

INTERIM STUDY PROPOSAL 2019-039

1 State of Arkansas  
2 92nd General Assembly  
3 Regular Session, 2019

**A Bill**

SENATE BILL 191

4 By: Senator Rapert

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6  
7 Filed with: Senate Committee on Judiciary  
8 pursuant to A.C.A. §10-3-217.

9 **For An Act To Be Entitled**

10 AN ACT TO CREATE THE COURT OR JURY FINDING OF GUILTY  
11 BUT WITH A MENTAL ILLNESS; CONCERNING THE AFFIRMATIVE  
12 DEFENSE OF NOT GUILTY BY WAY OF MENTAL DISEASE OR  
13 DEFECT; CONCERNING CLAIMS OF INSANITY BY A CRIMINAL  
14 DEFENDANT; AND FOR OTHER PURPOSES.

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16  
17 **Subtitle**

18 TO CREATE THE COURT OR JURY FINDING OF  
19 GUILTY BUT WITH A MENTAL ILLNESS;  
20 CONCERNING THE AFFIRMATIVE DEFENSE OF NOT  
21 GUILTY BY WAY OF MENTAL DISEASE OR  
22 DEFECT; AND CONCERNING CLAIMS OF INSANITY  
23 BY A CRIMINAL DEFENDANT.

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25  
26 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

27  
28 SECTION 1. Arkansas Code § 5-2-301, concerning definitions used in the  
29 context of the defense of mental disease or defect, is amended to add  
30 additional subdivisions to read as follows:

31 (14) "No longer requires hospitalization" means that the person  
32 may be safely discharged from the Arkansas State Hospital; and

33 (15) "Safely discharged to the Department of Correction" means:  
34 (A) A person is of the physical and mental condition that  
35 being incarcerated in the Department of Correction would not subject him,

1 her, or another person to substantial risk of bodily injury resulting from  
2 the person's mental illness; and

3 (B) The Department of Correction has available medical or  
4 mental health staff to enable the person to continue his or her ongoing  
5 mental health treatment.

6  
7 SECTION 2. Arkansas Code § 5-2-312 is amended to read as follows:  
8 5-2-312. Lack of criminal responsibility – Affirmative defense =  
9 Guilty but with a mental illness.

10 (a)(1) It is an affirmative defense to a prosecution that at the time  
11 the defendant engaged in the conduct charged he or she lacked criminal  
12 responsibility.

13 (2) When the affirmative defense of lack of criminal  
14 responsibility is presented to a jury, ~~prior to~~ before deliberations the jury  
15 shall be instructed regarding the disposition of a defendant:

16 (A) ~~acquitted~~ Acquitted due to the defendant's lack of  
17 criminal responsibility as described under § 5-2-314; or

18 (B) Found guilty but with a mental illness.

19 (b)(1) If the defendant raises the affirmative defense of lack of  
20 criminal responsibility, the state may request and the court shall grant upon  
21 the request an alternative jury instruction and verdict form for the jury to  
22 consider that the person is guilty but with a mental illness.

23 (2) A defendant is guilty but with a mental illness if the jury  
24 finds that:

25 (A) The defendant suffered from a lack of criminal  
26 responsibility at the time the offense was committed;

27 (B) The defendant committed the offense; and

28 (C) The defendant is currently in need of psychiatric  
29 treatment for the mental disease or defect that he or she has.

30 (c) The defendant may simultaneously argue the affirmative defense of  
31 lack of criminal responsibility and for a finding of guilty but with a mental  
32 illness and a jury instruction may be given to explain that fact.

33 (d) The state may simultaneously argue against the affirmative defense  
34 of lack of criminal responsibility and for a finding of guilty but with a  
35 mental illness and a jury instruction may be given to explain that fact.

1           (e) ~~When~~ If a defendant is acquitted on a ground of lack of criminal  
2 responsibility, the verdict and judgment shall state that the defendant was  
3 acquitted on a ground of lack of criminal responsibility.

4           (f) If a defendant is found guilty but with a mental illness, the  
5 verdict and judgment shall state that the defendant was found guilty but with  
6 a mental illness.

7  
8           SECTION 3. Arkansas Code § 5-2-313 is repealed.

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

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

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

17                   ~~(2) At the time of the conduct charged, the defendant lacked~~  
18 ~~criminal responsibility.~~

19           ~~(b) If the defendant did not raise the issue of lack of criminal~~  
20 ~~responsibility as an affirmative defense under § 5-2-328, then the court is~~  
21 ~~required to make a factual determination that the defendant committed the~~  
22 ~~offense and that he or she lacked criminal responsibility at the time of the~~  
23 ~~commission of the offense.~~

24  
25           SECTION 4. Arkansas Code § 5-2-314 is amended to read as follows:

26           5-2-314. Acquittal – Examination of defendant – Hearing.

27           (a) ~~When~~ If a defendant is acquitted due to the defendant’s lack of  
28 criminal responsibility, a circuit court is required to determine, and to  
29 include the determination in the order of acquittal, one (1) of the  
30 following:

31                   (1) The offense involved bodily injury to another person or  
32 serious damage to the property of another person or involved a substantial  
33 risk of bodily injury to another person or serious damage to the property of  
34 another person, and that the defendant remains affected by mental disease or  
35 defect;

1           (2) The offense involved bodily injury to another person or  
2 serious damage to the property of another person or involved a substantial  
3 risk of bodily injury to another person or serious damage to the property of  
4 another person, and that the defendant is no longer affected by mental  
5 disease or defect;

6           (3) The offense did not involve bodily injury to another person  
7 or serious damage to the property of another person nor did it involve  
8 substantial risk of bodily injury to another person or serious damage to the  
9 property of another person, and that the defendant remains affected by mental  
10 disease or defect; or

11           (4) The offense did not involve bodily injury to another person  
12 or serious damage to the property of another person nor did it involve a  
13 substantial risk of bodily injury to another person or serious damage to the  
14 property of another person, and that the defendant is no longer affected by  
15 mental disease or defect.

16           (b)(1) If the circuit court enters a determination based on  
17 subdivision (a)(1) or subdivision (a)(3) of this section, the circuit court  
18 shall order the defendant committed to the custody of the Department of Human  
19 Services for an examination by a psychiatrist or a licensed psychologist.

20           (2) Upon filing of an order of commitment under subdivision  
21 (b)(1) of this section with a circuit clerk, the circuit clerk shall submit a  
22 copy of the order to the Arkansas Crime Information Center.

23           (c) If the circuit court enters a determination based on subdivision  
24 (a)(2) or subdivision (a)(4) of this section, the circuit court shall  
25 immediately discharge the defendant.

26           (d)(1)(A) The department shall file the psychiatric or psychological  
27 report with the probate clerk of the circuit court having venue within thirty  
28 (30) days following receipt of an order of acquittal.

29           (B) If before thirty (30) days the department makes  
30 application to the circuit court for an extension of time to file the  
31 psychiatric or psychological report and the circuit court finds there is good  
32 cause for the delay, the circuit court may order that additional time be  
33 allowed for the department to file the psychiatric or psychological report.

34           (C) A hearing shall be conducted by the circuit court and  
35 shall take place not later than ten (10) days following the filing of the  
36 psychiatric or psychological report with the circuit court.

1           (2) If the psychiatric or psychological report is not filed  
2 within thirty (30) days following the department's receipt of an order of  
3 acquittal or within such additional time as authorized by the circuit court,  
4 the circuit court may grant a petition for a writ of habeas corpus ordering  
5 the release of the defendant under terms and conditions that are reasonable  
6 and just for the defendant and societal concerns about the safety of persons  
7 and property of others.

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

16           (2) With respect to any other offense, the person has the burden  
17 of proof by a preponderance of the evidence.

18           (f)(1) A person acquitted whose mental condition is the subject of a  
19 hearing has a right to counsel.

20           (2)(A) If it appears to the circuit court that the person  
21 acquitted is in need of counsel, an attorney shall be appointed immediately  
22 upon filing of the original petition.

23           (B)(i) When an attorney is appointed by the circuit court,  
24 the circuit court shall determine the amount of the fee to be paid the  
25 attorney appointed by the circuit court and issue an order of payment.

26           (ii) The amount of the fee allowed shall be based  
27 upon the time and effort of the attorney in the investigation, preparation,  
28 and representation of the client at the court hearings.

29           (g)(1) The quorum court of each county shall appropriate funds for the  
30 purpose of payment of the attorney's fees provided for by subsection (f) of  
31 this section.

32           (2) Upon presentment of a claim accompanied by an order of the  
33 circuit court fixing the fee, the claim shall be approved by the county court  
34 and paid in the same manner as other claims against the county are paid.

1 (h) A hearing conducted pursuant to subsection (d) of this section may  
2 be held at the Arkansas State Hospital or a designated receiving facility or  
3 program where the person acquitted is detained.

4 (i) When conducting any hearing set out in this section, the circuit  
5 judge may conduct the hearing within any county of his or her judicial  
6 district.

7 (j)(1)(A) It is the duty of the prosecuting attorney's office in the  
8 county where the petition is filed to represent the State of Arkansas at any  
9 hearing held ~~pursuant to~~ under this section except a hearing pending at the  
10 Arkansas State Hospital ~~in Pulaski County~~.

11 (B) A prosecuting attorney may contract with another  
12 attorney to provide services under subdivision (j)(1)(A) of this section.

13 (2) The ~~office~~ Office of the Prosecutor Coordinator shall appear  
14 for and on behalf of the State of Arkansas at the Arkansas State Hospital ~~in~~  
15 ~~Little Rock~~.

16 (3) Representation under this subsection is a part of the  
17 official duties of a prosecuting attorney or the ~~office~~ Office of the  
18 Prosecutor Coordinator and the prosecuting attorney or the ~~office~~ Office of  
19 the Prosecutor Coordinator is immune from civil liability in the performance  
20 of this official duty.

21  
22 SECTION 5. Arkansas Code § 5-2-315 is amended to read as follows:

23 5-2-315. Discharge or conditional release for person who was  
24 acquitted.

25 (a)(1)(A) When the Director of the Department of Human Services or his  
26 or her designee determines that a person acquitted for lack of criminal  
27 responsibility has recovered from his or her mental disease or defect to such  
28 an extent that his or her release or his or her conditional release under a  
29 prescribed regimen of medical, psychiatric, or psychological care or  
30 treatment would no longer create a substantial risk of bodily injury to  
31 another person or serious damage to the property of another person, the  
32 director shall promptly file an application for discharge or conditional  
33 release of the person ~~acquitted~~ with the circuit court that ordered the  
34 commitment.

1 (B) In addition, if the person ~~acquitted~~ has an impairment  
2 due to alcohol or substance abuse, the director may petition the circuit  
3 court for involuntary commitment under § 20-64-815.

4 (2) The director shall send a copy of the application to the  
5 counsel for the person ~~acquitted~~ and to the attorney for the state.

6 (b)(1) Within twenty (20) days after receiving the application for  
7 discharge or conditional release of the person ~~acquitted~~, the attorney for  
8 the state may petition the circuit court for a hearing to determine whether  
9 the person ~~acquitted~~ should be released.

10 (2) If the attorney for the state does not request a hearing,  
11 the circuit court may conduct a hearing on its own motion or discharge the  
12 person ~~acquitted~~.

13 (c) If the circuit court finds after a hearing under subsection (b) of  
14 this section by the standard specified in § 5-2-314(e) that the person  
15 ~~acquitted~~ has recovered from his or her mental disease or defect to such an  
16 extent that:

17 (1) The discharge of the person ~~acquitted~~ would no longer create  
18 a substantial risk of bodily injury to another person or serious damage to  
19 property of another person, then the circuit court shall order that the  
20 person ~~acquitted~~ be immediately discharged; or

21 (2) The conditional release of the person ~~acquitted~~ under a  
22 prescribed regimen of medical, psychiatric, or psychological care or  
23 treatment would no longer create a substantial risk of bodily injury to  
24 another person or serious damage to property of another person, then the  
25 circuit court shall order:

26 (A) That the person ~~acquitted~~ be conditionally released  
27 under a prescribed regimen of medical, psychiatric, or psychological care or  
28 treatment that has been:

29 (i) Prepared for the person ~~acquitted~~;  
30 (ii) Certified to the circuit court as appropriate  
31 by the director of the facility in which the person ~~acquitted~~ is committed;  
32 and

33 (iii) Found by the circuit court to be appropriate;  
34 and

35 (B) Explicit conditions of release, including without  
36 limitation requirements that:

1 (i) The person ~~acquitted~~ comply with the prescribed  
2 regimen of medical, psychiatric, or psychological care or treatment;

3 (ii) The person ~~acquitted~~ be subject to regularly  
4 scheduled personal contact with a compliance monitor for the purpose of  
5 verifying compliance with the conditions of release;

6 (iii) Compliance with the conditions of release be  
7 documented with the circuit court by the compliance monitor at ninety-day  
8 intervals or at such intervals as the circuit court may order; and

9 (iv) Impose the conditions of release for a period  
10 of up to five (5) years.

11 (d) If the circuit court determines that ~~the~~ a person who was  
12 acquitted has not met his or her burden of proof under subsection (c) of this  
13 section, the person ~~acquitted~~ shall continue to be committed to the custody  
14 of the Department of Human Services.

15 (e) A person ordered to be in charge of a prescribed regimen of  
16 medical, psychiatric, or psychological care or treatment of a person  
17 acquitted for lack of criminal responsibility shall provide:

18 (1) The prescribed regimen of medical, psychiatric, or  
19 psychological care or treatment;

20 (2) Periodic written documentation to a compliance monitor of  
21 compliance with the conditions of release, including, ~~but not limited to,~~  
22 without limitation documentation of compliance with the prescribed:

- 23 (A) Medication;
- 24 (B) Treatment and therapy;
- 25 (C) Substance abuse treatment; and
- 26 (D) Drug testing; and

27 (3)(A) Written notice of any failure of the person ~~acquitted~~ to  
28 comply with the prescribed regimen of medical, psychiatric, or psychological  
29 care or treatment to the:

- 30 (i) Compliance monitor;
- 31 (ii) Attorney for the person ~~acquitted~~;
- 32 (iii) Attorney for the state; and
- 33 (iv) Circuit court having jurisdiction.

34 (B) The written notice under subdivision (e)(3)(A) of this  
35 section shall be provided immediately upon the failure of the person  
36 ~~acquitted~~ to comply with a condition of release.



1                   (C)(i) Upon the written notice under subdivision (e)(3)(A)  
 2 of this section or upon other probable cause to believe that the person  
 3 ~~acquitted~~ has failed to comply with the prescribed regimen of medical,  
 4 psychiatric, or psychological care or treatment, the person ~~acquitted~~ may be  
 5 detained and shall be taken without unnecessary delay before the circuit  
 6 court having jurisdiction over him or her.

7                   (ii) After a hearing, the circuit court shall  
 8 determine whether the person ~~acquitted~~ should be remanded to an appropriate  
 9 facility on the ground that, in light of his or her failure to comply with  
 10 the prescribed regimen of medical, psychiatric, or psychological care or  
 11 treatment, his or her continued release would create a substantial risk of  
 12 bodily injury to another person or serious damage to property of another  
 13 person.

14                   (D) At any time after a hearing employing the same  
 15 criteria, the circuit court may modify or eliminate the prescribed regimen of  
 16 medical, psychiatric, or psychological care or treatment.

17                   (f)(1) Regardless of whether the director or his or her designee has  
 18 filed an application ~~pursuant to a provision of~~ under subsection (a) of this  
 19 section, and at any time during the commitment of the person ~~acquitted~~, a  
 20 person acquitted for lack of criminal responsibility, his or her counsel, or  
 21 his or her legal guardian may file with the circuit court that ordered the  
 22 commitment a motion for a hearing to determine whether the person ~~acquitted~~  
 23 should be discharged from the facility in which the person ~~acquitted~~ is  
 24 committed.

25                   (2) However, no motion under subdivision (f)(1) of this section  
 26 may be filed more than one (1) time every one hundred eighty (180) days.

27                   (3) A copy of the motion under subdivision (f)(1) of this  
 28 section shall be sent to the:

29                   (A) Director of the facility in which the person ~~acquitted~~  
 30 is committed; and

31                   (B) Attorney for the state.

32

33                   SECTION 6. Arkansas Code § 5-2-317 is amended to read as follows:

34                   5-2-317. Jurisdiction and venue.

1 (a) A circuit court has exclusive jurisdiction over a person acquitted  
2 by reason of mental disease or defect and committed to the custody of the  
3 Director of the Department of Human Services ~~pursuant to~~ under § 5-2-314(b).

4 (b) Venue is determined as follows:

5 (1) For a person committed to the custody of the Department of  
6 Human Services ~~pursuant to~~ under § 5-2-314(b) and who has been committed to  
7 the Arkansas State Hospital for examination, ~~then~~ venue may be in Pulaski  
8 County for the initial hearing ~~pursuant to~~ under § 5-2-314 and for a  
9 conditional release hearing ~~pursuant to~~ under § 5-2-315; and

10 (2) For a person who has been conditionally released ~~pursuant to~~  
11 under § 5-2-315, ~~then~~ venue for any hearing seeking the modification,  
12 revocation, or dismissal of a conditional release order is in the county  
13 where the person currently resides.

14  
15 SECTION 7. Arkansas Code Title 5, Chapter 2, Subchapter 3, is amended  
16 to add an additional section to read as follows:

17 5-2-318. Guilty but with a mental illness – Sentence.

18 (a) A verdict of guilty but with a mental illness is the same as a  
19 verdict of guilty with the same burden of proof except for the disposition of  
20 the defendant.

21 (b) A person who is found guilty but with a mental illness is subject  
22 to the full range of sentence for the offense originally charged but shall be  
23 remanded to the custody of the Arkansas State Hospital for treatment until  
24 the Medical Director of the Arkansas State Hospital determines that the  
25 person is no longer in need of hospitalization under the procedures described  
26 under § 5-2-320.

27 (c) The time a person is in the custody of the Arkansas State Hospital  
28 is credited toward the length of time to which the person is sentenced for  
29 the offense.

30  
31 SECTION 8. Arkansas Code Title 5, Chapter 2, Subchapter 3, is amended  
32 to add an additional section to read as follows:

33 5-2-319. Guilty but with a mental illness – Commitment to Arkansas  
34 State Hospital – Discharge.

35 (a)(1) If a verdict in a trial for a felony is returned as guilty but  
36 with a mental illness, the defendant shall be sentenced by the circuit court.

1           (2) The circuit court shall issue a sentence that is consistent  
2 with the seriousness of the offense but also in light of the mitigating  
3 factor that the defendant had a mental illness at the time of the offense and  
4 remains with a mental illness and requires mental health treatment before  
5 being discharged to the Department of Correction.

6           (3) The circuit court shall allow both mitigating and  
7 aggravating evidence from the defendant and the state for the purposes of  
8 sentencing.

9           (b)(1) If the circuit court sentences the defendant to a period of  
10 incarceration, the defendant shall first be remanded to the custody of the  
11 Arkansas State Hospital for further treatment.

12           (2) Subject to § 5-2-320, the defendant shall remain at the  
13 Arkansas State Hospital for the period of his or her incarceration until and  
14 if the Medical Director of the Arkansas State Hospital determines that the  
15 defendant no longer requires hospitalization and:

16           (A) If the defendant has been convicted of a felony  
17 offense requiring incarceration, may be safely moved to the general  
18 population in the Department of Correction for the remainder of his or her  
19 sentence;

20           (B) If the defendant has been convicted of a felony  
21 offense and the defendant was sentenced to a suspended sentence or to  
22 probation, may be safely released into society for further supervision and  
23 treatment; or

24           (C) If the defendant has been convicted of a misdemeanor  
25 offense, safely released into society and shall be subject to further  
26 monitoring by the court to the extent permitted by law.

27           (3) If the defendant was sentenced to probation, the circuit  
28 court may impose any prohibition, restriction, or requirement on the  
29 defendant as the circuit court considers necessary for the safety of the  
30 defendant and the community, including further mental health treatment.

31           (c) A person ordered to be in charge of a prescribed regimen of  
32 medical, psychiatric, or psychological care or treatment of a person found  
33 guilty but with a mental illness shall provide:

34           (1) The prescribed regimen of medical, psychiatric, or  
35 psychological care or treatment; and

1           (2) Periodic written documentation including without limitation  
2 documentation of compliance with the prescribed:

- 3                   (A) Medication;
- 4                   (B) Treatment and therapy;
- 5                   (C) Substance abuse treatment; and
- 6                   (D) Drug testing.

7  
8           SECTION 9. Arkansas Code Title 5, Chapter 2, Subchapter 3, is amended  
9 to add an additional section to read as follows:

10           5-2-320. Guilty but with a mental illness – Discharge to Department of  
11 Correction procedures.

12           (a) When the Medical Director of the Arkansas State Hospital  
13 determines that a person found guilty but with a mental illness no longer  
14 requires hospitalization, the Medical Director of the Arkansas State Hospital  
15 shall promptly notify the circuit court, the attorney for the person, and the  
16 attorney for the state.

17           (b) Within twenty (20) days after receiving the notice described under  
18 subsection (a) of this section, the attorney for the person may petition the  
19 circuit court for a hearing to determine whether the person should be  
20 discharged to the Department of Correction.

21           (c) If the circuit court finds after a hearing under subsection (b) of  
22 this section that the person no longer requires hospitalization, then the  
23 circuit court shall order that the person be immediately discharged to the  
24 Department of Correction.

25           (d) If the circuit court determines that the person still requires  
26 hospitalization, the person shall continue to be committed to the custody of  
27 the Arkansas State Hospital.

28  
29           SECTION 10. Arkansas Code Title 5, Chapter 2, Subchapter 3, is amended  
30 to add an additional section to read as follows:

31           5-2-321. Guilty but with a mental illness – Length of sentence.

32           A person found guilty but with a mental illness shall not be confined  
33 in the Arkansas State Hospital, the Department of Correction, the Department  
34 of Community Correction, or under supervision longer than the maximum  
35 sentence for the offense with which he or she was convicted without full  
36 civil or involuntary commitment proceedings.

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Referred requested by the Arkansas Senate  
Prepared by: BPG/VJF