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Testimony SUPPORTING HB2359, H.D. 1
Relating to Forensic Mental Health Procedures

REPRESENTATIVE KARL RHOADS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Hearing Date: February 16, 2016, 2:00 p.m. Room Number: 325

Fiscal Implications: Undetermined at this time.

Department Testimony: The Department of Health (DOH) supports this measure which is part of the Administration's package.

We thank the Legislature for its continued support. Only through a combination of support in building a new facility, support in rebuilding community programs, and fundamental policy changes will Hawaii be able to effectively address the needs of its citizens, the operation of the Hawaii State Hospital (HSH), and be able to provide an effective continuum of mental health supports. Clearly, all three branches of government play a critical role in making this system function effectively.

The primary purpose of this bill is to ensure the timely and relevant administration of mental health examinations, support the process of expedient administration of justice, and clarify the procedure for re-evaluation of fitness to proceed after a finding of unfitness and the delivery of fitness restoration services from clinical professionals and treatment teams. This may be accomplished by separating the fitness to proceed and the penal responsibility components of

examinations ordered pursuant to HRS §704-404 and codifying procedures for the determination of a defendant's regained fitness to proceed pursuant to HRS §704-406.

Under current section HRS §704-404(4), if the defendant's fitness to proceed comes into question, a court must order an examination of a defendant to determine the defendant's fitness to proceed and penal responsibility simultaneously. During this period of time, a pretrial defendant, who may have a serious mental disease or defect, may be held in state custody for more than thirty days awaiting the evaluation due to the complexity of conducting an evaluation that examines both fitness to proceed and penal responsibility. It is in the best interest of the defendants, and the judiciary, for the examination process to proceed in a timely, expedient manner.

Furthermore, while evaluations of fitness to proceed are utilized by the court in each instance that they are ordered, only some of the evaluations of penal responsibility are utilized. The reason for this is because the evaluations of responsibility only become relevant if the affirmative defense of lack of penal responsibility is argued by the defendant. We estimate that penal responsibility evaluations are used only in a minor fraction of the cases for which these exams are ordered and completed. Pairing them together is more burdensome to the examination process, lengthens the time to complete the evaluation and report to the court, and generates a product that may not be utilized during adjudication.

In addition, pairing fitness to proceed and penal responsibility in one evaluation creates an ethical dilemma for the examiners and legal concerns for the defendant. An unfit defendant may not have sufficient capacity to consult with defense counsel to determine the implications of

providing information to the examiner during the penal responsibility component of the examination. The American Bar Association's Criminal Justice Mental Health Standards (Standard 7-4.4) recommends that an evaluation of the defendant's mental condition at the time of the alleged offense to determine penal responsibility should not be combined in any evaluation to determine fitness to proceed unless the defense requests it or unless good cause is shown.

Proposed revisions also include modifying the availability of records gathered pursuant to HRS §704-404 to include prosecution and defense counsel, including a risk assessment of danger in the requirements for a fitness examination, and clarifying that the court's consideration of release on conditions is to be based on "substantial" danger to the defendant or the person or property of others.

The changes proposed in HB 2359 H.D. 1 separate the fitness to proceed and the penal responsibility components of examinations pursuant to HRS §704-4 and **does not change the current one panel and three panel structure of assignment to examiners**. With regards to the determination of a defendant's regained fitness to proceed under HRS §704-406, the statute is silent with respect to the procedure to determine a defendant's regained fitness to proceed after the delivery of fitness restoration services from clinical professionals and treatment teams. The proposed changes in HB 2359 H.D. 1 codify a procedure to re-examine a defendant's fitness to proceed that includes: 1) the court may appoint a one qualified examiner for all petty misdemeanors, misdemeanors, class B felonies, and class C felonies to be designated by the director of health from within the DOH and 2) the court shall appoint three qualified examiners for charges of murder in the first and second degrees, attempted murder in the first and second

degrees and class A felony cases with one of the three designated by the director of health from within the DOH. The proposed changes **do not alter** the three panel assignment in felony cases for initial assessment of fitness to proceed and penal responsibility, placement into conditional release status, or discharge from conditional release status.

Accordingly, this measure as drafted in HB 2359 H.D. 1 provides a more efficient pretrial process leading to a decrease in the amount of delays defendants experience due to the examination process and enables a more expedient administration of justice. Within the past year, a complaint was lodged with the Special Litigation Section of the U.S. Department of Justice (DOJ) alleging a violation of the Civil Right of Institutional Persons Act (CRIPA) due to lengthy delays in court-ordered examinations related to **several** position vacancies within the DOH. This drew the attention of the Hawaii Disability Rights Center. If not remedied, the DOJ's Office for Civil Rights could launch a full investigation leading to legal action and oversight. This measure should also assist in ensuring a defendant's right to a speedy trial.

The DOH has met with key stakeholders including representatives of Criminal Justice Division of the Department of the Attorney General, the state Office of the Public Defender, and county Offices of the Prosecuting Attorney to receive their feedback on the proposals contained within this bill. Feedback received during this process led to the DOH's support of HB 2359 H.D. 1. We continue to be open to working with the legislature and other key stakeholders to address any specific issues in this key policy area.

We have indicated to you previously and indicated to other stakeholders that **our current path is not sustainable.** Policy change will be required. We have determined that adjustments

in statute pertaining to, in this instance, forensic exam procedures will be critical in improving the efficient utilization of resources, addressing public safety and supporting the rights of defendants. Consistent with this we support the measure.

Thank you for the opportunity to testify.

Offered Amendments: None at this time.

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

February 16, 2016

H.B. No. 2359 HD1: RELATING TO FORENSIC MENTAL HEALTH PROCEDURES

Chair Rhoads and Members of the Committee:

We support the intent of H.B. No. 2359 HD1. It is our position that fitness to proceed examinations and examinations for penal responsibility should be conducted separately. This is in keeping with the American Bar Association's Criminal Justice Mental Health Standards, Standard 7-4.4. If a defendant's fitness to proceed is in question, that defendant should not be forced into a decision on whether to proceed with the affirmative defense of penal responsibility. Thus, the portion of the bill which separates the fitness to proceed examination from the penal responsibility examination would allow us to meet our ethical obligations to the client.

We also support the proposed process for reevaluation of a defendant who has previously been found unfit to proceed. For persons charged with offenses other than Class A felonies and above, the bill would allow for appointment of a single independent evaluator who would determine whether the defendant has been restored to fitness. Currently, the procedure requires the appointment of a three-panel commission of evaluators to re-evaluate fitness to proceed. We believe that this change would streamline the process for the determination of restoration of fitness.

Thank you for the opportunity to provide testimony in this matter.

DEPARTMENT OF THE PROSECUTING ATTORNEY

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THE HONORABLE KARL RHOADS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Eighth State Legislature
Regular Session of 2016
State of Hawai`i

February 16, 2016

RE: H.B. 2359, H.D. 1; RELATING TO FORENSIC MENTAL HEALTH PROCEDURES.

Chair Rhoads, Vice Chair San Buenaventura, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in opposition to H.B. 2359 and H.D. 1.

The purpose of H.B. 2359 and H.D. 1 is to ensure that mental health examinations are completed expeditiously and that defendants who may have mental health issues are afforded their due process rights. To accomplish the purposes of H.B. 2359, this bill among other changes, seeks to complete a defendant's penal responsibility and fitness to proceed examinations separately unless requested by the defendant or the court finds good cause to complete both concurrently. Although financially this approach appears appropriate, to ensure the most accurate facts relating to the alleged incident requires, if not necessitates the gathering of information as close in time as possible. One can assume that through the passage of time, vital facts and information pertaining to a defendant's penal responsibility could and would be lost. By completing the examination regarding penal responsibility and fitness concurrently, the courts, the defendant, and the prosecution would be ensured that any and all facts that are vital to the determination of penal responsibility would not be lost.

In addition, H.B. 2359 and H.D. 1 establishes that in cases that are not one of the following: murder in the first and second degree, attempted murder in the first and second degree, and any Class A felony cases, a three (3) panel of health evaluators would be required but would limit all of other cases to a one (1) panel review. By allowing the reduction in the amount of health professionals involved no matter what stage of the judicial proceeding would inherently decrease the reliability of the results. If this change went into law, every class B and class C felony case in which a defendant was determined to regain fitness would be decided on the opinion of 1 examiner, without the benefit of a "second (or third / 'tie-breaker') opinion." Perhaps most alarming, is that some of the more serious crimes involving class B and class C felony offenses in Hawai'i would be determined by 1 examiner.

Because assessment of one's mental condition is not a black-and-white science, and is often subject to differing opinions, it is crucial that the court and all stakeholders have the benefit of receiving multiple opinions in every felony case, to most accurately assess that defendant's mental condition. Please keep in mind that, while our criminal code categorizes offenses into class A, B and C felonies, that alone does not distinguish the "dangerousness" of an individual. In fact, there are very dangerous people coming through our court system at every level of felony crime, and limiting these mental examinations to the opinion of 1 examiner would be detrimental to accurately determining whether these individuals are fit to stand trial.

Decreasing the number of examiners from 3 down to 1 would also eliminate the additional precaution of having at least one psychiatrist and at least one psychologist per felony fitness examination. It is our understanding that psychiatrists and psychologists have different areas of expertise, and thus provide slightly different perspectives on each defendant. The Department strongly believes that the existing statutes currently contains appropriate safeguards that are crucial to ensuring the most accurate result in felony fitness proceedings, and further believes that these safeguards are warranted for all class A, B and C felony cases where the defendant's mental fitness is in question.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes H.B. 2359 and H.D. 1. Thank for you the opportunity to testify on this matter.

Testimony HB 2359 ND1
February 15, 2016
Marvin W Acklin, PhD

To: Committee on the Judiciary (JUD), hearing on Tuesday, February 16, 2016, 2:00 PM

Re: Testimony submitted for HB 2359 HD1
Bifurcation of fitness to proceed and criminal responsibility evaluations

From: Marvin W. Acklin, PhD, ABPP, Independent Practice, Honolulu

To the Committee:

I am a board-certified clinical and forensic psychologist practicing in Honolulu since 1989.

I have conducted approximately 500 court-appointed mental examinations ("three panels") for fitness to proceed, criminal responsibility, conditional release, and discharge from conditional release.

My research group has undertaken research on three panels since 2004. We have published 3 peer-reviewed articles in forensic mental health journals, examining quality of forensic reports submitted to the Hawaii Judiciary. Citations to these studies are listed below.

Regrettably forensic report quality is mediocre, if not poor, based on our empirical research studies. There is a clear need for quality improvement.

Factors which contribute to poor report quality include 1) non-standardization of procedures and report formats, 2) intermittent examiner training (ideally, training should be annual; there has not been a training in Hawaii for at least two years), 3) and complexity of the forensic examiner's task.

Today, most evaluations include both an examination of the defendant's current mental state (fitness to proceed) and a retrospective assessment of mental state at the time of the offense (criminal responsibility).

Bifurcating fitness to proceed from criminal responsibility examinations is likely to significantly reduce task complexity, and permit a better deployment of examiner resources under pressure of scheduling, deadlines, complex evaluation procedures, and a sometimes difficult clientele.

It is hoped and likely that the whole system will function more efficiently.

For these reasons, I would urge the JUD committee to support this well-written piece of legislation.

Thank you for your attention and consideration.

Marvin W. Acklin, PhD, ABAP, ABPP
Board-certified Clinical, Assessment, & Forensic Psychologist
Associate Clinical Professor of Psychiatry, John A Burns School of Medicine
Honolulu, Hawaii

References

Fuger, K., Acklin, M.W., Gowensmith, W., & Ignacio, L. (2014). Sanity in Paradise: Quality of Criminal Responsibility Reports Submitted to the Hawaii Judiciary, *International Journal of Law and Psychiatry*, 37, 3, 272-280.

Nguyen, A., Acklin, M.W., Fuger, K., & Ignacio, L. (2011). Freedom in Paradise: Quality of Conditional Release Reports Submitted to the Hawaii Judiciary, *International Journal of Law and Psychiatry*, 34, 341-348.

Robinson, R., & Acklin, M.W. (2010). Fitness in Paradise: Quality of Forensic Reports Submitted to the Hawaii Judiciary. *International Journal of Law and Psychiatry*, 33, 3, 131-137.

From: mailinglist@capitol.hawaii.gov
Sent: Saturday, February 13, 2016 4:11 AM
To: JUDtestimony
Cc: NuWayveUnl@gmail.com
Subject: *Submitted testimony for HB2359 on Feb 16, 2016 14:00PM*

HB2359
Submitted on: 2/13/2016
Testimony for JUD on Feb 16, 2016 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
James Terrell Trice	Individual	Support	No

Comments:

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LATE

February 15, 2006

To: Representative Cindy Evans

Hawaii State Legislature

From: Harold V. Hall, PhD, ABPP, Director

Pacific Institute for the Study of Conflict and Aggression

Kamuela, Hawaii 96743

Re: Commentary on Forensic Bills before Hawaii State Legislature

Aloha Representative Evans:

You requested that I comment on proposed HRS 704-related bills currently before the Hawaii State Legislature that if passed into law may have significant unresolved issues. I am responding from the perspective of a forensic psychologist after having conducted over 1000 sanity evaluations in Hawaii and the federal courts since the late 1970s as a DOH Courts and Corrections psychologist and in later independent practice. Recommendations in this paper are consistent with the empirical and forensic literature.

For Hawaii, as in most states, there are 3 principal types of forensic evaluations under the penal code--CST (fitness), MSO (penal responsibility) and CR (release after restoration) cases--and 3 generations of research reflecting increasing improvement of forensic methods. Except for the relatively easy task of determining competency, HRS 704 forensic evaluators overall only marginally meet minimal scientific requirements. The gold standard for forensic evaluation is the employment of (third generation) empirically supported **forensic assessment instruments (FAIs)**. Use of FAIs generally bootstrap forensic evaluations to acceptable scientific standards. This recommended practice is widespread for many states on the mainland

Comments and suggestions follow:

SB 309 (or equivalent bills) RELATING TO MENTAL HEALTH EXAMINATIONS: No recommendations are made. Passage of this bill into law is badly needed. The critical situation the bill describes is consistent with my forensic experience with the county jails, HSH and OCCC for pretrial defendants.

HB 2359 (or equivalent bills) RELATING TO FORENSIC MENTAL HEALTH PROCEDURES: Several changes should be considered. Decoupling CST and MSO exams as this bill proposes is strongly supported from an ethical perspective. If passed, however, this bill would likely create a substantial increase in the number of required HRS 704 evaluations in an already taxed system which research has established suffers from a lack of quality control. Estimates of that increase from the CST research range from 15% to 25% of all felony defendants who would ordinarily be evaluated by 3-panels that combine CST and MSO examinations.

To handle this anticipated increase, HB 2359 proposes, among other changes, that only one evaluator should be is required for some CST, MSO and CR cases. This change to 1-person forensic evaluations is **not recommended** until quality control is established. Adequate quality control means that examiners have produced adequate reliability and validity evaluation results. The proposed changes highlighted below would, in my opinion, increase quality control to acceptable levels.

In some states, 2-person panels are used to good effect. As they represent a less radical shift compared to one-person evaluations, with some stakeholders extremely critical of forensic evaluations without multiple evaluators to balance the perspectives and to provide multiple options to trial judges, they are **recommended** for this proposed bill but again only if quality control is improved by the changes below. Otherwise the predicted result would a substantial increase of forensic cases with even more degradation in quality control. One could then expect the continuation of an unacceptably high number of split panels, low reliability and thus low validity of examination results.

Recommended changes to HB 2359 follow.

1. For both CST (fitness to proceed) and MSO (penal responsibility) exams, go to Section 2 (5)(a) and Section 3 (5)(a) and change the text to read: "(a) A description of the nature of the examination shall include a listing of the empirically-supported forensic assessment instruments employed in the evaluation".

Alternatively, insert the following after (a): "(b) A listing of the empirically supported forensic assessment instruments employed in the evaluation". The original (b) becomes (c) and so forth to re-alphabetize the sequence.

2. For Section 3 (4) (c) change the text to read: "An assessment of the risk of dangerousness to the defendant or to the person or property of others for consideration of and determination of the defendant's release on conditions which shall include the use of reliable and valid forensic measures of violence risk". Currently, many evaluators use only their clinical judgment and records to form their opinion or, as research indicates, simply clone the findings of the hospitalization treatment team.

3. For Section 4 (4) for fitness after restoration, please change the text to read: "An examination for fitness to proceed performed under this section may employ any *method that is accepted by the professions of medicine or psychology as meeting*

minimal scientific standards for the examination of those alleged....." (highlighted words only change in passage).

Alternatively, use the wording "...may employ any method accepted by the professions of medicine or psychology that meets minimal scientific standards for the examination of those alleged...." (this option represents only a change in form).

4. Regarding a possible resolution, to help insure quality control, **forensic certification** is a must. There have been continual false starts for decades in DOH's efforts to initiate and maintain a certification program for HRS 704 examiners (see discussion below). Certification should include evaluation of redacted reports by examiners in addition to testing knowledge of the penal code and forensic research, as with other states.

5. Regarding a possible resolution, to increase quality, the requirement for **board certification or board eligibility** in forensic psychology or psychiatry should be considered. As with the federal government and many states, incentive pay should be considered for examiners board certified in forensics control for quality control and to prevent loss of highly qualified forensic professionals to the private sector.

6. Regarding a possible resolution or a separate bill under HRS 704, the **retirement of Frye test in favor of Daubert test** should be considered (Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 1993). Frye has been replaced in the federal courts and most states in favor of the Daubert. The Daubert test allows the trial judge to assess the soundness of methodology employed by experts such as the requirements to specify the error rate of measures employed and whether their methods have been published in peer-reviewed publications.

7. To increase quality control, it is recommended that judges provide feedback to examiners and grade the quality of their forensic report or expert testimony. This could be accomplished by way of a standardized checklist of relevant factors filled out after the case is over. The motivating effects of grading performance are well known.

Support for the recommended changes: Based on a detailed review of the empirical and forensic literature, the remainder of this paper provides strong justification for the suggested changes. The primary conclusion of this paper is that no changes in the penal code—reducing the number of examiners, cutting out administrative blocks, shortening processing time—will effectively address the forensic issues in the proposed bills unless much better quality control is built in the HRS 704 evaluation process.

This well-supported conclusion is based on replicated research findings that 3-panels appointed under HRS 704 have unacceptably high numbers of split panels resulting in a low inter-rater agreement and evidence that many examiners do not

use available empirically sound, evidence based models and measures to assess CST, MSO and CR.

There are exceptions. They include most Courts and Correction forensic professionals and a few standout private psychologists and psychologists who exceed minimal scientific requirements.

The thousands of forensic Hawaii reports by other HRS 704 examiners that I have reviewed do not usually reflect unanimous opinions. With CST exams, there appears to be high unanimous agreement on competent defendants and low agreement on incompetency. Competent defendants are easy to determine from their interaction with the examiner, knowledge of the charges and possible consequences to themselves as well of the court process, identification of their defense attorney, roles of the court officers, and, critically, their ability to rationally plan their defense in cooperation with their attorney. Incompetent defendants require a more complex and integrated approach, and are much less frequently agreed upon. The the CST literature indicates incompetency is opined when the defendant is actively psychotic, especially with visual and auditory hallucinations, has a prior history of psychiatric hospitalizations, and is unemployed.

No active certification program: One of several ways to to improve quality control of forensic evaluations is to certify the examiners. A huge, unresolved problem in Hawaii is that there is no current system in place to certify the quality of HRS 704 forensic evaluators. Yet there is a HRS 704-404 requirement for examiners to be selected from a list maintained by DOH. The DOH program is currently inactive and, upon recent discussion with Courts and Corrections staff, firm plans for certification training have not been made. Currently, the DOH list of examiners is closed to new forensic professionals who wish to be placed on that list. In addition to creating a static list with a dwindling number of examiners, This practice raises issues of restraint of trade and possible lawsuits. Research has established that certification training improves substantially the quality of HRS 704 examiners.

No requirement or incentive pay for board certification in forensic psychology or psychiatry. Another way to better insure quality control would be to require HRS 704 examiners to be board certified in forensics. This issue has been repeatedly raised over the last 35 that I know of and even now DOH is revisiting the issue. In the absence of board certification, there could be a requirement to to become board eligible in forensic competencies and actively work on attaining board certification.

The admission of expert testimony under Frye: Then as now, part of the difficulty in establishing and maintaining quality control of forensic examiners problem lies in the interpretation of the Frye test standard for admitting scientific evidence at trial, still the law in Hawaii (U.S. v. Frye, 293 F. 1013; D.C. Cir. 1923). It provides that expert opinion on a scientific is admissible only where the technique is generally accepted as "reliable" in the relevant scientific community. The "general acceptance" test of Frye became the dominant standard for determining the admissibility of novel scientific evidence at trial with the Court of Appeals noting

that the prime focus was on "counting scientists' votes, rather than verifying the soundness of a scientific conclusion" (Jones v. United States, 548 A.2d 35, 42; D.C., 1948). Also known as the Kelly/Frye test, the Supreme Court of California laid out some of the main advantages of the Frye standard when properly applied (People v. Kelly, 549 P.2d 1240; Cal. 1976). These included having experts assess the general validity of a scientific method and expressing a determinative voice in the process, and obtaining consensus in the scientific community that would promote uniformity of decisions. "At its core, the purpose of the Frye test is to ensure that the "the scientific theory or discovery from which an expert derives an opinion is *reliable*" (Hildwin v. State, 951 So. 2d 784; Fla. 2006; emphasis added). Critically, the word "reliable" as used in Frye-related legal cases refers to methods that validly measure what they purport to measure, whereas psychologists use the word "reliable" to reflect consistency of responding on standardized measures or inter-rater agreement.

Frye was replaced in the federal courts and most states in favor of the Daubert standard where the trial judge assesses whether the reasoning of methodology underlying proffered testimony was sound (Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 1993). There are many articles in the legal calling for the retirement of the Frye standard. Nevertheless, in Hawaii, the court expressly declined to adopt Daubert but did consider the provisions of the test "instructive" (State v. Vliet, 19 P.3d 42; Haw. 2001).

Presently, and under proposed legislation (e.g., see HB 2359), it is entirely permissible for HRS 704 examiners to proffer conclusions under the Frye standard based on the (first generation) method of simply reviewing available records and interviewing the defendant.

Research relevant to forensic evaluations conducted on the mainland show improvement and common use of FAIs.

A sampling of the available data-based studies follows:

Research on new CST assessment methods started to accelerate, as reported in a 5-year research update, with suggestions offered for more reliable and valid measures (Cooper & Grisso, 1997).

Research conducted in several states on the Mainland endorse the findings of Cooper & Grisso (1997) and show low reliability in CST evaluations was due to several systemic factors (Skeem & Golding, 1998).

Randy Otto (2006) of University of South Florida in his now-classic article "Competency to Stand Trial" in *Applied Psychology in Criminal Justice* drawing on the work of Grisso and others offers a template for CST evaluations. The factors in 3rd generation standardized tests of CST such as the Fitness Interview Test and MacArthur Competence Assessment Tool form the basis of the model.

Even with evidence-based FAIs, systematic bias on the part of forensic evaluators which favors the retaining party has been demonstrated (Murrie, D., Boccaccini, M. Zapf, P., Warren, J., & Henderson, C., 2008). A multitude of other biasing and distorting factors from the literature that could affect fitness examinations using 3rd generation methods have been documented (e.g., see Stafford & Sellbom, 2012 Assessment of competence to stand trial. In Weiner, I. & Otto. R., Handbook of Psychology, Volume 11, 2nd Edition, pp 412-439).

The National Judicial College in Mental Competency: Best Practices Model (2011-12), together with research on fitness suggests in part that CST exams should be conducted separately from MSO evaluations and that the licensed psychologist or psychiatrist be forensically trained and certified in performing competency evaluations. It is highly recommended that forensic assessment instruments (FAIs) be used in conjunction with standardized measures of malingering and deception (see Hall & Pritchard, Pritchard, 1986; Hall & Poirier, 2003; Hall & Thompson, 2007). Other recommendations that may not be followed by some forensic examiners include inserting the following in the report: (1) A statement that the defendant was advised of its purpose and its nontherapeutic and non-confidential nature, and that the defendant expressed understanding of this advisory and agreed to proceed with the evaluation; (2) A description of the evaluator's contacts and interviews with the defendant, conversations with the prosecutor, and a description of any non-privileged information obtained from the defense attorney; (3) A description of the entire database should be included in the report, including partial administrations of tests; (4) If the defendant is unfit, an opinion as to whether he or she is likely to be restored to competency within a reasonable or statutorily determined period; (5) Unless required, as in CST/CR evaluations, statements regarding future dangerousness should be excluded from the report; and (5) A CV should be submitted at the time the CST report is filed. Some examiners to good effect along with the CV list the criminal cases with which they have been involved, the retaining party, the date of the CST hearing, and the outcome. This enables them to calculate percentage of time they have been retained by the prosecutor versus defense, and relative impact on outcome.

Pirelli, Gottdiener & Zapf (2011) in their article "A meta-analytic review of competency to stand trial research" in Psychology, Public Policy and Law, analyzed 68 studies representing 50 years of competency research between 1967 and 2008, and found a significantly greater discrepancy in scores between competent and incompetent defendants on competency assessment instruments as compared to (2nd generation) traditional psychological measures such as the clinical interview, MMPI-2, Rorschach, and intelligence testing. The study noted the significant advances in this field since the 1960s, recommending that findings regarding the use of 3rd generation empirically-supported, evidence-based competency tests should always be incorporated into competency standards and practice. They found the base rate of recommended incompetency across 59 nonmatched samples to be 27.5%

The use of FAIs to boost inter-rater agreement on CST exams was reported by Stafford & Sellbom (2012) in their review of the literature in Weiner & Otto's Handbook of Psychology. For example, the Interdisciplinary Fitness Interview (IFI) has a 95% agreement rate among interviewers regarding competence. On the Georgia Court competency Test classification accuracy was about 82%. The TOMM as a measure of malingering reported levels of sensitivity of 96% to 98% and a specificity of 100%. The MacArthur Competence Assessment Tool-Criminal Adjudication showed good utility (Pinals, Tillbrook, & Mumley, 2016). The point is that this study corroborates other investigations that shows use of FAIs to replace 1st and 2nd generation CST exams can significantly boost reliability.

Research relevant to forensic exams in Hawaii show big problems in quality control: There are compelling reasons to believe that HRS 704 evaluations in Hawaii suffer from systemic and chronic problems in quality. These are improving but minimal scientific standards for forensic examinations are only partially met.

Robinson & Acklin (2010) examined 150 CST reports in Hawaii and found "pervasive mediocrity with respect to quality" with forensic reports showing "a general lack of attention to quality elements, especially historical and opinion rationale elements". Only one-quarter of the reports scored at the 80% maximum possible score with quality scores for the entire sample about 69% (SD = 15.21), a "substantial level of agreement". Unfortunately, inter-rater agreement was not reported for incompetent versus competent defendants, so it is unknown whether the easier task of raters unanimously agreeing on competency boosted the score. This is compared to the much lower unanimous agreement as to whether the accused was rated incompetent. Report quality did not differ as a function of evaluator professional identity as a psychiatrist or psychologist. The 6 Courts and corrections evaluators submitted a greater number of reports above the 80% quality criterion. Quality scores indicated training in forensics increased quality scores.

Only 24% of reports included a complete statement that the limits of confidentiality were explained to the defendant. They stated: "Complying with ethical requirements for disclosure does not appear to be a common practice amongst Hawaii forensic evaluators". About ¾ of the evaluators did not comply with the requirements (page 135). Courts and Corrections staff had a much better record. This finding, however, is important to consider as it undermines the "guarantee" against self-incrimination the authors suggest because of HRS 704-416 requirement that statements made by the defendant are inadmissible except to establish a diagnosed condition, and cannot be used as evidence against him or her.

Gowensmith, Murrie & Boccaccini (2012) assessed the "field reliability" or agreement among forensic evaluators in routine practice from a review of 216 Hawaii cases. In 71% of initial CST evaluations, all evaluators agreed about a defendant's competence or incompetence (kappa = .65). Agreement was lower (61%, kappa = .57) in re-evaluations of defendants who were originally found incompetent and sent fro restoration services. When evaluators disagreed, judges

tended to make decisions consistent with the majority opinion. When judges disagreed with the majority opinion, they more often did so to find a defendant incompetent than competent.

The quality of three-panel fitness evaluations in Hawaii in terms of rate of agreement between examiners was studied by Gowensmith & Murrie (2013) where they coded data from 716 CST reports, taken from 241 cases, representing 15 independent psychologists, 16 certified psychiatrists, and 7 DOH psychologists. Results showed that evaluator agreement was better in CST exams (overall 71%) than for criminal responsibility exams (55%) and for evaluation to determine readiness for conditional release (overall about 53%). Reflecting the much easier task of experts agreeing that a defendant had sufficient competency skills, they state: "Most of those [fitness] cases (59%) involved unanimous agreement that the defendant was competent, and *few (12%) involved unanimous agreement that the defendant was incompetent"*(emphasis added). The rate of agreement of 59% leaves over 40% split decisions where examiners did not agree that the defendant was competent.

The situation becomes worse when it is considered that reliability, in this case inter-rater agreement, defines the upper limit of validity. If reliability is low then we have no way to determine whether the results were valid. Once the defendant reaches the trial stage in Hawaii, he or she faces a split panel in regards to criminal responsibility a little less than half the time (45%). For defendant found NGRI, committed to HSH, and then examined for release, there is low agreement (53%) in terms of examiners unanimously agreeing on readiness to be released (CR). Three-panel examinations in Hawaii may be significantly flawed if the results of Gowensmith's research are accurate, and the results of the meta-analysis by Pirelli, et. al., (2011) can be generalized to Hawaii.

Gowensmith & Murrie (2015) ask: "Does this mean that expert mental health testimony is worthless?" They go on to state that the levels of agreement across the 3 types of HRS 704 forensic evaluations were above chance. But above chance performances does not equate to adequacy of reports or testimony by a long shot. Using their own figures, the level of agreement among fitness examiners in regards to incompetency (12%), a dichotomous variable that by chance alone is 31%, is significantly *lower* than expectation.

Quality of CST, MSO, and CR exams can be raised by use of FAIs: The key to raising the adequacy of HRS 704 forensic evaluations in Hawaii lies in examiners administrating empirically sound forensic assessment instruments (FAIs). These evidence-based reliable and valid measures can be easily administered by both properly trained psychologists and psychiatrists, and are already well known by some forensic professionals in Hawaii. Along with FAIs, norm-based measures of response set are commonly used to assess whether malingering has occurred.

For CST exams, recommended available measures that have good reliability and validity include the 22-item MacArthur Competence Assessment Tool-Criminal

Adjudication (MacCAT-CA), CAST-MR, ECST-R, CAI/RCAI, MacCat-CA, CST, GCCT) along with other defendant-specific information.

For MSO exams, Rogers Criminal Assessment Scales (RCRAS) utilizes consideration of cognitive and volitional capacity under our current test of insanity into testable hypotheses, and rates individual items on a Likert-type scale. The RCRAS, as the gold standard of tests for penal responsibility, has generated research showing high agreement (over 90%) between forensic psychologists using this measure to assess actual case outcomes

For tests to assess response set, recommended measures include the SIRS or Structured Interview Response Set, MMPI-2, Validity Indicator Profile, TOMM or Tests of Malingered Memory,

In Washington, for example, a competency assessment protocol includes a review of the records, a thorough clinical interview, administration of evidence-based competency tests, and measures of response set (see Washington State Institute for Public Policy, May 2011, Competency to stand trial and conditional release evaluations). Other states have similar procedures.

A blowup of HB 2359 Relating to Mental Health Examinations: Currently, Hawaii conjoins CST and MSO evaluations in the vast majority of criminal cases, similar to most other states and uses the MPC/ALI test of insanity. About 85-90% of criminal cases in Hawaii as described in HRS 704-404 are conjoined. This bill proposes, among other changes, the decoupling of CST and MSO examinations because (1) sometimes the criminal responsibility portion of the HRS 704 sanity report is not utilized by the court; (2) conjoining lengthens the time to examine the defendant and report to the court, (3) pairing them is burdensome, and (4) in spite of the court-ordered requirement for the defendant who raises the issue of insanity to undergo the HRS 704-404 examination, legal and ethical issues nevertheless are be raised. The authors stated: " ...defendants who are unfit to proceed, by definition, may not have sufficient capacity to consult with defense counsel to determine the impact of providing incriminating information to the examiner relevant to the defendant's state of mind at the time of the crime". Finally, these recommendations are held to be consistent with the recommendation of the ABA's CJMHS, Standard 7-4.4 that the two should not be paired (unless the defense requests it or unless good cause is shown).

I am concerned with #2 and #3. Decoupling CST and MSO exams if done in every case, the exceptions aside for a moment, creates a doubling of the HRS 704 evaluations in an already taxed judicial system. Base rates for competency referrals range from 2% to 8% of felony arrests. Currently, on a national level, approximately 80% of defendants are eventually found competent to stand trial (or never were incompetent), meaning that the remaining 20% are incompetent and never regain competency. Those 20% of defendants who do not proceed with trial nevertheless require fitness examinations as well as evaluation for violence risk. Violence risk assessments for any forensic purpose take considerable time and effort to do

properly, reflecting the difficult task of prognosticating future behavior (see Hall, 2008, Mee & Hall, 2001). Further, under current law, a dangerousness assessment is required if the examiner opines the accused has an exculpating disorder. To render these opinions, again a comprehensive violence risk analysis must be performed. There are no short cuts to conducting these risk evaluations properly despite the wording in HRS 704-404 that the examiner need only render conclusory statements about potential harm to self, others and property.

The proposed bill makes no mention of a method that could be utilized by the court in determining if the accused is likely to be in the 80% competent category. If so, a evaluation should proceed after a screening for competency. The requirement for a violence risk analysis in determination of the defendant's release on conditions (see Section 3, (5)(c)) will add considerably to the time and effort by forensic examiners. Already, current law requires that dangerousness be assessed in MSO cases if an exculpating disorder is determined.

The proposed bill conflates competent and incompetent defendants and thereby underrates the complexity of examination of some incompetent defendants: The framers state: "An evaluation of fitness do not necessarily require determining a diagnosis or an exhaustive record review, as it involves an examination of a defendant's current cognitive capacity and state". Incompetent defendants, up to 20% of those referred for 3-panel examination, often represent complex cases that definitely do require a thorough record review, interview, and evaluation on valid and reliable forensic-relevant measures (see Hall, 2008,. Recall that the Gowensmith research in Hawaii showed that the rate of agreement was a very low 12% for incompetent defendants, leaving 88% of the cases having no unanimous agreement among the examiners. This means split decisions in almost 9 out of 10 cases, strikingly high and does not come close to minimal standards for any kind of forensic work.

This finding suggests incompetent defendants can be placed in peril when examiners do not agree he or she is incompetent. This finding conforms to my experience that when only one examiner on the 3-panel uses FAIs, teasing out factors suggesting incompetency that were neglected by the other examiners who did not use testing, that examiner may be the minority opinion in the split 3-panel. Since research has shown that judges tend to go with the majority opinion, some defendants may be forced to go to trial even though they were incompetent.

Despite the above misgivings, the decoupling of fitness and sanity evaluations in Hawaii is a sound and long overdue step in the right direction, and is already practiced in the majority of states. The rights of the accused take precedence over cost considerations represented by increased numbers of forensic evaluations. Before changes are made, however, quality control needs to be built into the proposed bill. Otherwise changes will be meaningless.. Finally, there is no doubt that incriminating information about the incompetent defendant can obtained by the examiner, treatment personnel at OCCC during the defendant's pretrial detainment, and others in the CJS. Often, I read in the medical records at OCCC and

HSH of incidents where the accused conversed with the staff and, thinking the released information may not be harmful, shared events of the alleged offense that could place his case in jeopardy.

Research supports decoupling. CST and MSO examinations are distinctly different. Chauhan, Warren, Kois, & Well-beloved Stone (2015) reported in Psychology, Public Policy and Law that they examined 5,731 forensic evaluations conducted over 17 years. They found that "Joint evaluations were *less likely* to lead to an opinion supportive of incompetency but more likely to lead to an opinion supportive of insanity' (p. 59; emphasis added). This finding may be of little solace to the incompetent defendant when the extremely low rate of NGRI acquittal's is considered.

HB 2359 does not address quality control for CST and MSO evaluations, and does not specify any requirements for normally would be a standardized assessment of violence risk. Using the old Frye test, an examination performed may employ any method that is "accepted" by psychology or medicine for the examination of CST and MST. In addition to the requirements for making conclusory statements, rendering opinions, the only substantive requirements for examiners conducting those evaluations are that records be reviewed and that the examiner meet with the defendant in order to conduct his or her examination. In this regard, HRS 704 has not changed since the Model Penal Code was introduced in Hawaii about a half century ago. There is no requirement for using empirically-based FAIs, or even traditional psychometric testing.

HB 2359 also proposes a requirement for only *one* evaluator in (1) felony fitness evaluations for defendants who have previously participated in fitness restorative services and were originally charged with crimes other than murder and attempted murder or class A felonies; (2) nonfelony fitness cases, continuing the current law; (3) MSO nonfelony cases, an addition to current law; (4) CST/CR cases involving a violence risk assessment towards others and property, as well specification of conditions for release.

Two-person panels are recommended for 1 and 4, but only if FAIs are utilized by the forensic examiners. Until Hawaii-based examiners meet minimal scientific standards in their work, it is too radical of a change to have only 1 examiner perform those evaluations.

Full references to sources cited in this paper can be found in Hall, H.V. (Editor, 2008). *Forensic Psychology and Neuropsychology for Criminal and Civil Cases.* Boca Raton, FL: CRC Press; H.V. & Ebert R. (2002). *Violence prediction: Guidelines for the Forensic Practitioner,* Second Edition. Springfield, IL: Charles C. Thomas; Hall, H. & Poirier, J. (2001). *Detecting Malingering and Deception: Forensic Distortion Analysis,* Second Edition. Boca Raton, FL: CRC Press; Hall, H.V. & Pritchard, D.A. (1996). *Detecting Malingering and Deception: Forensic Distortion Analysis (FDA).* Boca Raton, FL: CRC Press; Hall, H.V. & Thompson, J. (2007). Explicit alternative testing (EAT): Towards clinical-forensic applications. *Forensic Examiner, 16,* 38-43;Mee, C.

& Hall, H.V. (2001). Risky business: Assessing dangerousness in Hawaii. Honolulu, HI: *University of Hawaii Law Review,* 63-120. Full references to other sources can be obtained by the author.

End of article.