

Stricken language would be deleted from and underlined language would be added to present law.  
Act 472 of the Regular Session

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91st General Assembly

# A Bill

Regular Session, 2017

SENATE BILL 42

By: Senator J. Hutchinson

*By: Representatives Capp, D. Whitaker*

## For An Act To Be Entitled

*AN ACT CONCERNING FITNESS TO PROCEED AND LACK OF  
CRIMINAL RESPONSIBILITY; CONCERNING A MENTAL  
EVALUATION OF A CRIMINAL DEFENDANT; AND FOR OTHER  
PURPOSES.*

### Subtitle

*CONCERNING FITNESS TO PROCEED AND LACK OF  
CRIMINAL RESPONSIBILITY; AND CONCERNING A  
MENTAL EVALUATION OF A CRIMINAL  
DEFENDANT.*

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

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 Arkansas Code § 5-2-301(2), concerning the capacity of a defendant, is repealed.

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

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

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

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



life;

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

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

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

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

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

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

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

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

5-2-304. Notice requirement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~examination, if known;~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(A) Psychiatric record;~~

~~(B) Medical record; or~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) If the statement is constitutionally admissible.

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

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

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

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

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

qualified physician or other expert to testify.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~otherwise antisocial conduct.~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) The Arkansas Prosecuting Attorneys Association;

(B) The Department of Human Services; and

(C) The Arkansas Public Defender Commission.

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

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

(B) The criminal charges pending against the defendant;

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

(D) The defendant's custody status;

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

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

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

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

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

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

(B) Information about the alleged offense.

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

(A) Psychiatric records;

(B) Medical records; or

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

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

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

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

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

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

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

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

(i) The purpose of the examination;

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

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

(E) Describe, in specific terms:

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

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

(iii) The conclusions reached.

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

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

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

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

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

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

(d) Understand the adversarial nature of criminal proceedings;

(e) Exhibit appropriate courtroom behavior;  
and

(f) Testify;

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

(a) A mental disease or defect; or

(b) An intellectual disability; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (A) The Arkansas Prosecuting Attorneys Association;
- (B) The Department of Human Services; and
- (C) The Arkansas Public Defender Commission.

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

- (A) The defendant's name, age, gender, and race;
- (B) The criminal charges pending against the defendant;
- (C) The defendant's attorney's name and address;
- (D) The defendant's custody status;
- (E) The case number for which the examination was ordered;
- (F) A unique identifying number on the incident reporting form as required by the Arkansas Crime Information Center; and
- (G) The name of the requesting attorney, if applicable.

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

- (A) The name and address of any attorney involved in the matter;
- (B) Information about the alleged offense; and
- (C) Any information about the defendant's background that is determined to be relevant to the examination, including the criminal history of the defendant.

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

- (A) Psychiatric records;
- (B) Medical records; or
- (C) Records pertaining to treatment of the defendant for substance or alcohol abuse.

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

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

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

this section shall contain:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) The database shall contain without limitation:

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

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

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

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

(E) The result of the examination;

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

restored; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*/s/J. Hutchinson*

**APPROVED: 03/13/2017**