

1 State of Arkansas
2 91st General Assembly
3 Regular Session, 2017

A Bill

SENATE BILL 42

4
5 By: Senator J. Hutchinson

For An Act To Be Entitled

6
7
8 AN ACT CONCERNING THE CRIMINAL DEFENSES OF FITNESS TO
9 PROCEED AND LACK OF CRIMINAL RESPONSIBILITY; AND FOR
10 OTHER PURPOSES.

Subtitle

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13
14 CONCERNING THE CRIMINAL DEFENSES OF
15 FITNESS TO PROCEED AND LACK OF CRIMINAL
16 RESPONSIBILITY.

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18
19 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

20
21 SECTION 1. Arkansas Code § 5-2-301(2), concerning the capacity of a
22 defendant, is repealed.

23 ~~(2) “Capacity of the defendant to have the culpable mental~~
24 ~~state” means a defendant’s ability to have the culpable mental state~~
25 ~~necessary to establish an element of the offense charged, as defined in § 5-~~
26 ~~2-202;~~

27
28 SECTION 2. Arkansas Code § 5-2-301(6)(A), concerning the definition of
29 mental disease or defect, is amended to read as follows:

30 (6)(A) “Mental disease or defect” means a:

31 (i) Substantial disorder of thought, mood,
32 perception, orientation, or memory that grossly impairs judgment, behavior,
33 capacity to recognize reality, or ability to meet the ordinary demands of
34 life;

35 (ii) State of significantly subaverage general
36 intellectual functioning existing concurrently with a defect of adaptive



1 behavior that developed during the developmental period; or
 2 (iii) Significant impairment in cognitive
 3 functioning acquired as a direct consequence of a brain injury or resulting
 4 from a progressively deteriorating neurological condition.

5
 6 SECTION 3. Arkansas Code § 5-2-301, concerning definitions for the
 7 issue of mental disease or defect in criminal cases, is amended to add two
 8 new subdivisions to read as follows:

9 (13) "Lack of criminal responsibility" means that due to a
 10 mental disease or defect a defendant:

11 (A) Lacked the capacity to form the culpable mental state
 12 at the time of the alleged offense; and

13 (B) Lacked the capacity at the time of the alleged offense
 14 to either:

15 (i) Appreciate the criminality of his or her
 16 conduct; or

17 (ii) Conform his or her conduct to the requirements
 18 of the law; and

19 (14) "Lacked the capacity to form the culpable mental state"
 20 means a defendant lacked the capacity to form the culpable mental state
 21 necessary to establish an element of the alleged offense.

22
 23 SECTION 4. Arkansas Code § 5-2-304 is amended to read as follows:
 24 5-2-304. Notice requirement.

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

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

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

1
2 SECTION 5. Arkansas Code § 5-2-305 is repealed.

3 ~~5-2-305. Mental health examination of defendant.~~

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

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

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

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

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

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

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

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

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

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

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

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

1 defect.

2 ~~(B) A court shall not order the Division of Behavioral~~
 3 ~~Health Services of the Department of Human Services to conduct a criminal~~
 4 ~~responsibility examination if a fitness to proceed examination has previously~~
 5 ~~determined that the defendant does not have a mental disease or defect unless~~
 6 ~~the requesting party can show reasonable cause to believe.~~

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

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

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

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

18 ~~(b)(1) Upon suspension of further proceedings in the prosecution, the~~
 19 ~~court shall enter an order.~~

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

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

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

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

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

36 ~~(4)(A)(i) Two (2) distinctly different uniform examination~~

1 orders shall be developed by the Administrative Office of the Courts, the
 2 office of the Prosecutor Coordinator, the Department of Human Services, and
 3 the Arkansas Public Defender Commission. One (1) uniform examination order
 4 shall be for a fitness to proceed examination and opinion and the other
 5 uniform examination order shall be for a criminal responsibility examination
 6 and opinion.

7 (ii) ~~At a minimum the uniform examination orders~~
 8 ~~shall contain the:~~

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

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

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

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

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

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

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

- 34 (a) ~~The information on the uniform examination~~
 35 ~~order as provided in subdivision (b)(4)(A)(ii) of this section;~~
- 36 (b) ~~The name of the judge who ordered the~~

1 ~~examination, if known;~~

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

3 ~~examination, if known;~~

4 ~~(d) The name of the examiner who conducted the~~

5 ~~examination;~~

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

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

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

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

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

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

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

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

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

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

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

36 ~~(B) A description of any evidence that the defendant is~~

1 ~~feigning a sign or symptom of mental disease or defect;~~

2 ~~(C)—A specific description of the signs or symptoms of~~
3 ~~mental disease or defect if in the opinion of the examiner the defendant has~~
4 ~~a mental disease or defect; and~~

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

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

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

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

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

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

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

35 ~~(2)—Upon entry of an order by a circuit court, a copy of the~~
36 ~~report of the examination concerning a defendant shall be provided to the~~

1 ~~circuit court by the person designated to perform the examination.~~

2 ~~(g)(1) Notwithstanding the provision of any statute enacted prior to~~
3 ~~January 1, 1976, any existing medical or pertinent record in the custody of a~~
4 ~~public agency shall be made available to the examiner and to the prosecuting~~
5 ~~attorney and the defendant's attorney for inspection and copying.~~

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

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

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

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

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

18 ~~(A) Psychiatric record;~~

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

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

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

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

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

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

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

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

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

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

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

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

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

19
 20 SECTION 6. Arkansas Code § 5-2-307 is amended to read as follows:

21 5-2-307. Admissibility of statements made during examination or
 22 treatment.

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

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

27 (2) If the statement is constitutionally admissible.

28
 29 SECTION 7. Arkansas Code § 5-2-308 is amended to read as follows:

30 5-2-308. Expert witnesses ~~-~~ Mental health examiner.

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

35 ~~(b)(2) If the examiner is called by the court, the examiner~~
 36 ~~called as a witness he or she~~ he or she is subject to cross-examination by the

1 prosecution and by the defendant.

2 ~~(e)~~(b) Both the prosecution and the defendant may summon any other
3 qualified physician or other expert to testify.

4
5 SECTION 8. Arkansas Code § 5-2-309 is amended to read as follows:

6 5-2-309. Determination of fitness to proceed.

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

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

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

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

19 (2) A copy of the report filed ~~pursuant to § 5-2-305~~ under § 5-
20 2-327 shall be attached to the order of commitment or order of conditional
21 release.

22
23 SECTION 10. Arkansas Code § 5-2-312 is amended to read as follows:

24 5-2-312. Lack of ~~capacity~~ criminal responsibility – Affirmative
25 defense.

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

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

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

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

1 314.

2 ~~(b) As used in the Arkansas Criminal Code, “mental disease or defect”~~
 3 ~~does not include an abnormality manifested only by repeated criminal or~~
 4 ~~otherwise antisocial conduct.~~

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

9
 10 SECTION 11. Arkansas Code § 5-2-313 is amended to read as follows:

11 5-2-313. Acquittal based on ~~mental health~~ lack of criminal
 12 responsibility report.

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

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

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

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

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

35 (a) When a defendant is acquitted ~~on the ground of mental disease or~~
 36 ~~defect~~ due to the defendant’s lack of criminal responsibility, a circuit

1 court is required to determine and to include the determination in the order
2 of acquittal one (1) of the following:

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

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

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

19 5-2-327. Examination of defendant – Fitness to proceed.

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

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

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

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

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

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

34 (A) Appointing one (1) or more qualified psychiatrists who
35 do not practice in the Arkansas State Hospital to examine the defendant and
36 report on the defendant's mental condition; or

1 (B)(i) Directing the Director of the Division of
2 Behavioral Health Services of the Department of Human Services to provide a
3 qualified psychiatrist who will examine and report upon the defendant's
4 mental condition.

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

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

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

16 (A) The Arkansas Prosecuting Attorneys Association;

17 (B) The Department of Human Services; and

18 (C) The Arkansas Public Defender Commission.

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

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

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

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

24 (D) The defendant's custody status;

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

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

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

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

31 (4) The uniform order shall require the prosecuting attorney to
32 provide to the examiner any information relevant to the examination,
33 including without limitation:

34 (A) The name and address of any attorney involved in the
35 matter; and

36 (B) Information about the alleged offense.

1 (5) The court may require the attorney for the defendant to
2 provide any available information relevant to the examination, including
3 without limitation:

4 (A) Psychiatric records;

5 (B) Medical records; or

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

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

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

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

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

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

18 (C) Document that the examiner explained to the defendant:

19 (i) The purpose of the examination;

20 (ii) The persons to whom an examination report on
21 the examination is provided; and

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

24 (D) Describe, in specific terms:

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

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

29 (iii) The conclusions reached.

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

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

36 (i) The capacity of the defendant during criminal

1 proceedings to:

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

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

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

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

11 (e) Exhibit appropriate courtroom behavior;
12 and

13 (f) Testify;

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

16 (a) A mental disease or defect; or

17 (b) An intellectual disability;

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

22 (iv) If the defendant is taking psychoactive or
23 other medication, whether the medication is necessary to maintain the
24 defendant's competency, and the effect, if any, of the medication on the
25 defendant's appearance, demeanor, or ability to participate in the criminal
26 proceedings.

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

30 (g) This subchapter does not preclude the defendant from having an
31 examination conducted by an expert of the defendant's own choosing to
32 determine the defendant's fitness to proceed and the court shall provide the
33 defendant's expert with a reasonable opportunity to examine the defendant
34 upon a timely request.

35 (h) When the defendant has previously been found fit to proceed, the
36 court may order a second or subsequent examination to determine a defendant's

1 fitness to proceed only if the court:

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

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

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

9 (i) Upon completion of examination under this section, the court may
10 enter an order providing for further examination of the defendant and may
11 order the defendant into the custody of the director for further examination
12 and observation if the court determines that commitment and further
13 examination are warranted.

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

17 5-2-328. Examination of defendant – Lack of criminal responsibility.

18 (a)(1) Subject to § 5-2-311, when a defendant files a notice of intent
19 to raise the affirmative defense of lack of criminal responsibility under §
20 5-2-304, the court shall immediately suspend any further proceedings.

21 (2) If a court suspends further proceedings in the prosecution
22 under subdivision (a)(1) of this section, the court shall enter an order
23 appointing one (1) or more qualified and disinterested experts to examine the
24 defendant.

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

30 (B)(i) A person designated by the court to perform an
31 examination under this section shall file the examination report with the
32 clerk of the court ordering the examination.

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

35 (iii) A copy of the examination report shall be
36 provided by the clerk to the defendant's attorney and the prosecuting

1 attorney.

2 (b)(1) A uniform order to be used by a court ordering an examination
3 of a defendant's lack of criminal responsibility under this section shall be
4 developed by the Administrative Office of the Courts in conjunction with the
5 following organizations:

6 (A) The Arkansas Prosecuting Attorneys Association;

7 (B) The Department of Human Services; and

8 (C) The Arkansas Public Defender Commission.

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

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

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

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

14 (D) The defendant's custody status;

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

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

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

19 (3) The uniform order shall require the prosecuting attorney to
20 provide to the examiner any information relevant to the examination,
21 including without limitation:

22 (A) The name and address of any attorney involved in the
23 matter;

24 (B) Information about the alleged offense; and

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

28 (4) The court may require the attorney for the defendant to
29 provide any available information relevant to the examination, including
30 without limitation:

31 (A) Psychiatric records;

32 (B) Medical records; or

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

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

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

3 (c)(1) An examination report prepared by an examiner ordered under
4 this section shall contain:

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

6 (B) An opinion as to whether the defendant lacked criminal
7 responsibility and an explanation of the examiner's opinion and the basis of
8 the opinion; and

9 (C) If an examination cannot be conducted because of the
10 unwillingness of the defendant to participate in the examination, an opinion
11 as to whether the unwillingness of the defendant is the result of mental
12 disease or defect.

13 (d)(1) Subject to § 5-2-309, an examination of the defendant's fitness
14 to proceed and the defendant's lack of criminal responsibility may be ordered
15 at the same time only if the defendant simultaneously raises the issue of the
16 defendant's fitness to proceed and files notice that he or she intends to
17 rely upon the affirmative defense of lack of criminal responsibility.

18 (2) However, an examination of the defendant's fitness to
19 proceed and the defendant's lack of criminal responsibility may not be
20 combined into the same examination order and are instead required to be
21 tracked separately by the Division of Behavioral Health Services of the
22 Department of Human Services.

23 (e)(1) An examiner appointed under this section to examine a defendant
24 with regard to a defense of lack of criminal responsibility also may be
25 appointed by the court to examine the defendant with regard to the
26 defendant's fitness to proceed under § 5-2-327.

27 (2) However, the examiner must file with the court separate
28 written reports concerning the defendant's fitness to proceed and lack of
29 criminal responsibility.

30 (f) Unless otherwise required by this section, an examiner shall not
31 render an opinion or issue a report on the defendant's lack of criminal
32 responsibility if the examiner believes that the defendant is not fit to
33 proceed until the court issuing the order for an examination into the
34 defendant's lack of criminal responsibility makes a determination as to the
35 defendant's fitness to proceed.

36 (g) A court shall not order the Division of Behavioral Health Services

1 of the Department of Human Services to conduct an examination of a
2 defendant's lack of criminal responsibility if a previous examination into
3 the defendant's fitness to proceed has already determined that the defendant
4 does not have a mental disease or defect unless the requesting party can show
5 reasonable cause to believe:

6 (1) There is evidence of a mental disease or defect that was not
7 fully considered in the previous examination into the defendant's fitness to
8 proceed; or

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

12 (h)(1) This section does not prevent a defendant from having an
13 examination into his or her lack of criminal responsibility conducted by his
14 or her expert or from maintaining a defense of not guilty by reason of a lack
15 of criminal responsibility using testimony from a defense expert or other
16 evidence.

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

20
21 SECTION 16. Arkansas Code Title 5, Chapter 2, Subchapter 3, is amended
22 to add an additional section to read as follows:

23 5-2-329. Data to be maintained by the Division of Behavioral Health
24 Services of the Department of Human Services.

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

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

31 (3) The database shall contain without limitation:

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

34 (B) The name of the judge who ordered the examination, if
35 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 was examined regarding his or her
6 fitness to proceed, whether the defendant had his or her fitness to proceed
7 restored; and

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

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

16
17 SECTION 17. Arkansas Code § 5-13-301(c)(2), concerning the offense of
18 terroristic threatening, is amended to read as follows:

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

23
24 SECTION 18. Arkansas Code § 5-14-103(d)(2), concerning the offense of
25 rape, is amended to read as follows:

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

30
31 SECTION 19. Arkansas Code § 5-71-208(e), concerning the offense of
32 harassment, is amended to read as follows:

33 (e) If the judicial officer has reason to believe that mental disease
34 or defect of the defendant will or has become an issue in the ~~cause~~ case, the
35 judicial officer shall enter ~~such orders as are~~ consistent with ~~§ 5-2-305~~ §
36 5-2-327 or § 5-2-328, or both.

1
2 SECTION 20. Arkansas Code § 5-71-209(e), concerning the offense of
3 harassing communications, is amended to read as follows:

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

8
9 SECTION 21. Arkansas Code § 5-71-229(a)(2)(D), concerning the offense
10 of stalking, is amended to read as follows:

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

15
16 SECTION 22. Arkansas Code § 5-71-229(b)(2)(D), concerning the offense
17 of stalking, is amended to read as follows:

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

22
23 SECTION 23. Arkansas Code § 5-71-229(c)(2)(D), concerning the offense
24 of stalking, is amended to read as follows:

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

29
30 SECTION 24. Arkansas Code § 9-27-502(b)(2)(A), concerning the
31 competency of a juvenile charged with capital murder or murder in the first
32 degree, is amended to read as follows:

33 (2)(A) For ~~such juveniles~~ a juvenile under thirteen (13) years
34 of age and who ~~are~~ is charged with capital murder, § 5-10-101, or murder in
35 the first degree, § 5-10-102, the court shall order an evaluation to be
36 performed in accordance with ~~§ 5-2-305(b)~~ § 5-2-327 or § 5-2-328, or both, by

1 a psychiatrist or a clinical psychologist who is specifically qualified by
2 training and experience in the evaluation of juveniles.

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