

1 State of Arkansas *As Engrossed: S1/31/17 S2/2/17 H2/17/17 H2/22/17*

2 91st General Assembly

A Bill

3 Regular Session, 2017

SENATE BILL 42

4

5 By: Senator J. Hutchinson

6 *By: Representatives Capp, D. Whitaker*

7

8

For An Act To Be Entitled

9

AN ACT CONCERNING FITNESS TO PROCEED AND LACK OF

10

CRIMINAL RESPONSIBILITY; CONCERNING A MENTAL

11

EVALUATION OF A CRIMINAL DEFENDANT; AND FOR OTHER

12

PURPOSES.

13

14

15

Subtitle

16

CONCERNING FITNESS TO PROCEED AND LACK OF

17

CRIMINAL RESPONSIBILITY; AND CONCERNING A

18

MENTAL EVALUATION OF A CRIMINAL

19

DEFENDANT.

20

21

22 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

23

24 SECTION 1. Arkansas Code § 5-2-301(2), concerning the capacity of a
25 defendant, is repealed.

26

~~(2) "Capacity of the defendant to have the culpable mental~~

27

~~state" means a defendant's ability to have the culpable mental state~~

28

~~necessary to establish an element of the offense charged, as defined in § 5-~~

29

~~2-202;~~

30

31 SECTION 2. Arkansas Code § 5-2-301(6)(A), concerning the definition of
32 mental disease or defect, is amended to read as follows:

33

(6)(A) "Mental disease or defect" means a:

34

(i) Substantial disorder of thought, mood,

35

perception, orientation, or memory that grossly impairs judgment, behavior,

36

capacity to recognize reality, or ability to meet the ordinary demands of



1 life;

2 (ii) State of significantly subaverage general
3 intellectual functioning existing concurrently with a defect of adaptive
4 behavior that developed during the developmental period; or

5 (iii) Significant impairment in cognitive
6 functioning acquired as a direct consequence of a brain injury or resulting
7 from a progressively deteriorating neurological condition.

8

9 SECTION 3. Arkansas Code § 5-2-301, concerning definitions for the
10 issue of mental disease or defect in criminal cases, is amended to add
11 additional subdivisions to read as follows:

12 (13) "Expert" means a qualified psychiatrist or a qualified
13 psychologist; and

14 (14) "Lack of criminal responsibility" means that due to a
15 mental disease or defect a defendant lacked the capacity at the time of the
16 alleged offense to either:

17 (A) Appreciate the criminality of his or her conduct; or

18 (B) Conform his or her conduct to the requirements of the
19 law.

20

21 SECTION 4. Arkansas Code § 5-2-304 is amended to read as follows:

22 5-2-304. Notice requirement.

23 (a) When a defendant intends to raise ~~mental disease or defect~~ lack of
24 criminal responsibility as a defense in a prosecution or put in issue his or
25 her fitness to proceed, the defendant shall notify the prosecutor and the
26 court at the earliest practicable time.

27 (b)(1) Failure to notify the prosecutor within a reasonable time
28 before the trial date entitles the prosecutor to a continuance that for
29 limitation purposes is deemed an excluded period granted on application of
30 the defendant.

31 (2) Alternatively, in lieu of suspending any further proceedings
32 under ~~§ 5-2-305~~ § 5-2-328, the court may order the immediate examination of
33 the defendant at a designated receiving facility or program by a~~qualified~~
34 ~~psychiatrist or a qualified psychologist~~ an expert.

35

36 SECTION 5. Arkansas Code § 5-2-305 is repealed.

1 ~~5-2-305. Mental health examination of defendant.~~

2 ~~(a)(1) Subject to the provisions of §§ 5-2-304 and 5-2-311, the court~~
3 ~~shall immediately suspend any further proceedings in a prosecution if:~~

4 ~~(A)(i) A defendant charged in circuit court files notice~~
5 ~~that he or she intends to rely upon the defense of mental disease or defect.~~

6 ~~(ii) After the notice of intent to raise the defense~~
7 ~~of not guilty for reason of mental disease or defect is filed, any party may~~
8 ~~petition the court for a criminal responsibility examination and opinion.~~

9 ~~(iii)(a) It is not necessary for the petitioner to~~
10 ~~request a fitness to proceed examination if fitness to proceed does not~~
11 ~~appear to be an issue.~~

12 ~~(b) An examiner shall not render an opinion or~~
13 ~~issue a report on criminal responsibility if the examiner believes that the~~
14 ~~defendant is not fit to proceed.~~

15 ~~(c) In a case under subdivision~~
16 ~~(a)(1)(A)(iii)(b) of this section, the criminal responsibility examination~~
17 ~~shall be suspended and the court notified immediately that there is a~~
18 ~~question as to the defendant's fitness to proceed; or~~

19 ~~(B)(i) Any party or the court raises the issue of the~~
20 ~~defendant's fitness to proceed.~~

21 ~~(ii) The court shall order a fitness to proceed~~
22 ~~examination if it finds there is a reasonable suspicion that a defendant is~~
23 ~~not fit to proceed.~~

24 ~~(2)(A) The fitness to proceed examination, and the criminal~~
25 ~~responsibility examination and request for an opinion on the defendant's~~
26 ~~criminal responsibility, are two distinctly different examinations.~~

27 ~~(B) The fitness to proceed examination and the criminal~~
28 ~~responsibility examination may be done at the same time only if the defendant~~
29 ~~simultaneously raises the issue of the defendant's fitness to proceed and~~
30 ~~files notice that he or she intends to rely upon the defense of mental~~
31 ~~disease or defect.~~

32 ~~(C) In all other cases the process is bifurcated.~~

33 ~~(3)(A) A defendant shall not be found not guilty by reason of~~
34 ~~mental disease or defect in the absence of proof of a mental disease or~~
35 ~~defect.~~

36 ~~(B) A court shall not order the Division of Behavioral~~

1 ~~Health Services of the Department of Human Services to conduct a criminal~~
2 ~~responsibility examination if a fitness to proceed examination has previously~~
3 ~~determined that the defendant does not have a mental disease or defect unless~~
4 ~~the requesting party can show reasonable cause to believe;~~

5 ~~(i) There is evidence of a mental disease or defect~~
6 ~~that was not fully considered in the previous fitness to proceed examination;~~
7 ~~or~~

8 ~~(ii) That the prior opinion that the defendant does~~
9 ~~not have a mental disease or defect was based on information or facts later~~
10 ~~shown to be false or unreliable.~~

11 ~~(4)(A) If a trial jury has been impaneled and the court suspends~~
12 ~~proceedings under subdivision (a)(1) of this section, the court may retain~~
13 ~~the jury or declare a mistrial and discharge the jury.~~

14 ~~(B) A discharge of the trial jury is not a bar to further~~
15 ~~prosecution.~~

16 ~~(b)(1) Upon suspension of further proceedings in the prosecution, the~~
17 ~~court shall enter an order:~~

18 ~~(A) Directing that the defendant undergo examination and~~
19 ~~observation by one (1) or more qualified psychiatrists or qualified~~
20 ~~psychologists;~~

21 ~~(B) Appointing one (1) or more qualified psychiatrists not~~
22 ~~practicing within the Arkansas State Hospital to make an examination and~~
23 ~~report on the mental condition of the defendant; or~~

24 ~~(C) Directing the Director of the Division of Behavioral~~
25 ~~Health Services of the Department of Human Services to determine who will~~
26 ~~examine and report upon the mental condition of the defendant.~~

27 ~~(2) The Director of the Division of Behavioral Health Services~~
28 ~~of the Department of Human Services or his or her designee shall determine~~
29 ~~the location of the examination.~~

30 ~~(3) The examination shall be for a period not exceeding sixty~~
31 ~~(60) days or such longer period as the Director of the Division of Behavioral~~
32 ~~Health Services of the Department of Human Services or his or her designee~~
33 ~~determines to be necessary for the purpose of the examination.~~

34 ~~(4)(A)(i) Two (2) distinctly different uniform examination~~
35 ~~orders shall be developed by the Administrative Office of the Courts, the~~
36 ~~office of the Prosecutor Coordinator, the Department of Human Services, and~~

1 ~~the Arkansas Public Defender Commission. One (1) uniform examination order~~
2 ~~shall be for a fitness to proceed examination and opinion and the other~~
3 ~~uniform examination order shall be for a criminal responsibility examination~~
4 ~~and opinion.~~

5 ~~(ii) At a minimum the uniform examination orders~~
6 ~~shall contain the:~~

- 7 ~~(a) Defendant's name, age, gender, and race;~~
- 8 ~~(b) Charges pending against the defendant;~~
- 9 ~~(c) Defendant's attorney's name and address;~~
- 10 ~~(d) Defendant's custody status;~~
- 11 ~~(e) Case number;~~
- 12 ~~(f) Unique identifying number on the incident~~
13 ~~reporting form as required by the Arkansas Crime Information Center; and~~
- 14 ~~(g) Name of the requesting attorney.~~

15 ~~(iii) The uniform examination order shall be~~
16 ~~utilized any time that a defendant is ordered to be examined by the court~~
17 ~~pursuant to this section, and a copy of the uniform examination order shall~~
18 ~~be forwarded to the Director of the Department of Human Services or his or~~
19 ~~her designee.~~

20 ~~(iv) An examination under this subchapter shall not~~
21 ~~be conducted without using a uniform examination order.~~

22 ~~(v) Fitness to proceed and criminal responsibility~~
23 ~~examination orders may be ordered at the same time in accordance with~~
24 ~~subdivision (a)(1) of this section, but they may not be combined into one (1)~~
25 ~~uniform examination order and shall be tracked separately by the division.~~

26 ~~(B)(i) The division shall maintain a database of all~~
27 ~~examinations of defendants performed pursuant to this subchapter.~~

28 ~~(ii) The database shall be maintained in a manner to~~
29 ~~enable it to generate reports and data compilations either with or without~~
30 ~~personal identifying information.~~

31 ~~(iii) At a minimum the database shall contain:~~

32 ~~(a) The information on the uniform examination~~
33 ~~order as provided in subdivision (b)(4)(A)(ii) of this section;~~

34 ~~(b) The name of the judge who ordered the~~
35 ~~examination, if known;~~

36 ~~(c) The name of the attorney who requested the~~

1 ~~examination, if known;~~

2 ~~(d) The name of the examiner who conducted the~~
3 ~~examination;~~

4 ~~(e) The result of the examination;~~

5 ~~(f) If the defendant is found not fit to~~
6 ~~proceed, whether the defendant was restored to fitness to proceed; and~~

7 ~~(g) If the defendant is found not guilty by~~
8 ~~reason of mental disease or defect, the defendant's progress through his or~~
9 ~~her commitment and conditional release.~~

10 ~~(iv) The database should be designed in a manner~~
11 ~~that allows reports to be generated for the General Assembly, researchers,~~
12 ~~and the public to track the efficiency and effectiveness of the examination~~
13 ~~process and the restoration and treatment programs of the division without~~
14 ~~invading the privacy of individual defendants and patients.~~

15 ~~(c)(1) Upon completion of an examination pursuant to subsection (b) of~~
16 ~~this section, the court may enter an order providing for further examination~~
17 ~~and may order the defendant committed to the Arkansas State Hospital or other~~
18 ~~appropriate facility for further examination and observation if the court~~
19 ~~determines that commitment and further examination and observation are~~
20 ~~warranted.~~

21 ~~(2) When the defendant has previously been found fit to proceed,~~
22 ~~the court may order a second or subsequent examination to determine a~~
23 ~~defendant's fitness to proceed only if the court:~~

24 ~~(A) Finds reasonable cause to believe that new or~~
25 ~~previously undiscovered evidence calls into question the factual, legal, or~~
26 ~~scientific basis of the opinion upon which the previous finding of fitness~~
27 ~~relied;~~

28 ~~(B) Finds reasonable cause to believe that the defendant's~~
29 ~~mental condition has changed; or~~

30 ~~(C) Sets forth in the order a factual or legal basis upon~~
31 ~~which to order another examination.~~

32 ~~(d)(1) An examiner's report under this subchapter shall include:~~

33 ~~(A) A description of the nature of the examination;~~

34 ~~(B) A description of any evidence that the defendant is~~
35 ~~feigning a sign or symptom of mental disease or defect;~~

36 ~~(C) A specific description of the signs or symptoms of~~

1 ~~mental disease or defect if in the opinion of the examiner the defendant has~~
2 ~~a mental disease or defect; and~~

3 ~~(D)—A substantiated diagnosis in the terminology of the~~
4 ~~American Psychiatric Association's current edition of the Diagnostic and~~
5 ~~Statistical Manual of Mental Disorders.~~

6 ~~(2)—In addition to the information in subdivision (d)(1) of this~~
7 ~~section, a report of a fitness to proceed examination shall specifically~~
8 ~~include an opinion on whether the defendant lacks the capacity to understand~~
9 ~~the proceedings against him or her and to assist effectively in his or her~~
10 ~~own defense as a consequence of mental disease or defect and an explanation~~
11 ~~of the examiner's opinion and the basis of the opinion.~~

12 ~~(3)—In addition to the information in subdivision (d)(1) of this~~
13 ~~section, a report of a criminal responsibility examination shall include the~~
14 ~~following:~~

15 ~~(A)—An opinion as to whether as the result of a mental~~
16 ~~disease or defect the defendant at the time of the alleged criminal conduct~~
17 ~~lacked the capacity to appreciate the criminality of his or her conduct or to~~
18 ~~conform his or her conduct to the requirements of law and an explanation of~~
19 ~~the examiner's opinion and the basis of the opinion; and~~

20 ~~(B)—When directed by the court, an opinion as to the~~
21 ~~capacity of the defendant to have the culpable mental state that is required~~
22 ~~to establish an element of the offense charged with an explanation of the~~
23 ~~examiner's opinion and the basis of the opinion.~~

24 ~~(e)—If an examination cannot be conducted because of the unwillingness~~
25 ~~of the defendant to participate in the examination, the report of the~~
26 ~~examination shall so state and shall include, if possible, an opinion as to~~
27 ~~whether the unwillingness of the defendant is the result of mental disease or~~
28 ~~defect.~~

29 ~~(f)(1)—A person designated to perform an examination shall file the~~
30 ~~report of the examination with the clerk of the court, and the clerk of the~~
31 ~~court shall mail a copy to the defense attorney and a copy to the prosecuting~~
32 ~~attorney.~~

33 ~~(2)—Upon entry of an order by a circuit court, a copy of the~~
34 ~~report of the examination concerning a defendant shall be provided to the~~
35 ~~circuit court by the person designated to perform the examination.~~

36 ~~(g)(1)—Notwithstanding the provision of any statute enacted prior to~~

1 ~~January 1, 1976, any existing medical or pertinent record in the custody of a~~
2 ~~public agency shall be made available to the examiner and to the prosecuting~~
3 ~~attorney and the defendant's attorney for inspection and copying.~~

4 ~~(2) The court shall require the prosecuting attorney to provide~~
5 ~~to the examiner any information relevant to the examination, including, but~~
6 ~~not limited to:~~

7 ~~(A) The name and address of any attorney involved in the~~
8 ~~matter;~~

9 ~~(B) Information about the alleged offense; and~~

10 ~~(C) Any information about the defendant's background that~~
11 ~~is deemed relevant to the examination, including the criminal history of the~~
12 ~~defendant.~~

13 ~~(3) The court may require the attorney for the defendant to~~
14 ~~provide any available information relevant to the examination, including, but~~
15 ~~not limited to, a:~~

16 ~~(A) Psychiatric record;~~

17 ~~(B) Medical record; or~~

18 ~~(C) Record pertaining to treatment of the defendant for~~
19 ~~substance or alcohol abuse.~~

20 ~~(h)(1) When an examination of a defendant has been completed, the~~
21 ~~county from which the defendant had been sent for the examination shall~~
22 ~~procure the defendant within three (3) working days from the Arkansas State~~
23 ~~Hospital or from a designated receiving facility or program or other facility~~
24 ~~where the examination was performed.~~

25 ~~(2) If the county fails to procure the defendant within this~~
26 ~~three-day period, the county shall bear any room or board costs on the fourth~~
27 ~~and subsequent days.~~

28 ~~(i) A person under commitment and supervision of the Department of~~
29 ~~Correction who is a defendant charged in circuit court shall not undergo an~~
30 ~~examination or observation conducted by a psychiatrist or other mental health~~
31 ~~employee of the Department of Correction to determine the mental condition of~~
32 ~~the defendant.~~

33 ~~(j)(1) A person or entity that provides treatment under this~~
34 ~~subchapter may impose a charge for the cost of the treatment.~~

35 ~~(2) A charge for costs under subdivision (j)(1) of this section~~
36 ~~may not exceed the actual cost of the treatment.~~

1 ~~(3)(A) The division shall promulgate rules establishing~~
2 ~~reasonable charges for costs of treatment under this subchapter.~~

3 ~~(B) Rules establishing reasonable charges for costs of~~
4 ~~treatment under this subchapter shall:~~

5 ~~(i) Provide for postponing the collection of the~~
6 ~~charges based on clinical considerations or the patient's inability to pay,~~
7 ~~or both; and~~

8 ~~(ii) Waive charges for treatment of defendants who~~
9 ~~plead guilty or nolo contendere or are found guilty at trial.~~

10 ~~(k) An examination report required to be filed with the clerk of the~~
11 ~~court under this subchapter is a public record.~~

12 ~~(l) This subchapter does not preclude the defendant from having a~~
13 ~~fitness to proceed examination or a criminal responsibility examination~~
14 ~~conducted by a defense expert or from maintaining the defense of not guilty~~
15 ~~by reason of mental disease or defect using testimony from a defense expert~~
16 ~~or other evidence.~~

17
18 SECTION 6. Arkansas Code § 5-2-307 is amended to read as follows:

19 5-2-307. Admissibility of statements made during examination or
20 treatment.

21 ~~Any~~ A statement made by a person during an examination or treatment is
22 admissible as evidence only:

23 (1) To the extent permitted by the ~~Uniform~~ Arkansas Rules of
24 Evidence, ~~§ 16-41-101 [repealed]; and~~

25 (2) If the statement is constitutionally admissible.

26
27 SECTION 7. Arkansas Code § 5-2-308 is amended to read as follows:

28 5-2-308. Expert witnesses ~~-~~ Mental health examiner.

29 ~~(a)~~ (1) At ~~any~~ a hearing concerning a defendant's lack of criminal
30 responsibility or fitness to proceed, or upon trial, an examiner who reported
31 pursuant to § 5-2-305 conducted an examination under § 5-2-327 or § 5-2-328
32 may be called as a witness by the prosecution, the defendant, or the court.

33 ~~(b)~~ (2) If the examiner is called by the court, ~~the examiner~~
34 ~~called as a witness~~ he or she is subject to cross-examination by the
35 prosecution and by the defendant.

36 ~~(e)~~ (b) Both the prosecution and the defendant may summon any other

1 qualified physician or other expert to testify.

2
3 SECTION 8. Arkansas Code § 5-2-309 is amended to read as follows:

4 5-2-309. Determination of fitness to proceed.

5 (a) If the defendant's fitness to proceed becomes an issue at any
6 stage of the case, the issue of the defendant's fitness to proceed shall be
7 determined by the court.

8 (b) If neither party contests the finding of the report filed pursuant
9 to ~~§ 5-2-305~~ § 5-2-327, the court may make the determination under subsection
10 (a) of this section on the basis of the report.

11 (c) If the finding of the report is contested, the court shall hold a
12 hearing on the issue of the defendant's fitness to proceed.

13
14 SECTION 9. Arkansas Code § 5-2-310(a)(2), concerning the filing of a
15 report concerning lack of fitness to proceed, is amended to read as follows:

16 (2) A copy of the report filed ~~pursuant to § 5-2-305~~ under § 5-
17 2-327 shall be attached to the order of commitment or order of conditional
18 release.

19
20 SECTION 10. Arkansas Code § 5-2-312 is amended to read as follows:

21 5-2-312. Lack of ~~capacity~~ criminal responsibility – Affirmative
22 defense.

23 (a)(1) It is an affirmative defense to a prosecution that at the time
24 the defendant engaged in the conduct charged he or she lacked ~~capacity as a~~
25 ~~result of mental disease or defect to~~ criminal responsibility.

26 ~~(A) Conform his or her conduct to the requirements of law;~~

27 ~~or~~

28 ~~(B) Appreciate the criminality of his or her conduct.~~

29 (2) When the affirmative defense of ~~mental disease or defect~~
30 lack of criminal responsibility is presented to a jury, prior to
31 deliberations the jury shall be instructed regarding the disposition of a
32 defendant acquitted ~~on a ground of mental disease or defect pursuant to~~ due
33 to the defendant's lack of criminal responsibility as described under § 5-2-
34 314.

35 ~~(b) As used in the Arkansas Criminal Code, "mental disease or defect"~~
36 ~~does not include an abnormality manifested only by repeated criminal or~~

1 ~~otherwise antisocial conduct.~~

2 ~~(e)(b)~~ When a defendant is acquitted on a ground of ~~mental disease or~~
3 ~~defect~~ lack of criminal responsibility, the verdict and judgment shall state
4 that the defendant was acquitted on a ground of ~~mental disease or defect~~ lack
5 of criminal responsibility.

6
7 SECTION 11. Arkansas Code § 5-2-313 is amended to read as follows:

8 5-2-313. Acquittal based on ~~mental health~~ lack of criminal
9 responsibility report.

10 (a) On the basis of the report filed ~~pursuant to § 5-2-305~~ under § 5-
11 2-328 and after a hearing, if a hearing is requested, the court may enter
12 judgment of acquittal on the ground of ~~mental disease or defect~~ lack of
13 criminal responsibility if the court is satisfied that the following criteria
14 are met:

15 (1) The defendant currently has the capacity to understand the
16 proceedings against him or her and to assist effectively in his or her own
17 defense; and

18 (2) At the time of the conduct charged, the defendant lacked
19 ~~capacity as a result of mental disease or defect to conform his or her~~
20 ~~conduct to the requirements of law or to appreciate the criminality of his or~~
21 ~~her conduct~~ criminal responsibility.

22 (b) If the defendant did not raise the issue of ~~mental disease or~~
23 ~~defect~~ lack of criminal responsibility as an affirmative defense ~~pursuant to~~
24 ~~§ 5-2-305~~ under § 5-2-328, then the court is required to make a factual
25 determination that the defendant committed the offense and that he or she ~~was~~
26 ~~suffering from a mental disease or defect~~ lacked criminal responsibility at
27 the time of the commission of the offense.

28
29 SECTION 12. The lead in language of Arkansas Code § 5-2-314(a),
30 concerning acquittal orders due to lack of criminal responsibility, is
31 amended to read as follows:

32 (a) When a defendant is acquitted ~~on the ground of mental disease or~~
33 ~~defect~~ due to the defendant's lack of criminal responsibility, a circuit
34 court is required to determine and to include the determination in the order
35 of acquittal one (1) of the following:

36

1 SECTION 13. Arkansas Code § 5-2-314(e)(1), concerning the burden of
2 proof for release after acquittal due to lack of criminal responsibility, is
3 amended to read as follows:

4 (e)(1) A person found not guilty ~~on the ground of mental disease or~~
5 ~~defect~~ of an offense involving bodily injury to another person or serious
6 damage to the property of another person or involving a substantial risk of
7 bodily injury to another person or serious damage to the property of another
8 person due to the person's lack of criminal responsibility has the burden of
9 proving by clear and convincing evidence that his or her release would not
10 create a substantial risk of bodily injury to another person or serious
11 damage to property of another person due to a present mental disease or
12 defect.

13
14 SECTION 14. Arkansas Code Title 5, Chapter 2, Subchapter 3, is amended
15 to add an additional section to read as follows:

16 5-2-327. Examination of defendant – Fitness to proceed.

17 (a)(1) Any party or the court may raise the issue of the defendant's
18 fitness to proceed.

19 (2) The court shall order a examination under this section if it
20 finds there is a reasonable suspicion that a defendant is not fit to proceed.

21 (3)(A) Subject to §§ 5-2-304 and 5-2-311, the court shall
22 immediately suspend further proceedings in a prosecution if it has ordered a
23 examination under this section.

24 (B)(i) If a jury has been impaneled and the court suspends
25 proceedings under subdivision (a)(3)(A) of this section, the court may retain
26 the jury or declare a mistrial and discharge the jury.

27 (ii) A discharge of the jury is not a bar to further
28 prosecution.

29 (4) If a court suspends further proceedings in the prosecution
30 under subdivision (a)(3)(A) of this section, the court shall enter an order:

31 (A) Appointing one (1) or more experts who do not practice
32 in the Arkansas State Hospital to examine the defendant and report on the
33 defendant's mental condition; or

34 (B)(i) Directing the Director of the Division of
35 Behavioral Health Services of the Department of Human Services to provide a
36 expert who will examine and report upon the defendant's mental condition.

1 (ii) The director or his or her designee shall
2 determine the location of the examination required under subdivision
3 (a)(4)(B) of this section.

4 (c) An examination ordered under this section shall be for a period
5 not exceeding sixty (60) days unless the director or his or her designee
6 determines a longer period of examination is necessary for the purpose of the
7 examination.

8 (d)(1) A uniform order to be used by a court ordering an examination
9 of a defendant's fitness to proceed under this section shall be developed by
10 the Administrative Office of the Courts in conjunction with the following
11 organizations:

12 (A) The Arkansas Prosecuting Attorneys Association;

13 (B) The Department of Human Services; and

14 (C) The Arkansas Public Defender Commission.

15 (2) The uniform order developed under this subsection shall
16 contain the following information:

17 (A) The defendant's name, age, gender, and race;

18 (B) The criminal charges pending against the defendant;

19 (C) The defendant's attorney's name and address;

20 (D) The defendant's custody status;

21 (E) The case number for which the examination was ordered;

22 (F) A unique identifying number on the incident reporting
23 form as required by the Arkansas Crime Information Center; and

24 (G) The name of the requesting attorney, if applicable.

25 (3) An examination under this section shall not be conducted
26 without using the uniform order required under this subsection.

27 (4) The uniform order shall require the prosecuting attorney to
28 provide to the examiner any information relevant to the examination,
29 including without limitation:

30 (A) The name and address of any attorney involved in the
31 matter; and

32 (B) Information about the alleged offense.

33 (5) The court may require the attorney for the defendant to
34 provide any available information relevant to the examination, including
35 without limitation:

36 (A) Psychiatric records;

1 (B) Medical records; or

2 (C) Records pertaining to treatment of the defendant for
3 substance or alcohol abuse.

4 (e)(1) An examination report ordered under this section shall be filed
5 with the clerk of the court ordering the examination and is a public record.

6 (2) The court clerk shall provide copies of the examination
7 report to the defendant's attorney and the prosecuting attorney.

8 (f)(1) An examination report prepared by an examiner ordered under
9 this section shall:

10 (A) Contain an opinion as to whether or not the defendant
11 is fit to proceed and the basis for the opinion;

12 (B) Contain an opinion as to whether the defendant has a
13 mental disease or defect;

14 (C) Contain a substantiated diagnosis in the terminology
15 of the American Psychiatric Association's most current edition of the
16 Diagnostic and Statistical Manual of Mental Disorders;

17 (D) Document that the examiner explained to the defendant:

18 (i) The purpose of the examination;

19 (ii) The persons to whom the examination report is
20 provided; and

21 (iii) The limits on rules of confidentiality
22 applying to the relationship between the examiner and the defendant; and

23 (E) Describe, in specific terms:

24 (i) The procedures, techniques, and tests used in
25 the examination;

26 (ii) The purpose of each procedure, technique, or
27 test; and

28 (iii) The conclusions reached.

29 (2) An examiner's opinion on the defendant's fitness to proceed
30 or lack of fitness to proceed may not be based solely on the defendant's
31 refusal to communicate during the examination.

32 (3)(A) During an examination to determine a defendant's fitness
33 to proceed and in any examination report based on that examination, an
34 examiner shall consider:

35 (i) The capacity of the defendant during criminal
36 proceedings to:

1 (a) Rationally understand the charges against
2 him or her and the potential consequences of the pending criminal
3 proceedings;

4 (b) Disclose to the defendant's attorney
5 pertinent facts, events, and states of mind;

6 (c) Engage in a reasoned choice of legal
7 strategies and options;

8 (d) Understand the adversarial nature of
9 criminal proceedings;

10 (e) Exhibit appropriate courtroom behavior;
11 and

12 (f) Testify;

13 (ii) As supported by current indications and the
14 defendant's personal history, whether the defendant is a person with:

15 (a) A mental disease or defect; or

16 (b) An intellectual disability; and

17 (iii) The degree of impairment resulting from the
18 mental disease or defect or intellectual disability, if existent, and the
19 specific impact on the defendant's capacity to engage with the defendant's
20 attorney in an effective manner.

21 (B) The information or lack of information contained in
22 the examiner's report is not intended to limit the introduction of evidence
23 regarding the defendant's fitness to proceed.

24 (g) This subchapter does not preclude the defendant from having an
25 examination conducted by an expert of the defendant's own choosing to
26 determine the defendant's fitness to proceed and the court shall provide the
27 defendant's expert with a reasonable opportunity to examine the defendant
28 upon a timely request.

29 (h) When the defendant has previously been found fit to proceed, the
30 court may order a second or subsequent examination to determine a defendant's
31 fitness to proceed only if the court:

32 (1) Finds reasonable cause to believe that new or previously
33 undiscovered evidence calls into question the factual, legal, or scientific
34 basis of the opinion upon which the previous finding of fitness relied;

35 (2) Finds reasonable cause to believe that the defendant's
36 mental condition has changed; or

1 (3) Sets forth in the order a factual or legal basis upon which
2 to order another examination.

3 (i) Upon completion of examination under this section, the court may
4 enter an order providing for further examination of the defendant and may
5 order the defendant into the custody of the director for further examination
6 and observation if the court determines that commitment and further
7 examination are warranted.

8
9 SECTION 15. Arkansas Code Title 5, Chapter 2, Subchapter 3, is amended
10 to add an additional section to read as follows:

11 5-2-328. Examination of defendant – Affirmative defense of lack of
12 criminal responsibility.

13 (a)(1) Subject to § 5-2-311, if and only if a defendant charged in
14 circuit court files a notice of intent to raise the affirmative defense of
15 lack of criminal responsibility under § 5-2-304, the circuit court shall
16 immediately suspend any further proceedings.

17 (2) When the defendant files notice under subdivision (a)(1) of
18 this section, then the circuit court may on its own motion or on the motion
19 of the prosecuting attorney or the defense attorney enter an order appointing
20 one (1) or more disinterested experts to examine the defendant with regard to
21 the defense of lack of criminal responsibility.

22 (3)(A) An examination under this section shall be for a period
23 not exceeding sixty (60) days or a longer period as the Director of the
24 Division of Behavioral Health Services of the Department of Human Services or
25 his or her designee determines to be necessary for the purpose of the
26 examination.

27 (B)(i) A person designated by the circuit court to perform
28 an examination under this section shall file the examination report with the
29 clerk of the circuit court ordering the examination.

30 (ii) An examination report filed under this
31 subdivision (a)(3)(B) is a public record.

32 (iii) A copy of the examination report shall be
33 provided by the clerk to the defendant's attorney and the prosecuting
34 attorney.

35 (b)(1) A uniform order to be used by a circuit court ordering an
36 examination of a defendant's lack of criminal responsibility under this

1 section shall be developed by the Administrative Office of the Courts in
2 conjunction with the following organizations:

3 (A) The Arkansas Prosecuting Attorneys Association;

4 (B) The Department of Human Services; and

5 (C) The Arkansas Public Defender Commission.

6 (2) The uniform order developed under this subsection shall
7 contain, without limitation, the following information:

8 (A) The defendant's name, age, gender, and race;

9 (B) The criminal charges pending against the defendant;

10 (C) The defendant's attorney's name and address;

11 (D) The defendant's custody status;

12 (E) The case number for which the examination was ordered;

13 (F) A unique identifying number on the incident reporting
14 form as required by the Arkansas Crime Information Center; and

15 (G) The name of the requesting attorney, if applicable.

16 (3) The uniform order shall require the prosecuting attorney to
17 provide to the examiner any information relevant to the examination,
18 including without limitation:

19 (A) The name and address of any attorney involved in the
20 matter;

21 (B) Information about the alleged offense; and

22 (C) Any information about the defendant's background that
23 is determined to be relevant to the examination, including the criminal
24 history of the defendant.

25 (4) The circuit court may require the attorney for the defendant
26 to provide any available information relevant to the examination, including
27 without limitation:

28 (A) Psychiatric records;

29 (B) Medical records; or

30 (C) Records pertaining to treatment of the defendant for
31 substance or alcohol abuse.

32 (5) After it is developed, a copy of the uniform order under
33 this subsection shall be forwarded to the director.

34 (6) An examination under this section shall not be conducted
35 without using the uniform order required under this subsection.

36 (c)(1) An examination report prepared by an examiner ordered under

1 this section shall contain:

2 (A) A description of the nature of the examination;

3 (B) An opinion as to whether as the result of a mental
4 disease or defect the defendant at the time of the alleged offense lacked the
5 capacity to appreciate the criminality of his or her conduct or to conform
6 his or her conduct to the requirements of the law, an explanation of the
7 examiner's opinion, and the basis of that opinion;

8 (C) When directed by the circuit court, an opinion as to
9 whether at the time of the alleged offense the defendant lacked the capacity
10 to form a culpable mental state that is required to establish an element of
11 the alleged offense, an explanation of the examiner's opinion, and the basis
12 of that opinion; and

13 (D) If an examination cannot be conducted because of the
14 unwillingness of the defendant to participate in the examination, an opinion
15 as to whether the unwillingness of the defendant is the result of mental
16 disease or defect.

17 (d)(1) An examiner appointed under this section to examine a defendant
18 with regard to a defense of lack of criminal responsibility also may be
19 appointed by the circuit court to examine the defendant with regard to the
20 defendant's fitness to proceed under § 5-2-327.

21 (2) However, the examiner must file with the circuit court
22 separate written reports concerning the defendant's fitness to proceed and
23 lack of criminal responsibility.

24 (e) Unless otherwise required by this section, an examiner shall not
25 render an opinion or issue a report on the defendant's lack of criminal
26 responsibility if the examiner believes that the defendant is not fit to
27 proceed until the circuit court issuing the order for an examination into the
28 defendant's lack of criminal responsibility makes a determination as to the
29 defendant's fitness to proceed.

30 (f) A circuit court shall not order the Division of Behavioral Health
31 Services of the Department of Human Services to conduct an examination of a
32 defendant's lack of criminal responsibility if a previous examination into
33 the defendant's fitness to proceed has already determined that the defendant
34 does not have a mental disease or defect unless the requesting party can show
35 reasonable cause to believe:

36 (1) There is evidence of a mental disease or defect that was not

1 fully considered in the previous examination into the defendant's fitness to
2 proceed; or

3 (2) That the previous opinion that the defendant does not have a
4 mental disease or defect was based on information or facts later shown to be
5 false or unreliable.

6 (g)(1) This section does not prevent a defendant from having an
7 examination into his or her lack of criminal responsibility conducted by his
8 or her expert or from maintaining a defense of not guilty by reason of a lack
9 of criminal responsibility using testimony from a defense expert or other
10 evidence.

11 (2) If a defendant wishes to be examined by an expert of his or
12 her own choosing, the circuit court shall provide the expert with reasonable
13 opportunity to examine the defendant upon a timely request.

14
15 SECTION 16. Arkansas Code Title 5, Chapter 2, Subchapter 3, is amended
16 to add an additional section to read as follows:

17 5-2-329. Data to be maintained by the Division of Behavioral Health
18 Services of the Department of Human Services.

19 (a)(1) The Division of Behavioral Health Services of the Department of
20 Human Services shall maintain a database of all examinations of defendants
21 performed under this subchapter.

22 (2) The database shall be maintained in a manner that enables it
23 to generate reports and compile data with or without personal identifying
24 information.

25 (3) The database shall contain without limitation:

26 (A) The defendant's information on the uniform order
27 required under § 5-2-327 or § 5-2-328;

28 (B) The name of the judge who ordered the examination, if
29 known;

30 (C) The name of the attorney who requested the
31 examination, if known;

32 (D) The name of the examiner who conducted the
33 examination;

34 (E) The result of the examination;

35 (F) If the defendant was examined regarding his or her
36 fitness to proceed, whether the defendant had his or her fitness to proceed

1 restored; and

2 (G) If the defendant was found not guilty or acquitted
3 because of the affirmative defense of lack of criminal responsibility, the
4 defendant's progress through his or her commitment and conditional release.

5 (b) The database should be designed in a manner that allows reports to
6 be generated for the General Assembly, researchers, and the public to track
7 the efficiency and effectiveness of the examination process and the
8 restoration and treatment programs of the division without invading the
9 privacy of individual defendants and patients.

10
11 *SECTION 17. Arkansas Code Title 5, Chapter 2, Subchapter 3, is amended*
12 *to add an additional section to read as follows:*

13 5-2-330. Examination by Department of Correction prohibited.

14 A defendant committed to and under the supervision of the Department of
15 Correction who is charged in circuit court shall not undergo an examination
16 or observation conducted under this subchapter by a psychiatrist or other
17 mental health employee of the department to determine the mental condition of
18 the defendant.

19
20 *SECTION 18. Arkansas Code § 5-13-301(c)(2), concerning the offense of*
21 *terroristic threatening, is amended to read as follows:*

22 (2) If the judicial officer has reason to believe that mental
23 disease or defect of the defendant will or has become an issue in the cause,
24 the judicial officer shall enter ~~such orders as are~~ consistent with ~~§ 5-2-305~~
25 § 5-2-327 or § 5-2-328, or both.

26
27 *SECTION 19. Arkansas Code § 5-14-103(d)(2), concerning the offense of*
28 *rape, is amended to read as follows:*

29 (2) If a judicial officer has reason to believe that mental
30 disease or defect of the defendant will or has become an issue in the case,
31 the judicial officer shall enter ~~such orders as are~~ consistent with ~~§ 5-2-305~~
32 § 5-2-327 or § 5-2-328, or both.

33
34 *SECTION 20. Arkansas Code § 5-71-208(e), concerning the offense of*
35 *harassment, is amended to read as follows:*

36 (e) If the judicial officer has reason to believe that mental disease

1 or defect of the defendant will or has become an issue in the ~~cause~~ case, the
2 judicial officer shall enter ~~such~~ orders ~~as are~~ consistent with ~~§ 5-2-305~~ §
3 5-2-327 or § 5-2-328, or both.

4
5 SECTION 21. Arkansas Code § 5-71-209(e), concerning the offense of
6 harassing communications, is amended to read as follows:

7 (e) If the judicial officer has reason to believe that mental disease
8 or defect of the defendant will or has become an issue in the ~~cause~~ case, the
9 judicial officer shall enter ~~such~~ orders ~~as are~~ consistent with ~~§ 5-2-305~~ §
10 5-2-327 or § 5-2-328, or both.

11
12 SECTION 22. Arkansas Code § 5-71-229(a)(2)(D), concerning the offense
13 of stalking, is amended to read as follows:

14 (D) If the judicial officer has reason to believe that
15 mental disease or defect of the defendant will or has become an issue in the
16 ~~cause~~ case, the judicial officer shall enter ~~such~~ orders ~~as are~~ consistent
17 with ~~§ 5-2-305~~ § 5-2-327 or § 5-2-328, or both.

18
19 SECTION 23. Arkansas Code § 5-71-229(b)(2)(D), concerning the offense
20 of stalking, is amended to read as follows:

21 (D) If the judicial officer has reason to believe that
22 mental disease or defect of the defendant will or has become an issue in the
23 ~~cause~~ case, the judicial officer shall enter ~~such~~ orders ~~as are~~ consistent
24 with ~~§ 5-2-305~~ § 5-2-327 or § 5-2-328, or both.

25
26 SECTION 24. Arkansas Code § 5-71-229(c)(2)(D), concerning the offense
27 of stalking, is amended to read as follows:

28 (D) If the judicial officer has reason to believe that
29 mental disease or defect of the defendant will or has become an issue in the
30 ~~cause~~ case, the judicial officer shall enter ~~such~~ orders ~~as are~~ consistent
31 with ~~§ 5-2-305~~ § 5-2-327 or § 5-2-328, or both.

32
33 SECTION 25. Arkansas Code § 9-27-502(b)(2)(A), concerning the
34 competency of a juvenile charged with capital murder or murder in the first
35 degree, is amended to read as follows:

36 (2)(A) For ~~such juveniles~~ a juvenile under thirteen (13) years

1 of age and who ~~are~~ is charged with capital murder, § 5-10-101, or murder in
2 the first degree, § 5-10-102, the court shall order an evaluation to be
3 *performed in accordance with ~~§ 5-2-305(b) by a psychiatrist or a clinical~~*
4 *~~psychologist who is specifically qualified by training and experience in the~~*
5 *~~evaluation of juveniles § 5-2-327 or § 5-2-328, or both.~~*

6
7 /s/J. Hutchinson

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10 **APPROVED: 03/13/2017**
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