LATE TESTIMONY

Testimony of the Office of the Public Defender,
State of Hawaii,
to the House Judiciary Committee

March 29, 2011

S.B. No. 1067, S.D. 1, H.D. 1: RELATING TO PROBATION

Chair Aquino and Members of the Committee:

We oppose the passage of S.B. No. 1067, S.D. 1, H.D. 1 which provides for disclosure by the judiciary of specified information on criminal defendants to treatment programs prior to admission to treatment by the program. While we question the expenditure of resources to provide this service by the Judiciary to outside programs, our primary objection is that this bill appears to nullify current sentencing statutes such as HRS 706-622.5, Sentencing for first-time drug offenders, and 706-622.9, Sentencing for first-time property offenders if those persons are repeat offenders. Additionally, we fear that the disclosure provided for in this bill will discourage treatment programs from making an objective, unbiased assessment of a defendant's application to enter their program.

Our current statute gives the Judiciary the discretion to share the specified information with a treatment provider "upon acceptance of the defendant into" the treatment program. This bill provides that this information be disclosed to treatment programs as part of the determination for acceptance and admission into the program.

Currently, to the extent that a program requires this information before deciding whether to accept a defendant, the programs can and do require the defendant to sign consents for release of information so that the program can gather the information it considers essential to making a decision about acceptance into their program. One way of looking at this bill, is that it will make taxpayers pay state personnel to do the work previously done by the treatment programs in their application process.

The greater problem with this legislation, however, is that it would seemingly prevent repeat offender defendants from complying with sentencing statutes such as those governing first time drug offenders. HRS 706-622.5 provides that a first-time drug offender, including repeat offenders whose incarceration is not necessary to protect the public, is eligible for a sentence of probation if:

- he or she is determined to be nonviolent;
- he or she has been assessed by a certified substance abuse counselor to be in need of substance abuse treatment; and
- other than Drug Court defendants, the defendant presents to the Court a proposal to receive substance abuse treatment in accordance with the treatment plan resulting from the assessment **through a substance abuse treatment program that includes an identified source of payment for the treatment program.**

In other words, the defendant needs to get an assessment which leads to a treatment plan which leads to application to programs which, hopefully, leads to acceptance into a program so that the defendant can comply with 706-622.5 by providing the Court, **prior**

to sentencing, with the name of the treatment program, the cost and how it is going to be paid for. The same requirement is included in HRS 706-622.9, Sentencing of first-time property offenders.

This legislation is described as necessary, in Section 1, so that the risk information developed by the Judiciary is shared with a treatment program BEFORE the program makes a decision to admit the defendant. However, currently the risk assessment done by the Judiciary, including the Level of Service Inventory, is done AFTER a defendant is placed on probation IF the defendant is already under court supervision, i.e. is a repeat offender.

So, if the treatment programs are not going to make admission decisions without the risk assessment done by the Judiciary, how will repeat offender defendants be able to present a treatment plan with payment information to the Court? That means such defendants will be prevented from complying with 706-622.5 and 706-622.9 and will not be able to be sentenced pursuant to those statutes. If they cannot qualify under those statutes, they will not be eligible for probation.

We also note that this bill does not even provide that the treatment program must return what is very confidential information, having made no copies of it, if the defendant is not accepted into their program. It also does not contain any provision requiring the program to maintain the confidentiality of the information. Many of these programs employ former patients as counselors and such, some are even family members or neighbors of persons applying to the program and we are very hesitant that confidential information be shared in such circumstances.

Also, the adult probation records which this bill addresses often contain an assessment of the risk of danger which a defendant presents. Access to these assessments are currently so guarded that they are not even provided to the prosecutor or defense counsel. This bill allows that they be shared with any number of treatment programs.

Additionally, currently, in deciding whether to accept a defendant for treatment, programs conduct a risk assessment independent of the probation department's assessment. Oftentimes, the court relies upon this independent assessment by the program. The program's assessment can differ from that of the probation department. In making a fair determination as to whether a defendant should be admitted to a treatment program, the court should be allowed access to as many different assessments as possible.

It is feared that passage of this measure will result in agencies choosing to forego independent risk assessments and simply conform to the findings made by the probation department.

For these reasons, we oppose this measure. Thank for the opportunity to comment on this bill.

PD NO.: 16829

PD TO BE ASSIGNED: _____

PRELIMINARY HEARING

DATE: 03/30/11

P.D.: _____

DEFENDANT: FISK, AUSTIN

PROSECUTOR: _____

REPORTER: _____

JUDGE: _____

CHARGES	CASE NO.
SEX ASSLT 3	
SEX ASSLT 3	

☐ IF MARKED, PLEASE SEE CONTINUATION PAGE FOR ADDITIONAL CHARGES

Disposition: _____

Arraignment & Plea Date in Circuit Court: _____

Preliminary Hearing transcript needed: ☐ YES ☐ NO

Reason: _____

Describe mental condition of defendant; if based on preliminary hearing a mental examination of Defendant is warranted: _____

List any possible sponsors for Defendant on supervised release: _____

List any preliminary investigation that may need to be done on case: _____

Name of complaining witness: _____

Other witnesses called: _____

Is Defendant on probation or parole?	☐ YES	☐ NO
Does Defendant have any prior felonies?	☐ YES	☐ NO
Was there hearsay evidence used at preliminary?	☐ YES	☐ NO
Any statement made by Defendant?	☐ YES	☐ NO
Did Defendant confess to committing offense?	☐ YES	☐ NO
Did you object to hearsay evidence being used?	☐ YES	☐ NO

Comments: _____