

State of Arkansas
92nd General Assembly
Regular Session, 2019

A Bill

SENATE BILL 191

By: Senator Rapert

For An Act To Be Entitled

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

Subtitle

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

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

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

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

(15) "Safely discharged to the Department of Correction" means:

(A) A person is of the physical and mental condition that being incarcerated in the Department of Correction would not subject him, her, or another person to substantial risk of bodily injury resulting from the person's mental illness; and

(B) The Department of Correction has available medical or



mental health staff to enable the person to continue his or her ongoing mental health treatment.

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

5-2-312. Lack of criminal responsibility – Affirmative defense – Guilty but with a mental illness.

(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 criminal responsibility.

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

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

(B) Found guilty but with a mental illness.

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

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

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

(B) The defendant committed the offense; and

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

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

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

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

(f) If a defendant is found guilty but with a mental illness, the

verdict and judgment shall state that the defendant was found guilty but with a mental illness.

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

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

~~(a) On the basis of the report filed under § 5-2-328 and after a hearing, if a hearing is requested, the court may enter judgment of acquittal on the ground of 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 criminal responsibility.~~

~~(b) If the defendant did not raise the issue of lack of criminal responsibility as an affirmative defense 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 lacked criminal responsibility at the time of the commission of the offense.~~

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

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

(a) ~~When~~ If a defendant is acquitted 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:

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

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

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

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

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

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

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

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

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

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

(2) If the psychiatric or psychological report is not filed within thirty (30) days following the department's receipt of an order of acquittal or within such additional time as authorized by the circuit court, the circuit court may grant a petition for a writ of habeas corpus ordering the release of the defendant under terms and conditions that are reasonable

and just for the defendant and societal concerns about the safety of persons and property of others.

(e)(1) A person found not guilty 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.

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

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

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

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

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

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

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

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

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

(j)(1)(A) It is the duty of the prosecuting attorney's office in the

county where the petition is filed to represent the State of Arkansas at any hearing held ~~pursuant to~~ under this section except a hearing pending at the Arkansas State Hospital ~~in Pulaski County~~.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (i) Prepared for the person ~~acquitted~~;
- (ii) Certified to the circuit court as appropriate by the director of the facility in which the person ~~acquitted~~ is committed; and
- (iii) Found by the circuit court to be appropriate; and

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

- (i) The person ~~acquitted~~ comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment;
- (ii) The person ~~acquitted~~ be subject to regularly scheduled personal contact with a compliance monitor for the purpose of verifying compliance with the conditions of release;
- (iii) Compliance with the conditions of release be documented with the circuit court by the compliance monitor at ninety-day intervals or at such intervals as the circuit court may order; and
- (iv) Impose the conditions of release for a period

of up to five (5) years.

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

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

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

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

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

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

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

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

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

(ii) After a hearing, the circuit court shall determine whether the person ~~acquitted~~ should be remanded to an appropriate facility on the ground that, in light of his or her failure to comply with

the prescribed regimen of medical, psychiatric, or psychological care or treatment, his or her continued release would create a substantial risk of bodily injury to another person or serious damage to property of another person.

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

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

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

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

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

(B) Attorney for the state.

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

5-2-317. Jurisdiction and venue.

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

(b) Venue is determined as follows:

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

(2) For a person who has been conditionally released ~~pursuant to~~ under § 5-2-315, ~~then~~ venue for any hearing seeking the modification,

revocation, or dismissal of a conditional release order is in the county where the person currently resides.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) Medication;

(B) Treatment and therapy;

(C) Substance abuse treatment; and

(D) Drug testing.

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

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

(a) When the Medical Director of the Arkansas State Hospital

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

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

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

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

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

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

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