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## Criminal Law—Child Abuse Resulting in Death—Arkansas Amends Its First Degree Murder Statute

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CRIMINAL LAW—CHILD ABUSE RESULTING IN DEATH—ARKANSAS AMENDS ITS FIRST DEGREE MURDER STATUTE. *Midgett v. State*, 292 Ark. 278, 729 S.W.2d 410 (1987).

Eight year old Ronnie Midgett, Jr., died at the hands of his father amid circumstances of prolonged and brutal physical abuse. The autopsy revealed multiple bruises, abrasions, and rib fractures, both healed and unhealed. The boy was poorly nourished. The immediate cause of death was intra-abdominal hemorrhage due to blunt force trauma, an injury consistent with that of a blow to the stomach with a fist. The boy's ten-year-old sister testified that four days prior to Ronnie's death the father was drinking whiskey and beating the boy, striking him on the stomach and the back. She further testified that she had seen the father choke Ronnie on previous occasions. Inquiries by school personnel and a social worker who noticed the bruises and the lethargic behavior of the child revealed only a story of a rough-playing little brother. Ronnie did not complain about the abusive treatment.<sup>1</sup>

The State charged the father with first degree murder<sup>2</sup> and obtained a conviction after a jury trial. On appeal, the father argued that despite the abuse of the child, the evidence was insufficient to prove that he killed the boy with the requisite premeditated and deliberated purpose of causing his death. The Arkansas Supreme Court agreed that no such evidence existed and modified the conviction to second degree murder.<sup>3</sup> *Midgett v. State*, 292 Ark. 278, 729 S.W.2d 410 (1987).

In response to the *Midgett* decision the state Attorney General's office drafted a bill with the intention of broadening the scope of first

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1. The conduct of both the offender and the victim and the nature of the injuries to the victim are typical of what is known as the "battered child syndrome." The syndrome is characterized by a pattern of "physically correlated symptoms" identified by the medical community as explainable only by "intentional ill treatment." Note, *The Battered Child: Logic in Search of the Law*, 8 SAN DIEGO L. REV. 364, 365-68 (1971).

2. ARK. CODE ANN. § 5-10-102(a) (Supp. 1987) states in part that "[a] person commits murder in the first degree if . . . [w]ith the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person . . . ."

3. The *Midgett* court specifically cited ARK. CODE ANN. § 5-10-103(a) (1987). "A person commits murder in the second degree if . . . [w]ith the purpose of causing serious physical injury to another person, he causes the death of any person. *Id.*"

The sentence for first degree murder is ten years to forty years, or life. The sentence for second degree murder is five years to twenty years. ARK. CODE ANN. § 5-4-401 (1987).

degree murder to include cases of child abuse resulting in death. Upon introduction at the request of the Attorney General, the Arkansas legislature immediately passed the bill and amended the statute, adding the provision that "[a] person commits murder in the first degree if . . . [u]nder circumstances manifesting cruel and malicious indifference to the value of human life, he knowingly causes the death of a person fourteen years of age or younger."<sup>4</sup>

This legislative response follows the public attention and revulsion that now exist in society with respect to child abuse in general.<sup>5</sup> However, the traditional statutory grading of criminal offenses, and specifically the classifying of murder by degrees, appear inadequate to address the range of public concern now focused on child abuse.<sup>6</sup> A comparison of various other statutory formulations and the struggle of other courts to punish child abuse resulting in death will help to illustrate the uniqueness of the General Assembly's response in Arkansas and highlight the need for further revisions.

The homicide statutes of many states require premeditation and deliberation as the criminal intent or *mens rea* necessary for higher degrees of culpability.<sup>7</sup> Some courts find these elements satisfied in circumstances similar to those in *Midgett*.<sup>8</sup> These courts infer premeditation and deliberation from the nature and extent of the injuries

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4. Act of June 4, 1987, No. 52 (1st Ext. Sess.) (codified at ARK. CODE ANN. § 5-10-102(a)(3) (Supp. 1987)). An emergency clause expressly refers to *Midgett* and states: "[The] confusion with reference to the application of Arkansas' first degree murder statute to child abuse cases resulting in death [requires] the immediate passage of this Act . . . in order to clearly establish Arkansas' first degree murder statute to be applicable in such cases." *Id.* at § 2.

5. The identification of injuries that are a result of child abuse, a record of the incidence of such abuse, and the legislative response to the problem are developments only of the last forty years. See generally Meyers, *The Legal Response to Child Abuse: In the Best Interest of the Child*, 24 J. FAM. L. 149 (1986).

6. In a case of child abuse not resulting in death, the debate is between the imposition of criminal sanctions versus a therapeutic approach to dealing with the offender. Meyers, *supra* note 5, at 178-79. The attention to the social and psychological context in which the offense occurs presents difficult problems of defining the conduct and applying legal remedies. See generally Shepherd, *The Abused Child And The Law*, 22 WASH. & LEE L. REV. 182 (1965).

7. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1105 (1978); CAL. PENAL CODE § 189 (West 1970); IDAHO CODE § 18-4001 (1987) (malice aforethought); MD. CRIM. CODE ANN. § 407 (1982); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970); NEV. REV. STAT. § 200.010 (Michie 1985).

8. See, *e.g.*, *Burnett v. State*, 287 Ark. 158, 697 S.W.2d 95 (1985) (thirteen-month-old child brutally abused over a period of months leading to death) (overruled by *Midgett*); *Morris v. State*, 270 Ind. 295, 384 N.E.2d 1022 (1979) (five-month-old baby died from a skull fracture caused by blows to the face and having its head hit on the floor several times); *Hern v. State*, 97 Nev. 529, 635 P.2d 278 (1981) (multiple bruises and abrasions covering a three-year-old child found as the undisputed cause of death held sufficient to establish the requisite premeditation).

and from a liberal construction of the time required to deliberate, allowing the formation of the intent in an instant.<sup>9</sup> However, other courts find insufficient evidence of these requisite elements of intent for a first degree murder conviction in a death resulting from child abuse.<sup>10</sup> The courts find no evidence of time sufficient to form the intention<sup>11</sup> or that no evidence of prior mistreatment or threatening conduct existed toward the child.<sup>12</sup> The inconsistency and difficulty in applying the concepts of premeditation and deliberation are recognized by many authorities.<sup>13</sup> The recently revised criminal laws of several states no longer use these concepts to distinguish the more culpable murder offense.<sup>14</sup>

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9. See, e.g., *Burnett v. State*, 287 Ark. 158, 698 S.W.2d 95 (1985); *Morris v. State*, 270 Ind. 295, 384 N.E.2d 1022 (1979); *Hern v. State*, 97 Nev. 529, 635 P.2d 278 (1981).

10. See, e.g., *Commonwealth v. Cadwell*, 374 Mass. 308, 317, 372 N.E.2d 246, 252 (1978) (A four-year-old boy died from a twenty-minute beating inflicted by hand. Injuries, inflicted before and after this beating, covered a considerable portion of the child's body. The court stated that "there is an irreducible doubt in all the circumstances whether the defendant consciously formed a purpose that morning to do the child mortal injury; but if the defendant did, it is still probable that the resolve lasted for only 'a fleeting period of time.'" (quoting *Commonwealth v. Williams*, 364 Mass. 145, 152, 301 N.E.2d 683, 688 (1983))); *People v. Ingraham*, 232 N.Y. 245, 133 N.E. 575 (1921) (A father strangled to death his six-year-old daughter. The defendant's hands around the girl's throat for several minutes before causing death was held insufficient to indicate premeditation.); *Pannill v. Commonwealth*, 185 Va. 244, 38 S.E.2d 457 (1946) (Defendant brutally beat his eleven-year-old daughter with a half-inch switch inflicting wounds from which she eventually died. The court found no evidence that the defendant previously mistreated or made any prior threats against the girl and, therefore, found no evidence of premeditation.); see Comment, *Commonwealth v. Cadwell: Deliberate Premeditation, Extreme Atrocity and Cruelty, and the Battered Child Syndrome—A New Look at Criminal Culpability in Massachusetts*, 14 NEW. ENG. 812 (1979) (suggesting that the *Cadwell* court considers the child abuse syndrome as a mitigating factor in the resulting death).

11. See, e.g. *Commonwealth v. Cadwell*, 374 Mass. 308, 372 N.E.2d 246 (1978).

12. See, e.g. *Pannill v. Commonwealth*, 185 Va. 244, 38 S.E.2d 457 (1946).

13. See, e.g., B. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS* 338 (M. Hall ed. 1967) (suggesting that the distinction between degrees of murder based on premeditation and deliberation is too vague and obscure for either a jury or an experienced judge to understand); AMERICAN LAW INSTITUTE, *MODEL PENAL CODE AND COMMENTARIES*, Pt. II, at 127-28 (1980) (stating that the "notion that prior reflection should distinguish . . . murder is fundamentally unsound").

14. See, e.g., ILL. ANN. STAT. ch. 38, para. 9-1 (Smith-Hurd Supp. 1987). A person "commits first degree murder if, in performing the acts which cause the death: (1) He either intends to kill or do great bodily harm . . . or knows that such acts will cause death . . . or . . . (2) He knows that such acts create a strong probability of death or great bodily harm . . ." *Id.* The statute takes into account the aggravating factors that "the murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty . . ." *Id.* at § (b)7; IND. CODE ANN. § 35-42-1-1 (Burns Supp. 1987) (knowingly or intentionally kills another); N.Y. PENAL LAW § 125.27 (McKinney 1975) ("[w]ith intent to cause the death . . ."). "Intent" is generally defined similarly to "purposely" as used in the Model Penal Code, requiring a "conscious object to engage in conduct of that nature or to cause such a result; and . . . if the element involves the nature of attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they

As an alternative basis for a first degree murder conviction, Massachusetts provides for murder committed with "extreme atrocity or cruelty."<sup>15</sup> Premeditation is not required.<sup>16</sup> In *Commonwealth v. Cadwell*<sup>17</sup> the Massachusetts Supreme Judicial Court held the particular circumstances of child abuse resulting in death "much less persuasive of extreme cruelty than is commonly found in convictions on that basis."<sup>18</sup> The court found that "the previous assaults [on the child] were physically distinct from the final assault; they were not themselves an accumulative cause of death."<sup>19</sup> However, in *Commonwealth v. Hutchinson*<sup>20</sup> the Massachusetts Supreme Judicial Court distinguished *Cadwell* on the basis of more severe injuries inflicted upon the child and upheld a first degree murder conviction under the extreme atrocity and cruelty provision.<sup>21</sup> The court's struggle with the particular circumstances of death from child abuse sufficient to warrant a conviction points out the difficulty of addressing the issue within the framework of existing statutory formulations.

Several jurisdictions designate murder by torture as a first degree offense and find it applicable to deaths by child abuse.<sup>22</sup> Murder by

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exist." MODEL PENAL CODE § 2.02(2)(a) (1974); *Accord* N.Y. PENAL LAW § 15.05(1) (McKinney 1987).

15. MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970).

16. *Commonwealth v. Cadwell*, 374 Mass. 308, 318, 372 N.E.2d 246, 252 (1978) (citing *Commonwealth v. Appleby*, 358 Mass. 407, 415, 265 N.E.2d 485, 491 (1970)).

17. 374 Mass. 308, 372 N.E.2d 246 (1978) (prolonged abuse over several months culminated in a twenty-minute beating that caused the death).

18. *Id.* at 318, 372 N.E.2d at 252. "Our cases have usually looked to the consciousness and degree of suffering of the victim, the disproportion between the means actually needed to inflict death and those employed, the instrumentalities employed and the extent of physical injury." *Id.* at 318, 372 N.E.2d at 252-53 (quoting *Commonwealth v. Connolly*, 356 Mass. 617, 628, 255 N.E.2d 191, 198 (1970)).

19. *Id.* at 318, 372 N.E.2d at 252.

20. 395 Mass. 568, 481 N.E.2d 188 (1985).

21. *Id.* The *Hutchinson* court distinguished *Cadwell* on the basis of the severity of the injuries resulting when the child's head was beaten repeatedly against a wall. Additionally, the court stated that "the defendant, unlike the defendant in the *Cadwell* case, received the benefit of the jury's consideration [through a jury instruction] of any impairment of . . . mind which may typify adults that batter children." *Id.* at 578, 481 N.E.2d at 194-95.

The circumstances of *Midgett* are much closer to those of *Cadwell* than to those of *Hutchinson*. Additionally, the *Midgett* court analyzes the state of mind of the defendant, as does the *Cadwell* court.

22. *E.g.*, CAL. PENAL CODE § 189 (West 1970) ("All murder which is perpetrated by means of a bomb, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing"); IDAHO CODE § 18-4001 (1987) ("Torture is the intentional infliction of extreme and prolonged pain with the intent to cause suffering. It shall also be torture to inflict on a human being extreme and prolonged acts of brutality irrespective of proof of intent to cause suffering. The death of a human being caused by such torture is murder irrespective of

torture requires no intent to cause death.<sup>23</sup> However, the intention to inflict prolonged pain and suffering upon the victim remains a key element of proof.<sup>24</sup> The condition of the decedent's body and the circumstances surrounding the killing provide inferences of this intent.<sup>25</sup> Most cases require infliction of pain for the purpose of revenge, persuasion, extortion, or satisfaction of some sadistic inclination.<sup>26</sup> The inconsistent results of cases that attempt to apply premeditation and deliberation in order to distinguish between degrees of murder are also present under the murder by torture formulation. The result turns on the particular construction of these *mens rea* requirements.<sup>27</sup>

Prosecuting a death resulting from child abuse under the felony murder doctrine provides the advantage of not having to prove the vague concepts of premeditation and deliberation. The State must

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proof of specific intent to kill; torture causing death shall be deemed the equivalent of intent to kill.”).

See, e.g., *People v. Demond*, 59 Cal. App. 3d 574, 130 Cal. Rptr. 590 (1976) (three-year-old died from injuries typical of the battered child syndrome: murder by torture conviction upheld); *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985) (murder by torture conviction upheld in the death of a three-year-old boy by prolonged and brutal abuse). Cf. *State v. Kountz*, 108 Ariz. 459, 501 P.2d 931 (1972) (torture conviction upheld when the child was systematically and cruelly tortured with intent to cause extreme pain and suffering); *People v. Steger*, 16 Cal. 3d 539, 128 Cal. Rptr. 161, 546 P.2d 665 (1976) (first degree murder by torture conviction in a case of child abuse resulting in death modified to second degree murder on the grounds that the offense requires a deliberated and premeditated intent to inflict pain).

23. See, e.g., *State v. Kountz*, 108 Ariz. 459, 501 P.2d 931 (1972); *People v. Demond*, 59 Cal. App. 3d 574, 130 Cal. Rptr. 590 (1976); *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985).

24. See, e.g., *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985).

25. *Id.* The severity of the victim's wounds alone may not supply an inference of the requisite intent. In California murder by torture is a form of premeditated murder, requiring similar evidence of intent to cause pain to the victim as evidence of intent to kill. *People v. Steger*, 16 Cal. 3d 539, 128 Cal. Rptr. 161, 546 P.2d 665 (1976). The *Steger* court found no evidence that the continuous infliction of pain and injury upon the child was not several distinct explosions of violence. “[T]he abuser tends to suffer from emotional pressures which are not directly related to the child himself, focuses his own general feelings of frustration and anger on the one child, and expresses his emotions through an *uncontrolled* display of physical abuse of the child.” *Id.* at 549, 128 Cal. Rptr. at 167, 546 P.2d at 671 n.4 (quoting Note, *The Battered Child: Logic in Search of the Law*, 8 SAN DIEGO L. REV. 364, 375 (1971)). *But see* *People v. Demond*, 59 Cal. App. 3d 574, 130 Cal. Rptr. 590 (1976) (finding no mitigating circumstances of drugs or alcohol or of heat of passion to diminish the defendant's capacity to premeditate).

26. Apparently these purposes add to the inference gained solely from the condition of the body. Evidence of the defendant's sadistic treatment of others, *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985), and evidence that a defendant forced the child to eat her own feces, suggesting conduct prompted by sadistic impulses, *People v. Demond*, 59 Cal. App. 3d 574, 130 Cal. Rptr. 590 (1976), helped create inferences sufficient for convictions of murder by torture.

27. Characterizing the *Midgett* decision as adopting a strict construction of premeditation does not infer a premeditated intent to cause suffering under a murder by torture formulation.

only show an intent to commit the felony itself.<sup>28</sup> The majority of jurisdictions include felony murder in their first degree provisions,<sup>29</sup> but few contain enumerated or defined offenses that encompass the conduct of child abuse.<sup>30</sup> Successful felony murder convictions include those based on the felonies of aggravated battery<sup>31</sup> and cruelty to children.<sup>32</sup> The felony of mayhem, defined in part as the permanent disabling of the victim, may support a conviction of murder under the doctrine.<sup>33</sup> A potential problem with the felony murder approach arises with the concept of merger. The acts constituting child abuse, merging into the resulting homicide, may preclude a conviction of felony murder.<sup>34</sup>

In *Midgett v. State*<sup>35</sup> the Arkansas Supreme Court stated that "[u]nless our law is changed to permit conviction of first degree murder for something like child abuse or torture resulting in death,"<sup>36</sup> the State must show substantial evidence that an accused acted with premeditation and deliberation to obtain a conviction "no matter how

28. See generally 2 W. LAFAVE & A. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 7.5 (1986).

29. E.g., ARIZ. REV. STAT. ANN. § 13-1105 (1978); ARK. CODE ANN. § 5-10-102 (1987); COLO. REV. STAT. § 18-3-102 (1986); DEL. CODE ANN. tit. 11, § 636 (1987).

30. See GA. CODE ANN. § 16-5-1(c) (1984) (general felony murder provision). The Georgia Code contains the felony of cruelty to children:

A parent, guardian, or other persons supervising the welfare of or having immediate charge or custody of a child under the age of 18 commits the offense of cruelty to children when he willfully deprives the child of necessary sustenance to the extent that the child's health or well-being is jeopardized. (b) Any person commits the offense of cruelty to children when he maliciously causes a child under the age of 18 cruel or excessive physical or mental pain.

*Id.* § 16-5-70 (1984); ILL. ANN. STAT. ch. 38, para. 9-1(3) (Smith-Hurd Supp. 1987) ("committing a forcible felony other than second degree murder"); MD. PENAL CODE ANN. § 410 (1985) (mayhem is an enumerated felony generally defined as maiming in MD. PENAL CODE ANN. §§ 384, 386 (1985)).

31. *People v. Ray*, 80 Ill. App. 3d 151, 35 Ill. Dec. 688, 399 N.E.2d 977 (1979).

32. *Bethea v. State*, 251 Ga. 328, 304 S.E.2d 713 (1983).

33. See McKenna, *A Case Study of Child Abuse: A Former Prosecutor's View*, 12 AMER. CRIM. LAW REV. 165 (1974) (discussing *Maryland v. Stern*, Crim. No. 12790 (Montgomery Co. Cir. Ct. Mar. 15, 1973), *appeal docketed*, No. 271 (Md. Ct. Sp. App., filed Apr. 3, 1973)).

34. "Some cases have held that the collateral felony must be a felony which is 'independent' of the conduct which kills; it must involve conduct separate from the acts of personal violence which constitute a necessary part of the homicide itself." 2 W. LAFAVE & A. SCOTT, *supra* note 28, § 7.5, at 229 (1986). The merger doctrine prevents 'bootstrapping' of lesser offenses of violence to the person without the necessary proof of any intent to cause death. See also *People v. Smith*, 35 Cal. 3d 798, 201 Cal. Rptr. 311, 678 P.2d 886 (1984) (held that the acts constituting the felony of child abuse in California form an integral part of the homicide consequently merging into the homicide).

35. 292 Ark. 278, 729 S.W.2d 410 (1987).

36. *Id.* at 287, 729 S.W.2d at 414.

heinous the facts may otherwise be."<sup>37</sup> The court overruled *Burnett v. State*<sup>38</sup> which held the required mental state was properly inferred from the substantial evidence of abuse inflicted upon a child. Just as the Indiana court failed to do in *Morris v. State*,<sup>39</sup> the Arkansas court found no explanation in *Burnett* for "the quantum leap from 'the facts,' horrible as they were, to the inference of premeditation."<sup>40</sup>

The *Midgett* court stated that a distinction remains between first degree and second degree murder under the Arkansas statute.<sup>41</sup> Prior case law in Arkansas recognized a notion of instantaneous premeditation.<sup>42</sup> However, requiring no evidence of any appreciable time for reflection on the part of a defendant destroys the statutory distinction.<sup>43</sup> The court found no evidence to show that the appellant "formed that intention before acting, and . . . weighed in his mind the consequences of a course of conduct, as distinguished from acting upon sudden impulse without the exercise of reasoning power."<sup>44</sup>

Finding no statement made or other demonstration "that the appellant was abusing his son in the hope that he would eventually die,"<sup>45</sup> the court offered a possible explanation of the state of mind of the appellant. In a case of child abuse of long duration, since the child has not died from previous instances of abuse, the offender may expect the child not to die as the result of further abuse.<sup>46</sup> Additionally, since he did not kill his son in a previous beating, with the clear opportunity to do so, the inference that he planned his son's death in accordance with the concepts of premeditation and deliberation is negated.<sup>47</sup> The court further stated that even if the evidence supported a

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37. *Id.*

38. 287 Ark. 158, 697 S.W.2d 95 (1985) (A thirteen-month-old child died from a rupture of the colon caused by a blow with a fist to the abdomen. The autopsy revealed multiple bruises and abrasions covering the entire body, four broken ribs and other internal injuries in various stages of the healing process.).

39. 270 Ind. 245, 384 N.E.2d 1022 (1979).

40. 292 Ark. at 284, 729 S.W.2d at 412.

41. *Id.* at 287, 729 S.W.2d at 414.

42. *Stout v. State*, 263 Ark. 355, 565 S.W.2d 23 (1978).

43. 292 Ark. at 286, 729 S.W.2d at 414 (quoting 2 W. LAFAVE & A. SCOTT, *supra* note 28, § 7.7, at 237 (1986)).

44. *Id.* at 285, 729 S.W.2d at 413 (citing *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, *cert. denied*, 459 U.S. 1022 (1980)). This language comes from the Arkansas Model Jury Instructions. See ARKANSAS SUPREME COURT COMM. ON JURY INSTRUCTIONS, ARKANSAS MODEL JURY INSTRUCTIONS AMCI 1507 (1982).

45. 292 Ark. at 283, 729 S.W.2d at 412.

46. *Id.* at 285, 729 S.W.2d at 413.

47. *Id.* (citing *Simmons v. State*, 227 Ark. 1109, 305 S.W.2d 119 (1957)) (The *Simmons* court noted that opportunities the defendant had to kill his victims after obtaining his shotgun but before the killings negated premeditation.); *Cf. Tippet v. State*, 224 Ark. 981, 278 S.W.2d

finding that intent to cause death "developed in a drunken, misguided, and overheated attempt at disciplining"<sup>48</sup> the child, still no evidence at all of a premeditated and deliberated killing existed.<sup>49</sup>

Circumstantial evidence may provide a basis for the inference of premeditation.<sup>50</sup> That evidence includes the type of weapon used in the killing, the manner of its use,<sup>51</sup> "the nature, extent and location of the wounds inflicted, [and] the conduct of the accused."<sup>52</sup> The *Midgett* court recognized that "a fist may be a deadly weapon, [but] the evidence of the use of the fist in this case is not comparable to the evidence"<sup>53</sup> found in prior cases consisting of other more substantial circumstances.<sup>54</sup>

The dissent in *Midgett*, willing to read premeditation into these circumstances of child abuse resulting in death, supported the verdict of the trial court.<sup>55</sup> The dissent stated that the majority apparently could accept the appellant's intention to kill the child if he were "murdered with a bullet or a knife."<sup>56</sup> This suggests a notion that the risk created by the use of a dangerous weapon affords a sufficient inference of intent. The use of the fist in this case, in light of the relative strengths of the appellant and the victim, also created a risk sufficient to sustain the inference.

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110 (1955) (a first degree murder conviction upheld where the condition of the victim's body showed a prolonged beating although it was shown appellant had the means and opportunity to kill his wife instantly).

48. 292 Ark. at 285, 729 S.W.2d at 413.

49. *Id.*

50. *Id.* at 282, 729 S.W.2d at 411 (citing *House v. State*, 230 Ark. 622, 324 S.W.2d 112 (1959)). In *House* a man attempted to have sexual intercourse with a woman and after a protracted fight, he dumped the body in a water-filled ditch not knowing whether she was dead or alive. Leaving her in the water and having time to premeditate during the fight proved sufficient for the inference of premeditation.

51. *Id.* at 283, 729 S.W.2d at 412 (citing *Weldon v. State*, 168 Ark. 534, 270 S.W.2d 968 (1925) (three bullet wounds through the center of the victim's body and mutilation with a knife held sufficient to infer premeditation)).

52. *Stout v. State*, 263 Ark. 355, 360, 565 S.W.2d 23, 26 (1978).

53. 292 Ark. at 283, 729 S.W.2d at 412.

54. *Id.* The prior cases referred to by the court are *House v. State*, 230 Ark. 622, 324 S.W.2d 112 (1959) and *Weldon v. State*, 168 Ark. 534, 270 S.W.2d 968 (1925). Apparently, walking away from the victim in the water-filled ditch after fighting for some period of time provided the other circumstance in the *House* case. 292 Ark. at 288, 729 S.W.2d at 415. In *Weldon*, the "'overkill' and mutilation of the body . . . were circumstances creating substantial evidence of premeditation and deliberation." *Id.*

In its petition for rehearing the State said, "It is unclear to the appellee on what basis 'other circumstances' in those cases were sufficient to distinguish them from the circumstances of the instant case." Appellee's Petition for Rehearing at 5, *reh'g denied*, *Midgett v. State*, 292 Ark. 278, 729 S.W.2d 410 (1987).

55. 292 Ark. at 289, 729 S.W.2d at 415 (Hickman, J., dissenting).

56. *Id.* at 291, 729 S.W.2d at 416 (Hickman, J., dissenting).

In questioning the majority and its inquiry into the state of mind of the appellant, the dissent asks: "How do we ever know the actual or subliminal intent of a defendant? 'If the *act* appellant intended was criminal, then the law holds him accountable, even though such a *result* was not intended.'"<sup>57</sup> This analysis, however, does not conform with the statutory guidelines of culpable mental states as they affect the separate elements of criminal offenses.<sup>58</sup>

The legislative response provoked by *Midgett* provides the primary significance of the decision. The amendment to the first degree murder statute apparently equates "circumstances manifesting cruel and malicious indifference to the value of human life, [when one] knowingly causes the death of a person fourteen (14) years of age or younger"<sup>59</sup> with child abuse resulting in death. However, in view of the *Midgett* court's analysis of the existing evidence to make an inference of the appellant's state of mind, the amendment may not encompass the facts of *Midgett*, despite the clear legislative intent.

The amendment requires a *mens rea* of "knowingly" causing death.<sup>60</sup> As defined by the Arkansas Code, one "knowingly" causes a result of an offense if he acts with an awareness that "it is practically certain that his conduct will cause such a result."<sup>61</sup> The court in *Midgett* suggested that the appellant may well have come to expect that the child would not die from further abuse.<sup>62</sup> This suggestion does not reconcile easily with a required finding that the appellant in *Midgett* meets the "knowing" standard and was aware to a "practical certainty" that death would result from his actions.

The second degree murder statute contains a provision similar to the amendment with a culpable mental state of "knowingly."<sup>63</sup> In

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57. *Id.* at 290, 729 S.W.2d at 416 (Hickman, J., dissenting) (quoting *Hankins v. State*, 206 Ark. 881, 884, 178 S.W.2d 56, 58 (1944)).

58. The "culpable mental states, taken in conjunction with the three possible constituents of an offense—conduct, attendant circumstances, and result—serve to define each Code offense. In other words, under the Code, every offense is defined so as to require that a person act either purposely, knowingly, recklessly or negligently with respect to conduct, attendant circumstances, and/or the result of such conduct." Commentary to ARK. STAT. ANN. § 41-203 (1977) (current version at ARK. CODE ANN. § 5-2-202 (1987)).

59. ARK. CODE ANN. § 5-10-102(a)(3) (Supp. 1987).

60. *Id.*

61. ARK. CODE ANN. § 5-2-202(2) (1987) (additionally, knowledge of attendant circumstances by the actor requires an awareness that such circumstances exist).

62. 292 Ark. at 285, 729 S.W.2d at 413.

63. ARK. CODE ANN. § 5-10-103(a) (1987) states that "[a] person commits murder in the second degree if . . . [h]e knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life . . . ."

*Johnson v. State*<sup>64</sup> the court strictly interpreted the "knowing" standard under the second degree provision. The accused, in firing a gun at his intended victim, killed a bystander across the street. Distinguishing a situation of shooting into a crowd of people, and noting that the victim was not part of a group of people present on the street at that time, the court found insufficient evidence that the accused "knowingly" caused the death of the bystander. By analogy, because four days passed from the last incidence of abuse to the day the child in *Midgett* died,<sup>65</sup> arguably the father's blows were not directed with such force to justify an inference that he "knowingly" caused the death, that is, that the boy was "practically certain" to die from the abuse.

However, it does not appear that the Arkansas Supreme Court applies the "knowing" standard consistently. In *Boone v. State*<sup>66</sup> the court affirmed a conviction of second degree murder in a case of child abuse resulting in death. A mother allowed the repeated exposure of her four-year-old son to beatings inflicted by her fiancé. The court stated that "[t]here is no doubt that appellant could not have been around the child without knowledge of such abuse."<sup>67</sup> The court did not address the knowledge requirement in terms of a "practical certainty" regarding the *result* of the conduct.

Assuming that a case of child abuse resulting in death will warrant an inference of "knowing" conduct, then the question becomes one of the limits to application of the amendment. For example, if a parent acts upon a sudden impulse on one occasion only, and in a heated rage kills the child, will the language of the amendment support a first degree conviction? Conceding that the parent's awareness of the consequences of the action is sufficient for the inference of intent, the inquiry turns to the attendant circumstances of the offense: the manifesting of a "cruel and malicious indifference"<sup>68</sup> as opposed to an "extreme indifference"<sup>69</sup> to the value of human life. The amendment's formulation perhaps distinguishes between circumstances of the battered child syndrome and a more acute, instantaneous instance of child abuse.

However, to concede that the amendment applies to the single impulsive act causing death may broaden its scope so as to encompass

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64. 270 Ark. 992, 606 S.W.2d 752 (1980).

65. 292 Ark. at 281-82, 729 S.W.2d at 411.

66. 282 Ark. 274, 668 S.W.2d 17 (1984).

67. *Id.* at 277, 668 S.W.2d at 20.

68. ARK. CODE ANN. § 5-10-102(a)(3) (Supp. 1987).

69. ARK. CODE ANN. § 5-10-103(a)(2) (1987).

fact situations much different than that of *Midgett*. Conduct previously found less culpable may warrant a first degree murder conviction simply because of the age of the victim.<sup>70</sup> If the bystander in *Johnson* happened to be a ten-year-old child, does the amendment apply despite the *Johnson* court's interpretation of "knowing" conduct and make the inference of intent sufficient for a first degree murder conviction?

The *Midgett* decision shows the intent of the court to retain the substantive distinctions made by the grading of offenses. In response, the amendment addresses the emotional issue of child abuse and mandates the culpability for a resulting death. Despite the legislative intent, a question remains of the current status of Arkansas law in effecting the policy of culpability in circumstances such as *Midgett*. The scope of the amendment will depend upon the court's drawing the difficult distinctions between culpable mental states.

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70. For example, consider a street fight in which a fourteen year old, cut by a knife, eventually dies as a result of the wound. A court compelled to find sufficient evidence for a first degree conviction in a single incident of abuse directed toward a child may broaden the scope of the amendment to apply to the above fact situation.

