutive Versus Concurrent Sentences

**C. Reduction of a Defendant's Sentence**

**D. The Sex and Child Offender Registration Act of 1997**

**X. SUPERVISED RELEASE: PROBATION**

**A. Discretion of the Court**

**B. Factors to Consider**

**C. Time Limitations**

**D. Revocation of Probation**

1. Burden
  - a. Required Proof
  - b. Uncorroborated Testimony
  - c. Appellate Review
2. Failure to Pay Fines as Grounds for Revocation

**E. Sentencing a Defendant for a Parole Violation**

1. Imprisonment
2. Credit for Time Served

# ARKANSAS

## *Case List by Court*

*A case with + indicates a decision not designated for publication.*

*A case with ++ indicates that although the subject matter is not child exploitation, the principle presented may still apply.*

### **I. U.S. Supreme Court**

- *Franks v. Delaware*,<sup>++</sup> 438 U.S. 154 (1978)
- *United States v. Grubbs*, 547 U.S. 90, 96-7 (2006)

### **II. Supreme Court of Arkansas**

- *Barcenas v. State*, 33 S.W.3d 136 (Ark. 2000)
- *Berger v. State*, 36 S.W.3d 286 (Ark. 2001)
- *Bowker v. State*, 214 S.W.3d 243 (Ark. 2005)
- *Clark v. State*, 913 S.W.2d 297 (Ark. 1996)
- *Clem v. State*, 90 S.W.3d 428 (Ark. 2002)
- *Cogburn v. State*, 732 S.W.2d 807 (Ark. 1987)
- *Cozad v. State*, 792 S.W.2d 606 (Ark. 1990)
- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)
- *Dabney v. State*,<sup>++</sup> 930 S.W.2d 360 (Ark. 1996)
- *Davis v. State*, 956 S.W.2d 163 (Ark. 1997)
- *Douthitt v. State*, 935 S.W.2d 241 (Ark. 1996)
- *Graham v. State*, 861 S.W.2d 299 (Ark. 1993)
- *Greenlee v. State*, 884 S.W.2d 947 (Ark. 1994)
- *Griswold v. State*, 716 S.W.2d 767 (Ark. 1986)
- *Hathcock v. State*, 182 S.W.3d 152 (Ark. 2004)
- *Hernandez v. State*, 962 S.W.2d 756 (Ark. 1998)
- *Hoggard v. State*, 640 S.W.2d 102 (Ark. 1982)
- *Johnson v. State*, 944 S.W.2d 115 (Ark. 1997)
- *Kester v. State*, 797 S.W.2d 704 (Ark. 1990)
- *Kirwan v. State*, 96 S.W.3d 724 (Ark. 2003)
- *Laughlin v. State*, 872 S.W.2d 848 (Ark. 1994)
- *Leheny v. State*, 818 S.W.2d 236 (Ark. 1991)
- *Lindsey v. State*, 890 S.W.2d 584 (Ark. 1994)
- *Marshall v. State*, 27 S.W.3d 392 (Ark. 2000)
- *Martin v. State*, 119 S.W.3d 504 (Ark. 2003)
- *McDonald v. State*,<sup>+</sup> **No. CR 04-719, 2006 Ark. LEXIS 8 (Ark. Jan. 5, 2006)**

- *McGrew v. State*, 991 S.W.2d 588 (Ark. 1999)
- *McGuire v. State*, 706 S.W.2d 360 (Ark. 1986)
- *Modlin v. State*,<sup>++</sup> 110 S.W.3d 727 (Ark. 2003)
- *Moseley v. State*, 80 S.W.3d 325 (Ark. 2002)
- *Munson v. State*, 959 S.W.2d 391 (Ark. 1998)
- *Norman v. State*,<sup>++</sup> 931 S.W.2d 96 (Ark. 1996)
- *Parish v. State*, 163 S.W.3d 843 (Ark. 2004)
- *Parnell v. State*, 912 S.W.2d 422 (Ark. 1996)
- *Reinert v. State*, 71 S.W.3d 52 (Ark. 2002)
- *Richardson v. State*, 863 S.W.2d 572 (Ark. 1993)
- *Smart v. State*, 761 S.W.2d 915 (Ark. 1988)
- *Smith v. State*,<sup>+</sup> No. CR 01-1283, 2003 Ark. LEXIS 174 (Ark. Apr. 10, 2003)
- *Smith v. State*, 118 S.W.3d 542 (Ark. 2003)
- *Spencer v. State*, 72 S.W.3d 461 (Ark. 2002)
- *State v. Lee*, 639 S.W.2d 745 (Ark. 1982)
- *Taylor v. State*, 138 S.W.3d 684 (Ark. 2003)
- *Thomas v. State*, 79 S.W.3d 347 (Ark. 2002)
- *Wilson v. State*, 898 S.W.2d 469 (Ark. 1995)

### III. Court of Appeals of Arkansas

- *Ambrose v. Ark. Dep't of Human Servs.*,<sup>+</sup> No. CA 02-639, 2002 Ark. App. LEXIS 670 (Ark. Ct. App. Dec. 4, 2003)
- *Atchley v. State*, 2 S.W.3d 86 (Ark. Ct. App. 1999)
- *Callie v. State*,<sup>+</sup> No. CACR 01-1351, 2003 Ark. App. LEXIS 42 (Ark. Ct. App. Jan. 22, 2003)
- *Chappell v. State*, 710 S.W.2d 214 (Ark. Ct. App. 1986)
- *Chrobak v. State*, 58 S.W.3d 387 (Ark. Ct. App. 2001)
- *Daniels v. State*,<sup>+</sup> No. CACR 99-654, 2000 Ark. App. LEXIS 351 (Ark. Ct. App. Apr. 26, 2000)
- *Dep't of Human Servs. v. Parker*, 197 S.W.3d 33 (Ark. Ct. App. 2004)
- *Dye v. State*, 119 S.W.3d 513 (Ark. Ct. App. 2003)
- *Eaton v. State*, 151 S.W.3d 15 (Ark. Ct. App. 2004)
- *Elmore v. State*,<sup>+</sup> No. CACR 02-193, 2002 Ark. App. LEXIS 667 (Ark. Ct. App. Dec. 4, 2002)
- *Finney v. State*,<sup>+</sup> No. CACR 02-1272, 2003 Ark. App. LEXIS 700 (Ark. Ct. App. Sep. 17, 2003)
- *Flud v. State*,<sup>+</sup> No. CACR 00-695, 2001 Ark. App. LEXIS 207 (Ark. Ct. App. Mar. 14, 2001)
- *Gabrion v. State*, 42 S.W.3d 572 (Ark. Ct. App. 2001)
- *Gadberry v. State*, 877 S.W.2d 941 (Ark. Ct. App. 1994)
- *Gardner v. State*, 64 S.W.3d 761 (Ark. Ct. App. 2001)
- *Garner v. State*, 101 S.W.3d 857 (Ark. Ct. App. 2003)
- *George v. State*, 189 S.W.3d 28 (Ark. 2004)

- *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780 (Ark. Ct. App. Nov. 14, 2001)
- *Green v. State*,<sup>+</sup> No. CACR 99-142, 2000 Ark. App. LEXIS 110 (Ark. Ct. App. Feb. 16, 2000)
- *Hall v. State*, 692 S.W.2d 769 (Ark. Ct. App. 1985)
- *Hamm v. State*, 57 S.W.3d 252 (Ark. Ct. App. 2001)
- *Harris v. State*,<sup>+</sup> No. CACR 93-1028, 1994 Ark. App. LEXIS 517 (Ark. Ct. App. Nov. 2, 1994)
- *Heape v. State*, 192 S.W.3d 281 (Ark. Ct. App. 2004)
- *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822 (Ark. Ct. App. Nov. 28, 2001)
- *Hopkins v. Ark. Dep't. of Human Svcs.*,<sup>++</sup> 83 S.W.3d 418 (Ark. Ct. App. 2002)
- *King v. State*,<sup>+</sup> No. CACR 95-378, 1996 Ark. App. LEXIS 375 (Ark. Ct. App. June 5, 1996)
- *Lincks v. State*,<sup>+</sup> No. CACR 96-1181, 1997 Ark. App. LEXIS 409 (Ark. Ct. App. May 28, 1997)
- *Love v. State*,<sup>+</sup> No. CACR 00-498, 2000 Ark. App. LEXIS 816 (Ark. Ct. App. Dec. 20, 2000)
- *Mashburn v. State*, 189 S.W.3d 73 (Ark. Ct. App. June 23, 2004)
- *May v. State*,<sup>+</sup> No. CACR 05-523, 2006 Ark. App. LEXIS 144 (Ark. Ct. App. Feb. 15, 2006)
- *McArdell v. State*, 833 S.W.2d 786 (Ark. Ct. App. 1992)
- *Meeks v. State*,<sup>+</sup> No. CACR 00-629, 2001 Ark. App. LEXIS 227 (Ark. Ct. App. Mar. 21, 2001)
- *Mitchem v. State*,<sup>+</sup> No. CACR 05-735, 2006 Ark. App. LEXIS 618 (Ark. Ct. App. Sep. 6, 2006)
- *Moody v. Dep't of Human Svcs.*,<sup>+</sup> No. CA 03-283, 2003 Ark. App. LEXIS 859 (Ark. Ct. App. Nov. 19, 2003)
- *Murphy v. State*, 117 S.W.3d 627 (Ark. Ct. App. 2003)
- *Murray v. State*,<sup>+</sup> No. CACR 97-488, 1997 Ark. App. LEXIS 819 (Ark. Ct. App. Dec. 10, 1997)
- *Newburn v. State*,<sup>+</sup> No. CACR 99-729, 2000 Ark. App. LEXIS 39 (Ark. Ct. App. Jan. 26, 2000)
- *Oates v. State*,<sup>+</sup> No. CACR 00-280, 2000 Ark. App. LEXIS 664 (Ark. Ct. App. Oct. 25, 2000)
- *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567 (Ark. Ct. App. Oct. 9, 2002)
- *Petras v. State*,<sup>+</sup> No. CACR 05-839, 2006 Ark. App. LEXIS 462 (Ark. Ct. App. June 28, 2006)
- *Pipkins v. State*,<sup>+</sup> No. CACR 00-867, 2001 Ark. App. LEXIS 390 (Ark. Ct. App. May 16, 2001)
- *Sehorn v. State*,<sup>+</sup> No. CACR 04-948, 2005 Ark. App. LEXIS 931 (Ark. Ct. App. Dec. 14, 2005)
- *Stanislawski v. State*,<sup>+</sup> No. CACR 97-01336, 1988 Ark. App. LEXIS 362 (Ark. Ct. App. May 6, 1988)

- *Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104 (Ark. Ct. App. Feb. 27, 2002)
- *Tapp v. State*,<sup>+</sup> No. CACR 94-774, 1995 Ark. App. LEXIS 322 (Ark. Ct. App. June 23, 1995)
- *Thornton v. State*,<sup>+</sup> No. CACR 05-1320 2006 Ark. App. LEXIS 559 (Ark. Ct. App. Sep. 20, 2006)
- *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358 (Ark. Ct. App. May 14, 1997)
- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)
- *Tull v. State*, 119 S.W.3d 523 (Ark. Ct. App. 2003)
- *Turbyfill v. State*, 211 S.W.3d 557 (Ark. Ct. App. 2005)
- *Welch v. State*,<sup>+</sup> No. CACR 04-786, 2005 Ark. App. LEXIS 542 (Ark. Ct. App. Aug. 31, 2005)
- *Winters v. State*, 201 S.W.3d 4 (Ark. Ct. App. 2005)



# ARKANSAS

## *Topic Outline with Cases*

*A case with + indicates a decision not designated for publication.*

*A case with ++ indicates that although the subject matter is not child exploitation, the principle presented may still apply.*

### **I. OFFENSES DEFINED**

#### **A. Carnal Abuse in the Third Degree**

- *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358 (Ark. Ct. App. May 14, 1997)

#### **B. Child Pornography**

##### **1. Offenses**

##### **a. Engaging Children in Sexually Explicit Conduct for Use in a Visual or Print Medium**

###### **i. Elements**

- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)
- *Graham v. State*, 861 S.W.2d 299 (Ark. 1993)
- *Richardson v. State*, 863 S.W.2d 572 (Ark. 1993)

###### **ii. Definitions**

###### **(a) “Sexually Explicit Conduct”**

- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)

###### **(b) “Producing”**

- *Richardson v. State*, 863 S.W.2d 572 (Ark. 1993)

##### **b. Pandering or Possessing a Visual or Print Medium Depicting Sexually Explicit Conduct Involving a Child**

**i. Elements**

- *George v. State*, 189 S.W.3d 28 (Ark. 2004)
- *Kirwan v. State*, 96 S.W.3d 724 (Ark. 2003)
- *Gabrion v. State*, 42 S.W.3d 572 (Ark. Ct. App. 2001)
- *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822 (Ark. Ct. App. Nov. 28, 2001)

**ii. “Sexual Conduct” Defined**

- *Gabrion v. State*, 42 S.W.3d 572 (Ark. Ct. App. 2001)

**c. Employing a Child in a Sexual Performance**

**i. Elements**

- *Graham v. State*, 861 S.W.2d 299 (Ark. 1993)

**ii. Definitions**

**(a) “Performance”**

- *Graham v. State*, 861 S.W.2d 299 (Ark. 1993)

**(b) “Sexual Performance”**

- *Graham v. State*, 861 S.W.2d 299 (Ark. 1993)

**(c) “Sexual Conduct”**

- *Graham v. State*, 861 S.W.2d 299 (Ark. 1993)

**d. Producing, Directing, or Promoting a Sexual Performance**

**i. Elements**

- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)

**ii. Definitions**

**(a) “Performance”**

- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)

**(b) “Sexual Conduct”**

- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)
- *Gabrion v. State*, 42 S.W.3d 572 (Ark. Ct. App. 2001)

**e. Distributing, Possessing, or Viewing Matter Depicting Sexually Explicit Conduct Involving a Child**

No relevant state cases reported; however, the “distribution, possession, and viewing” statute can be found at ARK. CODE ANN. § 5-27-602(a).

**f. Virtual/Simulated Child Pornography**

No relevant state cases reported.

**2. Lewd and Lascivious**

**a. Definitions**

**i. “Lewd”**

- *George v. State*, 189 S.W.3d 28 (Ark. 2004)
- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)
- *Gabrion v. State*, 42 S.W.3d 572 (Ark. Ct. App. 2001)

**ii. “Indecent”**

- *George v. State*, 189 S.W.3d 28 (Ark. 2004)
- *Gabrion v. State*, 42 S.W.3d 572 (Ark. Ct. App. 2001)

**b. Lascivious Exhibition**

- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)

**C. Rape**

**1. Elements**

**a. Completed Offense**

- *Kirwan v. State*, 96 S.W.3d 724 (Ark. 2003)
- *Clem v. State*, 90 S.W.3d 428 (Ark. 2002)
- *Johnson v. State*, 944 S.W.2d 115 (Ark. 1997)
- *Parnell v. State*, 912 S.W.2d 422 (Ark. 1996)

- *Murphy v. State*, 117 S.W.3d 627 (Ark. Ct. App. 2003)
- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)
- *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567 (Ark. Ct. App. Oct. 9, 2002)
- *Chrobak v. State*, 58 S.W.3d 387 (Ark. Ct. App. 2001)
- *Daniels v. State*,<sup>+</sup> No. CACR 99-654, 2000 Ark. App. LEXIS 351 (Ark. Ct. App. Apr. 26, 2000)
- *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358 (Ark. Ct. App. May 14, 1997)
- *Harris v. State*,<sup>+</sup> No. CACR 93-1028, 1994 Ark. App. LEXIS 517 (Ark. Ct. App. Nov. 2, 1994)

**b. Attempted Rape**

- *Kirwan v. State*, 96 S.W.3d 724 (Ark. 2003)
- *Mitchem v. State*,<sup>+</sup> No. CACR05-735, 2006 Ark. App. LEXIS 618 (Ark. Ct. App. Sep. 6, 2006)

**2. Definitions**

**a. “Sexual Intercourse”**

- *Clark v. State*, 913 S.W.2d 297 (Ark. 1996)
- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)
- *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358 (Ark. Ct. App. May 14, 1997)

**b. “Deviate Sexual Activity”**

- *Clem v. State*, 90 S.W.3d 428 (Ark. 2002)
- *Johnson v. State*, 944 S.W.2d 115 (Ark. 1997)
- *Clark v. State*, 913 S.W.2d 297 (Ark. 1996)
- *Thornton v. State*,<sup>+</sup> No. CACR05-1320, 2006 Ark. App. LEXIS 559 (Ark. Ct. App. Sep. 20, 2006)
- *Eaton v. State*, 151 S.W.3d 15 (Ark. Ct. App. 2004)
- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)
- *Harris v. State*,<sup>+</sup> No. CACR 93-1028, 1994 Ark. App. LEXIS 517 (Ark. Ct. App. Nov. 2, 1994)

**c. “Physically Helpless”**

- *Dabney v. State*,++ 930 S.W.2d 360 (Ark. 1996)
- *Chrobak v. State*, 58 S.W.3d 387 (Ark. Ct. App. 2001)

**3. Force**

**a. Factors to Consider**

- *Griswold v. State*, 716 S.W.2d 767 (Ark. 1986)
- *Petras v. State*, + No. CACR05-839, 2006 Ark. App. LEXIS 462 (Ark. Ct. App. June 28, 2006)

**b. Evidence of Forcible Compulsion**

- *Kirwan v. State*, 96 S.W.3d 724 (Ark. 2003)

**4. Circumstantial Evidence of Penetration**

- *Clem v. State*, 90 S.W.3d 428 (Ark. 2002)
- *Marshall v. State*, No. CACR04-1146, 2006 Ark. App. LEXIS 43 (Ark. Ct. App. Jan. 18, 2006)
- *Sehorn v. State*, No. CACR04-948, 2005 Ark. App. LEXIS 931 (Ark. Ct. App. Dec. 14, 2005)
- *Turbyfill v. State*, 211 S.W.3d 557 (Ark. Ct. App. 2005)
- *Finney v. State*, + No. CACR02-1272, 2003 Ark. App. LEXIS 700 (Ark. Ct. App. Sep. 17, 2003)
- *Parks v. State*,+ No. CA 01-497, 2002 Ark. App. LEXIS 567 (Ark. Ct. App. Oct. 9, 2002)

**5. Lesser-Included Offenses: What Is Not a Lesser-Included Offense of Rape?**

- *Kester v. State*, 797 S.W.2d 704 (Ark. 1990)
- *Tolbert v. State*,+ No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)

**6. Juvenile Offenders**

- *Parnell v. State*, 912 S.W.2d 422 (Ark. 1996)

**D. Sexual Abuse in the First Degree**

(NOTE: Sexual Abuse Law repealed in 2001; crime of Sexual Abuse no longer exists. See SEXUAL ASSAULT.)

## 1. Elements

- *Leheny v. State*, 818 S.W.2d 236 (Ark. 1991)
- *Daniels v. State*,<sup>+</sup> No. CACR 99-654, 2000 Ark. App. LEXIS 351 (Ark. Ct. App. Apr. 26, 2000)
- *Newburn v. State*,<sup>+</sup> No. CACR 99-729, 2000 Ark. App. LEXIS 39 (Ark. Ct. App. Jan. 26, 2000)
- *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358 (Ark. Ct. App. May 14, 1997)
- *Gadberry v. State*, 877 S.W.2d 941 (Ark. Ct. App. 1994)
- *Stanislowski v. State*,<sup>+</sup> No. CACR 97-01336, 1988 Ark. App. LEXIS 362 (Ark. Ct. App. May 6, 1988)
- *Chappell v. State*, 710 S.W.2d 214 (Ark. Ct. App. 1986)

## 2. Sexual Contact

### a. Defined

- *Leheny v. State*, 818 S.W.2d 236 (Ark. 1991)
- *Daniels v. State*,<sup>+</sup> No. CACR 99-654, 2000 Ark. App. LEXIS 351 (Ark. Ct. App. Apr. 26, 2000)
- *Gadberry v. State*, 877 S.W.2d 941 (Ark. Ct. App. 1994)
- *Stanislowski v. State*,<sup>+</sup> No. CACR 97-01336, 1988 Ark. App. LEXIS 362 (Ark. Ct. App. May 6, 1988)

### b. Proving Sexual Gratification

- *Daniels v. State*,<sup>+</sup> No. CACR 99-654, 2000 Ark. App. LEXIS 351 (Ark. Ct. App. Apr. 26, 2000)

## E. Sexual Assault in the First Degree

- *Bowker v. State*, 214 S.W.3d 243 (Ark. 2005)
- *May v. State*,<sup>+</sup> No. CACR 05-523, 2006 Ark. App. LEXIS 144 (Ark. Ct. App. Feb. 15, 2006)
- *Murphy v. State*, 117 S.W.3d 627 (Ark. Ct. App. 2003)

## F. Sexual Misconduct

(NOTE: Sexual Misconduct Law repealed in 2001.)

- *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358 (Ark. Ct. App. May 14, 1997)

## **G. Sexual Solicitation**

### **1. Elements**

- 
- *Welch v. State*, No. CACR04-786, 2005 Ark. App. LEXIS 542 (Ark. Ct. App. Aug. 31, 2005)
- *Heape v. State*, 192 S.W.3d 281 (Ark. Ct. App. 2004)
- *Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104 (Ark. Ct. App. Feb. 27, 2002)
- *Lincks v. State*,<sup>+</sup> No. CACR 96-1181, 1997 Ark. App. LEXIS 409 (Ark. Ct. App. May 28, 1997)
- *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358 (Ark. Ct. App. May 14, 1997)

### **2. Online Enticement/Solicitation for Travel with the Intent to Engage in Sex with a Minor**

- *Kirwan v. State*, 96 S.W.3d 724 (Ark. 2003)

## **H. Transporting a Minor for the Purposes of Prostitution**

No relevant state cases reported.

## **I. Violation of Minor**

*(NOTE: The crime Violation of a Minor no longer exists. Ark. Code Ann. §5-14-120, concerning violation of a minor in the first degree, was repealed by Acts 2001, No. 1738, § 12. Ark. Code Ann. §5-14-121, concerning violation of a minor in the second degree, was repealed by Acts 2001, No. 1738, § 13.)*

### **1. First Degree**

#### **a. Elements**

- *Smith v. State*, 118 S.W.3d 542 (Ark. 2003)
- *Reinert v. State*, 71 S.W.3d 52 (Ark. 2002)
- *Green v. State*,<sup>+</sup> No. CACR 99-142, 2000 Ark. App. LEXIS 110 (Ark. Ct. App. Feb. 16, 2000)

#### **b. “Guardian” Defined**

- *Reinert v. State*, 71 S.W.3d 52 (Ark. 2002)

## **2. Second Degree**

### **a. Elements**

- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)
- *Oates v. State*,<sup>+</sup> No. CACR 00-280, 2000 Ark. App. LEXIS 664 (Ark. Ct. App. Oct. 25, 2000)

### **b. Definitions**

#### **i. “Sexual Contact”**

- *Oates v. State*,<sup>+</sup> No. CACR 00-280, 2000 Ark. App. LEXIS 664 (Ark. Ct. App. Oct. 25, 2000)

#### **ii. “Sexual Gratification”**

- *Oates v. State*,<sup>+</sup> No. CACR 00-280, 2000 Ark. App. LEXIS 664 (Ark. Ct. App. Oct. 25, 2000)

## **II. MANDATORY REPORTING: CHILD MALTREATMENT ACT**

(NOTE: *Child Abuse Reporting Act*, Ark. Code Ann. § 12-12-507(c), was amended; now called “*Child Maltreatment Act*”.)

### **A. Purpose of the Child Maltreatment Act**

- *Cozad v. State*, 792 S.W.2d 606 (Ark. 1990)

### **B. Admissibility of Reports**

#### **1. Generally**

- *Cozad v. State*, 792 S.W.2d 606 (Ark. 1990)

#### **2. Privilege**

- *Cozad v. State*, 792 S.W.2d 606 (Ark. 1990)

### **C. “Abuse”**

#### **1. Definition**

- *Ambrose v. Ark. Dep’t of Human Servs.*,<sup>+</sup> No. CA 02-639, 2002 Ark. App. LEXIS 670 (Ark. Ct. App. Dec. 4, 2003)



- *Moody v. Dep't of Human Servs.*,<sup>+</sup> No. CA 03-283, 2003 Ark. App. LEXIS 859 (Ark. Ct. App. Nov. 19, 2003)

## **2. Physical Discipline**

- *Dep't of Human Servs. v. Parker*, 197 S.W.3d 33 (Ark. Ct. App. 2004)
- *Ambrose v. Ark. Dep't of Human Servs.*,<sup>+</sup> No. CA 02-639, 2002 Ark. App. LEXIS 670 (Ark. Ct. App. Dec. 4, 2003)

### **a. Reasonable or Moderate**

- *Dep't of Human Servs. v. Parker*, 197 S.W.3d 33 (Ark. Ct. App. 2004)
- *Ambrose v. Ark. Dep't of Human Servs.*,<sup>+</sup> No. CA 02-639, 2002 Ark. App. LEXIS 670 (Ark. Ct. App. Dec. 4, 2003)

### **b. Factors to Consider**

- *Dep't of Human Servs. v. Parker*, 197 S.W.3d 33 (Ark. Ct. App. 2004)
- *Ambrose v. Ark. Dep't of Human Servs.*,<sup>+</sup> No. CA 02-639, 2002 Ark. App. LEXIS 670 (Ark. Ct. App. Dec. 4, 2003)

## **III. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE**

### **A. Search Warrants**

#### **1. Probable Cause**

- *George v. State*, 189 S.W.3d 28 (Ark. 2004)
- *Chrobak v. State*, 58 S.W.3d 387 (Ark. Ct. App. 2001)

#### **a. Affidavits**

##### **i. Time Element**

###### **(a) Generally**

- *George v. State*, 189 S.W.3d 28 (Ark. 2004)

###### **(b) Inference**

- *George v. State*, 189 S.W.3d 28 (Ark. 2004)

**(c) Good-Faith Exception**

- *George v. State*, 189 S.W.3d 28 (Ark. 2004)

**(d) Circumstantial Evidence**

- *George v. State*, 189 S.W.3d 28 (Ark. 2004)

**(e) Suppression**

- *George v. State*, 189 S.W.3d 28 (Ark. 2004)

**ii. False Information: The Defendant's Burden**

- *Franks v. Delaware*,<sup>++</sup> 438 U.S. 154 (1978)

**b. Appellate Review**

- *George v. State*, 189 S.W.3d 28 (Ark. 2004)
- *Winters v. State*, 201 S.W.3d 4 (Ark. Ct. App. 2005)
- *Chrobak v. State*, 58 S.W.3d 387 (Ark. Ct. App. 2001)

**2. Scope**

- *Norman v. State*,<sup>++</sup> 931 S.W.2d 96 (Ark. 1996)

**3. Staleness**

**a. General Rule**

- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)
- *Richardson v. State*, 863 S.W.2d 572 (Ark. 1993)

**b. Exception to the General Rule**

- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)
- *Richardson v. State*, 863 S.W.2d 572 (Ark. 1993)

**i. Requirements for Nighttime Searches**

- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)
- *Richardson v. State*, 863 S.W.2d 572 (Ark. 1993)

**ii. Erroneous Issuance of a Nighttime Search Warrant**

- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)

- *Richardson v. State*, 863 S.W.2d 572 (Ark. 1993)

**(a) Failure to Justify a Nighttime Search**

- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)
- *Richardson v. State*, 863 S.W.2d 572 (Ark. 1993)

**(b) Invalidation of a Nighttime Search Warrant**

- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)

**(c) Good-Faith Exception**

- *Richardson v. State*, 863 S.W.2d 572 (Ark. 1993)

**c. Delay in Applying for a Search Warrant**

- *Chrobak v. State*, 58 S.W.3d 387 (Ark. Ct. App. 2001)

**d. Delay in Executing a Search Warrant**

- *Chrobak v. State*, 58 S.W.3d 387 (Ark. Ct. App. 2001)

**B. Anticipatory Warrants**

- *United States v. Grubbs*, 547 U.S. 90, 96-7 (2006)

**C. Types of Searches**

**1. Consent Searches**

- *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822 (Ark. Ct. App. Nov. 28, 2001)

**a. Test for Valid Consent**

- *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822 (Ark. Ct. App. Nov. 28, 2001)

**b. Standard for Measuring the Scope of Consent**

- *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822 (Ark. Ct. App. Nov. 28, 2001)

**c. Withdrawal or Limitation of Consent**

- *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822 (Ark. Ct. App. Nov. 28, 2001)

**2. Employer Searches**

No relevant state cases reported.

**3. Private (Civilian) Searches**

No relevant state cases reported.

**4. University-Campus Searches**

No relevant state cases reported.

**D. Methods of Searching**

No relevant state cases reported.

**E. Computer-Technician/Repairperson Discoveries**

No relevant state cases reported.

**F. Photo-Development Discoveries**

No relevant state cases reported.

**G. Custodial Interrogation: Waiver of *Miranda* Rights**

**1. Voluntariness of Waiver**

- *Barcenas v. State*, 33 S.W.3d 136 (Ark. 2000)

**2. Validity of Waiver**

- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)

**3. Burden**

- *Barcenas v. State*, 33 S.W.3d 136 (Ark. 2000)
- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)

**4. Appellate Review**

- *Barcenas v. State*, 33 S.W.3d 136 (Ark. 2000)
- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)

**H. Criminal Forfeiture**

No relevant state cases reported.

**I. Disciplinary Hearings for Federal and State Officers**

No relevant state cases reported.

**J. Probation and Parolee Rights**

No relevant state cases reported.

**IV. JURISDICTION AND NEXUS**

**A. Jurisdictional Nexus**

No relevant state cases reported.

**B. Internet Nexus**

No relevant state cases reported.

**C. State Jurisdiction, Federal Jurisdiction, and Concurrent Jurisdiction**

**1. State Jurisdiction**

- *Kirwan v. State*, 96 S.W.3d 724 (Ark. 2003)

**2. Federal Jurisdiction**

No relevant state cases reported.

**3. Concurrent Jurisdiction**

No relevant state cases reported.

**D. Interstate Possession of Child Pornography**

No relevant state cases reported.

**V. DISCOVERY AND EVIDENCE**

**A. Timely Review of Evidence**

No relevant state cases reported.

**B. Accusatory Instruments**

**1. Information**

**a. Requirements**

- *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567 (Ark. Ct. App. Oct. 9, 2002)

**b. Bill of Particulars**

- *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567 (Ark. Ct. App. Oct. 9, 2002)

**c. Time of the Offense**

- *Martin v. State*, 119 S.W.3d 504 (Ark. 2003)
- *Wilson v. State*, 898 S.W.2d 469 (Ark. 1995)
- *Daniels v. State*,<sup>+</sup> No. CACR 99-654, 2000 Ark. App. LEXIS 351 (Ark. Ct. App. Apr. 26, 2000)
- *Newburn v. State*,<sup>+</sup> No. CACR 99-729, 2000 Ark. App. LEXIS 39 (Ark. Ct. App. 2000)

**2. Juvenile Proceedings**

**a. Charging Instrument**

- *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567 (Ark. Ct. App. Oct. 9, 2002)

**b. Bill of Particulars**

- *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567 (Ark. Ct. App. Oct. 9, 2002)

**c. Time of the Offense**

- *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567 (Ark. Ct. App. Oct. 9, 2002)

**C. Defense Requests for Copies of Child Pornography**

No relevant state cases reported.

**D. Introduction of E-mails into Evidence**

**1. Hearsay/Authentication Issues**

No relevant state cases reported.

**2. Circumstantial Evidence**

No relevant state cases reported.

**3. Technical Aspects of Electronic Evidence Regarding Admissibility**

No relevant state cases reported.

**E. Text-Only Evidence**

**1. Introduction into Evidence**

No relevant state cases reported.

**2. Relevance**

No relevant state cases reported.

**F. Evidence Obtained from Internet Service Providers**

**1. Electronic Communications Privacy Act**

No relevant state cases reported.

**2. Cable Act**

No relevant state cases reported.

**3. Patriot Act**

**a. National Trap and Trace Authority**

No relevant state cases reported.

**b. State-Court-Judge Jurisdictional Limits**

No relevant state cases reported.

**G. Admissibility of Photographs and Videotapes**

- *Flud v. State*,<sup>+</sup> No. CACR 00-695, 2001 Ark. App. LEXIS 207 (Ark. Ct. App. Mar. 14, 2001)

**1. Photographs**

- *Flud v. State*,<sup>+</sup> No. CACR 00-695, 2001 Ark. App. LEXIS 207 (Ark. Ct. App. Mar. 14, 2001)
- *Stanislawski v. State*,<sup>+</sup> No. CACR 97-01336, 1988 Ark. App. LEXIS 362 (Ark. Ct. App. May 6, 1988)

**2. Videotapes**

- *Flud v. State*,<sup>+</sup> No. CACR 00-695, 2001 Ark. App. LEXIS 207 (Ark. Ct. App. Mar. 14, 2001)

**H. Prior Bad Acts**

**1. Inadmissible**

- *Spencer v. State*, 72 S.W.3d 461 (Ark. 2002)
- *Berger v. State*, 36 S.W.3d 286 (Ark. 2001)
- *Hernandez v. State*, 962 S.W.2d 756 (Ark. 1998)
- *Lindsey v. State*, 890 S.W.2d 584 (Ark. 1994)
- *Callie v. State*,<sup>+</sup> No. CACR 01-1351, 2003 Ark. App. LEXIS 42 (Ark. Ct. App. Jan. 22, 2003)
- *Garner v. State*, 101 S.W.3d 857 (Ark. Ct. App. 2003)
- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)
- *Tull v. State*, 119 S.W.3d 523 (Ark. Ct. App. 2003)
- *Elmore v. State*,<sup>+</sup> No. CACR 02-193, 2002 Ark. App. LEXIS 667 (Ark. Ct. App. Dec. 4, 2002)
- *Meeks v. State*,<sup>+</sup> No. CACR 00-629, 2001 Ark. App. LEXIS 227 (Ark. Ct. App. Mar. 21, 2001)
- *Love v. State*,<sup>+</sup> No. CACR 00-498, 2000 Ark. App. LEXIS 816 (Ark. Ct. App. Dec. 20, 2000)



- *Newburn v. State*,<sup>+</sup> No. CACR 99-729, 2000 Ark. App. LEXIS 39 (Ark. Ct. App. Jan. 26, 2000)

## 2. Admissible

- *Spencer v. State*, 72 S.W.3d 461 (Ark. 2002)
- *Berger v. State*, 36 S.W.3d 286 (Ark. 2001)
- *Hernandez v. State*, 962 S.W.2d 756 (Ark. 1998)
- *Lindsey v. State*, 890 S.W.2d 584 (Ark. 1994)
- *Callie v. State*,<sup>+</sup> No. CACR 01-1351, 2003 Ark. App. LEXIS 42 (Ark. Ct. App. Jan. 22, 2003)

### a. Balancing Test

- *Munson v. State*, 959 S.W.2d 391 (Ark. 1998)
- *Elmore v. State*,<sup>+</sup> No. CACR 02-193, 2002 Ark. App. LEXIS 667 (Ark. Ct. App. Dec. 4, 2002)

### b. Relevant to Main Issue of Guilt or Innocence

- *Callie v. State*,<sup>+</sup> No. CACR 01-1351, 2003 Ark. App. LEXIS 42 (Ark. Ct. App. Jan. 22, 2003)

### c. Character Evidence

- *Callie v. State*,<sup>+</sup> No. CACR 01-1351, 2003 Ark. App. LEXIS 42 (Ark. Ct. App. Jan. 22, 2003)

### d. Motive, Opportunity, Intent, Preparation, Plan, Knowledge, Identity, Absence of Mistake, Absence of Accident

- *Spencer v. State*, 72 S.W.3d 461 (Ark. 2002)
- *Berger v. State*, 36 S.W.3d 286 (Ark. 2001)
- *Hernandez v. State*, 962 S.W.2d 756 (Ark. 1998)
- *Lindsey v. State*, 890 S.W.2d 584 (Ark. 1994)
- *Garner v. State*, 101 S.W.3d 857 (Ark. Ct. App. 2003)
- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)
- *Tull v. State*, 119 S.W.3d 523 (Ark. Ct. App. 2003)
- *Elmore v. State*,<sup>+</sup> No. CACR 02-193, 2002 Ark. App. LEXIS 667 (Ark. Ct. App. Dec. 4, 2002)
- *Meeks v. State*,<sup>+</sup> No. CACR 00-629, 2001 Ark. App. LEXIS 227 (Ark. Ct. App. Mar. 21, 2001)
- *Love v. State*,<sup>+</sup> No. CACR 00-498, 2000 Ark. App. LEXIS 816 (Ark. Ct. App. Dec. 20, 2000)

- *Newburn v. State*,<sup>+</sup> No. CACR 99-729, 2000 Ark. App. LEXIS 39 (Ark. Ct. App. Jan. 26, 2000)

**i. Generally**

- *Love v. State*,<sup>+</sup> No. CACR 00-498, 2000 Ark. App. LEXIS 816 (Ark. Ct. App. Dec. 20, 2000)

**ii. Sexual Abuse of a Child**

- *Spencer v. State*, 72 S.W.3d 461 (Ark. 2002)
- *Munson v. State*, 959 S.W.2d 391 (Ark. 1998)
- *Douthitt v. State*, 935 S.W.2d 241 (Ark. 1996)
- *Richardson v. State*, 863 S.W.2d 572 (Ark. 1993)
- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)

**e. Pedophile Exception**

- *Clark v. State*, 913 S.W.2d 297 (Ark. 1996)

**i. Character**

- *Parish v. State*, 163 S.W.3d 843 (Ark. 2004)
- *Spencer v. State*, 72 S.W.3d 461 (Ark. 2002)
- *Berger v. State*, 36 S.W.3d 286 (Ark. 2001)
- *Hernandez v. State*, 962 S.W.2d 756 (Ark. 1998)
- *Munson v. State*, 959 S.W.2d 391 (Ark. 1998)
- *Garner v. State*, 101 S.W.3d 857 (Ark. Ct. App. 2003)
- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)
- *Elmore v. State*,<sup>+</sup> No. CACR 02-193, 2002 Ark. App. LEXIS 667 (Ark. Ct. App. Dec. 4, 2002)
- *Meeks v. State*,<sup>+</sup> No. CACR 00-629, 2001 Ark. App. LEXIS 227 (Ark. Ct. App. Mar. 21, 2001)
- *Gadberry v. State*, 877 S.W.2d 941 (Ark. Ct. App. 1994)

**ii. Motive**

- *Parish v. State*, 163 S.W.3d 843 (Ark. 2004)
- *Tull v. State*, 119 S.W.3d 523 (Ark. Ct. App. 2003)

**iii. Intimate Relationship**

- *Tull v. State*, 119 S.W.3d 523 (Ark. Ct. App. 2003)
- *Elmore v. State*,<sup>+</sup> No. CACR 02-193, 2002 Ark. App. LEXIS 667 (Ark. Ct. App. Dec. 4, 2002)

**iv. Same Household**

- *Munson v. State*, 959 S.W.2d 391 (Ark. 1998)
- *Garner v. State*, 101 S.W.3d 857 (Ark. Ct. App. 2003)

**3. Appellate Review**

- *Parish v. State*, 163 S.W.3d 843 (Ark. 2004)
- *Love v. State*,<sup>+</sup> No. CACR 00-498, 2000 Ark. App. LEXIS 816 (Ark. Ct. App. Dec. 20, 2000)

**I. Simultaneous Bad Acts: Intentional Pattern of Abusive Behavior**

- *Clem v. State*, 90 S.W.3d 428 (Ark. 2002)
- *Lindsey v. State*, 890 S.W.2d 584 (Ark. 1994)

**J. Subsequent Sexual Misconduct**

- *Hernandez v. State*, 962 S.W.2d 756 (Ark. 1998)

**K. Prior Acts of the Victim: Rape-Shield Laws**

- *Parish v. State*, 163 S.W.3d 843 (Ark. 2004)
- *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780 (Ark. Ct. App. Nov. 14, 2001)

**1. Admissibility**

- *Martin v. State*, 119 S.W.3d 504 (Ark. 2003)
- *Laughlin v. State*, 872 S.W.2d 848 (Ark. 1994)

**2. “Prior Sexual Conduct” Defined**

- *Martin v. State*, 119 S.W.3d 504 (Ark. 2003)
- *Taylor v. State*, 138 S.W.3d 684 (Ark. 2003)

### **3. Determination of Relevant Evidence**

- *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780 (Ark. Ct. App. Nov. 14, 2001)

### **4. Appellate Review**

- *Hathcock v. State*, 182 S.W.3d 152 (Ark. 2004)
- *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780 (Ark. Ct. App. Nov. 14, 2001)

## **L. Witnesses and Testimony**

### **1. Competency**

#### **a. Presumption**

- *Clem v. State*, 90 S.W.3d 428 (Ark. 2002)
- *Laughlin v. State*, 872 S.W.2d 848 (Ark. 1994)

#### **b. Criteria for Determining Competency**

- *Modlin v. State*,<sup>++</sup> 110 S.W.3d 727 (Ark. 2003)
- *Clem v. State*, 90 S.W.3d 428 (Ark. 2002)
- *Greenlee v. State*, 884 S.W.2d 947 (Ark. 1994)
- *Laughlin v. State*, 872 S.W.2d 848 (Ark. 1994)
- *McArdell v. State*, 833 S.W.2d 786 (Ark. Ct. App. 1992)
- *Chappell v. State*, 710 S.W.2d 214 (Ark. Ct. App. 1986)

#### **c. Child Witnesses**

- *Hoggard v. State*, 640 S.W.2d 102 (Ark. 1982)
- *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567 (Ark. Ct. App. Oct. 9, 2002)
- *McArdell v. State*, 833 S.W.2d 786 (Ark. Ct. App. 1992)

#### **d. Burden of Persuasion**

- *Clem v. State*, 90 S.W.3d 428 (Ark. 2002)

#### **e. Discretion of the Trial Court**

- *Chappell v. State*, 710 S.W.2d 214 (Ark. Ct. App. 1986)

**f. Appellate Review**

- *Clem v. State*, 90 S.W.3d 428 (Ark. 2002)
- *McArdell v. State*, 833 S.W.2d 786 (Ark. Ct. App. 1992)
- *Chappell v. State*, 710 S.W.2d 214 (Ark. Ct. App. 1986)

**2. Child Victims: Videotaped Depositions**

- *Greenlee v. State*, 884 S.W.2d 947 (Ark. 1994)

**a. Requirements**

- *Kester v. State*, 797 S.W.2d 704 (Ark. 1990)
- *Cogburn v. State*, 732 S.W.2d 807 (Ark. 1987)
- *McGuire v. State*, 706 S.W.2d 360 (Ark. 1986)
- *State v. Lee*, 639 S.W.2d 745 (Ark. 1982)
- *Tapp v. State*,<sup>+</sup> No. CACR 94-774, 1995 Ark. App. LEXIS 322 (Ark. Ct. App. June 23, 1995)
- *Chappell v. State*, 710 S.W.2d 214 (Ark. Ct. App. 1986)

**b. Discretion of the Trial Court**

- *Kester v. State*, 797 S.W.2d 704 (Ark. 1990)
- *Tapp v. State*,<sup>+</sup> No. CACR 94-774, 1995 Ark. App. LEXIS 322 (Ark. Ct. App. June 23, 1995)

**3. Sexual-Assault and Sexual-Abuse Victims**

**a. Substantial Evidence**

- *Clem v. State*, 90 S.W.3d 428 (Ark. 2002)
- *Spencer v. State*, 72 S.W.3d 461 (Ark. 2002)
- *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567 (Ark. Ct. App. Oct. 9, 2002)

**b. Uncorroborated Testimony**

- *Clem v. State*, 90 S.W.3d 428 (Ark. 2002)
- *Davis v. State*, 956 S.W.2d 163 (Ark. 1997)
- *Laughlin v. State*, 872 S.W.2d 848 (Ark. 1994)
- *Chrobak v. State*, 58 S.W.3d 387 (Ark. Ct. App. 2001)
- *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, (Ark. Ct. App. Oct. 9, 2002)
- *Daniels v. State*,<sup>+</sup> No. CACR 99-654, 2000 Ark. App. LEXIS 351 (Ark. Ct. App. Apr. 26, 2000)

- *Newburn v. State*,<sup>+</sup> No. CACR 99-729, 2000 Ark. App. LEXIS 39 (Ark. Ct. App. 2000)
- c. Minor Victim**
- *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, (Ark. Ct. App. Oct. 9, 2002)
- d. Inconsistent Testimony**
- *Chrobak v. State*, 58 S.W.3d 387 (Ark. Ct. App. 2001)
- e. Admission of Hearsay Testimony: Harmless Error**
- *Clark v. State*, 913 S.W.2d 297 (Ark. 1996)
- 4. Expert Testimony**
- a. General Test for Expert Testimony**
- *Davis v. State*, 956 S.W.2d 163 (Ark. 1997)
  - *Hopkins v. Ark. Dep't. of Human Servs.*,<sup>++</sup> 83 S.W.3d 418 (Ark. Ct. App. 2002)
- b. Relevance of Expert Testimony**
- *Davis v. State*, 956 S.W.2d 163 (Ark. 1997)
- c. Child-Abuse Syndrome**
- *Kester v. State*, 797 S.W.2d 704 (Ark. 1990)
- d. Appellate Review**
- *Davis v. State*, 956 S.W.2d 163 (Ark. 1997)
- 5. Non-Expert Testimony**
- *Hopkins v. Ark. Dep't. of Human Servs.*,<sup>++</sup> 83 S.W.3d 418 (Ark. Ct. App. 2002)
- 6. Preparation of Witnesses**
- *Smith v. State*,<sup>+</sup> No. CR 01-1283, 2003 Ark. LEXIS 174 (Ark. Apr. 10, 2003)

## **7. Exclusion of Witnesses**

### **a. Generally**

- *Clark v. State*, 913 S.W.2d 297 (Ark. 1996)
- *McArdell v. State*, 833 S.W.2d 786 (Ark. Ct. App. 1992)
- *Hall v. State*, 692 S.W.2d 769 (Ark. Ct. App. 1985)

### **b. Crime Victim**

- *Kester v. State*, 797 S.W.2d 704 (Ark. 1990)
- *Smith v. State*,<sup>+</sup> No. CR 01-1283, 2003 Ark. LEXIS 174 (Ark. Apr. 10, 2003)
- *King v. State*,<sup>+</sup> No. CACR 95-378, 1996 Ark. App. LEXIS 375 (Ark. Ct. App. June 5, 1996)
- *Gadberry v. State*, 877 S.W.2d 941 (Ark. App. 1994)
- *McArdell v. State*, 833 S.W.2d 786 (Ark. Ct. App. 1992)

## **8. Impeachment of a Witness by a Prior Juvenile Adjudication**

- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)

## **M. Scientific Evidence**

### **1. Polygraphs and Truth-Serum Tests: Inadmissible**

- *Cogburn v. State*, 732 S.W.2d 807 (Ark. 1987)
- *Oates v. State*,<sup>+</sup> No. CACR 00-280, 2000 Ark. App. LEXIS 664 (Ark. Ct. App. Oct. 25, 2000)

### **2. Scientific Acceptance or Recognition**

- *Cogburn v. State*, 732 S.W.2d 807 (Ark. 1987)

## **N. Hearsay Exceptions**

### **1. A Child's Statement of Sexual Abuse**

- *Kester v. State*, 797 S.W.2d 704 (Ark. 1990)
- *Smart v. State*, 761 S.W.2d 915 (Ark. 1988)
- *Cogburn v. State*, 732 S.W.2d 807 (Ark. 1987)
- *Gadberry v. State*, 877 S.W.2d 941 (Ark. Ct. App. 1994)

**a. No Rule to Prohibit the Child from Testifying**

- *Smart v. State*, 761 S.W.2d 915 (Ark. 1988)

**b. Factors to Determine Trustworthiness**

- *Cogburn v. State*, 732 S.W.2d 807 (Ark. 1987)
- *Gadberry v. State*, 877 S.W.2d 941 (Ark. Ct. App. 1994)
- *Chappell v. State*, 710 S.W.2d 214 (Ark. Ct. App. 1986)

**c. Reasonable Notice**

- *Gadberry v. State*, 877 S.W.2d 941 (Ark. Ct. App. 1994)

**d. Videotaped Statements**

- *Cogburn v. State*, 732 S.W.2d 807 (Ark. 1987)

**2. Spontaneous Statements**

- *Greenlee v. State*, 884 S.W.2d 947 (Ark. 1994)

**O. Privileges**

**1. Marital Privilege: Inapplicable**

- *Munson v. State*, 959 S.W.2d 391 (Ark. 1998)

**2. Social-Worker Privilege**

- *Cozad v. State*, 792 S.W.2d 606 (Ark. 1990)

**VI. AGE OF THE CHILD VICTIM**

**A. Proving the Age of the Child Depicted**

No relevant state cases reported.

**B. The Defendant's Knowledge of the Age of the Child Depicted**

No relevant state cases reported.

**VII. MULTIPLE COUNTS**



**A. What Constitutes an Item of Child Pornography?**

No relevant state cases reported.

**B. Issues of Double Jeopardy**

- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)

**1. Previous Prosecution in Another Jurisdiction**

- *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822 (Ark. Ct. App. Nov. 28, 2001)

**2. Same Offense**

- *Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)

**3. Mistrial**

- *Atchley v. State*, 2 S.W.3d 86 (Ark. Ct. App. 1999)

**C. Multiplicity**

**1. Rape**

- *Smith v. State*, 118 S.W.3d 542 (Ark. 2003)

**2. Sexual Abuse**

- *Newburn v. State*,<sup>+</sup> No. CACR 99-729, 2000 Ark. App. LEXIS 39 (Ark. Ct. App. Jan. 26, 2000)

**D. Joinder**

- *McArdell v. State*, 833 S.W.2d 786 (Ark. Ct. App. 1992)

**E. Severance**

**1. Factors Favoring Severance**

- *Chappell v. State*, 710 S.W.2d 214 (Ark. Ct. App. 1986)

## **2. Right to Severance of Offenses**

- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)
- *McArdell v. State*, 833 S.W.2d 786 (Ark. Ct. App. 1992)

## **3. Refusal to Sever Cases**

- *Richardson v. State*, 863 S.W.2d 572 (Ark. 1993)

# **VIII. DEFENSES**

## **A. Age of the Defendant**

- *Kirwan v. State*, 96 S.W.3d 724 (Ark. 2003)
- *Clem v. State*, 90 S.W.3d 428 (Ark. 2002)
- *Johnson v. State*, 944 S.W.2d 115 (Ark. 1997)
- *Parnell v. State*, 912 S.W.2d 422 (Ark. 1996)
- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)
- *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358 (Ark. Ct. App. May 14, 1997)
- *Harris v. State*,<sup>+</sup> No. CACR 93-1028, 1994 Ark. App. LEXIS 517 (Ark. Ct. App. Nov. 2, 1994)

## **B. Consent**

### **1. Under-Aged Victim**

- *Kirwan v. State*, 96 S.W.3d 724 (Ark. 2003)

### **2. Incest**

- *Douthitt v. State*, 935 S.W.2d 241 (Ark. 1996)

## **C. Diminished Capacity**

### **1. Addiction to the Internet**

No relevant state cases reported.

### **2. Insanity**

No relevant state cases reported.

**D. First Amendment**

No relevant state cases reported.

**E. Impossibility**

**1. Factual: Attempt Crimes**

- *Kirwan v. State*, 96 S.W.3d 724 (Ark. 2003)

**2. Legal**

No relevant state cases reported.

**F. Manufacturing Jurisdiction**

No relevant state cases reported.

**G. Mistake of Fact: The Victim's Age and Child-Pornography Offenses**

- *Graham v. State*, 861 S.W.2d 299 (Ark. 1993)

**H. Outrageous Conduct**

No relevant state cases reported.

**I. Researcher**

No relevant state cases reported.

**J. Sexual Orientation**

No relevant state cases reported.

**K. Statute of Limitations**

**1. General Rules**

**a. Rape**

- *Gardner v. State*, 64 S.W.3d 761 (Ark. Ct. App. 2001)

**b. Sexual Abuse**

- *Gardner v. State*, 64 S.W.3d 761 (Ark. Ct. App. 2001)

**2. Limited Exception**

- *Dye v. State*, 119 S.W.3d 513 (Ark. Ct. App. 2003)
- *Gardner v. State*, 64 S.W.3d 761 (Ark. Ct. App. 2001)

**3. Tolling**

- *McGrew v. State*, 991 S.W.2d 588 (Ark. 1999)

**IX. SENTENCING ISSUES**

**A. Bifurcated Sentencing**

**1. Procedure**

- *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780 (Ark. Ct. App. Nov. 14, 2001)

**2. Alternative Sentencing**

- *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780 (Ark. Ct. App. Nov. 14, 2001)

**B. Sentencing Imposition**

**1. Broad Inquiry**

- *Marshall v. State*, 27 S.W.3d 392 (Ark. 2000)

**2. Evidence**

- *Smith v. State*, 118 S.W.3d 542 (Ark. 2003)
- *Marshall v. State*, 27 S.W.3d 392 (Ark. 2000)
- *Pipkins v. State*,<sup>+</sup> No. CACR 00-867, 2001 Ark. App. LEXIS 390 (Ark. Ct. App. May 16, 2001)

**a. Other Crimes or Wrongs**

- *Marshall v. State*, 27 S.W.3d 392 (Ark. 2000)

**b. Attempted Crimes**

- *Marshall v. State*, 27 S.W.3d 392 (Ark. 2000)

**c. Pardoned Offenses**

- *Richardson v. State*, 863 S.W.2d 572 (Ark. 1993)

**d. Uncharged Offenses**

- *Richardson v. State*, 863 S.W.2d 572 (Ark. 1993)

**e. Victim-Impact Evidence**

- *Marshall v. State*, 27 S.W.3d 392 (Ark. 2000)
- *Pipkins v. State*,<sup>+</sup> No. CACR 00-867, 2001 Ark. App. LEXIS 390 (Ark. Ct. App. May 16, 2001)

**f. Aggravating Factors**

- *Johnson v. State*, 944 S.W.2d 115 (Ark. 1997)

**i. Age of Victim**

No relevant state cases reported.

**ii. Distribution/Intent to Traffic**

No relevant state cases reported.

**iii. Number of Images**

No relevant state cases reported.

**iv. Pattern of Activity for Sexual Exploitation**

No relevant state cases reported.

**v. Sadistic, Masochistic, or Violent Material**

No relevant state cases reported.

**vi. Use of Computers**

No relevant state cases reported.

**3. Consecutive Versus Concurrent Sentences**

- *Smith v. State*, 118 S.W.3d 542 (Ark. 2003)

- *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780 (Ark. Ct. App. Nov. 14, 2001)

**C. Reduction of a Defendant’s Sentence**

- *Thomas v. State*, 79 S.W.3d 347 (Ark. 2002)
- *McDonald v. State*,<sup>+</sup> No. CR 04-719, 2006 Ark. LEXIS 8 (Ark. Jan. 5, 2006)

**D. The Sex and Child Offender Registration Act of 1997**

- *Green v. State*,<sup>+</sup> No. CACR 99-142, 2000 Ark. App. LEXIS 110 (Ark. Ct. App. Feb. 16, 2000)

**X. SUPERVISED RELEASE: PROBATION**

**A. Discretion of the Court**

- *Green v. State*,<sup>+</sup> No. CACR 99-142, 2000 Ark. App. LEXIS 110 (Ark. Ct. App. Feb. 16, 2000)

**B. Factors to Consider**

- *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780 (Ark. Ct. App. Nov. 14, 2001)
- *Green v. State*,<sup>+</sup> No. CACR 99-142, 2000 Ark. App. LEXIS 110 (Ark. Ct. App. Feb. 16, 2000)

**C. Time Limitations**

- *Hamm v. State*, 57 S.W.3d 252 (Ark. Ct. App. 2001)

**D. Revocation of Probation**

**1. Burden**

- *Mashburn v. State*, 189 S.W.3d 73 (Ark. Ct. App. June 23, 2004)
- *Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104 (Ark. Ct. App. Feb. 27, 2002)
- *Murray v. State*,<sup>+</sup> No. CACR 97-488, 1997 Ark. App. LEXIS 819 (Ark. Ct. App. Dec. 10, 1997)

**a. Required Proof**

- *Mashburn v. State*, 189 S.W.3d 73 (Ark. Ct. App. June 23, 2004)

- *Murray v. State*,<sup>+</sup> No. CACR 97-488, 1997 Ark. App. LEXIS 819 (Ark. Ct. App. Dec. 10, 1997)

**b. Uncorroborated Testimony**

- *Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104 (Ark. Ct. App. Feb. 27, 2002)

**c. Appellate Review**

- *Murray v. State*,<sup>+</sup> No. CACR 97-488, 1997 Ark. App. LEXIS 819 (Ark. Ct. App. Dec. 10, 1997)
- *Mashburn v. State*, 189 S.W.3d 73 (Ark. Ct. App. June 23, 2004)
- *Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104 (Ark. Ct. App. Feb. 27, 2002)

**2. Failure to Pay Fines as Grounds for Revocation**

- *Murray v. State*,<sup>+</sup> No. CACR 97-488, 1997 Ark. App. LEXIS 819 (Ark. Ct. App. Dec. 10, 1997)
- *Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104 (Ark. Ct. App. Feb. 27, 2002)

**E. Sentencing a Defendant for a Parole Violation**

- *Moseley v. State*, 80 S.W.3d 325 (Ark. 2002)

**1. Imprisonment**

- *Moseley v. State*, 80 S.W.3d 325 (Ark. 2002)

**2. Credit for Time Served**

- *Moseley v. State*, 80 S.W.3d 325 (Ark. 2002)

# ARKANSAS

## *Case Highlights*

*A case with + indicates a decision not designated for publication.*

*A case with ++ indicates that although the subject matter is not child exploitation, the principle presented may still apply.*

*Ambrose v. Ark. Dep't of Human Servs.*,<sup>+</sup> No. CA 02-639, 2002 Ark. App. LEXIS 670 (Ark. Ct. App. Dec. 4, 2003)

The victim's testimony established that he had sustained more than transient pain or minor temporary marks. The victim sustained bruises that had broken the skin and were still apparent some two weeks later; therefore, the appellate court found that there was substantial evidence to support the administrative law judge's decision requiring the defendant to be placed on the Child Maltreatment Central Registry based on the maltreatment of her minor son.

*Atchley v. State*, 2 S.W.3d 86 (Ark. Ct. App. 1999)

The defendant moved to dismiss the charges against him, alleging that because the State had goaded him into moving for a mistrial at his first trial, application of the Double-Jeopardy Clause precludes retrial. The trial court denied the motion. The appellate court held that only where the governmental conduct in question is intended to goad the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first trial on his own motion. The trial court accepted the prosecutor's assertion that he had not intended to cause the mistrial and the appellate court could not say that the record did not support the trial court's finding that the State did not goad the appellant into asking for a mistrial.

*Barcenas v. State*, 33 S.W.3d 136 (Ark. 2000)

The Arkansas Supreme Court found that, after reviewing a videotape, it was clear that the defendant was not fully aware of his *Miranda* rights when he made his statement. The defendant appeared perplexed by the warnings, which had to be repeated and explained in different ways in a language not his own. Further, the defendant's answers to the warnings appeared at times unintelligible and there was no transcript of the videotape prepared by the court reporter, apparently because of the difficulty in doing so. The Supreme Court was further influenced by the fact that, even though the trial court denied the defendant's motion to suppress, 21 days earlier it granted a motion for withdrawal of a guilty plea due to the language barrier and because the plea had not been knowingly and intelligently made; therefore, the Supreme Court reversed the trial court's order denying suppression of the videotaped statement. Because unfair prejudice to the defendant resulted from playing the videotaped statement to the jury, the Supreme Court also reversed the judgment of conviction and remanded for further proceedings.



*Berger v. State*, 36 S.W.3d 286 (Ark. 2001)

The trial court did not abuse its discretion in permitting two former victims to testify under the pedophile exception because their statements revealed the defendant's motive, intent, and plan involving the current victim by showing the defendant's proclivity for a specific act with a person or class of persons with whom he had an intimate relationship.

*Bowker v. State*, 214 S.W.3d 243 (Ark. 2005)

A family friend to whom a minor is entrusted is in a position of authority or trust over that minor during the time of entrustment; in this instance defendant's relationship could be characterized, at a minimum, to be that of a chaperone, which met the statutory threshold.

*Callie v. State*,<sup>+</sup> No. CACR 01-1351, 2003 Ark. App. LEXIS 42 (Ark. Ct. App. Jan. 22, 2003)

The defendant challenged the introduction of evidence detailing his prior bad acts. There was testimony regarding two incidents in which he had sexual contact with other relatives. His stepdaughter testified that while living in the defendant's home as a minor she was raped by the defendant, who was drinking at the time, when he followed her back to her bedroom and forced himself on her. The appellate court indicated that this was very similar to the manner in which the defendant raped his daughters; therefore, the testimony was admitted under the pedophile exception because it showed that the defendant had a proclivity to rape young girls in his household to whom he is in the role of *paterfamilias*. Given the similarity of the victims' ages, the circumstances of the relationship, and the manner in which the rapes were accomplished and concealed, it was clearly within the trial court's discretion to admit this evidence.

*Chappell v. State*, 710 S.W.2d 214 (Ark. Ct. App. 1986)

Although the victim was hesitant and used child-like, but understandable, words, the appellate court could not conclude from her testimony that she did not understand the nature of an oath, the consequences of false swearing, or that she lacked the ability to receive or retain accurate impressions or transmit them to the fact-finder. The victim was able to tell the court that she was seven years old and lived in a foster home with foster parents and siblings, all of whose names she correctly recalled; she correctly stated the date of her birth and that she was in the first grade, what her favorite subject was, and who her teacher was; she stated that it was bad to tell a lie and good to tell the truth; and she recognized the difference between the truth and a lie. The mere fact that she did not answer some questions put to her and gave some inconsistent responses did not mean she was not a competent witness. Mere inconsistencies or hesitation in testimony may affect credibility but not the competency of a witness.

*Chrobak v. State*, 58 S.W.3d 387 (Ark. Ct. App. 2001)

The court held that there was enough forceful, circumstantial evidence to compel reasonable minds to reach a conclusion consistent with the defendant's guilt on the charge of rape and inconsistent with any other reasonable conclusion. The victim testified that the defendant had, in previous instances, inappropriately touched her chest and vagina and attempted to penetrate her and the defendant's contention that the trial court erred in denying his motion to suppress the evidence was found to be unpersuasive.

*Clark v. State*, 913 S.W.2d 297 (Ark. 1996)

The court held that if this case did not pertain to child abuse or incest, the evidence of other crimes would be inadmissible character evidence under Rule 404(b). However, such evidence of prior sexual acts is admissible under the pedophile exception to show similar acts with the same child or other children in the same household when it is helpful in showing a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship. The defendant committed the prior offenses against young children, just as he was accused of doing in this case. Arkansas courts have long held that such evidence helps to prove the depraved sexual instinct of the accused. This rationale is equally applicable to evidence of other sexual acts by the accused with the victim or another child in the same household. The defendant cited no authority contradicting this rule of law in the context of a sex-related offense involving a minor victim; therefore, he failed to demonstrate that the trial court's ruling violated Arkansas Rule of Evidence 404(b).

*Clem v. State*, 90 S.W.3d 428 (Ark. 2002)

In a case involving sexual abuse of a daughter by her father and a son being forced to have sex with his sister and mother, the trial court was right to allow photographs of the family's home showing the general state of the home and that defendant had pictures of nude women in plain view on the walls.

*Cogburn v. State*, 732 S.W.2d 807 (Ark. 1987)

The appropriate procedure for presenting the videotaped testimony of a child victim of sexual abuse was not followed by the trial court; therefore, the trial court erred in receiving the videotape into evidence and the appellate court reversed the conviction. The defendant was denied the right to cross-examine the child at the time she made her videotaped statement and the State was, in effect, permitted to offer the direct testimony of the victim twice, once through the videotape and once through live testimony.

*Cozad v. State*, 792 S.W.2d 606 (Ark. 1990)

The mandatory reporting provisions of the Child Maltreatment Act apply to both civil proceedings and criminal cases.

*Cummings v. State*, 110 S.W.3d 272 (Ark. 2003)

The defendants, husband and wife, were convicted of permitting a child (the defendant-wife's 13-year-old daughter) to engage in sexually explicit conduct for use in visual or print medium. The defendant-husband was also convicted of producing a sexual performance. On appeal, the defendants argued that the evidence did not support their convictions because they did not knowingly engage in sexually explicit conduct because the intent of the videos and the photographs was for modeling purposes, nor did the evidence support the defendant-husband's producing conviction because the purpose of the film was for modeling and not for anything sexual. The State contended that whether the videotapes and photographs contained a lewd display of the child victim's breasts and genital areas was a fact question for the jury, and the items themselves were of such a nature that a reasonable juror could conclude that the tapes and photographs were made

with the knowledge that they contained lewd displays. The Arkansas Supreme Court agreed, finding that the jury could have inferred that the defendants' intent in the making of the videotapes, as well as in operating the web\_site that displayed photographs of the child victim in various stages of undress, was for sexual purposes and not for "modeling purposes," as the defendants contended.

*Dabney v. State*,++ 930 S.W.2d 360 (Ark. 1996)

"Physically helpless" means that a person is unconscious or physically unable to communicate lack of consent or rendered unaware that the sexual act is occurring.

*Daniels v. State*,+ No. CACR 99-654, 2000 Ark. App. LEXIS 351 (Ark. Ct. App. Apr. 26, 2000)

The uncorroborated testimony of a sexual-abuse victim is sufficient to support a conviction for first-degree sexual abuse. As the victim's testimony undoubtedly explained and specified where the defendant touched her, her statement provided adequate proof to indicate that the defendant engaged in sexual contact with someone under the age of 14 years.

*Davis v. State*, 956 S.W.2d 163 (Ark. 1997)

On appeal, the defendant contended that the trial court erred in allowing a witness (a family service worker) to offer expert testimony that it was not unusual for child-sexual-abuse victims to recant their allegations. The witness testified that she had been involved in investigating child-abuse cases for six-and-one-half years and had received eight weeks of new-worker training that covered different aspects of abuse, neglect, and family dynamics. Three years prior to trial, the witness had received 150 hours of additional training. In view of the witness' training and experience, the appellate court could not say that the trial court abused its discretion in qualifying the witness as an expert and allowing her testimony, as it was apparent she had knowledge of child-abuse cases beyond that of an ordinary person.

*Dep't of Human Servs. v. Parker*, 197 S.W.3d 33 (Ark. Ct. App. 2004)

Abuse did not occur when a step-father hit a child on the bottom with a belt in a rational, calm manner.

*Douthitt v. State*, 935 S.W.2d 241 (Ark. 1996)

The defendant contended that the trial court erred in failing to sever the three rape counts against him from the counts involving incest and first-degree violation of a minor. He claimed that the three rape counts were alleged to have occurred from 1989 through 1991 and a break in time existed between the other 60 counts that were alleged to have occurred in 1993 through 1994. The defendant argued that this difference or break in time reflected the rape charges were not a part of a single scheme or plan and should have been severed; however, the appellate court held that when a charge concerns the sexual abuse of a child, evidence of other crimes, wrongs, or acts (such as sexual abuse of that child or other children) is admissible to show motive, intent, or plan. The same evidence was admissible against the defendant in each count of sexual abuse; therefore, the trial court did not abuse its discretion in denying severance.

*Dye v. State*, 119 S.W.3d 513 (Ark. Ct. App. 2003)

If the six-year statute of limitations for rape has expired, a prosecution may nevertheless commence if, when the alleged violation occurred, the offense was committed against a minor, the violation has not previously been reported to a law-enforcement agency or prosecuting attorney, and the six-year statute of limitations has not expired since the victim has reached the age of 18; therefore, the appellate court held that the present case was not barred by the six-year statute of limitations as the victim was born in 1978 and was abused during either 1983 or 1984, which would have resulted in the previous statute of limitations running during 1989-90. However, the 1987 amendment to the statute tolled the running of the statute of limitations until six years after the victim reached majority; therefore, the defendant had no vested right in the statute and the charges were timely filed.

*Eaton v. State*, 151 S.W.3d 15 (Ark. Ct. App. 2004)

When persons, other than physicians or other persons for legitimate medical reasons, insert something in another person's vagina or anus, it is not necessary that the State provide direct proof that the act was done for sexual gratification.

*Elmore v. State*,<sup>+</sup> No. CACR 02-193, 2002 Ark. App. LEXIS 667 (Ark. Ct. App. Dec. 4, 2002)

The defendant waived the issue of alleged prior sexual abuse being placed into evidence when an investigator testified, without objection, that when he asked the defendant about the abuse in California, the defendant said he had been arrested for lewd and lascivious conduct with a minor and that he had decided to plea to a lesser charge.

*Finney v. State*,<sup>+</sup> No. CACR02-1272, 2003 Ark. App. LEXIS 700 (Ark. Ct. App. Sep. 17, 2003).

Where the victim had a friction burn just inside her labia majora, and there was other circumstantial evidence of penetration, the evidence was sufficient for a jury to find that there had been penetration.

*Flud v. State*,<sup>+</sup> No. CACR 00-695, 2001 Ark. App. LEXIS 207 (Ark. Ct. App. Mar. 14, 2001)

The defendant contended that the trial court erred in allowing the State to play a portion of a VHS tape recording that showed him engaged in sexual acts because it was not relevant and because any probative value was outweighed by unfair prejudice. The appellate court disagreed because the defendant denied having the child in his house and denied showing him a videotape and the victim's testimony contradicted that of the defendant. The VHS tape, which was retrieved from within the defendant's house, corroborated the victim's description of what was on the videotape. The appellate court found the relevance to be clear and held that establishing the veracity of the victim's story was critical. The videotape helped to do that and any prejudicial impact was outweighed by its probative value, particularly in light of the trial court limiting the portions shown to those pieces that confirmed the child's testimony. Thus, the appellate court found no abuse of the trial court's discretion.

*Franks v. Delaware*,<sup>++</sup> 438 U.S. 154 (1978)

Where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in a search warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the 4<sup>th</sup> Amendment of the U.S. Constitution requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

*Gabrion v. State*, 42 S.W.3d 572 (Ark. Ct. App. 2001)

The defendant was convicted on two counts of possessing a visual medium depicting sexually explicit conduct involving a child. The defendant admitted he made tapes of the two girls, whom he knew to be 14 years of age, and that he directed both of the girls to undress and assume suggestive poses that showed off their breasts and buttocks. The tapes also contained full-frontal nudity of both girls. On appeal, the defendant contended that the scenes with exposed breasts and one in which one girl kisses the other girl's nipple was not sufficient evidence to sustain his convictions because the scenes did not involve sexually explicit conduct nor were the images involved "lewd." The defendant asserted that if any exhibition by a child were deemed "lewd," the word would have no meaning and the statute would criminalize even the possession of nude or seminude baby pictures. The defendant suggested that in determining if the acts on the tapes were lewd, the appellate court should ignore the fact that the girls were underage and consider the same acts as if they were performed by adults. The appellate court found this argument to be without merit because it ignored the fact that the videotapes in question showed full-frontal nudity of both underage girls. Even if the appellate court were to accept the defendant's argument that exhibition of the girls' breasts on the tape was not lewd, the defendant's failure to address the fact of the full-frontal nudity would be fatal to his appeal; however, even if the defendant had not made this omission, the appellate court would still have held that the scenes were indecent and therefore "lewd."

*Gadberry v. State*, 877 S.W.2d 941 (Ark. Ct. App. 1994)

The trial judge did not abuse his discretion in allowing an investigator to testify as to statements made by the victim. The victim was partially unavailable due to her lack of memory and the trial court found the victim's statement introduced through the investigator to be trustworthy. Additionally, the victim-declarant was subject to cross-examination and the hearsay testimony, although more specific, was duplicative of the victim's testimony as well as the defendant's confession.

*Gardner v. State*, 64 S.W.3d 761 (Ark. Ct. App. 2001)

If the statute of limitations period prescribed (six years for rape and three years for first-degree sexual abuse) has expired, a prosecution may commence for rape and first-degree sexual abuse if, when the alleged violation occurred, the offense was committed against a minor, the violation has not previously been reported to a law-enforcement agency or

prosecuting attorney, and the prescribed period has not expired since the victim has reached the age of 18.

*Garner v. State*, 101 S.W.3d 857 (Ark. Ct. App. 2003)

On appeal, the defendant contended that the trial judge erred in allowing the victim to testify about his conduct toward her because it was not relevant to the offenses with which he was charged (first- and second-degree violation of a minor). The appellate court disagreed, holding that the testimony of the victim showed plan and *modus operandi* by demonstrating that the defendant had gone through a similar sequence with all of the girls, involving compliments of a sexual nature, staring at them, and attempting to get them alone, that preceded the actual assaults. Further, the testimony showed the defendant's depraved sexual instinct and proclivity for sexual predation upon young girls under his care.

*George v. State*, 189 S.W.3d 28 (Ark. 2004)

The mere allegation that a suspect may be a child pornographer, without some time reference as to when the observations were made, is insufficient circumstantial evidence to conclude that contraband will be found at his home no matter when it may have been formerly observed.

*Graham v. State*, 861 S.W.2d 299 (Ark. 1993)

The defendant was wrongly convicted of employing a child in a sexual performance. The performance must be displayed in front of an audience that consists of two or more individuals; however, the State was not successful in providing any evidence beyond mere speculation that the acts portrayed in the videotape were presented before an audience.

*Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780 (Ark. Ct. App. Nov. 14, 2001)

The defendant argued that the trial court erred by refusing to allow him to cross-examine the minor victims about previous instances in which another person allegedly sexually abused them. With respect to the rape-shield statute, the record demonstrated that the defendant failed to file a written motion with the trial court stating what he planned to offer as relevant evidence and the purpose for which the evidence was relevant, nor did he proffer the testimony he sought to introduce. Instead, at trial, the defendant asked the court whether he would be permitted to ask the victim anything at all about her relationship with her boyfriend. The defendant never proffered the evidence that he sought to have admitted and failed to inform the court that he wanted to offer testimony that the victims were previously abused by a family member to impeach their testimony regarding the impact of his conduct upon their lives. This failure precluded the appellate court's consideration of his argument on appeal.

*Green v. State*,<sup>+</sup> No. CACR 99-142, 2000 Ark. App. LEXIS 110 (Ark. Ct. App. Feb. 16, 2000)

There was testimony that the defendant was the only adult in the house and that he was in charge of the girls' activities; therefore, he qualified as a temporary caretaker of the minor victim. Further, the minor victim testified that the defendant sexually molested her and he admitted to this in the taped conversations. He also admitted in his statement to

law enforcement that he touched the minor inappropriately. As such, the appellate court stated that that testimony constituted substantial evidence to support the verdict of guilty on charges of violating a minor in the first degree.

*Greenlee v. State*, 884 S.W.2d 947 (Ark. 1994)

The videotaped deposition of the victim was admissible as there was ample basis for a finding of good cause. The victim had nightmares, was nervous and frightened, shied away from men since the occurrence, was undergoing weekly counseling at her school, and would not be able to testify in front of many of people.

*Griswold v. State*, 716 S.W.2d 767 (Ark. 1986)

The defendant contended that the evidence was insufficient to sustain a conviction on certain counts of rape because of a lack of evidence of forcible compulsion. Both victims were children and they were alone every day after school with the defendant, who was their mother's brother and the only adult male living in the house. The Arkansas Supreme Court concluded that the jury would be justified in finding that their submission was induced through the forcible coercion of the appellant, who stood in *loco parentis*. Under these circumstances, the testimony of each victim was sufficient proof for the jury to find forcible compulsion. One of the victims testified that she asked the defendant not to have intercourse with her and that it upset her when he did, and the other victim testified the defendant told her to "do it or else." This was sufficient proof for the jury to find the acts were consummated against the will of the girls.

*Hall v. State*, 692 S.W.2d 769 (Ark. Ct. App. 1985)

The trial court erred in allowing some of the testimony given by the State's expert witness. The evidence of the expert tended to focus the attention of the jury upon whether the evidence against the defendant matched the evidence in the usual case involving sexual abuse of a young child. The expert witness failed to observe the abused minors and only provided broad testimony concerning child-sexual-abuse incidents.

*Hamm v. State*, 57 S.W.3d 252 (Ark. Ct. App. 2001)

The record demonstrated that the defendant entered a plea of guilty and received a 365-day jail term and a \$1,000 fine. He was, therefore, convicted. As a result of his conviction, he was ordered to serve one year of imprisonment followed by a two-year term of probation. This sentence was illegal because the defendant's probationary period exceeded the length of his jail imprisonment; however, the defendant filed his petition seeking to modify his sentence approximately one year later. The appellate court held that because the motion was not filed within the 90-day limitation, the trial court correctly determined that it lacked jurisdiction to vary the defendant's sentence.

*Harris v. State*,<sup>+</sup> No. CACR 93-1028, 1994 Ark. App. LEXIS 517 (Ark. Ct. App. Nov. 2, 1994)

The victim testified that the defendant followed her, tried to grab her arm, shoved her over a guardrail, hit her, and clutched her throat as they struggled. The defendant persisted even after the victim told him that she was a minor, that she was pregnant, and that she was HIV positive. The defendant ripped and removed the victim's clothes, put a belt around her neck, probed her with his fingers, both vaginally and rectally, and bit her

on the inner thigh and breast. The appellate court found that the evidence was sufficient to support a conviction for rape, as a person who engages in deviate sexual activity with another person by forcible compulsion commits the offense of rape. Deviate sexual activity includes the penetration of the vagina or anus of one person by any body member manipulated by another person.

*Hathcock v. State*, 182 S.W.3d 152 (Ark. 2004)

The trial court rightfully excluded information about the victim's sexual history under the rape-shield laws even though the defendant's theory was that the incest accusations were being falsely made because the defendant/father was too strict with his policy toward dating and his daughters' relationships with boys.

*Heape v. State*, 192 S.W.3d 281 (Ark. Ct. App. 2004)

Repeated offers to pay a fourteen-year-old girl for sex constituted sexual solicitation for the crime of sexual indecency with a child.

*Hernandez v. State*, 962 S.W.2d 756 (Ark. 1998)

The pedophile exception allows testimony to show that the perpetrator has a proclivity for the sexual abuse of children. Whether the witness testifies that he or she was abused before or after the conduct for which the defendant is charged, the testimony can show that the perpetrator has such a proclivity.

*Hoggard v. State*, 640 S.W.2d 102 (Ark. 1982)

Over the defendant's objection, the State was permitted to introduce a pamphlet containing a number of photographs of boys engaged in sexual acts. On appeal, the defendant contended the prejudicial effect of the exhibit greatly outweighed any probative value and should have been excluded. The Arkansas Supreme Court agreed the material was prejudicial, but the argument that its probative value was lacking weakened under scrutiny. The pornography and the offenses being tried (rape and engaging in deviate sexual activity with a 6-year-old boy) had a clear correlation: the pornography depicted deviate sexual acts by young males and the crime charged was deviate sexual acts between a 42-year-old man and a 6-year-old boy. More importantly, the pornography was used as the instrument by which the crime itself was solicited, as the child was encouraged to look at the pictures and then engage in the conduct depicted; therefore, the value of the evidence as proof of the crime was obvious.

*Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822 (Ark. Ct. App. Nov. 28, 2001)

The defendant argued that he limited the scope of consent to the search of his vehicle by his words and actions and that the law-enforcement official exceeded the scope of the consent by viewing photographs portraying his wife and children engaged in sexually explicit scenes. The officer's testimony established that he clarified to the defendant that he was searching for contraband, that the defendant then allowed him to proceed with the search, and that the defendant never told him to stop the search. The search was merely interrupted when the defendant said "wait." The testimony further indicated that the defendant told the officer to "go ahead." The appellate court held that based upon the



totality of the circumstances, the defendant did not limit his grant of consent to search his vehicle and the trial court's finding of a consensual search was not against the preponderance of the evidence.

*Hopkins v. Ark. Dep't of Human Servs.*,<sup>++</sup> 83 S.W.3d 418 (Ark. Ct. App. 2002)

Despite Hopkins' argument that the doctor-witness should have been qualified as an expert to render a medical opinion regarding the minor victim's burns, the appellate court concluded that such qualification was not required. The appellate court could not say that the trial court abused its discretion in permitting the doctor to testify without first requiring the Department of Human Services to qualify her as an expert witness. In the appellate court's view, the doctor's opinion that someone would have more extensive burns if they fell into a bathtub of scalding water is an opinion that a normal person could form on the basis of the observed facts. Persons with particularized knowledge may give opinions without being qualified as an expert; therefore, the appellate court concluded that the trial court did not abuse its discretion in permitting the doctor to provide opinion testimony regarding the burns because she had knowledge of the treatment and diagnosis of burns from her medical training.

*Johnson v. State*, 944 S.W.2d 115 (Ark. 1997)

The defendant argued that the evidence was insufficient to establish vaginal penetration; however, the Arkansas Supreme Court held that the testimony introduced by the State clearly established vaginal penetration. The victim testified she awoke on the morning in question to find the defendant lying next to her with his finger inside of her. She testified that his finger felt like a tampon and that she was using tampons; therefore, there was no question that she was familiar with how tampons feel and was competent to compare a tampon to the defendant's finger.

*Kester v. State*, 797 S.W.2d 704 (Ark. 1990)

The victim, the defendant's daughter, stated to a hospital social worker that her father had engaged in vaginal and anal intercourse with her. The victim's conversation with the social worker was videotaped. The victim was also deposed and the videotaped deposition was recorded. Both recordings were admitted at trial. While the Arkansas Rules of Evidence provide a general exception to the hearsay rule for the statements of child victims under the age of 10 concerning sex offenses, the defendant's right of confrontation was violated because the witness was allowed to testify twice through the admission of both videotaped recordings. The defendant was further prejudiced due to the fact that the victim revealed anal intercourse in the statement to the social worker at the hospital but did not mention it in the deposition statement.

*King v. State*,<sup>+</sup> No. CACR 95-378, 1996 Ark. App. LEXIS 375 (Ark. Ct. App. June 5, 1996)

The bias of a witness is not a collateral matter, and extrinsic evidence is admissible thereon if the witness denies or does not admit the facts claimed to show bias.

*Kirwan v. State*, 96 S.W.3d 724 (Ark. 2003)

Conduct is not a substantial step unless it is strongly corroborative of a person's criminal purpose. The fact that a law-enforcement officer was merely a fictional character created

by the law-enforcement agency had no relevance when challenging the sufficiency of the evidence. If there was substantial evidence that the defendant intended to rape an 11-year-old girl and that he took a substantial step toward the commission of that crime, the verdict should be affirmed even though the attendant circumstances were not as the defendant believed them to be. The appellate court concluded that driving to Arkansas was a final step in a course of conduct intended to culminate in the commission of rape. Internet conversations clearly indicated that the defendant sought to entice the fictitious child to meet him at her home in Arkansas, the contemplated place for the culmination of the seduction. Actual delivery of the young girl into the hands of the defendant was not required. The defendant's conduct in seducing both the fictitious mother and daughter and his travel from Houston to the meeting place in Arkansas, at the appointed time, were strongly corroborative of his expressed intent to engage in sexual intercourse or deviate sexual activity with an 11-year-old girl and constituted a substantial step toward the commission of the offense.

*Laughlin v. State*, 872 S.W.2d 848 (Ark. 1994)

The fact that one of two victims remembers an incidence of rape differently from another victim is immaterial as there is no requirement that the individual's testimony as a victim be corroborated. The testimony of a rape victim alone is sufficient to support a conviction.

*Leheny v. State*, 818 S.W.2d 236 (Ark. 1991)

The offense of endangering the welfare of a minor in the second degree is not intended to encompass allegations of sexual misconduct.

*Lincks v. State*,<sup>+</sup> No. CACR 96-1181, 1997 Ark. App. LEXIS 409 (Ark. Ct. App. May 28, 1997)

On appeal, the defendant argued that the testimony produced at trial was not sufficient to support a conviction of sexual solicitation of a child; however, the appellate court disagreed. The victim and her brother testified and made unequivocal identification of the defendant; the defendant's statement that he gave to law enforcement was entered into evidence; and several law-enforcement officers testified about the victim's and the defendant's statements as well as what they found in the defendant's home and vehicle. The uncorroborated testimony of one witness is sufficient to sustain a conviction.

*Lindsey v. State*, 890 S.W.2d 584 (Ark. 1994)

Defense counsel's suggestion that a father accused of incest is a fit parent affords the State the opportunity to rebut the suggestion with proof of the child's actual physical condition while living with her father. Proof of bad character becomes admissible when a party opens the door by eliciting evidence of good character.

*Love v. State*,<sup>+</sup> No. CACR 00-498, 2000 Ark. App. LEXIS 816 (Ark. Ct. App. Dec. 20, 2000)

The defendant was convicted of violating a minor in the first degree. On appeal, the defendant argued that the trial court erred in admitting testimony of two other girls who claimed the defendant had acted inappropriately toward them. The appellate court found the trial court did not abuse its discretion because the testimony was admissible to show the defendant's plan, motive, or opportunity. All of the girls testified that they had been in Saturday school or detention hall and, on two occasions, the defendant had gotten them

out of class. The defendant had also stated to one of the girls that he had an apartment and asked her to go there to have sex with him. All three of the girls testified that the defendant had made inappropriate sexual remarks to them, and the statements made to two of the girls occurred in close proximity to the time in which the victim contended she was raped by the defendant.

*Marshall v. State*, 27 S.W.3d 392 (Ark. 2000)

The defendant's status as a fugitive from an indictment for sexual solicitation of a child in another state was appropriately considered by the trial court as an aggravating circumstance in determining his sentence for multiple child-sexual-abuse convictions in Arkansas.

*Martin v. State*, 119 S.W.3d 504 (Ark. 2003)

The defendant argued that the trial court erred in refusing to allow him to present evidence about the victim's sexual conduct with two boys occurring after the defendant was arrested but prior to trial. The phrase "prior sexual conduct" has been interpreted broadly, such that it encompasses sexual conduct that occurs prior to trial, not just conduct occurring prior to the time of the alleged rape. The Arkansas Supreme Court found no error with the trial court's ruling that the evidence was not totally irrelevant to the defendant's defense, but that any probative value of the evidence was outweighed by the prejudicial effect on the victim and on the State's case. The evidence sought to be admitted by the defendant was just the sort of evidence that the rape-shield statute prohibits. It was improper character evidence offered to show that the victim was an immoral person.

*Mashburn v. State*, 189 S.W.3d 73 (Ark. Ct. App. June 23, 2004)

In a probation revocation hearing, the State has the burden of proving a violation of a condition of probation or the suspended sentence by a preponderance of the evidence. In the context of a probation revocation proceeding, on appeal, an appellate court will uphold a trial court's findings unless they are clearly against the preponderance of the evidence. The appellate court defers to the trial court's superior position for questions of credibility and weight to be given to testimony.

*May v. State*,+ No. CACR 05-523, 2006 Ark. App. LEXIS 144 (Ark. Ct. App. Feb. 15, 2006)

A martial arts instructor who engaged in sexual activity with a student was a person in a position of trust and authority over his victim, thus satisfying the requirements for sexual assault in the first degree.

*McArdell v. State*, 833 S.W.2d 786 (Ark. Ct. App. 1992)

On appeal, the defendant argued that since the charges against him did not result from one criminal episode and there were two separate victims involved, it was unfair to require him to be tried on both charges at the same time. The appellate court found that the trial court did not abuse its discretion in refusing to sever the offenses as the acts constituted a continuing course of conduct that, in effect, constituted a single scheme or plan.

*McDonald v. State*,+ No. CR 04-719, 2006 Ark. LEXIS 8 (Ark. Jan. 5, 2006)

The court has the power, in all cases of conviction, to reduce the extent or duration of the punishment assessed by a jury if, in the opinion of the court, the conviction is proper and the punishment assessed is greater than ought to be inflicted under the circumstances of the case.

*McGrew v. State*, 991 S.W.2d 588 (Ark. 1999)

The period of limitation does not run during any period when a prosecution against the accused for the same conduct is pending in Arkansas.

*McGuire v. State*, 706 S.W.2d 360 (Ark. 1986)

The defendant argued that the statute regarding videotaped depositions was violative of substantive due process because the age of 17 was arbitrary and the statute discriminated against defendants charged with sexual offenses. The Arkansas Supreme Court held that the statute pertaining to videotaped depositions was not in violation of substantive due process as the State had an interest in the general welfare of children and the defendant failed to demonstrate that the age limit was arbitrary. The statute also provided the least restrictive means of carrying out the State's interest in protecting children who are victims of sexual abuse. Finally, the statute did not discriminate against defendants charged with sexual offenses as it only applies only to sexual offenses committed against children.

*Meeks v. State*,+ No. CACR 00-629, 2001 Ark. App. LEXIS 227 (Ark. Ct. App. Mar. 21, 2001)

In cases where sexual conduct with a child is at issue, evidence of similar acts with the same or other children in the defendant's care or under his or her authority is admissible when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship; therefore, the victim's testimony that the defendant solicited sex from the victim's stepbrother was admissible and the trial judge did not abuse his discretion in denying a mistrial.

*Mitchem v. State*,+ No. CACR05-735, 2006 Ark. App. LEXIS 618 (Ark. Ct. App. Sep. 6, 2006)

Defendant was rightfully found guilty of attempted rape because he took substantial steps toward committing rape. Taking the victim to a hotel room and telling her that he and his girlfriend were going to have sex with her, then returning with his girlfriend goes "beyond mere planning and preparation" and was strongly corroborative of his criminal purpose.

*Modlin v. State*,++ 110 S.W.3d 727 (Ark. 2003)

When a child understood the difference between the truth and a lie and that he had an obligation to tell the truth, understood the questions being asked him, and had a consistent memory of the events in question, he was rightfully found a competent witness even though he did not understand the concept of an "oath" or the legal concept of false swearing.

*Moseley v. State*, 80 S.W.3d 325 (Ark. 2002)

Nothing shall prohibit a trial court from revoking probation and imposing any sentence that may have originally been imposed.

*Moody v. Dep't of Human Servs.*,+ No. CA 03-283, 2003 Ark. App. LEXIS 859 (Ark. Ct. App. Nov. 19, 2003)

A woman who intentionally burned her child committed child abuse.

*Munson v. State*, 959 S.W.2d 391 (Ark. 1998)

When a charge concerns the sexual abuse of a child, evidence of other crimes, wrongs, or acts such as sexual abuse of that child or other children is admissible to show motive, intent, or plan pursuant; therefore, the trial court did not err in denying the defendant's motion to suppress the testimony of the former stepdaughter who testified that she was sexually assaulted and physically abused by the defendant.

*Murphy v. State*, 117 S.W.3d 627 (Ark. Ct. App. 2003)

On appeal, the defendants argued that the State failed to prove that either of them was a temporary caretaker or a person in a position of trust or authority over the victim, which was required for a conviction of sexual assault in the first degree. The defendants asserted that they were no more than social friends of the victim's family. The appellate court found there was sufficient evidence from which the jury could have determined that the defendants were in a position of trust or authority in relation to the victim. The victim was a 16-year old minor who lived with his parents; there was testimony that he was somewhat developmentally delayed compared to normal children his age and that he did not drive; it was undisputed that the defendants specifically obtained permission from the victim's parents for him to leave with them; and there was testimony that the victim's parents asked for and received assurances from the defendants that they would look after the victim and not try anything with him. It was reasonable to infer that the victim's parents expected the defendants to provide food, transportation, safe lodging, and care for their son while he was with them. The defendants would not have had the opportunity to assault the victim absent his parents' entrusting him to their care.

*Murray v. State*,+ No. CACR 97-488, 1997 Ark. App. LEXIS 819 (Ark. Ct. App. Dec. 10, 1997)

Once the State introduces evidence of nonpayment in a revocation of probation hearing, the defendant then bears the burden of going forward with some reasonable excuse for his or her failure to pay. The trial court found that the defendant had the ability to pay but willfully failed to pay the sums ordered and the appellate court held that the trial court's decision was not against the preponderance of the evidence.

*Newburn v. State*,+ No. CACR 99-729, 2000 Ark. App. LEXIS 39 (Ark. Ct. App. Jan. 26, 2000)

The trial court did not abuse its discretion by admitting evidence that the defendant had been sexually abusing and raping the minor victim for a period of three years. Given the probative value of such evidence in child-sexual-abuse cases, it cannot be said that the probative value is substantially outweighed by the danger of unfair prejudice; therefore, the appellate court found that the trial court did not abuse its discretion by allowing the victim to testify about the defendant's history of sexually abusing and raping her.

*Norman v. State*,<sup>++</sup> 931 S.W.2d 96 (Ark. 1996)

The scope of a search shall be only such as is authorized by the warrant and is reasonably necessary to discover the persons or things specified therein.

*Oates v. State*,<sup>+</sup> No. CACR 00-280, 2000 Ark. App. LEXIS 664 (Ark. Ct. App. Oct. 25, 2000)

It is not necessary for the State to provide direct proof that an act is done for sexual gratification if it can be assumed that the desire for sexual gratification is a plausible reason for the act.

*Parish v. State*, 163 S.W.3d 843 (Ark. 2004)

When a charge concerns the sexual abuse of children, evidence of sexual abuse with children other than the victim is admissible to show motive, intent or plan. When the alleged crime is child abuse or incest, it is appropriate to allow evidence of similar acts with the same or other children in the same household when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship. Further, it is admissible to show the familiarity of the parties and antecedent conduct toward one another and to corroborate the testimony of the victim. Such evidence helps to show the depraved sexual instinct of the accused. The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court and will not be reversed absent an abuse of discretion.

*Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567 (Ark. Ct. App. Oct. 9, 2002)

Substantial evidence supported the defendant's rape conviction. The victim testified concerning all the elements of rape, including penetration and she testified in some detail about how the alleged rape took place. While it was true she could not precisely state the time when the rape allegedly occurred, the appellate court held that a precise time frame was not a necessary element for the conviction.

*Parnell v. State*, 912 S.W.2d 422 (Ark. 1996)

A 10-year-old may be subject to commitment as a juvenile delinquent for the crime of rape; however, in the instant case, the minor had clear defenses to any such charge because he acted under the duress of his adoptive father (the defendant) and because he was no more than 2 years older than his sister at the time of the sexual activity. Nonetheless, the fact that the minor was not guilty of a crime did not inure to the defendant's benefit. The defendant was guilty of complicitous conduct. A plain reading of the statute rendered the defendant criminally culpable irrespective of the minor's age defense or the fact that the minor acted only under duress.

*Petras v. State*,<sup>+</sup> No. CACR05-839, 2006 Ark. App. LEXIS 462 (Ark. Ct. App. June 28, 2006)

The victim's testimony that she did not consent and tried to passively resist defendant's advances, as well as the fact that the victim was the defendant's daughter was enough to establish the element of forcible compulsion.

*Pipkins v. State*,<sup>+</sup> No. CACR 00-867, 2001 Ark. App. LEXIS 390 (Ark. Ct. App. May 16, 2001)

If a victim is a minor, then a member of the victim's family may exercise the rights of the victim and present victim-impact testimony.

*Reinert v. State*, 71 S.W.3d 52 (Ark. 2002)

Although the defendant asserted that the statute regarding violation of a minor in the first degree was unconstitutionally vague because its terms "temporary caretaker" and "person in a position of trust or authority" were undefined, the defendant overlooked the term "guardian" in the statute. As the defendant's action clearly fell within the definition of "guardian," the Arkansas Supreme Court concluded that it did not have to discuss whether the defendant also came within the meaning of the term "temporary caretaker" or the broader phrase "person in a position of trust or authority of the minor." The defendant had been living with his girlfriend and her children, including the victim, for over two years; the defendant admitted that, as between him and the girl's mother, he would be considered the disciplinarian and the authority figure in the household; the defendant recounted several incidents that supported a conclusion that he was a person in a position of power or authority; and the minor victim testified that the defendant asked her to do chores around the house, and she stated that she would do what the defendant told her to do. Thus, the defendant was a guardian with respect to the victim.

*Richardson v. State*, 863 S.W.2d 572 (Ark. 1993)

The defendant moved for a directed verdict on the basis that the State had not proven the photographs were taken for pecuniary profit. The trial judge ruled pecuniary profit was not an element of the crime of engaging children in sexually explicit conduct for use in visual or print media; however, the Arkansas Supreme Court held that "for pecuniary profit" is a required element of proof under the statute.

*Sehorn v. State*, No. CACR04-948, 2005 Ark. App. LEXIS 931 (Ark. Ct. App. Dec. 14, 2005)

In a rape case, penetration can be shown by circumstantial evidence, and if the evidence gives rise to more than a mere suspicion, and the inference that might reasonably have been deduced from it would leave little room for doubt, that is sufficient.

*Smart v. State*, 761 S.W.2d 915 (Ark. 1988)

On appeal, the defendant argued that the use of the victim's hearsay statements and the victim's live testimony at trial was cumulative and prejudicial. He also argued that the witnesses testifying to the victim's hearsay statements were allowed to testify about matters other than the alleged sexual-abuse incident. The Arkansas Supreme Court found no merit in the defendant's arguments, and affirmed the trial court's judgment. The trial judge determined the statements possessed a reasonable likelihood of trustworthiness and admitted them into evidence at the trial. Not only were the hearsay statements offered at trial, but the victim also testified.

*Smith v. State*, 118 S.W.3d 542 (Ark. 2003)

While the defendant was prosecuted under the statute for violating a minor in the first degree and not under the rape statute, the same reasoning concerning offenses in rape

cases was applicable to offenses in cases involving violating a minor; therefore, the trial court did not err in imposing consecutive sentences.

*Smith v. State*,<sup>+</sup> No. CR 01-1283, 2003 Ark. LEXIS 174 (Ark. Apr. 10, 2003)

A minor victim of a crime and his or her parents or other custodian have the right to be present during any trial of the offense; therefore, the defendant did not suffer any prejudice from any impermissible influence on his victim because his victim had the right to be present during his trial and hear the testimony of all witnesses.

*Spencer v. State*, 72 S.W.3d 461 (Ark. 2002)

The defendant was convicted of raping his 5-year-old stepson. Testimony by the defendant's daughter regarding sexual acts performed upon her by the defendant were admissible to show the defendant's proclivity toward incestuous contact with children.

*Stanislawski v. State*,<sup>+</sup> No. CACR 97-01336, 1988 Ark. App. LEXIS 362 (Ark. Ct. App. May 6, 1988)

The defendant contended that there was insufficient evidence to prove that she committed sexual abuse in the first degree as an accomplice; however, the appellate court found ample evidence in the record of the defendant's criminal liability. The defendant encouraged her daughter to pose in the nude for photographs with the defendant's boyfriend, and the defendant supplied panties for the child to wear in several photo shots. From the unchallenged testimony of the defendant's daughter, there was substantial evidence that the defendant promoted or facilitated the sexual abuse of her child by aiding in the commission of the offense.

*State v. Lee*, 639 S.W.2d 745 (Ark. 1982)

A victim's videotaped depositions must be viewed and heard at trial and entered into the record in lieu of the direct testimony of the alleged victim.

*Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104 (Ark. Ct. App. Feb. 27, 2002)

The reliance of a probationer on another person to pay his or her fines is not a reasonable excuse for failure to pay those fines.

*Tapp v. State*,<sup>+</sup> No. CACR 94-774, 1995 Ark. App. LEXIS 322 (Ark. Ct. App. June 23, 1995)

Before trial, the State filed a motion requesting the use of a videotaped deposition of the child in lieu of her testimony before the jury. At the hearing on the motion, the victim's stepbrother testified that the girl does not do well in large crowds; that she gets very nervous around a group of people that she is not familiar with; and that he thought it would be better to use the videotape rather than making her testify before the jury. An assistant principal at a school testified as an expert on special education and mental retardation and that she had worked with the child victim in the past and that the child is classified as mentally retarded. The assistant principal testified that it would be very intimidating for the child to testify in open court; that it would cause the child a lot of uneasiness; that she would not be able to think clearly; and that it would be very upsetting for the child. The trial judge granted the motion, and the deposition was taken. On appeal, the defendant contended that the trial court erred in granting the motion because the State



failed to show “good cause”; however, the trial judge has considerable discretion in determining whether a videotaped deposition can be used. Many factors can be considered in determining what is good cause, including the circumstances surrounding the offense, the child victim’s age, and the potential for harm to the child. The trial judge made a finding of good cause based on the testimony of the child’s stepbrother and the expert; therefore, the appellate was unable to say that the trial judge abused his discretion.

*Taylor v. State*, 138 S.W.3d 684 (Ark. 2003)

The rape-shield statute serves to limit evidence of a victim’s past sexual conduct to prevent the victim from needless humiliation. When defendant tried to bring up a supposedly false rape allegation that the victim had made previously, the court rightly refused to allow the information before the jury because the victim had never admitted to having lied about the earlier rape claim, and the falsity of the claim had never been proven.

*Thomas v. State*, 79 S.W.3d 347 (Ark. 2002)

The jury fixes or determines punishment. The trial judge is not authorized to fix or determine punishment or in any way interfere with the jury’s right to do so. The judge is allowed to reduce the punishment assessed by the jury if, under the circumstances, the judge considers the punishment excessive and the trial judge has discretion to check jury sentences that are excessive or unduly harsh under the particular circumstances of a case.

*Thornton v. State*,<sup>+</sup> No. CACR05-1320, 2006 Ark. App. LEXIS 559 (Ark. Ct. App. Sep. 20, 2006)

There was sufficient evidence to find that defendant had committed deviate sexual activity where the victim testified that he had licked her vagina so hard that it hurt and had also forced her to perform oral sex, even though the victim was a small child and used child-like terms to describe the acts that had occurred.

*Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358 (Ark. Ct. App. May 14, 1997)

The defendant contended that the trial court erred in failing to instruct the jury on the lesser-included offenses of sexual solicitation of a child, sexual misconduct, sexual abuse in the first degree, and carnal abuse in the third degree. The defendant claimed that he could have been found guilty of any of these crimes. The appellate court concluded that because each of the above offenses contained an element that was not included in the offense of rape as applied to the defendant (the age of the accused), the trial court was correct in not instructing the jury on these offenses. Further, while the offense of sexual misconduct did not require proof of the defendant’s age, there was no rational basis for instructing the jury in this case on it. The Arkansas Supreme Court has held that the only substantive purpose of the sexual misconduct statute is to fill the gaps in other sections of the criminal code that occur when the offender is less than 18 or 21 years old. Since the defendant was 20 years old at the time of the offense, sexual misconduct was inapplicable and the trial court did not err in failing to give this instruction.

*Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180 (Ark. Ct. App. Mar. 5, 2003)

The defendant contended that the State failed to prove the victim was under the age of 14 at the time of the rape and that there was insufficient evidence of sexual intercourse or deviate sexual activity. The victim testified at trial that she had vaginal and oral sex with the defendant when she was 13 years of age. The appellate court found that the victim's testimony at trial that she was 13 years old at the time of the act constituted substantial evidence in this regard. Any discrepancies in the evidence were for the fact-finder to resolve.

*Tull v. State*, 119 S.W.3d 523 (Ark. Ct. App. 2003)

The defendant moved to exclude the testimony of his 45-year-old daughter, who testified that he had sexually violated her while she was a child living in his home 30 years ago. The appellate court affirmed the trial court's decision to deny the motion, holding that the daughter's testimony fell within the pedophile exception and that the probative value of the testimony outweighed the potential for unfair prejudice. The testimony of the present victim described an experience remarkably similar to the defendant's 45-year-old daughter. The similarity of the methods by which the defendant gradually broke down the girls' inhibitions, the offering of special privileges as an inducement, and the efforts he made to create situations where he could be alone with them, tended to show both that the defendant had the proclivity to sexually violate young girls entrusted to his care and that, with respect to the victim, he systematically planned to do so. The passage of 30 years between the events recounted in the testimony of the daughter and those for which the defendant was convicted in the present case was a significant factor to be considered in determining whether the probative value of the testimony outweighed the danger of unfair prejudice; however, the appellate court held that the trial court did not err in holding that the probative value of the daughter's testimony outweighed the danger of unfair prejudice.

*Turbyfill v. State*, 211 S.W.3d 557 (Ark. Ct. App. 2005)

Overwhelming evidence of guilt is not required in cases based on circumstantial evidence; the test is one of substantiality. There was substantial evidence of rape when an infant was brought in with a vaginal tear that was inconsistent with any scenario other than something being inserted into the vagina.

*United States v. Grubbs*, 547 U.S. 90, 96-7 (2006)

A conditioned anticipatory warrant complies with the Fourth Amendment's requirement of probable cause if both prerequisites of probability are satisfied. It must be true not only that *if* the triggering condition occurs "there is a fair probability that contraband or evidence of a crime will be found in a particular place," but also that there is probable cause to believe the triggering condition *will occur*.

*Welch v. State*, No. CACR04-786, 2005 Ark. App. LEXIS 542 (Ark. Ct. App. Aug. 31, 2005)

Leaving a child sexually explicit and solicitous notes was sufficient grounds for finding defendant guilty of sexual indecency with a child.

*Wilson v. State*, 898 S.W.2d 469 (Ark. 1995)

The uncorroborated testimony of a rape victim, adult or child, constitutes substantial evidence and is sufficient to support a verdict of guilty. The Arkansas Supreme Court concluded that the victim gave a full and detailed accounting of the defendant's actions that was sufficient to sustain the court's judgment. Any discrepancies in the testimony concerning the date of the offense were for the jury to resolve, and the time the crime was alleged to have occurred was not of serious importance since the date was not material to the crime.

*Winters v. State*, 201 S.W.3d 4 (Ark. Ct. App. 2005)

The duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

# ARKANSAS

## *Offenses Defined*

*A case with + indicates a decision not designated for publication.*

### **I. Carnal Abuse in the Third Degree**

- A person commits carnal abuse in the third degree if, being 20 years of age or older, he or she engages in sexual intercourse or deviate sexual activity with another person not his or her spouse who is less than 16 years old.  
– *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358, \*6 (Ark. Ct. App. May 14, 1997).

### **II. Child Pornography**

#### **A. Offenses**

#### **1. Engaging Children in Sexually Explicit Conduct for Use in a Visual or Print Medium**

##### **a. Elements**

- It is a crime for any person to employ, use, persuade, induce, entice, or coerce any child to engage in, or to have a child assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct. ARK. CODE ANN. § 5-27-303.  
– *Cummings v. State*, 110 S.W.3d 272, 284 (Ark. 2003).  
– *Graham v. State*, 861 S.W.2d 299, 302 (Ark. 1993).  
– *Richardson v. State*, 863 S.W.2d 572, 574 (Ark. 1993).
- It is a crime for a parent, legal guardian, or person having custody or control of a child to knowingly permit such child to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct. ARK. CODE ANN. § 5-27-303.  
– *Cummings v. State*, 110 S.W.3d 272, 284 (Ark. 2003).

**b. Definitions**

**i. “Sexually Explicit Conduct”**

- Lewd exhibition of the genitals or pubic area of any person, or the breast of a female constitutes sexually explicit conduct. ARK. CODE ANN. § 5-27-302 (4)(E).  
– *Cummings v. State*, 110 S.W.3d 272, 276 (Ark. 2003).

**ii. “Producing”**

- “Producing” is defined as producing, directing, manufacturing, issuing, publishing, or advertising for pecuniary profit. ARK. CODE ANN. § 5-27-302(3).  
– *Richardson v. State*, 863 S.W.2d 572, 574 (Ark. 1993).

**2. Pandering or Possessing a Visual or Print Medium Depicting Sexually Explicit Conduct Involving a Child**

**a. Elements**

- It is a crime to, with knowledge of the character of the visual or print medium involved:
  - (1) knowingly solicit, receive, purchase, exchange, possess, view, distribute, or control any visual or print medium depicting a child participating or engaging in sexually explicit conduct, or
  - (2) knowingly advertise for sale or distribution, sell, distribute, transport, ship, exhibit, display, or receive for the purpose of sale or distribution any visual or print medium depicting a child participating or engaging in sexually explicit conduct.

ARK. CODE ANN. § 5-27-304.

– *Gabrion v. State*, 42 S.W.3d 572, 574 (Ark. Ct. App. 2001).

– *George v. State*, 189 S.W.3d 28 (Ark. 2004).

– *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822, \*7 (Ark. Ct. App. Nov. 28, 2001).

– *Kirwan v. State*, 96 S.W.3d 724, 731 (Ark. 2003).

**b. “Sexual Conduct” Defined**

- “Sexual conduct” means lewd exhibition of the genitals or pubic area of any person or the breasts of a female.  
– *Gabrion v. State*, 42 S.W.3d 572, 574 (Ark. Ct. App. 2001).

**3. Employing a Child in a Sexual Performance**

**a. Elements**

- It is unlawful for any person to, knowing the character and content, employ, authorize, or induce a child under 17 years of age to engage in a sexual performance. ARK. CODE ANN. § 5-27-402.  
– *Graham v. State*, 861 S.W.2d 299, 300 (Ark. 1993).

**b. Definitions**

**i. “Performance”**

- “Performance” means any play, dance, act, drama, piece, interlude, pantomime, show, scene, or other three-dimensional presentation or part thereof that is exhibited before an audience of two or more persons. ARK. CODE ANN. § 5-27-401(1).  
– *Graham v. State*, 861 S.W.2d 299, 300 (Ark. 1993).

**ii. “Sexual Performance”**

- A “sexual performance” consists of any performance or part thereof that includes sexual conduct by a child younger than 17 years of age. ARK. CODE ANN. § 5-27-401(2).  
– *Graham v. State*, 861 S.W.2d 299, 300 (Ark. 1993).

**iii. “Sexual Conduct”**

- Sexual conduct involves actual or simulated sexual intercourse, deviate sexual activity, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals. ARK. CODE ANN. § 5-27-401(3).  
– *Graham v. State*, 861 S.W.2d 299, 300 (Ark. 1993).

**4. Producing, Directing, or Promoting a Sexual Performance**

**a. Elements**

- It is unlawful for any person to, knowing the character and content of the material, produce, direct, or promote a performance that includes sexual conduct by a child younger than 17 years of age. ARK. CODE ANN. § 5-27-403.  
– *Cummings v. State*, 110 S.W.3d 272, 284 (Ark. 2003).

**b. Definitions**

**i. “Performance”**

- “Performance” means any play, dance, act, drama, piece, interlude, pantomime, show, scene, or other three-dimensional presentation or part thereof whether performed live or photographed, filmed, videotaped, or visually depicted by any other photographic, cinematic, magnetic, or electronic means.  
– *Cummings v. State*, 110 S.W.3d 272, 276 (Ark. 2003).

**ii. “Sexual Conduct”**

- “Sexual conduct” means lewd exhibition of the genitals or pubic area of any person or the breasts of a female.  
– *Cummings v. State*, 110 S.W.3d 272, 276 (Ark. 2003).  
– *Gabrion v. State*, 42 S.W.3d 572, 574 (Ark. Ct. App. 2001).

**5. Distributing, Possessing, or Viewing Matter Depicting Sexually Explicit Conduct Involving a Child**

No relevant state cases reported; however, the “distribution, possession, and viewing” statute can be found at ARK. CODE ANN. § 5-27-602(a).

**6. Virtual/Simulated Child Pornography**

No relevant state cases reported.

**B. Lewd and Lascivious**

**1. Definitions**

**a. “Lewd”**

- “Lewd” has been defined as obscene, lustful, indecent, lascivious, or tending to moral impurity or wantonness.  
– *Cummings v. State*, 110 S.W.3d 272, 278 (Ark. 2003).  
– *Gabrion v. State*, 42 S.W.3d 572, 574 (Ark. Ct. App. 2001).  
– *George v. State*, 189 S.W.3d 28 (Ark. 2004).
- The terms lewd and lascivious have been frequently used interchangeably.  
– *Cummings v. State*, 110 S.W.3d 272, 279 (Ark. 2003).

**b. “Indecent”**

- “Indecent” is defined as offensive to common propriety, or offending against modesty or delicacy.
  - *Gabrion v. State*, 42 S.W.3d 572, 574 (Ark. Ct. App. 2001).
  - *George v. State*, 189 S.W.3d 28 (Ark. 2004).

**2. Lascivious Exhibition**

- There are factors for determining whether a visual depiction of a minor constitutes a lascivious exhibition of the genitals or pubic area. The trier of fact should look to whether the:
  - (1) focal point of the visual depiction is on the child’s genitalia or pubic area;
  - (2) setting of the visual depiction is sexually suggestive (*i.e.*, in a place or pose generally associated with sexual activity);
  - (3) child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child;
  - (4) child is fully or partially clothed or nude;
  - (5) visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
  - (6) visual depiction is intended or designed to elicit a sexual response in the viewer.
  - *Cummings v. State*, 110 S.W.3d 272, 279 (Ark. 2003).
- A visual depiction need not involve all of these factors to be a lascivious exhibition of the genitals or pubic area. The determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor.
  - *Cummings v. State*, 110 S.W.3d 272, 279 (Ark. 2003).

**III. Rape**

**A. Elements**

**1. Completed Offense**

- A person commits the offense of rape if he or she engages in sexual intercourse or deviate sexual activity by forcible compulsion or with another person who is incapable of consent because he or she is physically helpless, mentally defective, mentally incapacitated, or less than 14 years of age. ARK. CODE ANN. § 5-14-103.
  - *Chrobak v. State*, 58 S.W.3d 387, 391 (Ark. Ct. App. 2001).
  - *Clem v. State*, 90 S.W.3d 428, 430 (Ark. 2002).
  - *Harris v. State*,<sup>+</sup> No. CACR 93-1028, 1994 Ark. App. LEXIS 517, \*3 (Ark. Ct. App. Nov. 2, 1994).
  - *Johnson v. State*, 944 S.W.2d 115, 115 (Ark. 1997).
  - *Kirwan v. State*, 96 S.W.3d 724, 727 (Ark. 2003).



- *Murphy v. State*, 117 S.W.3d 627, 633 (Ark. Ct. App. 2003).
- *Parnell v. State*, 912 S.W.2d 422, 423 (Ark. 1996).
- *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358, \*2 (Ark. Ct. App. May 14, 1997).
- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*5 (Ark. Ct. App. Mar. 5, 2003).

- Time is not an essential element of rape; therefore, the State is not required to allege specific details of when and where every act of the sexual contact took place.
  - *Daniels v. State*,<sup>+</sup> No. CACR 99-654, 2000 Ark. App. LEXIS 351, \*16 (Ark. Ct. App. Apr. 26, 2000).
  - *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, \*8 (Ark. Ct. App. Oct. 9, 2002).

## 2. Attempted Rape

- There is no requirement as to the actual delivery of a victim into the hands of the defendant in order to convict him or her of attempted rape as such an action would be both dangerous to the youth and unnecessary.
  - *Kirwan v. State*, 96 S.W.3d 724, 731 (Ark. 2003).
- To be considered a substantial step to committing rape, conduct must be strongly corroborative of a person's criminal purpose.
  - *Mitchem v. State*,<sup>+</sup> No. CACR05-735, 2006 Ark. App. LEXIS 618 (Ark. Ct. App. Sep. 6, 2006)
  - *Kirwan v. State*, 96 S.W.3d 724, 728 (Ark. 2003). (case in which defendant solicited a minor via e-mail)
- Conduct that might reasonably be held by a trier of fact to be a substantial step to committing rape include:
  - (1) enticing or seeking to entice the contemplated victim of the offense to go to the place contemplated for its commission, or
  - (2) soliciting an innocent agent to engage in conduct constituting an element of the offense.
  - *Kirwan v. State*, 96 S.W.3d 724, 728 (Ark. 2003).

## B. Definitions

### 1. “Sexual Intercourse”

- “Sexual intercourse” is defined as penetration, however slight, of a vagina by a penis.
  - *Clark v. State*, 913 S.W.2d 297, 301 (Ark. 1996).
  - *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358, \*2 (Ark. Ct. App. May 14, 1997).
  - *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*5-6 (Ark. Ct. App. Mar. 5, 2003).

## 2. “Deviate Sexual Activity”

- “Deviate sexual activity” is defined as any act of sexual gratification involving the penetration, however slight, of the:
  - (1) anus or mouth of one person by the penis of another person, or
  - (2) vagina or anus of one person by any body part or foreign instrument manipulated by another person.
  - *Thornton v. State*,+ No. CACR05-1320, 2006 Ark. App. LEXIS 559 (Ark. Ct. App. Sep. 20, 2006).
  - *Eaton v. State*, 151 S.W.3d 15 (Ark. Ct. App. 2004).
  - *Clark v. State*, 913 S.W.2d 297, 301 (Ark. 1996).
  - *Clem v. State*, 90 S.W.3d 428, 430 (Ark. 2002).
  - *Harris v. State*,+ No. CACR 93-1028, 1994 Ark. App. LEXIS 517, \*3 (Ark. Ct. App. Nov. 2, 1994).
  - *Johnson v. State*, 944 S.W.2d 115, 115 (Ark. 1997).
  - *Tolbert v. State*,+ No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*5 (Ark. Ct. App. Mar. 5, 2003).

## 3. “Physically Helpless”

- “Physically helpless” means that a person is unconscious or physically unable to communicate lack of consent or rendered unaware that the sexual act is occurring.
  - *Chrobak v. State*, 58 S.W.3d 387, 391 (Ark. Ct. App. 2001).
  - *Dabney v. State*,++ 930 S.W.2d 360 (Ark. 1996).

## C. Force

### 1. Factors to Consider

- The age of the victim and the relationship of the victim to the assailant are key factors in weighing the sufficiency of evidence of force to prove rape.
  - *Petras v. State*,+ No. CACR05-839, 2006 Ark. App. LEXIS 462 (Ark. Ct. App. June 28, 2006).
  - *Griswold v. State*, 716 S.W.2d 767, 769 (Ark. 1986).
- The age of the prosecutrix is an important factor in determining whether consent to intercourse was given out of fear of harm.
  - *Griswold v. State*, 716 S.W.2d 767, 769 (Ark. 1986).

### 2. Evidence of Forcible Compulsion

- Evidence of forcible compulsion is not required to sustain a conviction where the victim is less than 14 years of age.
  - *Kirwan v. State*, 96 S.W.3d 724, 727 (Ark. 2003).

#### **D. Circumstantial Evidence of Penetration**

- Proof of penetration can be circumstantial and is required for both rape and deviate sexual activity.
  - *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, \*7 (Ark. Ct. App. Oct. 9, 2002).
  - *Finney v. State*,<sup>+</sup> No. CACR02-1272, 2003 Ark. App. LEXIS 700 (Ark. Ct. App. Sep. 17, 2003).
  - *Turbyfill v. State*, 211 S.W.3d 557 (Ark. Ct. App. 2005).
  - *Sehorn v. State*, No. CACR04-948, 2005 Ark. App. LEXIS 931 (Ark. Ct. App. Dec. 14, 2005).
- Penetration can be shown by circumstantial evidence. If that evidence gives rise to more than a mere suspicion and the inference that might reasonably have been deduced from it would leave little room for doubt, it is sufficient to support a conviction.
  - *Clem v. State*, 90 S.W.3d 428, 430 (Ark. 2002).
  - *Finney v. State*,<sup>+</sup> No. CACR02-1272, 2003 Ark. App. LEXIS 700 (Ark. Ct. App. Sep. 17, 2003).
  - *Turbyfill v. State*, 211 S.W.3d 557 (Ark. Ct. App. 2005).
  - *Sehorn v. State*, No. CACR04-948, 2005 Ark. App. LEXIS 931 (Ark. Ct. App. Dec. 14, 2005).

#### **E. Lesser-Included Offenses: What Is Not a Lesser-Included Offense of Rape?**

- Carnal abuse is not a lesser-included offense within the offense of rape.
  - *Kester v. State*, 797 S.W.2d 704, 706 (Ark. 1990).
- Violating a minor in the second degree is not a lesser-included offense of rape as it cannot be established by the same or less than all of the elements of rape.
  - *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*27 (Ark. Ct. App. Mar. 5, 2003).

#### **F. Juvenile Offenders**

- A 10-year old may be subject to commitment as a juvenile delinquent for the crime of rape.
  - *Parnell v. State*, 912 S.W.2d 422, 423 (Ark. 1996).

#### **IV. Sexual Abuse in the First Degree**

(NOTE: Sexual Abuse Law repealed in 2001; crime of Sexual Abuse no longer exists. See *SEXUAL ASSAULT*.)

## A. Elements

- First-degree sexual abuse occurs when a person 18 years of age or older engages in sexual contact with a person under the age of 14, who is not his or her spouse.
  - *Chappell v. State*, 710 S.W.2d 214, 215 (Ark. Ct. App. 1986).
  - *Daniels v. State*,<sup>+</sup> No. CACR 99-654, 2000 Ark. App. LEXIS 351, \*8 (Ark. Ct. App. Apr. 26, 2000).
  - *Gadberry v. State*, 877 S.W.2d 941, 943 (Ark. Ct. App. 1994).
  - *Leheny v. State*, 818 S.W.2d 236, 237 (Ark. 1991).
  - *Stanislawski v. State*,<sup>+</sup> No. CACR 97-01336, 1988 Ark. App. LEXIS 362, \*4 (Ark. Ct. App. May 6, 1988).
  - *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358, \*6 (Ark. Ct. App. May 14, 1997).
- The date the offense occurred is not a material element of the crime of sexual abuse.
  - *Newburn v. State*,<sup>+</sup> No. CACR 99-729, 2000 Ark. App. LEXIS 39, \*5 (Ark. Ct. App. Jan. 26, 2000).

## B. Sexual Contact

### 1. Defined

- “Sexual contact” consists of any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person, or the breast of a female.
  - *Daniels v. State*,<sup>+</sup> No. CACR 99-654, 2000 Ark. App. LEXIS 351, \*8 (Ark. Ct. App. Apr. 26, 2000).
  - *Gadberry v. State*, 877 S.W.2d 941, 943 (Ark. Ct. App. 1994).
  - *Leheny v. State*, 818 S.W.2d 236, 237 (Ark. 1991).
  - *Stanislawski v. State*,<sup>+</sup> No. CACR 97-01336, 1988 Ark. App. LEXIS 362, \*4 (Ark. Ct. App. May 6, 1988).

### 2. Proving Sexual Gratification

- When a person, other than for medical reasons, inserts something into another person’s vagina or anus, the State need not prove that the act was done for sexual gratification. A jury may reasonably assume the act was done for the purpose of sexual gratification.
  - *Daniels v. State*,<sup>+</sup> No. CACR 99-654, 2000 Ark. App. LEXIS 351, \*8-9 (Ark. Ct. App. Apr. 26, 2000).

## V. Sexual Assault in the First Degree

- A person commits sexual assault in the first degree if he or she engages in sexual intercourse or deviate sexual activity with another person, not his or her spouse, who is less than 18 years of age and the perpetrator is:

- (1) employed with the Department of Correction, Department of Community Punishment, Department of Human Services, any city or county jail, or juvenile detention facility, and the victim is in the custody of the Department of Correction, Department of Community Punishment, Department of Human Services, any city or county jail, or juvenile detention facility, or a contractor or agent;
- (2) a professional who is required to report suspected abuse or neglect and is in a position of trust or authority over the victim and uses the position to engage in sexual intercourse or deviate sexual activity; or
- (3) an employee in the victim's school or school district, a temporary caretaker, or a person in a position of trust or authority over the victim.

ARK. CODE ANN. § 5-14-124.

– *May v. State*,<sup>+</sup> No. CACR 05-523, 2006 Ark. App. LEXIS 144 (Ark. Ct. App. Feb. 15, 2006).

– *Bowker v. State*, 214 S.W.3d 243 (Ark. 2005).

– *Murphy v. State*, 117 S.W.3d 627, 630 (Ark. Ct. App. 2003).

## VI. Sexual Misconduct

(NOTE: *Sexual Misconduct Law repealed in 2001.*)

- A person commits sexual misconduct if he or she engages in sexual intercourse or deviate sexual activity with another person, not his or her spouse, who is less than 16 years old.  
– *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358, \*6 (Ark. Ct. App. May 14, 1997).

## VII. Sexual Solicitation

(NOTE: “*Sexual Solicitation*”, as formerly referred to in ARK. CODE ANN. § 5-14-110 is now referred to as “*Sexual Indecency*”.)

### A. Elements

- A person commits sexual solicitation of a child if, being 18 years old or older, he or she solicits any person not his or her spouse who is less than 14 years old to engage in sexual intercourse, deviate sexual activity, or sexual contact.  
ARK. CODE ANN. § 5-14-110.  
– *Welch v. State*, No. CACR04-786, 2005 Ark. App. LEXIS 542 (Ark. Ct. App. Aug. 31, 2005).  
– *Heape v. State*, 192 S.W.3d 281 (Ark. Ct. App. 2004).  
– *Lincks v. State*,<sup>+</sup> No. CACR 96-1181, 1997 Ark. App. LEXIS 409, \*5 (Ark. Ct. App. May 28, 1997).  
– *Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104, \*4-5 (Ark. Ct. App. Feb. 27, 2002).  
– *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358, \*5-6 (Ark. Ct. App. May 14, 1997).

**B. Online Enticement/Solicitation for Travel with the Intent to Engage in Sex with a Minor**

- There is no requirement as to the actual delivery of a victim into the hands of the defendant in order to convict him or her of attempted rape as such an action would be both dangerous to the youth and unnecessary.
  - *Kirwan v. State*, 96 S.W.3d 724 (Ark. 2003).
  - See also under **Attempted Rape**.

**VIII. Transporting a Minor for the Purposes of Prostitution**

No relevant state cases reported.

**IX. Violation of Minor**

*(NOTE: The crime Violation of a Minor no longer exists. Ark. Code Ann. §5-14-120, concerning violation of a minor in the first degree, was repealed by Acts 2001, No. 1738, § 12. Ark. Code Ann. §5-14-121, concerning violation of a minor in the second degree, was repealed by Acts 2001, No. 1738, § 13.)*

**A. First Degree**

**1. Elements**

- A person commits the offense of violation of a minor in the first degree if he or she engages in sexual intercourse or deviate sexual activity with another person not his or her spouse, who is more than 13 years of age but less than 18 years of age, and the actor is the minor’s guardian, an employee in the minor’s school or school district, a temporary caretaker, or a person in a position of trust or authority over the minor. ARK. CODE ANN. § 5-14-120.
  - *Green v. State*,<sup>+</sup> No. CACR 99-142, 2000 Ark. App. LEXIS 110, \*4 (Ark. Ct. App. Feb. 16, 2000).
  - *Reinert v. State*, 71 S.W.3d 52, 53 (Ark. 2002).
  - *Smith v. State*, 118 S.W.3d 542, 547 (Ark. 2003).

**2. “Guardian” Defined**

- “Guardian” means a parent, stepparent, legal guardian, legal custodian, foster parent, or anyone who, by virtue of a living arrangement, is placed in an apparent position of power or authority over a minor.
  - *Reinert v. State*, 71 S.W.3d 52, 54 (Ark. 2002).

**B. Second Degree**

**1. Elements**

- A person commits the offense of violation of a minor in the second degree if he or she engages in sexual contact with another person not

his or her spouse, who is more than 13 years of age but less than 18 years of age, and the actor is the minor's guardian, an employee in the minor's school or school district, a temporary caretaker, or a person in a position of trust or authority over the minor. ARK. CODE ANN. § 5-14-121(a).

– *Oates v. State*,<sup>+</sup> No. CACR 00-280, 2000 Ark. App. LEXIS 664, \*3-4 (Ark. Ct. App. Oct. 25, 2000).

– *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*26 (Ark. Ct. App. Mar. 5, 2003).

## 2. Definitions

### a. “Sexual Contact”

- “Sexual contact” means any act of sexual gratification involving the touching, directly or through clothing, of sex organs, including the breast of a female.

– *Oates v. State*,<sup>+</sup> No. CACR 00-280, 2000 Ark. App. LEXIS 664, \*4 (Ark. Ct. App. Oct. 25, 2000).

### b. “Sexual Gratification”

- The Arkansas Supreme Court has noted that “sexual” has been defined as “of or relating to the male or female sexes or their distinctive organs or functions” or “of or relating to the sphere of behavior associated with libidinal gratification”; “gratification” has been defined as “something that pleases.”

– *Oates v. State*,<sup>+</sup> No. CACR 00-280, 2000 Ark. App. LEXIS 664, \*4-5 (Ark. Ct. App. Oct. 25, 2000).

- The Arkansas Supreme Court has consistently held that it is not necessary for the State to provide direct proof that an act is done for sexual gratification if it can be assumed that the desire for sexual gratification is a plausible reason for the act.

– *Oates v. State*,<sup>+</sup> No. CACR 00-280, 2000 Ark. App. LEXIS 664, \*4-5 (Ark. Ct. App. Oct. 25, 2000).

# ARKANSAS

## *Mandatory Reporting: Child Maltreatment Act*

*A case with + indicates a decision not designated for publication.*

### **I. Purpose of the Child Maltreatment Act**

- The Child Maltreatment Act mandates that reports concerning instances or allegations of child abuse, sexual abuse, maltreatment, neglect, or abandonment be placed with the Child Abuse Hotline. ARK. CODE ANN. § 12-12-507(a)-(b).

### **II. Admissibility of Reports**

- No privilege, except that between a lawyer and client or between a minister, including a Christian Science practitioner, and any person confessing to or being counseled by the minister, shall prevent anyone from testifying concerning child maltreatment. ARK. CODE ANN. § 12-12-518(b).

### **III. “Abuse”**

#### **A. Definition**

- “Abuse” is defined as acts or omissions by a parent, guardian, custodian, foster parent, or any person who is entrusted with the juvenile’s care by a parent, guardian, custodian, or foster parent, including, but not limited to, an agent or employee of a public or private residential home, childcare facility, public or private school, or any person legally responsible for the juvenile’s welfare, that results in physical, psychological, or sexual abuse of any juvenile including intentionally, knowingly, or negligently and without justifiable cause any non-accidental physical injury or mental injury. ARK. CODE ANN. § 12-12-503.  
– *Ambrose v. Ark. Dep’t of Human Servs.*,<sup>+</sup> No. CA 02-639, 2002 Ark. App. LEXIS 670, \*2-3 (Ark. Ct. App. Dec. 4, 2003).  
– *Moody v. Dep’t of Human Servs.*,<sup>+</sup> No. CA 03-283, 2003 Ark. App. LEXIS 859 (Ark. Ct. App. Nov. 19, 2003).

#### **B. Physical Discipline**

- “Abuse” does not include the physical discipline of a child when it is reasonable and moderate and is inflicted by a parent or guardian for purposes of restraining or correcting the child. ARK. CODE ANN. § 12-12-503(C).  
– *Dep’t of Human Servs. v. Parker*, 197 S.W.3d 33 (Ark. Ct. App. 2004).  
– *Ambrose v. Ark. Dep’t of Human Servs.*,<sup>+</sup> No. CA 02-639, 2002 Ark. App. LEXIS 670, \*3 (Ark. Ct. App. Dec. 4, 2003).



**1. Reasonable or Moderate**

- Any act that is likely to cause and that does cause bodily harm greater than transient pain or minor temporary marks is not reasonable or moderate when used to correct or restrain a child. ARK. CODE ANN. § 12-12-503(C)(iv).  
– *Dep't of Human Servs. v. Parker*, 197 S.W.3d 33 (Ark. Ct. App. 2004).  
– *Ambrose v. Ark. Dep't of Human Servs.*,<sup>+</sup> No. CA 02-639, 2002 Ark. App. LEXIS 670, \*3 (Ark. Ct. App. Dec. 4, 2003).

**2. Factors to Consider**

- The age, size, and condition of the child, the location of the injury, and the frequency or recurrence of injuries shall be considered when determining whether the bodily harm is reasonable or moderate.  
– *Ambrose v. Ark. Dep't of Human Servs.*,<sup>+</sup> No. CA 02-639, 2002 Ark. App. LEXIS 670, \*3-4 (Ark. Ct. App. Dec. 4, 2003).

# ARKANSAS

## *Search and Seizure of Electronic Evidence*

*A case with + indicates a decision not designated for publication.*

*A case with ++ indicates that although the subject matter is not child exploitation, the principle presented may still apply.*

### **I. Search Warrants**

#### **A. Probable Cause**

- An issuing magistrate must make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him or her, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that evidence of a crime will be found in a particular place.
  - *Chrobak v. State*, 58 S.W.3d 387, 394 (Ark. Ct. App. 2001).
  - *George v. State*, 189 S.W.3d 28 (Ark. 2004).

#### **1. Affidavits**

##### **a. Time Element**

##### **i. Generally**

- Some mention of time in the affidavit is crucial because a magistrate must know that criminal activity or contraband exists where the search is to be conducted at the time of the issuance of the warrant. ARK. R. CRIM. PROC. 13.1(b).
  - *George v. State*, 189 S.W.3d 28 (Ark. 2004).

##### **ii. Inference**

- Arkansas law requires a search warrant affidavit to include either a reference of time or a basis upon which one can draw an inference.
  - *George v. State*, 189 S.W.3d 28 (Ark. 2004).
- Inference is not the same as conjecture.
  - *George v. State*, 189 S.W.3d 28 (Ark. 2004).

- Under Arkansas law, the question is whether a search warrant affidavit, within its four corners, provides a sufficient basis for an inference of time.  
– *George v. State*, 189 S.W.3d 28 (Ark. 2004).
- Suppression is not required if the time frame can be inferred from the affidavit itself.  
– *George v. State*, 189 S.W.3d 28 (Ark. 2004).

### **iii. Good-Faith Exception**

- The Arkansas Supreme Court has held that the good-faith exception saves a search warrant if a court can determine from the four corners of the affidavit that the officers could infer from the affidavit itself with certainty the time during which the criminal activity was observed.  
– *George v. State*, 189 S.W.3d 28 (Ark. 2004).
- Any reliance on a search warrant that is fundamentally defective for failing to list the time during which the criminal activity was observed, or facts from which this could be inferred, cannot be deemed reasonable under the good-faith exception.  
– *George v. State*, 189 S.W.3d 28 (Ark. 2004).

### **iv. Circumstantial Evidence**

- The affidavit must provide direct or circumstantial evidence that the alleged contraband is at the place to be searched.  
– *George v. State*, 189 S.W.3d 28 (Ark. 2004).

### **v. Suppression**

- An affidavit is insufficient if it mostly contains dates referring to the time when the affiant received a report, not when the activity was observed.  
– *George v. State*, 189 S.W.3d 28 (Ark. 2004).
- Where the affidavit for a search warrant makes no mention of the time during which the alleged criminal activity occurred or was taking place, the affidavit is considered insufficient to support the issuance of a search warrant, leading to the suppression of the evidence seized in the resulting search.  
– *George v. State*, 189 S.W.3d 28 (Ark. 2004).

**b. False Information: The Defendant’s Burden**

- If a defendant establishes by a preponderance of the evidence that a false statement made knowingly, intentionally, or with reckless disregard for the truth was included in a probable-cause affidavit, and if it was material to establish probable cause, the false information must be excised from the affidavit.  
– *Franks v. Delaware*,<sup>++</sup> 438 U.S. 154, 164-65 (1978).

**2. Appellate Review**

- The duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.  
– *Chrobak v. State*, 58 S.W.3d 387, 394 (Ark. Ct. App. 2001).  
– *George v. State*, 189 S.W.3d 28 (Ark. 2004).  
– *Winters v. State*, 201 S.W.3d 4 (Ark. Ct. App. 2005).

**B. Scope**

- The scope of a search shall be only such as is authorized by the warrant and is reasonably necessary to discover the persons or things specified therein. ARK. R. CRIM. PROC. 13.3(d).  
– *Norman v. State*,<sup>++</sup> 931 S.W.2d 96, 98 (Ark. 1996).

**C. Staleness**

**1. General Rule**

- A search warrant shall provide that it be executed between the hours of 6:00 A.M. and 8:00 P.M., and within a reasonable time, not to exceed 60 days. ARK. R. CRIM. PROC. 13.2(c).  
– *Cummings v. State*, 110 S.W.3d 272, 279-280 (Ark. 2003).  
– *Richardson v. State*, 863 S.W.2d 572, 575-576 (Ark. 1993).

**2. Exception to the General Rule**

- Upon a finding by the issuing judicial officer of reasonable cause to believe that the:  
(1) place to be searched is difficult of speedy access;  
(2) objects to be seized are in danger of imminent removal; or  
(3) warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy, the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and within a reasonable time not to exceed 60 days from the date of issuance. ARK. R. CRIM. PROC. 13.2(c)(i-iii).

- *Cummings v. State*, 110 S.W.3d 272, 279-280 (Ark. 2003).
- *Richardson v. State*, 863 S.W.2d 572, 575-576 (Ark. 1993).

**a. Requirements for Nighttime Searches**

- Searches that occur after 8:00 P.M. are nighttime searches.  
– *Richardson v. State*, 863 S.W.2d 572, 575 (Ark. 1993).
- A factual basis supporting a nighttime search is required as a prerequisite to the issuance of a warrant authorizing a nighttime search.  
– *Cummings v. State*, 110 S.W.3d 272, 280 (Ark. 2003).  
– *Richardson v. State*, 863 S.W.2d 572, 576 (Ark. 1993).

**b. Erroneous Issuance of a Nighttime Search Warrant**

- The issuance of a nighttime search warrant is in error where there is nothing to give reasonable cause to believe the items specified in the search warrant would be disposed of, removed, or hidden before the next morning.  
– *Cummings v. State*, 110 S.W.3d 272, 280 (Ark. 2003).  
– *Richardson v. State*, 863 S.W.2d 572, 576 (Ark. 1993).

**i. Failure to Justify a Nighttime Search**

- Failure to justify a nighttime search with sufficient factual information results in a substantial violation and a motion to suppress may be granted.  
– *Cummings v. State*, 110 S.W.3d 272, 280 (Ark. 2003).  
– *Richardson v. State*, 863 S.W.2d 572, 576 (Ark. 1993).
- Conclusory language, unsupported by facts, is insufficient to justify a nighttime search.  
– *Richardson v. State*, 863 S.W.2d 572, 576 (Ark. 1993).

**ii. Invalidation of a Nighttime Search Warrant**

- The appellate court has invalidated nighttime search warrants on several occasions when facts supporting one or more exigent circumstances have been found deficient.  
– *Cummings v. State*, 110 S.W.3d 272, 280 (Ark. 2003).

### iii. Good-Faith Exception

- An objective standard is applied in deciding whether law enforcement executing a warrant acted in good faith.  
– *Richardson v. State*, 863 S.W.2d 572, 576 (Ark. 1993).
- The objective standard requires law enforcement to have reasonable knowledge of what the rules require.  
– *Richardson v. State*, 863 S.W.2d 572, 576 (Ark. 1993).
- If no factual basis supports the issuance of a warrant for a nighttime search, a good-faith exception is not applicable.  
– *Richardson v. State*, 863 S.W.2d 572, 576 (Ark. 1993).

### 3. Delay in Applying for a Search Warrant

- The length of the delay is considered together with the nature of the unlawful activity and in light of common sense.  
– *Chrobak v. State*, 58 S.W.3d 387, 394-95 (Ark. Ct. App. 2001).

### 4. Delay in Executing a Search Warrant

- Delay in executing a search warrant does not always make probable cause fatally stale. Other factors must also be considered, including the nature of the criminal activity involved and the kind of property subject to search.  
– *Chrobak v. State*, 58 S.W.3d 387, 395 (Ark. Ct. App. 2001).

## II. Anticipatory Warrants

- A conditioned anticipatory warrant complies with the Fourth Amendment's requirement of probable cause if both prerequisites of probability are satisfied. It must be true not only that *if* the triggering condition occurs "there is a fair probability that contraband or evidence of a crime will be found in a particular place," but also that there is probable cause to believe the triggering condition *will occur*.  
– *United States v. Grubbs*, 587 U.S. 90, 96-7 (2006).

## III. Types of Searches

### A. Consent Searches

- A search based on consent shall not exceed, in duration or physical scope, the limits of the consent given.  
– *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822, \*3 (Ark. Ct. App. Nov. 28, 2001).

## **1. Test for Valid Consent**

- The test for a valid consent to search is that the consent be voluntary. ARK. R. CRIM. PROC. 11.3.  
– *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822, \*3 (Ark. Ct. App. Nov. 28, 2001).
- Voluntariness is a question of fact to be determined from all the circumstances. ARK. R. CRIM. PROC. 11.3.  
– *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822, \*3 (Ark. Ct. App. Nov. 28, 2001).

## **2. Standard for Measuring the Scope of Consent**

- The standard for measuring the scope of a suspect’s consent is that of objective reasonableness.  
– *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822, \*4 (Ark. Ct. App. Nov. 28, 2001).

## **3. Withdrawal or Limitation of Consent**

- Consent given may be withdrawn or limited at any time prior to the completion of the search. ARK. R. CRIM. PROC. 11.5.  
– *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822, \*3 (Ark. Ct. App. Nov. 28, 2001).
- If withdrawn or limited, the search under authority of the consent shall cease or be restricted to the new limits. ARK. R. CRIM. PROC. 11.5.  
– *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822, \*3 (Ark. Ct. App. Nov. 28, 2001).
- Things discovered and subject to seizure prior to such withdrawal or limitation of consent shall remain subject to seizure despite such change or termination of the consent. ARK. R. CRIM. PROC. 11.5.  
– *Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822, \*3 (Ark. Ct. App. Nov. 28, 2001).

## **B. Employer Searches**

No relevant state cases reported.

## **C. Private (Civilian) Searches**

No relevant state cases reported.

## **D. University-Campus Searches**

No relevant state cases reported.

#### **IV. Methods of Searching**

No relevant state cases reported.

#### **V. Computer-Technician/Repairperson Discoveries**

No relevant state cases reported.

#### **VI. Photo-Development Discoveries**

No relevant state cases reported.

#### **VII. Custodial Interrogation: Waiver of *Miranda* Rights**

##### **A. Voluntariness of Waiver**

- A full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it as well as whether the accused made the choice uncoerced by law enforcement to waive his or her rights are the essential focal points in determining whether a waiver of *Miranda* rights was knowingly and intelligently made.  
– *Barcnas v. State*, 33 S.W.3d 136, 139 (Ark. 2000).

##### **B. Validity of Waiver**

- There are two separate components in determining the validity of a defendant's waiver. First, the reviewing court examines the voluntariness of the statement by looking at whether the statements were the product of a free and deliberate choice rather than intimidation, coercion, or deception. The court also considers the following factors:
  - (1) age;
  - (2) education;
  - (3) intelligence of the accused;
  - (4) lack of advice of constitutional rights;
  - (5) length of detention;
  - (6) repeated or prolonged nature of the questioning; and
  - (7) use of physical punishment.Second, the court examines whether the waiver was knowingly and intelligently made. This examination focuses on whether the waiver was made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.  
– *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*20 (Ark. Ct. App. Mar. 5, 2003).



### **C. Burden**

- An accused's statement made while in custody is presumptively involuntary.  
– *Barcnas v. State*, 33 S.W.3d 136, 139 (Ark. 2000).  
– *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*19 (Ark. Ct. App. Mar. 5, 2003).
- The burden is on the State to prove by a preponderance of the evidence that the custodial statement was given voluntarily and was knowingly and intelligently made.  
– *Barcnas v. State*, 33 S.W.3d 136, 139 (Ark. 2000).  
– *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*19-20 (Ark. Ct. App. Mar. 5, 2003).

### **D. Appellate Review**

- An appellate court will make an independent review of the totality of the circumstances surrounding the confession to determine whether the appellant knowingly, voluntarily, and intelligently waived his or her constitutional rights.  
– *Barcnas v. State*, 33 S.W.3d 136, 139 (Ark. 2000).  
– *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*20 (Ark. Ct. App. Mar. 5, 2003).

## **VIII. Criminal Forfeiture**

No relevant state cases reported.

## **IX. Disciplinary Hearings for Federal and State Officers**

No relevant state cases reported.

## **X. Probation and Parolee Rights**

No relevant state cases reported.

# ARKANSAS

## *Jurisdiction and Nexus*

### **I. Jurisdictional Nexus**

No relevant state cases reported.

### **II. Internet Nexus**

No relevant state cases reported.

### **III. State Jurisdiction, Federal Jurisdiction, and Concurrent Jurisdiction**

#### **A. State Jurisdiction**

- A person may be convicted under the laws of Arkansas of an offense committed by him or her or by another for which he or she is legally accountable if either the conduct or a result that is an element of the offense occurs within Arkansas.

– *Kirwan v. State*, 96 S.W.3d 724, 731 (Ark. 2003).

#### **B. Federal Jurisdiction**

No relevant state cases reported.

#### **C. Concurrent Jurisdiction**

No relevant state cases reported.

### **IV. Interstate Possession of Child Pornography**

No relevant state cases reported.

# ARKANSAS

## *Discovery and Evidence*

*A case with + indicates a decision not designated for publication.*

*A case with ++ indicates that although the subject matter is not child exploitation, the principle presented may still apply.*

### **I. Timely Review of Evidence**

No relevant state cases reported.

### **II. Accusatory Instruments**

#### **A. Information**

##### **1. Requirements**

- An information or indictment in an adult prosecution is sufficient to charge an individual with a crime if it clearly states the offense, the party to be charged, and the county in which the offense was committed.  
– *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, \*10 (Ark. Ct. App. Oct. 9, 2002).
- It is not necessary to provide the particular circumstances of the offense, unless they are necessary to constitute a complete offense.  
– *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, \*10 (Ark. Ct. App. Oct. 9, 2002).

##### **2. Bill of Particulars**

- When a defendant feels that the information or indictment lacks sufficient facts to allege a crime such that he or she is not able to properly defend, he or she may request the State to furnish a bill of particulars.  
– *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, \*10 (Ark. Ct. App. Oct. 9, 2002).
- Where the information is definite in specifying the offense being charged, the charge itself constitutes a bill of particulars.  
– *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, \*11 (Ark. Ct. App. Oct. 9, 2002).

### **3. Time of the Offense**

- The time a crime is alleged to have occurred is not of critical significance unless the date is material to the offense; this is particularly true with sexual crimes against children and infants.
  - *Daniels v. State*,<sup>+</sup> No. CACR 99-654, 2000 Ark. App. LEXIS 351, \*16 (Ark. Ct. App. Apr. 26, 2000).
  - *Martin v. State*, 119 S.W.3d 504, 508 (Ark. 2003).
  - *Newburn v. State*,<sup>+</sup> No. CACR 99-729, 2000 Ark. App. LEXIS 39, \*4-5 (Ark. Ct. App. Jan. 26, 2000).
  - *Wilson v. State*, 898 S.W.2d 469, 471 (Ark. 1995).
- When the defense is that the sexual acts never occurred and were entirely fabricated, the lack of exact dates is not prejudicial to the defendant.
  - *Martin v. State*, 119 S.W.3d 504, 508 (Ark. 2003).

## **B. Juvenile Proceedings**

### **1. Charging Instrument**

- The charging instrument in a juvenile proceeding is a delinquency petition.
  - *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, \*8 (Ark. Ct. App. Oct. 9, 2002).

### **2. Bill of Particulars**

- While the Arkansas Rules of Criminal Procedure apply to juvenile delinquency proceedings, those rules are silent on the issue of whether a bill of particulars can be had in a juvenile proceeding.
  - *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, \*9 (Ark. Ct. App. Oct. 9, 2002).

### **3. Time of the Offense**

- There is no specific requirement that information regarding the specific time of the offense be included unless time happens to be an element of the particular offense.
  - *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, \*9 (Ark. Ct. App. Oct. 9, 2002).

## **III. Defense Requests for Copies of Child Pornography**

No relevant state cases reported.

**IV. Introduction of E-mails into Evidence**

**A. Hearsay/Authentication Issues**

No relevant state cases reported.

**B. Circumstantial Evidence**

No relevant state cases reported.

**C. Technical Aspects of Electronic Evidence Regarding Admissibility**

No relevant state cases reported.

**V. Text-Only Evidence**

**A. Introduction into Evidence**

No relevant state cases reported.

**B. Relevance**

No relevant state cases reported.

**VI. Evidence Obtained from Internet Service Providers**

**A. Electronic Communications Privacy Act**

No relevant state cases reported.

**B. Cable Act**

No relevant state cases reported.

**C. Patriot Act**

**1. National Trap and Trace Authority**

No relevant state cases reported.

**2. State-Court-Judge Jurisdictional Limits**

No relevant state cases reported.

## VII. Admissibility of Photographs and Videotapes

- Generally, the same considerations and requirements for admissibility that apply to photographs also apply to videotapes.  
– *Flud v. State*,<sup>+</sup> No. CACR 00-695, 2001 Ark. App. LEXIS 207, \*5 (Ark. Ct. App. Mar. 14, 2001).
- The admissibility of such evidence is in the sound discretion of the trial judge, whose discretion will not be set aside absent an abuse of that discretion.  
– *Flud v. State*,<sup>+</sup> No. CACR 00-695, 2001 Ark. App. LEXIS 207, \*5 (Ark. Ct. App. Mar. 14, 2001).

### A. Photographs

- The mere fact that a photograph is inflammatory or is cumulative is not, standing alone, sufficient reason to exclude it.  
– *Flud v. State*,<sup>+</sup> No. CACR 00-695, 2001 Ark. App. LEXIS 207, \*5 (Ark. Ct. App. Mar. 14, 2001).  
– *Stanislowski v. State*,<sup>+</sup> No. CACR 97-01336, 1988 Ark. App. LEXIS 362, \*6 (Ark. Ct. App. May 6, 1988).
- Even the most gruesome photographs may be admissible if they assist the trier of fact by:
  - (1) shedding light on some issue;
  - (2) proving a necessary element of the case;
  - (3) enabling a witness to testify more effectively;
  - (4) corroborating testimony; or
  - (5) enabling jurors to better understand the testimony.  
– *Flud v. State*,<sup>+</sup> No. CACR 00-695, 2001 Ark. App. LEXIS 207, \*5-6 (Ark. Ct. App. Mar. 14, 2001).  
– *Stanislowski v. State*,<sup>+</sup> No. CACR 97-01336, 1988 Ark. App. LEXIS 362, \*6 (Ark. Ct. App. May 6, 1988).
- If a photograph serves no valid purpose and could be used only to inflame the jurors' passion, it should be excluded.  
– *Flud v. State*,<sup>+</sup> No. CACR 00-695, 2001 Ark. App. LEXIS 207, \*6 (Ark. Ct. App. Mar. 14, 2001).

### B. Videotapes

- A videotape is admissible if it is relevant, helpful to the jury, and not prejudicial.  
– *Flud v. State*,<sup>+</sup> No. CACR 00-695, 2001 Ark. App. LEXIS 207, \*5 (Ark. Ct. App. Mar. 14, 2001).

## VIII. Prior Bad Acts

## A. Inadmissible

- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. ARK. R. EVID. 404(b).
  - *Berger v. State*, 36 S.W.3d 286, 290 (Ark. 2001).
  - *Callie v. State*,<sup>+</sup> No. CACR 01-1351, 2003 Ark. App. LEXIS 42, \*3-4 (Ark. Ct. App. Jan. 22, 2003).
  - *Elmore v. State*,<sup>+</sup> No. CACR 02-193, 2002 Ark. App. LEXIS 667, \*8 (Ark. Ct. App. Dec. 4, 2002).
  - *Garner v. State*, 101 S.W.3d 857, 859 (Ark. Ct. App. 2003).
  - *Hernandez v. State*, 962 S.W.2d 756, 759 (Ark. 1998).
  - *Lindsey v. State*, 890 S.W.2d 584, 587 (Ark. 1994).
  - *Love v. State*,<sup>+</sup> No. CACR 00-498, 2000 Ark. App. LEXIS 816, \*7 (Ark. Ct. App. Dec. 20, 2000).
  - *Meeks v. State*,<sup>+</sup> No. CACR 00-629, 2001 Ark. App. LEXIS 227, \*3 (Ark. Ct. App. Mar. 21, 2001).
  - *Newburn v. State*,<sup>+</sup> No. CACR 99-729, 2000 Ark. App. LEXIS 39, \*7 (Ark. Ct. App. Jan. 26, 2000).
  - *Spencer v. State*, 72 S.W.3d 461, 464 (Ark. 2002).
  - *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*12 (Ark. Ct. App. Mar. 5, 2003).
  - *Tull v. State*, 119 S.W.3d 523, 524 (Ark. Ct. App. 2003).

## B. Admissible

- The Arkansas Rules of Evidence do not preclude evidence showing the commission of another crime if there is some other, proper purpose for its admission into evidence.
  - *Callie v. State*,<sup>+</sup> No. CACR 01-1351, 2003 Ark. App. LEXIS 42, \*4 (Ark. Ct. App. Jan. 22, 2003).
- If evidence of another crime, wrong, or act is relevant to show that the offense of which the defendant is accused actually occurred and is not introduced merely to prove bad character, it will not be excluded.
  - *Berger v. State*, 36 S.W.3d 286, 290 (Ark. 2001).
  - *Hernandez v. State*, 962 S.W.2d 756, 759 (Ark. 1998).
  - *Lindsey v. State*, 890 S.W.2d 584, 587 (Ark. 1994).
  - *Spencer v. State*, 72 S.W.3d 461, 464 (Ark. 2002).

### 1. Balancing Test

- Before testimony of another crime is admitted under Rule. 404(b), the probative value of the evidence must be weighed against the danger of unfair prejudice.
  - *Munson v. State*, 959 S.W.2d 391, 395 (Ark. 1998).

- Time is a factor to be considered when determining the probative value of evidence of a prior crime.  
– *Elmore v. State*,<sup>+</sup> No. CACR 02-193, 2002 Ark. App. LEXIS 667, \*9 (Ark. Ct. App. Dec. 4, 2002).

## **2. Relevant to Main Issue of Guilt or Innocence**

- Evidence of other crimes can be admitted when it is relevant to the main issue of the guilt or innocence of the accused.  
– *Callie v. State*,<sup>+</sup> No. CACR 01-1351, 2003 Ark. App. LEXIS 42, \*4 (Ark. Ct. App. Jan. 22, 2003).

## **3. Character Evidence**

- By giving direct evidence of good character a party opens the door to rebuttal evidence showing bad character.  
– *Callie v. State*,<sup>+</sup> No. CACR 01-1351, 2003 Ark. App. LEXIS 42, \*3 (Ark. Ct. App. Jan. 22, 2003).

## **4. Motive, Opportunity, Intent, Preparation, Plan, Knowledge, Identity, Absence of Mistake, Absence of Accident**

- Evidence of other crimes, wrongs, or acts may be admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or absence of accident.  
– *Berger v. State*, 36 S.W.3d 286, 290 (Ark. 2001).  
– *Elmore v. State*,<sup>+</sup> No. CACR 02-193, 2002 Ark. App. LEXIS 667, \*8 (Ark. Ct. App. Dec. 4, 2002).  
– *Garner v. State*, 101 S.W.3d 857, 859 (Ark. Ct. App. 2003).  
– *Hernandez v. State*, 962 S.W.2d 756, 759 (Ark. 1998).  
– *Lindsey v. State*, 890 S.W.2d 584, 587 (Ark. 1994).  
– *Love v. State*,<sup>+</sup> No. CACR 00-498, 2000 Ark. App. LEXIS 816, \*7 (Ark. Ct. App. Dec. 20, 2000).  
– *Meeks v. State*,<sup>+</sup> No. CACR 00-629, 2001 Ark. App. LEXIS 227, \*3 (Ark. Ct. App. Mar. 21, 2001).  
– *Newburn v. State*,<sup>+</sup> No. CACR 99-729, 2000 Ark. App. LEXIS 39, \*7 (Ark. Ct. App. Jan. 26, 2000).  
– *Spencer v. State*, 72 S.W.3d 461, 464 (Ark. 2002).  
– *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*12 (Ark. Ct. App. Mar. 5, 2003).  
– *Tull v. State*, 119 S.W.3d 523, 524 (Ark. Ct. App. 2003).



**a. Generally**

- The test for establishing motive, intent, or plan is whether the evidence of the other act has independent relevance having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.  
– *Love v. State*,<sup>+</sup> No. CACR 00-498, 2000 Ark. App. LEXIS 816, \*7 (Ark. Ct. App. Dec. 20, 2000).

**b. Sexual Abuse of a Child**

- When a charge concerns the sexual abuse of a child, evidence of other crimes, wrongs, or acts, such as sexual abuse of that child or other children, is admissible to show motive, intent, or plan.  
– *Douthitt v. State*, 935 S.W.2d 241, 244-45 (Ark. 1996).  
– *Munson v. State*, 959 S.W.2d 391, 394 (Ark. 1998).  
– *Richardson v. State*, 863 S.W.2d 572, 577 (Ark. 1993).  
– *Spencer v. State*, 72 S.W.3d 461, 464 (Ark. 2002).
- The testimony of other rape victims is relevant in a criminal trial for the rape of an underage victim to show motive, intent, or plan.  
– *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*13 (Ark. Ct. App. Mar. 5, 2003).

**5. Pedophile Exception**

- If a case does not pertain to child abuse or incest, evidence of other sex-related crimes would be inadmissible character evidence; however, such evidence is allowed under a pedophile exception.  
– *Clark v. State*, 913 S.W.2d 297, 299 (Ark. 1996).

**a. Character**

- In recognizing “pedophile exception” Rule 404(b), the court has approved allowing evidence of similar acts with the same or other children in the same household when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship.  
– *Berger v. State*, 36 S.W.3d 286, 290 (Ark. 2001).  
– *Elmore v. State*,<sup>+</sup> No. CACR 02-193, 2002 Ark. App. LEXIS 667, \*9 (Ark. Ct. App. Dec. 4, 2002).  
– *Gadberry v. State*, 877 S.W.2d 941, 946 (Ark. Ct. App. 1994).  
– *Parish v. State*, 163 S.W.3d 843 (Ark. 2004).  
– *Garner v. State*, 101 S.W.3d 857, 860 (Ark. Ct. App. 2003).  
– *Hernandez v. State*, 962 S.W.2d 756, 759 (Ark. 1998).

- *Meeks v. State*,<sup>+</sup> No. CACR 00-629, 2001 Ark. App. LEXIS 227, \*4 (Ark. Ct. App. Mar. 21, 2001).
- *Munson v. State*, 959 S.W.2d 391, 395 (Ark. 1998).
- *Spencer v. State*, 72 S.W.3d 461, 464 (Ark. 2002).
- *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*13 (Ark. Ct. App. Mar. 5, 2003).

**b. Motive**

- Evidence of other sexual offenses is allowed under the pedophile exception to show motive where the other sexual offenses involve a similar act of sexual abuse of children and where the evidence shows a proclivity toward a specific act with a person or class of persons with whom the accused has had an intimate relationship, such as where the victim lives with the defendant in the same home or where the offenses were committed in the defendant’s home.
  - *Parish v. State*, 163 S.W.3d 843 (Ark. 2004).
  - *Tull v. State*, 119 S.W.3d 523, 524 (Ark. Ct. App. 2003).

**c. Intimate Relationship**

- The requirement of an intimate relationship has been met in a number of cases in the past where the victim either lives with the defendant in the same home or where the offenses were committed in the defendant’s home.
  - *Elmore v. State*,<sup>+</sup> No. CACR 02-193, 2002 Ark. App. LEXIS 667, \*9 (Ark. Ct. App. Dec. 4, 2002).
  - *Tull v. State*, 119 S.W.3d 523, 524 (Ark. Ct. App. 2003).

**d. Same Household**

- The pedophile exception only requires that the victims have lived in the same household as the defendant.
  - *Munson v. State*, 959 S.W.2d 391, 395 (Ark. 1998).
- The exception does not require that the victims live together in the same household.
  - *Munson v. State*, 959 S.W.2d 391, 395 (Ark. 1998).
- The pedophile exception has recently been declared to be applicable in classroom situations.
  - *Garner v. State*, 101 S.W.3d 857, 860 (Ark. Ct. App. 2003).

### **C. Appellate Review**

- The admission or rejection of evidence pursuant to Rule 404(b) is left to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.  
– *Love v. State*,<sup>+</sup> No. CACR 00-498, 2000 Ark. App. LEXIS 816, \*8 (Ark. Ct. App. Dec. 20, 2000).

### **IX. Simultaneous Bad Acts: Intentional Pattern of Abusive Behavior**

- A parent's perpetration of child abuse by neglect is relevant to a case of sexual abuse against that same child when both forms of abuse are occurring at the same time.  
– *Clem v. State*, 90 S.W.3d 428 (Ark. 2002).  
– *Lindsey v. State*, 890 S.W.2d 584, 588 (Ark. 1994).
- A contemptible lack of caring for a child's essential healthcare needs easily intertwines with sexual abuse of the child. Both forms of abuse are intentional and evidence lack of care, concern, and respect for the child's well being. Such evidence is pertinent in that it establishes an intentional pattern of abusive behavior on the part of the parent toward the child first by neglecting the child's basic hygienic needs, and second, by soliciting the child to engage in sexual activity.  
– *Clem v. State*, 90 S.W.3d 428 (Ark. 2002).  
– *Lindsey v. State*, 890 S.W.2d 584, 588 (Ark. 1994).

### **X. Subsequent Sexual Misconduct**

- Sexual misconduct that has occurred subsequent to the charged conduct is admissible. Similarly, evidence of subsequent conduct to prove identity, intent, lack of mistake, and the circumstances connected with the crime is admissible.  
– *Hernandez v. State*, 962 S.W.2d 756, 761 (Ark. 1998).

### **XI. Prior Acts of the Victim: Rape-Shield Laws**

- The rape-shield statute serves to limit evidence of a victim's past sexual conduct to prevent the victim from needless humiliation. ARK. CODE ANN. § 16-42-101(c).  
– *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780, \*15-16 (Ark. Ct. App. Nov. 14, 2001).  
– *Parish v. State*, 163 S.W.3d 843 (Ark. 2004).

#### **A. Admissibility**

- The rape-shield statute provides that evidence of a victim's prior sexual conduct is inadmissible at trial except where the court, at an *in camera* hearing, makes a written determination that such evidence is relevant to a fact

in issue and that its probative value outweighs its inflammatory or prejudicial nature.

– *Laughlin v. State*, 872 S.W.2d 848, 852 (Ark. 1994).

– *Martin v. State*, 119 S.W.3d 504, 512 (Ark. 2003).

## **B. “Prior Sexual Conduct” Defined**

- The appellate court has interpreted the phrase “prior sexual conduct” broadly, such that it encompasses sexual conduct that occurs prior to trial, not just conduct occurring prior to the time of the alleged rape.

– *Martin v. State*, 119 S.W.3d 504, 512 (Ark. 2003).

– *Taylor v. State*, 138 S.W.3d 684 (Ark. 2003).

## **C. Determination of Relevant Evidence**

- Evidence directly pertaining to the act upon which the prosecution is based or evidence of the victim’s prior sexual conduct with the defendant or any other person may be admitted at trial if the relevance of the evidence is determined in the following manner:

(1) a written motion shall be filed by the defendant with the court at any time prior to the time the defense rests stating that the defendant has an offer of relevant evidence and the purpose for which the evidence is believed relevant;

(2) a hearing on the motion shall be held *in camera* no later than three days before the trial is scheduled to begin, or at such later time as the court may permit for good cause; and

(3) a written record shall be made of the *in camera* hearing and shall be furnished to the appellate court on appeal.

ARK. CODE ANN. § 16-42-101.

– *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780, \*14-15 (Ark. Ct. App. Nov. 14, 2001).

- If, following the hearing, the court determines that the offered proof is relevant to a fact in issue and that its probative value outweighs its inflammatory or prejudicial nature, the court shall make a written order stating what evidence, if any, may be introduced by the defendant and the nature of the questions to be permitted in accordance with the applicable rules of evidence. ARK. CODE ANN. § 16-42-101.

– *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780, \*15 (Ark. Ct. App. Nov. 14, 2001).

## **D. Appellate Review**

- Trial courts are given discretion in ruling on the relevance of a victim’s prior sexual conduct.

– *Hathcock v. State*, 182 S.W.3d 152 (Ark. 2004).

– *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780, \*15 (Ark. Ct. App. Nov. 14, 2001).

- The appellate court will not reverse the trial court unless the appellate court determines that the ruling was clearly erroneous.
  - *Hathcock v. State*, 182 S.W.3d 152 (Ark. 2004).
  - *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780, \*15-16 (Ark. Ct. App. Nov. 14, 2001).

## **XII. Witnesses and Testimony**

### **A. Competency**

#### **1. Presumption**

- The trial court must begin with the presumption that every person is competent to be a witness.
  - *Clem v. State*, 90 S.W.3d 428, 434 (Ark. 2002).
  - *Laughlin v. State*, 872 S.W.2d 848, 850 (Ark. 1994).

#### **2. Criteria for Determining Competency**

- The criteria for determining whether a witness is competent to testify are:
  - (1) the ability to understand the obligation of an oath and to comprehend the obligation imposed by it;
  - (2) an understanding of the consequences of false swearing; and
  - (3) the ability to receive accurate impressions and to retain them to the extent that the capacity exists to transmit to the fact-finder a reasonable statement of what was seen, felt, or heard.
    - *Modlin v. State*,<sup>++</sup> 110 S.W.3d 727 (Ark. 2003).
    - *Chappell v. State*, 710 S.W.2d 214, 215 (Ark. Ct. App. 1986).
    - *Clem v. State*, 90 S.W.3d 428, 434 (Ark. 2002).
    - *Greenlee v. State*, 884 S.W.2d 947, 950 (Ark. 1994).
    - *Laughlin v. State*, 872 S.W.2d 848, 850-851 (Ark. 1994).
    - *McArdell v. State*, 833 S.W.2d 786 (Ark. Ct. App. 1992).

#### **3. Child Witnesses**

- No precise age of testimonial competency in children exists.
  - *Hoggard v. State*, 640 S.W.2d 102, 105 (Ark. 1982).
- It is primarily for the trial court to determine whether a child has the ability to observe, remember and relate the truth of the matter being litigated, and has a moral awareness of the duty to tell the truth.
  - *Hoggard v. State*, 640 S.W.2d 102, 105 (Ark. 1982).

- In a child-rape case, the matter of the competency of the child is primarily for the judge to decide, as he or she is better able than the court to judge the child's intelligence and understanding of the necessity for telling the truth.  
 – *McArdell v. State*, 833 S.W.2d 786, 789 (Ark. Ct. App. 1992).  
 – *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, \*6 (Ark. Ct. App. Oct. 9, 2002).

#### **4. Burden of Persuasion**

- The party alleging a witness is incompetent has the burden of persuasion.  
 – *Clem v. State*, 90 S.W.3d 428, 434 (Ark. 2002).

#### **5. Discretion of the Trial Court**

- The trial court has broad discretion in determining the competency of witnesses, particularly young ones, and, in eliciting testimony from such witnesses, some latitude in asking leading questions is permitted.  
 – *Chappell v. State*, 710 S.W.2d 214, 216 (Ark. Ct. App. 1986).

#### **6. Appellate Review**

- The question of competency is a matter lying in the sound discretion of the trial court and, in the absence of clear abuse of discretion or manifest error, that exercise will not be disturbed on appeal.  
 – *Chappell v. State*, 710 S.W.2d 214, 216 (Ark. Ct. App. 1986).  
 – *Clem v. State*, 90 S.W.3d 428, 434 (Ark. 2002).
- The issue of the competency of a witness is one in which the trial judge's evaluation is particularly important due to the opportunity he or she is afforded to observe the witness and the testimony. As long as the record is one upon which the trial judge could find a moral awareness of the obligation to tell the truth and an ability to observe, remember, and relate facts, an appellate court will not hold there has been a manifest error or abuse of discretion in allowing the testimony.  
 – *Clem v. State*, 90 S.W.3d 428, 434 (Ark. 2002).  
 – *McArdell v. State*, 833 S.W.2d 786, 789 (Ark. Ct. App. 1992).

### **B. Child Victims: Videotaped Depositions**

- A child's testimony may be presented by videotaped deposition for good cause shown. ARK. CODE ANN. § 16-44-203.  
 – *Greenlee v. State*, 884 S.W.2d 947, 950 (Ark. 1994).

## 1. Requirements

- In any prosecution for a sexual offense or criminal attempt to commit a sexual offense against a minor, upon motion of the prosecuting attorney and after notice to the opposing counsel, the court may, for good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of 17 years.
  - *Chappell v. State*, 710 S.W.2d 214, 216 (Ark. Ct. App. 1986).
  - *Cogburn v. State*, 732 S.W.2d 807, 809 (Ark. 1987).
  - *McGuire v. State*, 706 S.W.2d 360, 361 (Ark. 1986).
  - *State v. Lee*, 639 S.W.2d 745, 746 (Ark. 1982).
  - *Tapp v. State*,<sup>+</sup> No. CACR 94-774, 1995 Ark. App. LEXIS 322, \*3 (Ark. Ct. App. June 23, 1995).
- The videotaped deposition shall be taken before the judge in chambers in the presence of the prosecuting attorney, the defendant, and the defendant’s attorneys.
  - *Chappell v. State*, 710 S.W.2d 214, 216 (Ark. Ct. App. 1986).
  - *Cogburn v. State*, 732 S.W.2d 807, 809 (Ark. 1987).
  - *McGuire v. State*, 706 S.W.2d 360, 361 (Ark. 1986).
  - *State v. Lee*, 639 S.W.2d 745, 746 (Ark. 1982).
  - *Tapp v. State*,<sup>+</sup> No. CACR 94-774, 1995 Ark. App. LEXIS 322, \*3 (Ark. Ct. App. June 23, 1995).
- Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner as permitted at trial under the provisions of the Arkansas Uniform Rules of Evidence.
  - *Chappell v. State*, 710 S.W.2d 214, 216 (Ark. Ct. App. 1986).
  - *Cogburn v. State*, 732 S.W.2d 807, 809 (Ark. 1987).
  - *McGuire v. State*, 706 S.W.2d 360, 361 (Ark. 1986).
  - *State v. Lee*, 639 S.W.2d 745, 746 (Ark. 1982).
  - *Tapp v. State*,<sup>+</sup> No. CACR 94-774, 1995 Ark. App. LEXIS 322, \*3 (Ark. Ct. App. June 23, 1995).
- Any properly taken videotaped deposition shall be admissible at trial and received into evidence in lieu of the direct testimony of the victim; however, neither the presentation nor the preparation of such videotaped deposition shall preclude the prosecutor from calling the minor victim to testify at trial if that is necessary to serve the interests of justice.
  - *Chappell v. State*, 710 S.W.2d 214, 216 (Ark. Ct. App. 1986).
  - *Cogburn v. State*, 732 S.W.2d 807, 809 (Ark. 1987).
  - *McGuire v. State*, 706 S.W.2d 360, 361 (Ark. 1986).
  - *State v. Lee*, 639 S.W.2d 745, 746 (Ark. 1982).
  - *Tapp v. State*,<sup>+</sup> No. CACR 94-774, 1995 Ark. App. LEXIS 322, \*3 (Ark. Ct. App. June 23, 1995).

- Failure to follow the provisions is fatal to the admissibility of a videotaped statement of the child witness.  
– *Kester v. State*, 797 S.W.2d 704, 705 (Ark. 1990).

## 2. Discretion of the Trial Court

- The trial judge has considerable discretion in determining if a videotaped deposition can be used.  
– *Kester v. State*, 797 S.W.2d 704, 706 (Ark. 1990).  
– *Tapp v. State*,<sup>+</sup> No. CACR 94-774, 1995 Ark. App. LEXIS 322, \*3 (Ark. Ct. App. June 23, 1995).
- The judge can consider such things as the age of the child, the abuse the child has apparently endured, the circumstances surrounding the offense, the potential for harm to the child, and the testimony of an expert.  
– *Kester v. State*, 797 S.W.2d 704, 706 (Ark. 1990).  
– *Tapp v. State*,<sup>+</sup> No. CACR 94-774, 1995 Ark. App. LEXIS 322, \*3 (Ark. Ct. App. June 23, 1995).

## C. Sexual-Assault and Sexual-Abuse Victims

### 1. Substantial Evidence

- The testimony of a rape victim satisfies the substantial evidence requirement in a rape case; therefore, the testimony of a child-rape victim alone constitutes substantial evidence to support a rape conviction.  
– *Clem v. State*, 90 S.W.3d 428, 430 (Ark. 2002).  
– *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, \*5 (Ark. Ct. App. Oct. 9, 2002).  
– *Spencer v. State*, 72 S.W.3d 461, 465 (Ark. 2002).

### 2. Uncorroborated Testimony

- The uncorroborated testimony of a rape victim is sufficient to support a conviction if the testimony satisfies the statutory elements; however, circumstantial evidence must be consistent with the guilt of the defendant and inconsistent with any other reasonable conclusion.  
– *Chrobak v. State*, 58 S.W.3d 387, 390 (Ark. Ct. App. 2001).  
– *Clem v. State*, 90 S.W.3d 428, 430 (Ark. 2002).  
– *Davis v. State*, 956 S.W.2d 163, 165 (Ark. 1997).  
– *Laughlin v. State*, 872 S.W.2d 848, 851 (Ark. 1994).  
– *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, \*5-6 (Ark. Ct. App. Oct. 9, 2002).



- The uncorroborated testimony of a sexual-abuse victim is sufficient to support a conviction for first-degree sexual abuse.  
– *Daniels v. State*,<sup>+</sup> No. CACR 99-654, 2000 Ark. App. LEXIS 351, \*9 (Ark. Ct. App. Apr. 26, 2000).  
– *Newburn v. State*,<sup>+</sup> No. CACR 99-729, 2000 Ark. App. LEXIS 39, \*6 (Ark. Ct. App. Jan. 26, 2000).

### **3. Minor Victim**

- A minor rape victim’s testimony is admissible where the trial court is convinced of the victim’s ability to understand the consequences of not telling the truth.  
– *Parks v. State*,<sup>+</sup> No. CA 01-497, 2002 Ark. App. LEXIS 567, \*6 (Ark. Ct. App. Oct. 9, 2002).

### **4. Inconsistent Testimony**

- Inconsistencies in the testimony of a rape victim are matters of credibility for the jury to resolve.  
– *Chrobak v. State*, 58 S.W.3d 387, 391 (Ark. Ct. App. 2001).

### **5. Admission of Hearsay Testimony: Harmless Error**

- A trial court’s erroneous admission of hearsay testimony that reports an out-of-court statement of a minor rape victim is rendered harmless when the victim’s own trial testimony independently evidences her rape and the rape victim is available at trial for cross-examination by the defendant.  
– *Clark v. State*, 913 S.W.2d 297, 301 (Ark. 1996).

## **D. Expert Testimony**

### **1. General Test for Expert Testimony**

- If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.  
– *Hopkins v. Ark. Dep’t. of Human Svcs.*,<sup>++</sup> 83 S.W.3d 418, 423 (Ark. Ct. App. 2002).
- If some reasonable basis exists demonstrating that the witness has knowledge of the subject beyond that of ordinary knowledge, the evidence is admissible as expert testimony.  
– *Davis v. State*, 956 S.W.2d 163, 166 (Ark. 1997).

## **2. Relevance of Expert Testimony**

- Expert testimony must be relevant and not misleading or confusing to the jury.  
– *Davis v. State*, 956 S.W.2d 163, 166 (Ark. 1997).
- In determining the relevance of the testimony, the proponent must show that the evidence is reliable and sufficiently related to the facts of the case to aid the trier of fact in resolving the dispute.  
– *Davis v. State*, 956 S.W.2d 163, 166 (Ark. 1997).

## **3. Child-Abuse Syndrome**

- There is no error in allowing an expert on the subject of the child-abuse syndrome to testify about child abuse in general.  
– *Kester v. State*, 797 S.W.2d 704, 706 (Ark. 1990).

## **4. Appellate Review**

- Whether a witness qualifies as an expert in a particular field is a matter within the trial court's discretion.  
– *Davis v. State*, 956 S.W.2d 163, 166 (Ark. 1997).
- An appellate court will not reverse such a decision absent an abuse of that discretion.  
– *Davis v. State*, 956 S.W.2d 163, 166 (Ark. 1997).

## **E. Non-Expert Testimony**

- A person with particularized knowledge may give an opinion without being qualified as an expert witness; however, if the witness is not testifying as an expert, his or her testimony in the form of an opinion or inference is limited to those opinions or inferences which are;  
(1) rationally based on the perception of the witness, and  
(2) helpful to a clear understanding of his or her testimony or the determination of a fact in issue. ARK. R. EVID. 701.  
– *Hopkins v. Ark. Dep't. of Human Svcs.*,<sup>++</sup> 83 S.W.3d 418, 423-24 (Ark. Ct. App. 2002).

## **F. Preparation of Witnesses**

- There is no *per se* bar on an attorney's ability to prepare a witness through proper methods.  
– *Smith v. State*,<sup>+</sup> No. CR 01-1283, 2003 Ark. LEXIS 174, \*2 (Ark. Apr. 10, 2003).

## **G. Exclusion of Witnesses**

## 1. Generally

- At the request of a party, witnesses shall be excluded from the courtroom so they cannot hear the testimony of other witnesses. ARK. R. EVID. 615.  
– *McArdell v. State*, 833 S.W.2d 786, 788 (Ark. Ct. App. 1992).
- Unless a party is shown to be essential to the prosecution of a case, he or she must be excluded from the courtroom upon request; however, certain persons, including the victim of the crime, have the right to remain in the courtroom.  
– *Clark v. State*, 913 S.W.2d 297, 300 (Ark. 1996).  
– *Hall v. State*, 692 S.W.2d 769, 774 (Ark. Ct. App. 1985).

## 2. Crime Victim

- In any criminal prosecution, the victim of a crime, and in the event that the victim of a crime is a minor child under 18 years of age, that minor victim's parents, guardian, custodian, or other person with custody of the alleged minor victim, shall have the right to be present during any hearing, deposition, or trial of the offense. ARK. R. EVID. 616.  
– *Gadberry v. State*, 877 S.W.2d 941, 945 (Ark. App. 1994).  
– *Kester v. State*, 797 S.W.2d 704, 706 (Ark. 1990).  
– *King v. State*,<sup>+</sup> No. CACR 95-378, 1996 Ark. App. LEXIS 375, \*6 (Ark. Ct. App. June 5, 1996).  
– *McArdell v. State*, 833 S.W.2d 786, 788 (Ark. Ct. App. 1992).  
– *Smith v. State*,<sup>+</sup> No. CR 01-1283, 2003 Ark. LEXIS 174, \*3 (Ark. Apr. 10, 2003).

## H. Impeachment of a Witness by a Prior Juvenile Adjudication

- Evidence of juvenile adjudications is generally not admissible; however, the court may allow evidence of a juvenile adjudication of a witness, other than the accused, if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence. ARK. R. EVID. 609(d).  
– *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*9-10 (Ark. Ct. App. Mar. 5, 2003).

## XIII. Scientific Evidence

### A. Polygraphs and Truth-Serum Tests: Inadmissible

- The results of a polygraph are not admitted unless both parties enter into a written stipulation agreeing on their admissibility.  
– *Cogburn v. State*, 732 S.W.2d 807, 812 (Ark. 1987).  
– *Oates v. State*,<sup>+</sup> No. CACR 00-280, 2000 Ark. App. LEXIS 664, \*6 (Ark. Ct. App. Oct. 25, 2000).

- Truth-serum tests are generally held to occupy the same position as polygraph tests and most courts do not recognize the admissibility of either test for the purpose of proving the truth of the matter asserted.  
– *Cogburn v. State*, 732 S.W.2d 807, 812 (Ark. 1987).

## **B. Scientific Acceptance or Recognition**

- The great weight of authority regards results of truth serum tests as inadmissible inasmuch as they have not yet attained scientific acceptance as reliable and accurate means of ascertaining truth or deception; therefore it is apparent that the efficacy of neither the lie detector or the truth-serum test has gained that standing and scientific recognition nor demonstrated that degree of dependability to justify the courts in approving their use in the trial of criminal cases.  
– *Cogburn v. State*, 732 S.W.2d 807, 812 (Ark. 1987).

## **XIV. Hearsay Exceptions**

### **A. A Child’s Statement of Sexual Abuse**

- A statement made by a child under the age of 10 years concerning any type of sexual offense against that child is not excluded by the hearsay rule in a criminal case where the Confrontation Clause of the Sixth Amendment is applicable provided that the trial court conducts a hearing outside the presence of the jury and, with the evidentiary presumption that the statement is unreliable and inadmissible, finds that the statement offered possesses sufficient guarantees of trustworthiness that the truthfulness of the child’s statement is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.  
– *Cogburn v. State*, 732 S.W.2d 807, 808 (Ark. 1987).  
– *Gadberry v. State*, 877 S.W.2d 941, 943 (Ark. Ct. App. 1994).  
– *Kester v. State*, 797 S.W.2d 704, 705 (Ark. 1990).  
– *Smart v. State*, 761 S.W.2d 915, 916 (Ark. 1988).

#### **1. No Rule to Prohibit the Child from Testifying**

- While it is true that this hearsay exception was enacted to alleviate the trauma and distress of child victims by not requiring direct testimony from the child, there is nothing in this rule that prohibits a child from testifying.  
– *Smart v. State*, 761 S.W.2d 915, 916 (Ark. 1988).

#### **2. Factors to Determine Trustworthiness**

- The trial court may employ any factor it deems appropriate in deciding whether the statement of a child concerning any type of sexual offense against that child is sufficiently trustworthy, including:
  - (1) the spontaneity of the statement;

- (2) the lack of time to fabricate;
- (3) the consistency and repetition of the statement and whether the child has recanted the statement;
- (4) the mental state of the child;
- (5) the competency of the child to testify;
- (6) the child's use of terminology unexpected of a child of similar age;
- (7) the lack of a motive by the child to fabricate the statement;
- (8) the lack of bias by the child;
- (9) whether it is an embarrassing event the child would not normally relate;
- (10) the credibility of the person testifying to the statement;
- (11) the suggestiveness created by leading questions; and whether an adult with custody or control of the child may bear a grudge against the accused offender and may attempt to coach the child into making false charges. ARK. R. EVID. 803(25).
  - *Chappell v. State*, 710 S.W.2d 214, 218 (Ark. Ct. App. 1986).
  - *Cogburn v. State*, 732 S.W.2d 807, 810 (Ark. 1987).
  - *Gadberry v. State*, 877 S.W.2d 941, 943–44 (Ark. Ct. App. 1994).

### **3. Reasonable Notice**

- The proponent of the statement must give the adverse party reasonable notice of his or her intention to offer the statement and the particulars of the statement.
  - *Gadberry v. State*, 877 S.W.2d 941, 944 (Ark. Ct. App. 1994).

### **4. Videotaped Statements**

- Even though the hearsay exception applies generally to any statement made by a child that meets the required criteria, there are, however, specific provisions for such statements when they are videotaped.
  - *Cogburn v. State*, 732 S.W.2d 807, 808 (Ark. 1987).
- A general statute, such as the hearsay exception regarding a child's statement of sexual abuse, does not apply when there is a specific statute, such as the statute pertaining to videotaped testimony, covering a particular subject matter.
  - *Cogburn v. State*, 732 S.W.2d 807, 809 (Ark. 1987).

## **B. Spontaneous Statements**

- The interval between a statement and an event is governed by the particular circumstances of each case.
  - *Greenlee v. State*, 884 S.W.2d 947, 951 (Ark. 1994).

- The general rule is that an utterance following an exciting event must be made soon enough thereafter that it can reasonably be considered a product of the stress of the excitement, rather than of intervening reflection or deliberation.  
– *Greenlee v. State*, 884 S.W.2d 947, 951 (Ark. 1994).
- The trend is toward expansion of the time interval after an exciting event and some courts are more liberal in expanding the time period following an exciting event when the declarant is a child.  
– *Greenlee v. State*, 884 S.W.2d 947, 951 (Ark. 1994).

## **XV. Privileges**

### **A. Marital Privilege: Inapplicable**

- Any privilege between husband and wife does not constitute grounds for excluding evidence at any proceeding regarding adult abuse or sexual abuse.  
– *Munson v. State*, 959 S.W.2d 391, 392 (Ark. 1998).
- An exception to the marital privilege exists when one spouse is charged with a crime against the person or property of a person residing in the household of either. ARK. R. EVID. 504(d)(3).  
– *Munson v. State*, 959 S.W.2d 391, 392 (Ark. 1998).

### **B. Social-Worker Privilege**

- No licensed certified social worker, licensed master social worker, or licensed social worker or his secretary, stenographer, or clerk may disclose any information he or she may have acquired from persons consulting him or her in his or her professional capacity to those persons. ARK. CODE ANN. § 17-103-107.  
– *Cozad v. State*, 792 S.W.2d 606, 608 (Ark. 1990).

# **ARKANSAS**

*Age of the Child Victim*

**I. Proving the Age of the Child Depicted**

No relevant state cases reported.

**II. The Defendant's Knowledge of the Age of the Child Depicted**

No relevant state cases reported.

# ARKANSAS

## *Multiple Counts*

*A case with + indicates a decision not designated for publication.*

### **I. What Constitutes an Item of Child Pornography?**

No relevant state cases reported.

### **II. Issues of Double Jeopardy**

- The Double-Jeopardy Clause protects criminal defendants from:
  - (1) a second prosecution for the same offense after acquittal;
  - (2) a second prosecution for the same offense after conviction; and
  - (3) multiple punishments for the same offense.*– Cummings v. State*, 110 S.W.3d 272, 283 (Ark. 2003).

#### **A. Previous Prosecution in Another Jurisdiction**

- When conduct constitutes an offense within the concurrent jurisdiction of Arkansas and of the United States, a prosecution in any such other jurisdiction is an affirmative defense to a subsequent prosecution in Arkansas if the first prosecution resulted in an acquittal or in a conviction and the subsequent prosecution is based on the same conduct, unless the offense of which the defendant was formerly convicted or acquitted and the offense for which he or she is subsequently prosecuted each requires proof of a fact not required by the other, and the law defining each of the offenses is intended to prevent a substantially different harm or evil.  
*– Hoggard v. State*,<sup>+</sup> No. CACR 01-514, 2001 Ark. App. LEXIS 822, \*6 (Ark. Ct. App. Nov. 28, 2001).

#### **B. Same Offense**

- Whether a greater offense and its lesser-included offense are considered the same offense for double-jeopardy purposes depends on whether each statutory provision requires proof of a fact that the other does not. Under this test, a greater offense and its lesser-included offense are the same offense.  
*– Cummings v. State*, 110 S.W.3d 272, 283 (Ark. 2003).

#### **C. Mistrial**

- The Double-Jeopardy Clause is no bar to retrial if the defendant moves for and is granted a mistrial.  
*– Atchley v. State*, 2 S.W.3d 86, 89-90 (Ark. Ct. App. 1999).



- The circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him or her are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial. In other words, only where the governmental conduct in question is intended to goad the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first trial on his or her own motion.  
– *Atchley v. State*, 2 S.W.3d 86, 89-90 (Ark. Ct. App. 1999).
- The trial court must make a finding of fact and infer the existence or nonexistence of intent from objective facts and circumstances.  
– *Atchley v. State*, 2 S.W.3d 86, 89-90 (Ark. Ct. App. 1999).

### **III. Multiplicity**

#### **A. Rape**

- Rape is not defined as a continuing offense. Rather, it is a single crime that may be committed by either engaging in sexual intercourse or deviate sexual activity.  
– *Smith v. State*, 118 S.W.3d 542, 555 (Ark. 2003).
- When a victim testifies as to multiple acts of rape of a different nature, separated in point of time, there is no continuing offense as a separate impulse was necessary for the commission of each offense.  
– *Smith v. State*, 118 S.W.3d 542, 555 (Ark. 2003).

#### **B. Sexual Abuse**

- Sexual abuse in the first degree does not constitute a continuing course of conduct.  
– *Newburn v. State*,<sup>+</sup> No. CACR 99-729, 2000 Ark. App. LEXIS 39, \*6 (Ark. Ct. App. Jan. 26, 2000).

### **IV. Joinder**

- When offenses are based on the same conduct or a series of acts connected together or constituting parts of a single scheme or plan, they may be joined for trial.  
– *McArdell v. State*, 833 S.W.2d 786, 787 (Ark. Ct. App. 1992).

## V. Severance

### A. Factors Favoring Severance

- The issue of severance is to be determined on a case-by-case basis, considering the totality of the circumstances, with the following factors favoring severance:
  - (1) defenses are antagonistic;
  - (2) difficulty in segregating the evidence;
  - (3) lack of substantial evidence implicating one defendant except for the accusation of the other defendant;
  - (4) one defendant could have deprived the other of all peremptory challenges;
  - (5) if one defendant chooses to testify the other is compelled to do so;
  - (6) one defendant has no prior criminal record and the other has; and
  - (7) circumstantial evidence against one defendant appears stronger than against another.

– *Chappell v. State*, 710 S.W.2d 214, 219 (Ark. Ct. App. 1986).

### B. Right to Severance of Offenses

- Whenever two or more offenses have been joined for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to severance of the offenses. ARK. R. CRIM. PROC. 22.2(a).

– *McArdell v. State*, 833 S.W.2d 786, 787 (Ark. Ct. App. 1992).  
– *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*18 (Ark. Ct. App. Mar. 5, 2003).
- The court, on application of the prosecuting attorney or the defendant, shall grant a severance of offenses if:
  - (1) before trial, it is deemed appropriate to promote a fair determination of the defendant’s guilt or innocence of each offense, or
  - (2) during trial, upon consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant’s guilt or innocence of each offense.

ARK. R. CRIM. PROC. 22.2(b).  
– *McArdell v. State*, 833 S.W.2d 786, 787 (Ark. Ct. App. 1992).  
– *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*18 (Ark. Ct. App. Mar. 5, 2003).

### C. Refusal to Sever Cases

- If the facts necessary to prove the offenses will almost be required in each trial if a severance is granted and the evidence will be used in each trial to prove a plan, scheme, motive, or state of mind, there is no abuse of discretion in refusing to sever the cases.

– *Richardson v. State*, 863 S.W.2d 572, 577 (Ark. 1993).

# ARKANSAS

## *Defenses*

*A case with + indicates a decision not designated for publication.*

### **I. Age of the Defendant**

- It is an affirmative defense to rape of a child less than 14 years of age that the perpetrator was not more than 3 years older than the victim. ARK. CODE ANN. § 5-14-103 (a)(3)(A). (*NOTE: All cases say “not more than 2 years older...”, but the law was recently amended and increased to “not more than 3 years older...”*.)
  - *Clem v. State*, 90 S.W.3d 428, 430 (Ark. 2002).
  - *Harris v. State*,<sup>+</sup> No. CACR 93-1028, 1994 Ark. App. LEXIS 517, \*3 (Ark. Ct. App. Nov. 2, 1994).
  - *Johnson v. State*, 944 S.W.2d 115, 115 (Ark. 1997).
  - *Kirwan v. State*, 96 S.W.3d 724, 727 (Ark. 2003).
  - *Parnell v. State*, 912 S.W.2d 422, 423 (Ark. 1996).
  - *Todd v. State*,<sup>+</sup> No. CACR 96-975, 1997 Ark. App. LEXIS 358, \*2 (Ark. Ct. App. May 14, 1997).
  - *Tolbert v. State*,<sup>+</sup> No. CACR 02-315, 2003 Ark. App. LEXIS 180, \*5 (Ark. Ct. App. Mar. 5, 2003).

### **II. Consent**

#### **A. Under-Aged Victim**

- Consent is not an issue where a rape victim is less than 14 because an under-aged victim cannot consent to sexual intercourse.
  - *Kirwan v. State*, 96 S.W.3d 724, 728 (Ark. 2003).

#### **B. Incest**

- Consent is never an issue in the crime of incest.
  - *Douthitt v. State*, 935 S.W.2d 241, 245 (Ark. 1996).

### **III. Diminished Capacity**

#### **A. Addiction to the Internet**

No relevant state cases reported.

#### **B. Insanity**

No relevant state cases reported.

#### **IV. First Amendment**

No relevant state cases reported.

#### **V. Impossibility**

##### **A. Factual: Attempt Crimes**

- Impossibility is not a defense to an attempt crime.  
– *Kirwan v. State*, 96 S.W.3d 724, 727 (Ark. 2003).
- It is required that the defendant be judged on the basis of what he or she believes the attendant circumstances to be, not what the attendant circumstances actually are; therefore, a defendant is precluded from arguing that in light of the actual facts his or her conduct could not possibly result in the commission of the ultimate offense.  
– *Kirwan v. State*, 96 S.W.3d 724, 727 (Ark. 2003).

##### **B. Legal**

No relevant state cases reported.

#### **VI. Manufacturing Jurisdiction**

No relevant state cases reported.

#### **VII. Mistake of Fact: The Victim's Age and Child-Pornography Offenses**

- It is an affirmative defense to a child-pornography-offense prosecution that the defendant, in good faith, reasonably believed that the person engaged in the sexual conduct was 17 years of age or older. ARK. CODE ANN. § 5-27-404.  
– *Graham v. State*, 861 S.W.2d 299, 301 (Ark. 1993).

#### **VIII. Outrageous Conduct**

No relevant state cases reported.

#### **IX. Researcher**

No relevant state cases reported.

#### **X. Sexual Orientation**

No relevant state cases reported.

## **XI. Statute of Limitations**

### **A. General Rules**

#### **1. Rape**

- A prosecution for rape must be commenced within six years. ARK. CODE ANN. § 5-1-109(b)(1).  
– *Gardner v. State*, 64 S.W.3d 761, 763 (Ark. Ct. App. 2001).

#### **2. Sexual Abuse**

- A prosecution for first-degree sexual abuse must be commenced within three years. ARK. CODE ANN. § 5-1-109(b)(2).  
– *Gardner v. State*, 64 S.W.3d 761, 763 (Ark. Ct. App. 2001).

### **B. Limited Exception**

- If the prescribed period has expired, a prosecution may nevertheless be commenced for offenses such as rape and sexual abuse in the first degree, if, when the alleged violation occurred, the:
  - (1) offense was committed against a minor;
  - (2) violation has not previously been reported to a law-enforcement agency or prosecuting attorney; and
  - (3) prescribed period has not expired since the victim has reached the age of 18.

ARK. CODE ANN. § 5-1-109(h).

– *Dye v. State*, 119 S.W.3d 513, 515 (Ark. Ct. App. 2003).

– *Gardner v. State*, 64 S.W.3d 761, 764 (Ark. Ct. App. 2001).

- This exception extends the statute of limitations for Class Y felonies, such as rape, for up to six years beyond the eighteenth birthday of the victim, and for Class C felonies, such as first-degree sexual abuse, for up to three years beyond the eighteenth birthday of the victim, regardless of the age of the victim at the time of the offense.

– *Gardner v. State*, 64 S.W.3d 761, 764 (Ark. Ct. App. 2001).

### **C. Tolling**

- The period of limitation does not run during any period when a prosecution against the accused for the same conduct is pending in Arkansas. ARK. CODE ANN. § 5-1-109(g)(2).  
– *McGrew v. State*, 991 S.W.2d 588, 590 (Ark. 1999).

# ARKANSAS

## *Sentencing Issues*

*A case with + indicates a decision not designated for publication.*

### **I. Bifurcated Sentencing**

#### **A. Procedure**

- If the defendant is found guilty of one or more charges, the jury shall hear additional evidence relevant to sentencing on those charges. ARK. CODE ANN. § 16-97-101.  
– *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780, \*6 (Ark. Ct. App. Nov. 14, 2001).
- Evidence introduced in the guilt phase may be considered, but need not be reintroduced at the sentencing phase. ARK. CODE ANN. § 16-97-101.  
– *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780, \*6 (Ark. Ct. App. Nov. 14, 2001).
- Following the introduction of additional evidence relevant to sentencing, if any, instruction on the law, and argument, the jury shall again retire and determine a sentence within the statutory range. ARK. CODE ANN. § 16-97-101.  
– *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780, \*6 (Ark. Ct. App. Nov. 14, 2001).

#### **B. Alternative Sentencing**

- The court, in its discretion, may also instruct the jury that counsel may argue as to alternative sentences for which the defendant may qualify.  
– *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780, \*6 (Ark. Ct. App. Nov. 14, 2001).
- The jury, in its discretion, may make a recommendation as to an alternative sentence; however, that recommendation shall not be binding on the court.  
– *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780, \*6 (Ark. Ct. App. Nov. 14, 2001).

### **II. Sentencing Imposition**

## **A. Broad Inquiry**

- As a general proposition, a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he or she may consider, or the source from which it may come.  
– *Marshall v. State*, 27 S.W.3d 392, 395 (Ark. 2000).
- Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant.  
– *Marshall v. State*, 27 S.W.3d 392, 395 (Ark. 2000).

## **B. Evidence**

- The introduction of evidence during sentencing is governed by the rules of evidence.  
– *Pipkins v. State*,<sup>+</sup> No. CACR 00-867, 2001 Ark. App. LEXIS 390, \*4 (Ark. Ct. App. May 16, 2001).
- In the absence of prejudice, evidence relevant to sentencing may include, but is not limited to;
  - (1) prior convictions of the defendant;
  - (2) victim-impact evidence or statements;
  - (3) relevant character evidence; and
  - (4) evidence of aggravating or mitigating circumstance.– *Marshall v. State*, 27 S.W.3d 392, 394 (Ark. 2000).  
– *Smith v. State*, 118 S.W.3d 542, 554 (Ark. 2003).

### **1. Other Crimes or Wrongs**

- A trial court has wide discretion in admitting evidence of other crimes or wrongs, and its decision will not be reversed on appeal absent an abuse of that discretion.  
– *Marshall v. State*, 27 S.W.3d 392, 395 (Ark. 2000).
- Past criminal behavior proven by a preponderance of the evidence may be considered by a sentencing court even where no conviction resulted.  
– *Marshall v. State*, 27 S.W.3d 392, 395 (Ark. 2000).

## 2. Attempted Crimes

- Once guilt has been determined, additional evidence, even evidence regarding attempted crimes, may be admissible if it gives the sentencing body as much information as possible when it makes its sentencing decisions.  
– *Marshall v. State*, 27 S.W.3d 392, 395 (Ark. 2000).

## 3. Pardoned Offenses

- It is impermissible to use pardoned offenses in determining punishment.  
– *Richardson v. State*, 863 S.W.2d 572, 578 (Ark. 1993).

## 4. Uncharged Offenses

- In determining punishment, consideration of uncharged offenses is impermissible.  
– *Richardson v. State*, 863 S.W.2d 572, 578 (Ark. 1993).

## 5. Victim-Impact Evidence

- If a victim is a minor, then a member of the victim's family may exercise the rights of the victim and present victim-impact testimony.  
– *Pipkins v. State*,<sup>+</sup> No. CACR 00-867, 2001 Ark. App. LEXIS 390, \*2-3 (Ark. Ct. App. May 16, 2001).
- Evidence of a crime committed by another person is not proper victim-impact evidence.  
– *Marshall v. State*, 27 S.W.3d 392, 395 (Ark. 2000).

## 6. Aggravating Factors

- A trial court may deviate beyond a five percent range above the presumptive sentence when certain aggravating factors are present including, but not limited to:
  - (1) the offender knew or should have known that the victim was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health; or
  - (2) the offense was a violent or sexual offense committed in the victim's zone of privacy (*i.e.*, his or her home).  
– *Johnson v. State*, 944 S.W.2d 115, 117 (Ark. 1997).

### a. Age of Victim

No relevant state cases reported.



**b. Distribution/Intent to Traffic**

No relevant state cases reported.

**c. Number of Images**

No relevant state cases reported.

**d. Pattern of Activity for Sexual Exploitation**

No relevant state cases reported.

**e. Sadistic, Masochistic, or Violent Material**

No relevant state cases reported.

**f. Use of Computers**

No relevant state cases reported.

**C. Consecutive Versus Concurrent Sentences**

- When multiple sentences of imprisonment are imposed on a defendant convicted of more than one offense, the sentences shall run concurrently unless the court orders the sentences to run consecutively. ARK. CODE ANN. § 5-4-403.  
– *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780, \*11 (Ark. Ct. App. Nov. 14, 2001).  
– *Smith v. State*, 118 S.W.3d 542, 555 (Ark. 2003).
- A trial court is given sound discretion to determine whether multiple sentences should be served concurrently or consecutively, and the appellate court will not disturb a trial court’s decision on appeal unless there is a demonstration that the trial court clearly abused its discretion. ARK. CODE ANN. § 5-4-403.  
– *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780, \*11 (Ark. Ct. App. Nov. 14, 2001).  
– *Smith v. State*, 118 S.W.3d 542, 555 (Ark. 2003).

**III. Reduction of a Defendant’s Sentence**

- The court shall have power, in all cases of conviction, to reduce the extent or duration of the punishment assessed by a jury if, in the opinion of the court, the conviction is proper and the punishment assessed is greater than, under the circumstances of the case, ought to be inflicted, so that the punishment is not in any case reduced below the limit prescribed by law in such cases.  
– *McDonald v. State*,<sup>+</sup> No. CR 04-719, 2006 Ark. LEXIS 8 (Ark. Jan. 5, 2006).  
– *Thomas v. State*, 79 S.W.3d 347, 352 (Ark. 2002).

- Trial judges are not authorized to fix or determine punishment or in any way interfere with the jury's right to do so; however, trial judges are allowed to reduce the punishment assessed by the jury if, under the circumstances, the judge considers the punishment excessive.  
 – *McDonald v. State*,<sup>+</sup> No. CR 04-719, 2006 Ark. LEXIS 8 (Ark. Jan. 5, 2006).  
 – *Thomas v. State*, 79 S.W.3d 347, 352 (Ark. 2002).

#### **IV. The Sex and Child Offender Registration Act of 1997**

- The Sex and Child Offender Registration Act of 1997 (codified as ARK. CODE. ANN. §§ 12-12-901 et seq.) requires the Department of Correction to assess on a case-by-case basis the risk imposed on the public by persons classified as sex offenders.  
 – *Green v. State*,<sup>+</sup> No. CACR 99-142, 2000 Ark. App. LEXIS 110, \*10 (Ark. Ct. App. Feb. 16, 2000).
- The assessment of the degree of risk assigned to a sexual offender in accordance with the provisions of the statute is purely a matter for the executive branch.  
 – *Green v. State*,<sup>+</sup> No. CACR 99-142, 2000 Ark. App. LEXIS 110, \*10 (Ark. Ct. App. Feb. 16, 2000).
- All persons convicted of the violation of a minor in the first degree are included in the definition of sex offenders.  
 – *Green v. State*,<sup>+</sup> No. CACR 99-142, 2000 Ark. App. LEXIS 110, \*10 (Ark. Ct. App. Feb. 16, 2000).

# ARKANSAS

## *Supervised Release: Probation*

*A case with + indicates a decision not designated for publication.*

### **I. Discretion of the Court**

- Whether a person should be placed on probation is within the sound discretion of the trial court.  
– *Green v. State*,<sup>+</sup> No. CACR 99-142, 2000 Ark. App. LEXIS 110, \*9 (Ark. Ct. App. Feb. 16, 2000).

### **II. Factors to Consider**

- When considering whether to place a defendant on probation, four factors must be considered:
  - (1) whether there is an undue risk that the defendant will commit another offense during the probationary period;
  - (2) whether the defendant needs correctional treatment that could best be provided by confinement to a correctional facility;
  - (3) whether probation will discount the seriousness of the offense; or
  - (4) whether the defendant is gainfully employed or has the means available such that compensation to the victim will benefit the defendant's rehabilitation.

ARK. CODE ANN. § 5-4-301(b).

– *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780, \*7-8 (Ark. Ct. App. Nov. 14, 2001).

- When making the determination of whether to place a defendant on probation, the trial court may consider whether the conduct by the defendant caused serious harm.  
– *Green v. State*,<sup>+</sup> No. CACR 99-142, 2000 Ark. App. LEXIS 110, \*9 (Ark. Ct. App. Feb. 16, 2000).
- The fact that the defendant had no previous criminal history and the fact that the defendant led a law-abiding life for a substantial period of time before committing the offense, while not controlling the decision of the trial court to exercise its discretion, are to be accorded weight in favor of probation. ARK. CODE ANN. § 5-4-301(c).  
– *Graves v. State*,<sup>+</sup> No. CACR 01-498, 2001 Ark. App. LEXIS 780, \*7-8 (Ark. Ct. App. Nov. 14, 2001).

### **III. Time Limitations**

- When the defendant is placed on probation, the period of probation must not exceed the maximum jail time allowable for the offense charged.  
– *Hamm v. State*, 57 S.W.3d 252, 255 (Ark. Ct. App. 2001).
- Multiple periods of probation must run concurrently.  
– *Hamm v. State*, 57 S.W.3d 252, 255 (Ark. Ct. App. 2001).

## IV. Revocation of Probation

### A. Burden

- In a hearing on a petition to revoke probation, the burden is upon the State to prove the violation of a condition of the probation by a preponderance of the evidence.
  - *Mashburn v. State*, 189 S.W.3d 73 (Ark. Ct. App. June 23, 2004).
  - *Murray v. State*,<sup>+</sup> No. CACR 97-488, 1997 Ark. App. LEXIS 819, \*6-7 (Ark. Ct. App. Dec. 10, 1997).
  - *Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104, \*1-2 (Ark. Ct. App. Feb. 27, 2002).

#### 1. Required Proof

- Neither the same quality nor degree of proof is required for the exercise of the court’s discretion to revoke probation as is required for the finding of guilt beyond a reasonable doubt because the defendant in a probation revocation proceeding is not being tried on a criminal charge.
  - *Murray v. State*,<sup>+</sup> No. CACR 97-488, 1997 Ark. App. LEXIS 819, \*7 (Ark. Ct. App. Dec. 10, 1997).
- Only a preponderance of the evidence is necessary to support a finding that the probationer has inexcusably breached a condition associated with his or her release.
  - *Murray v. State*,<sup>+</sup> No. CACR 97-488, 1997 Ark. App. LEXIS 819, \*7 (Ark. Ct. App. Dec. 10, 1997).
- The State need only show that the defendant has violated one of the conditions of his or her probation to revoke probation.
  - *Mashburn v. State*, 189 S.W.3d 73 (Ark. Ct. App. June 23, 2004).
  - *Murray v. State*,<sup>+</sup> No. CACR 97-488, 1997 Ark. App. LEXIS 819, \*7 (Ark. Ct. App. Dec. 10, 1997).

#### 2. Uncorroborated Testimony

- Since the uncorroborated testimony of a victim, whether adult or child, is sufficient to support a conviction, such testimony is sufficient to support a revocation of probation under the lower standard of “preponderance of the evidence.”
  - *Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104, \*6 (Ark. Ct. App. Feb. 27, 2002).

### 3. Appellate Review

- On appeal, the appellate court will not reverse the trial court's decision unless it is clearly against the preponderance of the evidence.
  - *Mashburn v. State*, 189 S.W.3d 73 (Ark. Ct. App. June 23, 2004).
  - *Murray v. State*,<sup>+</sup> No. CACR 97-488, 1997 Ark. App. LEXIS 819, \*6-7 (Ark. Ct. App. Dec. 10, 1997).
  - *Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104, \*1-2 (Ark. Ct. App. Feb. 27, 2002).

### B. Failure to Pay Fines as Grounds for Revocation

- Probation may be revoked when a person does not pay fines that have been imposed.
  - *Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104, \*2 (Ark. Ct. App. Feb. 27, 2002).
- Once the State introduces evidence of non-payment of fines, the defendant bears the burden of going forward with some reasonable excuse for his or her failure to pay.
  - *Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104, \*2 (Ark. Ct. App. Feb. 27, 2002).
- To protect a probationer's Fourteenth Amendment rights, the trial court must determine that the probationer willfully refused to pay or failed to make sufficient *bona fide* efforts to legally acquire the resources to pay.
  - *Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104, \*2 (Ark. Ct. App. Feb. 27, 2002).
- In determining whether to revoke probation or conditional release, the court or releasing authority shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay any fines imposed.
  - *Murray v. State*,<sup>+</sup> No. CACR 97-488, 1997 Ark. App. LEXIS 819, \*7 (Ark. Ct. App. Dec. 10, 1997).
- The reliance of a probationer on another person to pay his fines is not a reasonable excuse.
  - *Stinnett v. State*,<sup>+</sup> No. CACR 01-751, 2002 Ark. App. LEXIS 104, \*3 (Ark. Ct. App. Feb. 27, 2002).

### V. Sentencing a Defendant for a Parole Violation

- Nothing prohibits the trial court from revoking probation and imposing any sentence that might have originally been imposed.
  - *Moseley v. State*, 80 S.W.3d 325, 330 (Ark. 2002).

**A. Imprisonment**

- A trial court can always sentence a defendant, upon a finding of guilt and revocation of his or her probation, to a term of imprisonment for violating probation.  
– *Moseley v. State*, 80 S.W.3d 325, 330 (Ark. 2002).
- If the court revokes a suspension or probation, it may enter a judgment of conviction and may impose any sentence on the defendant that might have been imposed originally for the offense of which he was found guilty.  
– *Moseley v. State*, 80 S.W.3d 325, 330 (Ark. 2002).

**B. Credit for Time Served**

- Arkansas law specifically contemplates giving credit for time spent in confinement against a term of imprisonment following a revocation of probation.  
– *Moseley v. State*, 80 S.W.3d 325, 331 (Ark. 2002).