CHAPTER 704
PENAL RESPONSIBILITY AND FITNESS TO PROCEED

Section

Note

L 2001, c 91, §4 purports to amend this chapter.

Law Journals and Reviews

Fitness to Proceed: Compassion or Prejudice? II HBJ, no. 13, at 135 (1998).

Case Notes

Chapter, based on model penal code, does not recognize diminished capacity as a distinct category of mitigation. 73 H. 109, 831 P.2d 512 (1992).

Trial court did not err in permitting prosecution to cross-examine defendant regarding defendant's non-statements to defendant's mental examiners where defendant's failure to mention defendant's concerns regarding aliens was clearly relevant to the question of whether defendant was being truthful when defendant testified at trial about having those concerns at the time of the incident, and §704-416 only addresses the admissibility of defendant's statements, not non-statements; thus, as the introduction of defendant's non-statements did not violate this chapter, defendant's right to a fair trial was not prejudiced by admission of the testimony. 116 H. 200, 172 P.3d 512 (2007).

Provisions of chapter apply only to issues raised under the chapter. 7 H. App. 402, 771 P.2d 899 (1989).

" **§704-400 Physical or mental disease, disorder, or defect excluding penal responsibility.** (1) A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law.

(2) As used in this chapter, the terms "physical or mental disease, disorder, or defect" do not include an abnormality manifested only by repeated penal or otherwise anti-social conduct. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §704-400

I. Physical and Mental Diseases, Disorders, and Defects.

Perhaps the most vexing problem in the penal law is determining when individuals shall not be held responsible for

their conduct because at the time of the conduct they suffered from a disease, disorder, or defect which was related in some way to the conduct. The law has traditionally dealt with this problem in two more or less distinct areas.

As chapter 702 has pointed out, a voluntary act or a voluntary omission is the sine qua non of penal liability. In dealing with cases involving physical disease, disorder, or defect, the courts have traditionally held that where such a condition precludes conduct from being voluntary, the defendant will not be held penally liable.

In the classic case of Fain v. Commonwealth,[1] the court recognized that a homicide committed during a state of somnambulism (sleepwalking) or somnolentia (sleep drunkenness) would preclude criminal liability because the defendant was unconscious and therefore the defendant's acts were involuntary. After citing numerous medico-legal treatises, the court said:

> These authorities, corroborated as they are by common observation, are sufficient to prove that it is possible for one, either in sleep or between sleeping and waking, to commit homicide, either unconsciously or under influence of hallucination or illusion resulting from an abnormal condition of the physical system.[2]

Following Fain, courts have held that where the physical condition of the defendant precludes or impairs consciousness the acts of the defendant will be regarded as involuntary and, therefore, result in an acquittal. Thus, in cases involving various forms of epilepsy,[3] traumatic injury to the head,[4] sexual assault,[5] and somnambulism,[6] the courts have recognized an absolute defense to penal liability predicated on the defendant's unconscious, but highly animated, action.

On the other hand, if a person's disease, disorder or defect is "mental" (as opposed to "physical"), the issue of the person's "guilt" is said, in the language of the cases, to turn on the person's "responsibility" for the person's conduct. Historically, a defendant will be relieved of responsibility for the defendant's conduct if, at the time of the conduct, the defendant was "labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."[7] This standard, known as the M'Naghten Rule or test, has been widely accepted in the United States. Persistent criticism of the rule has led to recent suggestions that it be modified to reflect current insights and terminology of modern psychiatry.[8] However, all recent suggestions have maintained the dichotomy between physical and mental diseases, disorders, and defects.

In this country, it originally was not of any pragmatic legal consequence whether the excusing condition was classified as "physical" or "mental"; the acquittal was absolute. In more recent years it has become common to qualify an acquittal based on the defendant's "mental" irresponsibility and to provide for commitment of the defendant thus acquitted to an appropriate medical institution. However, a defendant whose "physical" condition precludes voluntariness is still acquitted absolutely.

Medically, the classification of a defendant's (or a patient's) condition as either physical or mental, does not, in many cases, make sense. While it is true that there are many abnormalities of the mind or mental processes for which no biological basis can be found, many diseases, disorders, or defects which affect the behavior of a person have a multiple aetiology.[9]

Broadly speaking, two groups of factors influence the criminal actor in the latter cases: (1) the biological or organic factors, "the individual physical endowment of the criminal actor," the criminal actor's "bio-chemical, physiological, neurological, and anatomical peculiarities"; and (2) the social and psychological factors "emanating from relationships with individuals or groups in the external environment."[10]

> [O]ne must keep in mind the basic principle of multiple aetiology. Organic factors are operating synergistically with social and psychological stresses in a particular constitution, all factors contributing in varying degrees to the genesis of the breakdown and to the presenting clinical picture.[11]

The centrality of the brain as a bodily organ means that many physical conditions "may be crucially involved in impaired or aberrant conduct."[12] This is so whether the condition relates to the functioning of the brain directly (e.g., epilepsy, cerebral tumor, head trauma, encephalitis, or arteriosclerosis) or indirectly through a symbiotic relationship of the brain with another organ or system (e.g., glandular disorders, metabolic dysfunctions, and circulatory breakdowns).[13] Moreover, "[t]he number of accused persons whose criminal conduct might be biologically conditioned is probably quite large since the number of physical disorders that are capable of producing criminal behavior is itself extensive."[14]

This brief foray into "hornbook psychiatry"[15] indicates that the propensity of the courts to label a single integrated medical problem as either "physical" or "mental" can only be justified if rational legal consequences turn on this categorizing process. An examination of the cases will indicate that such rational consequences do not, in fact, result from affixing these legalistic labels to defendants with medical

problems that constitute conditions which excuse penal liability (or responsibility).

The rationale for providing for acquittal conditioned on commitment (or "hospitalization") in cases involving "mental" disease, disorder, or defect ("insanity") is that commitment is necessary to protect other members of society (and the acquitted defendant) from the consequences of repetition of the prohibited conduct. The rationale is no less applicable or persuasive in cases of "physical" conditions resulting in involuntary movements which threaten harm to others. These people too "may present a public health or safety problem, calling for therapy or even for custodial commitment. ..."[16] While it is true that mandatory commitment bears harshly on a person whose physical condition (or symptom thereof) may be nonrecurrent,[17] it bears no less harshly on the person whose mental condition (or symptom thereof) may be nonrecurrent--although the frequency of the latter instance may be less than that of the former.

The answer does not lie in the black-and-white distinction posed by present law: an excusing mental condition means commitment; an excusing physical condition means an unqualified acquittal. The answer lies, as the Code suggests in later sections, in tailoring the disposition of a defendant, acquitted on the basis of disease, disorder, or defect, to the condition of the defendant and to the needs of society. Commitment need not be mandatory because the defendant's disease, defect, or disorder is labelled "mental," nor should it be precluded because the defendant's excusing condition is labelled "physical."

The unsatisfactory posture of the law has led many courts to dissimilar decisions in substantially similar cases. Thus, while epilepsy has been held to be distinctly different from "insanity" (a mental condition constituting an excuse from criminal responsibility) in some cases,[18] in other cases it has not.[19] Cases of somnambulism, which are usually said to constitute a physical condition precluding voluntariness,[20] have also been classified as "a species of insanity."[21] Moreover, within the same jurisdiction cases involving the same type of disease, disorder, or defect have at one time labelled the condition "mental" and at another time labeled it "physical."[22]

One real danger of the false dichotomy that the law presently draws between mental and physical excusing conditions is that in those cases where the condition of the defendant is not easily categorized as either "mental" or "physical," the defendant might be convicted because the net effect of the evidence is not sufficient to raise a reasonable doubt in the minds of the jury on the issue of voluntariness or on the issue of mental

responsibility because of the inability of expert testimony to conform to the "either-or" proposition demanded by the law. Conviction may result in such cases notwithstanding substantial evidence that the defendant suffered from a condition which impaired the defendant's consciousness.[23]

Conversely, the unqualified acquittal, which the law has afforded defendants whose conduct resulted from physical conditions which rendered the action "involuntary," has led some judges to write strained opinions that can only be justified by the result sought to be achieved.

A series of British cases illustrates the dilemma which the state of the law forced upon the Courts. In Regina v. Charlson[24] the defendant was charged with assault for striking his son with a hammer. The defendant offered evidence that at the time of his acts he suffered from a cerebral tumor which impaired his consciousness, causing him to act in a state of automatism, and that he was not suffering from any mental illness. The trial judge instructed the jury:

> Therefore... you have to ask yourselves whether the accused knowingly struck his son, or whether he was acting as an automaton without any knowledge or control over his acts.... [Y]ou may consider that he may not have known what he was doing at all, although perhaps he remembered it in a vague sort of a way. If you think it was purely automatic action for which he had no responsibility at all and over which he had no control then the proper verdict would be "not guilty."[25]

The defendant was acquitted.

In Regina v. Kemp[26] the defendant struck his wife with a hammer. He pleaded that he had committed the act in a state of impaired consciousness caused by arteriosclerosis. The medical testimony was in conflict as to whether the condition should be labelled "physical" or "mental." The court held that regardless of the medical testimony concerning the explanation or labelling of the defendant's condition, the description of the condition established that "the accused suffers from... a disease of the mind within the true meaning of the McNaghten [sic] Rules."[27]

> The broad submission that was made to me on behalf of the accused was that this is a physical disease and not a mental disease; arteriosclerosis is a physical condition primarily and not a mental condition. But that argument does not go so far as to suggest that for the purpose of the law diseases that affect the mind can be divided into those that are physical in origin and those that are mental in origin. There is such a distinction medically. I think it is recognized by medical men that there are mental diseases which have an organic cause, there are

> disturbances of the mind which can be traced to some hardening of the arteries, to some degeneration of the brain cells or to some physical condition which accounts for mental derangement. It is also recognized that there are diseases functional in origin where it is not possible to point to any physical cause but simply to say that there has been a derangement of the functioning of the mind, such as melancholia, schizophrenia and many other of those diseases which are usually handled by psychiatrists. This medical distinction is not pressed as part of the argument for the accused in this case, and I think rightly. The distinction between the two categories is quite irrelevant for the purposes of the law, which is not concerned with the origin of the disease or the cause of it but simply with the mental condition which has brought about the act. It does not matter, for the purposes of the law, whether the defect of reason is due to a degeneration of the brain or to some other form of mental derangement. That may be a matter of importance medically, but it is of no importance to the law, which merely has to consider the state of mind in which the accused is, not how he got there.
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> Hardening of the arteries is a disease which is shown on the evidence to be capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning, understanding and so on, and so is in my judgment a disease of the mind which comes within the meaning of the [M'Naghten] Rules. I shall therefore direct the jury that it matters not whether they accept the evidence of certain testifying doctors, but that on the whole of the medical evidence they ought to find that there is a disease of the mind within the meaning of the [M'Naghten] Rule.[28]

Pursuant to the instructions of the court, the defendant was found "guilty but insane." The full import of the decision is recognized only when it is realized that the defendant pleaded automatism, not insanity, and the court instructed a verdict of guilt based on insanity arising out of an arteriosclerotic condition.

In 1961 the House of Lords decided Bratty v. Attorney-General for Northern Ireland[29] which dealt with the relationship between the defenses of impaired consciousness and "insanity." The defendant, in that case, pleaded: (1) that at the time of the conduct he suffered from psychomotor epilepsy, that as a result thereof he acted in a state of automatism, and that his actions were therefore involuntary; (2) that his psychomotor epilepsy rendered his mental condition confused and impaired, and that because of this he could not form the requisite intent

for murder; and (3) that he was guilty-but-insane (at the time the English equivalent of the American verdict of not guilty by reason of insanity) under the M'Naghten test. The trial judge rejected the first two pleas and refused to instruct on them, but submitted the issue of insanity to the jury. The jury rejected insanity and found the defendant guilty. At that time in England, unlike the law in many American jurisdictions, the defendant bore the burden of persuasion (by a preponderance of the evidence) on the issue of the defendant's insanity. The House of Lords upheld the trial judge, relying on the testimony given by doctors at the trial "that psychomotor epilepsy is a defect of reason due to disease of the mind."[30]

In Bratty the House of Lords assimilated the defense based on automatism into the defense of insanity where automatism is based on a "disease of the mind," i.e., where there is no evidentiary showing that the excusing condition is "physical" in nature. The Lord Chancellor said that

> Where the possibility of an unconscious act depends on, and only on, the existence of a defect of reason from disease of the mind within the McNaghten [sic] Rules, a rejection of the jury of this defense of insanity necessarily implies that they reject the possibility.[31]

In short, under the posture of the testimony, "there would need to be other evidence on which a jury could find non-insane automatism."[32]

Lord Denning took a somewhat different approach. In an opinion which rejects Charlson and accepts Kemp, he said:

> The major mental diseases, which doctors call psychoses, such as schizophrenia, are clearly diseases of the mind. But in Charlson's case, Barry J. seems to have assumed that other diseases such as epilepsy or cerebral tumor are not diseases of the mind, even when they manifest themselves in violence. I do not agree with this. It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in a hospital rather than be given an unqualified acquittal.[33]

It is obvious that Lord Denning's concern is not with language, but result. Lord Denning's primary concern is that a defendant whose condition (1) has caused violence which (2) may recur should be detained. If this requires that the defendant's condition be labelled as a "disease of the mind" for legal purposes, the language of judges is sufficiently flexible for the task. If it requires that the defendant be found guilty but insane, so be it. The inability of a British defendant to meet a burden of persuasion on the issue of insanity (which now

includes additional disorders) did not seem to bother the court--indeed, the Lord Chancellor was concerned lest the burden be avoided by a change in nomenclature.

The British experience has led to some anomalous results but at the same time provides some insights into a problem which can be resolved by appropriate legislation. It seems anomalous that conditions such as cerebral tumor or arteriosclerosis should be labelled "mental" or "diseases of the mind" and that defendants suffering from these conditions should be adjudged "insane" in order to achieve the custodial commitment deemed necessary. At the same time, the House of Lords seems eminently wise in attempting to point out the factors which properly call for commitment. (Whether the labelling process is necessary or logical is another matter.)

The Code seeks to avoid the arbitrary, meaningless and strained distinctions which have been made between excusing conditions which have been labelled "mental" and those which have been labelled "physical." Chapter 704 provides for a unified treatment of diseases, disorders, and defects which constitute an excusing condition. The same standards are provided for determining whether the condition of the accused will relieve the accused of responsibility for the accused's acts--it matters not that the condition is labelled "mental" or "physical" or both. At the same time, the Code, in subsequent sections of this chapter, provides for a flexible disposition of defendants acquitted on the basis of a disease, disorder, or defect which excludes responsibility and, therefore, liability. The disposition is tailored to the condition of the accused; if the condition demands custodial commitment, the same will be ordered notwithstanding the fact that the condition is primarily "physical" rather than "mental"; if the condition does not demand commitment and conditional release or discharge are appropriate, the same will be ordered notwithstanding the fact that the condition has been labelled "mental disease or disorder."

II. The Standards of Penal Responsibility.

Preliminarily it must be pointed out that the penal law is not concerned with the physical or mental condition of a defendant at the time of the alleged penal conduct unless the defendant's condition impairs the defendant's capacity not to engage in the prohibited conduct. The interrelationship between choice and guilt has been succinctly stated by the Third Circuit in a case involving the defendant's mental condition.

> The concept of mens rea, guilty mind, is based on the assumption that a person has a capacity to control his

> behavior and to choose between alternative courses of conduct. This assumption, though not unquestioned by theologians, philosophers and scientists, is necessary to the maintenance and administration of social controls. It is only through this assumption that society has found it possible to impose duties and create liabilities designed to safeguard persons and property....
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> ... [T]he fact that a defendant was mentally diseased is not determinative of criminal responsibility in and of itself but is significant only insofar as it indicates the extent to which the particular defendant lacked normal powers of control and choice at the time he committed the criminal conduct with which he is charged....[34]

As pointed out, the M'Naghten Rule, which is the traditional approach, provides that if a defendant did not know what the defendant was doing or did not know that what the defendant was doing was wrong, the defendant will not be held responsible for the defendant's acts.[35] A defendant who does not possess this minimum degree of rationality is said to be "legally insane." Without this minimum degree of cognitive capacity, choice, and therefore control, is clearly absent. Condemnation and punishment of such an individual would be unjust because the individual could not, by hypothesis, have employed reason to restrain the act: the individual did not and the individual could not know the facts essential to bring reason into play.[36] They are also futile because a "madman who believes that he is squeezing lemons when he chokes his wife or thinks that homicide is the command of God is plainly beyond reach of the restraining influence of law; he needs restraint but condemnation is entirely meaningless and ineffective."[37]

The M'Naghten Rule singles out only one factor as a test of responsibility: cognition--the ability of the defendant "to know" what the defendant was doing or "to know" the wrongfulness of the conduct. Fourteen states and the federal jurisdiction have recognized this as a defect in the M'Naghten formulation.[38] Many mental diseases, disorders, or defects may produce an incapacity for self-control without impairing cognition. Thus, these jurisdictions have supplemented the M'Naghten formulation with the "irresistible impulse" test.

Following the suggestion of these states and the Model Penal Code, this Code accepts the view that a defendant whose volitional capacity is impaired as a result of a disease, disorder, or defect should be relieved of penal liability just the same as a defendant whose cognitive capacity is so impaired.

> The draft of the M.P.C. accepts the view that any effort to exclude the non-deterrables from strictly penal sanctions, must take account of impairment of volitional

> capacity no less than impairment of cognition; and this result should be achieved directly in the formulation of the test, rather than left to mitigation in the application of M'Naghten. It also accepts the criticism of the "irresistible impulse" formulation as inept in so far as it may be impliedly restricted to sudden, spontaneous acts as distinguished from insane propulsions that are accompanied by brooding or reflection.[39]

The formulation for the test of volitional capacity is put in terms of whether the defendant lacked substantial capacity to conform the defendant's conduct to the requirements of the law.

Lack of capacity is, of course, distinguishable from a disposition not to conform to the requirements of the law. "The application of the principle will call, of course, for a distinction between incapacity, upon the one hand, and mere indisposition on the other. Such a distinction is inevitable in the application of a standard addressed to impairment of volition."[40]

The defendant's lack of volitional capacity is the same rationale which has precluded penal liability in cases involving physical diseases, disorders, or defects. As pointed out in Part I of this commentary, the defendant's inability to exercise volition while in a state of somnambulism, automatism, or epilepsy is the reason why the courts have found no basis for penal liability in such cases. Although it is true that the defendant's condition also probably precludes cognition, the courts have not dealt fully with this aspect of the question. Acquittals on the basis of involuntary action on the part of the defendant are unqualified (unless the disease, disorder, or defect is assimilated into "insanity"). Since, as pointed out, the reason for providing for a conditional or qualified acquittal in cases involving a mental disease, disorder, or defect is equally applicable to cases involving a physical condition impairing the defendant's volitional capacity (and possibly the defendant's cognitive capacity), there is no reason to provide different standards or different consequences for excusing conditions of the mind or the body or both. The Code provides for unified treatment of physical and mental conditions which impair cognition or volition or both.

A more subtle criticism of the M'Naghten test and the "irresistible impulse" test must be recognized and accepted. M'Naghten requires that the defendant must be completely without cognitive capacity--the defendant must not know the nature and quality of the defendant's act or that what the defendant is doing is wrong. The irresistible impulse test requires a complete lack of capacity for self-control. The legal requirement of total incapacity does not conform to the clinical

experience of psychiatrists.[41] Many persons with a mental disease, disorder, or defect may have an extremely limited capacity for self-control or cognition, but their lack of capacity is rarely total.

> The schizophrenic, for example, is disoriented from reality; the disorientation is extreme; but it is rarely total. Most psychotics will respond to a command of someone in authority within the mental hospital; they thus have some capacity to conform to a norm. But this is very different from the question of whether they have the capacity to conform to requirements that are not thus immediately symbolized by an attendant or policeman at the elbow. Nothing makes the inquiry into responsibility more unreal for the psychiatrist than limitation of the issue to some ultimate extreme of total incapacity, when clinical experience reveals only a graded scale with marks along the way.[42]

The Code does not demand total incapacity; it requires substantial incapacity. The word "substantial" is, of course, imprecise, but seeking precision in designating the degree of impairment that will preclude responsibility is as foolish as requiring total impairment. As the commentary to the Model Penal Code states: "To identify the degree of impairment with precision, is, of course, impossible both verbally and logically. The recommended formulation is content to rest upon the term 'substantial' to support the weight of judgment; if capacity is greatly impaired, that presumably should be sufficient."[43] An expert witness, called upon to assess a defendant's capacity at a prior time (which, of course, the witness probably did not observe), can hardly be asked for a more definitive statement even in the case of extreme conditions.

The Code has rejected the approach taken in Durham v. United States[44] which puts the test as follows: "an accused is not criminally responsible if his unlawful act was the product of a mental disease or mental defect." The problem with the Durham test is twofold: (1) It leaves the ultimate decision of criminal responsibility to the expert medical witness without any limitation or guide as to which kinds of cases the law seeks to exempt from condemnation and punishment. Once the expert witness has satisfied himself on the issue of causation and that the defendant's condition comes within the categories of "mental disease or mental defect," the defendant must be acquitted. (2) The question of causation or "product" is fraught with difficulties. "[T]he concept of the singleness of personality and unity of mental processes that psychiatry regards as fundamental"[45] makes it almost impossible to divorce the

question of whether the defendant would have engaged in the prohibited conduct if the defendant had not been ill from the question of whether the defendant was, at the time of the conduct, in fact ill.

The formulation for the test of criminal responsibility set forth in subsection (1) is derived from the Model Penal Code. That formulation was adopted substantially by the Third[46] and Tenth[47] Circuits and in haec verba by the Second Circuit.[48] The Code has adopted substantially the Model Penal Code formulation. However, the words "physical" and "disorder" have been added. The addition of the word "physical" is explained in Part I of this commentary. The word "disorder" has been added in an attempt to insure that, regardless of any technical distinctions that may be made according to medical usage, all conditions which impair capacity according to the standard set forth in the formulation will be covered.

III. An Abnormality Manifested Only by Repeated Penal or Otherwise Anti-Social Conduct.

Subsection (2) is designed to exclude from the category of "physical or mental disease, disorder, or defect" an abnormality manifested only by repeated penal or otherwise anti-social conduct. It is not intended that this clause be used to exclude any disease, disorder, or defect which is manifested by symptoms which include repeated penal or otherwise anti-social conduct.

There is considerable disagreement within the medical profession as to the proper definition of the words "psychopathy" and "sociopathy." At times they have been used to identify abnormalities which are manifested only by repeated penal conduct,[49] and at other times they have been used to identify serious mental disorders which are manifested by additional symptoms.[50] The Code cannot hope to resolve the issue of the proper definition of these words; because of this, it is not the intent of subsection (2) to stigmatize the use of the term per se. Rather, the Code points to the factors to be considered, not the label to be used.

We yield to the urge, thus far suppressed, to quote at length from the opinion of Judge Biggs in United States v. Currens:

> It is readily apparent that... [the] objection to the inclusion of psychopaths among those entitled to raise the defense of insanity assumes a particular definition of psychopathy; viz., that the term psychopathy comprehends a person who is a habitual criminal but whose mind is functioning normally. Perhaps some laymen and, indeed some psychiatrists, do define the term that broadly; and insofar as the term psychopathy does merely indicate a pattern of

recurrent criminal behavior we would certainly agree that it does not describe a disorder which can be considered insanity for purposes of a defense to a criminal action. But, we are aware of the fact that psychopathy, or sociopathy, is a term which means different things to experts in the fields of psychiatry and psychology. Indeed, a confusing welter of literature has grown up about the term causing some authorities to give up its use in dismay, labelling it a "waste basket category." See, e.g., Partridge, C.E., Current Conceptions of Psychopathic Personality, 10 American Journal of Psychiatry, pp. 53-59 (1930).

We have examined much of this literature and have certainly found it no less dismaying than those authorities to which we have just referred. Our study has, however, revealed two very persuasive reasons why this court should not hold that evidence of psychopathy is insufficient, as a matter of law, to put sanity or mental illness in issue. First, it is clear that as the majority of experts use the term, a psychopath is very distinguishable from one who merely demonstrates recurrent criminal behavior.... Moreover, the American Psychiatric Association in 1952 when it published its Diagnostic and Statistical Manual, Mental Disorders (Mental Hospital Service), altered its nomenclature, p. 38, removing sociopathic personality disturbance and psychopathic personality disturbance from a non-disease category and placing them in the category of "Mental Disorders."

Thus, it can be seen that in many cases the adjective "psychopathic" will be applied by experts to persons who are very ill indeed. It would not be proper for this court in this case to deprive a large heterogeneous group of offenders of the defense of insanity by holding blindly and indiscriminately that a person described as psychopathic is always criminally responsible.

Our second reason for not holding that psychopaths are "sane" as a matter of law is based on the vagaries of the term itself. In each individual case all the pertinent symptoms of the accused should be put before the court and jury and the accused's criminal responsibility should be developed from the totality of his symptoms. A court of law is not an appropriate forum for a debate as to the meaning of abstract psychiatric classifications. The criminal law is not concerned with such classifications but with the fundamental issue of criminal responsibility. Testimony and argument should relate primarily to the subject of the criminal responsibility of the accused and

> specialized terminology should be used only where it is helpful in determining whether a particular defendant should be held to the standards of the criminal law.[51]

Subsection (2) accepts the language of the Model Penal Code,[52] but does not accept the construction or intent placed on the language by the Model Penal Code commentary. That commentary accepted the Royal Commission's view that psychopathy is an abnormality manifested only by repeated deviant conduct and stated that the language "is designed to exclude from the concept of 'mental disease or defect' the case of so-called 'psychopathic personality.'"[53] The language, but not the commentary, is fully consistent with the discussion by Judge Biggs set out above.[54]

Previous Hawaii law has not examined directly the question of physical disease, disorder or defect excluding penal responsibility and liability; however, a recent case suggests that an "unforseeable sudden loss of consciousness" will deprive the defendant's conduct of voluntariness and result in an unqualified acquittal for the defendant.[55] To the extent that this may be said to be the law of this State, the Code would modify this by providing for a qualified acquittal.

Previous Hawaii statutory law on lack of penal responsibility based on the defendant's mental condition was: "Any person acting under mental derangement, rendering him incompetent to discern the nature and criminality of an act done by him, shall not be subject to punishment therefor...."[56] This has been interpreted as the equivalent of the M'Naghten Rule in an opinion in which the court went out of its way to condemn the Rule.[57]

The most recent pronouncement of the court impliedly modifies earlier cases which restricted the statutory formulation to mental conditions resulting from biological or organic factors.[58] These prior restrictive decisions are at least as archaic as M'Naghten which the court now claims "should have been discarded with the horse and buggy."[59]

Law Journals and Reviews

Comments and Questions About Mental Health Law in Hawaii. 13 HBJ, no. 4, at 3 (1978).

Extreme Emotion. 12 UH L. Rev. 39 (1990).

Extreme Mental or Emotional Disturbance (EMED). 23 UH L. Rev. 431 (2001).

Case Notes

"Substantial capacity"; instruction thereon approved. 61 H. 531, 606 P.2d 920 (1980).

Effect of voluntary intoxication on impairment of capacity. 62 H. 17, 608 P.2d 408 (1980).

Court did not err in referring to this section's legal definition of a "mental illness" for purposes of determining an insanity acquittee's eligibility for release. 84 H. 269, 933 P.2d 606 (1997).

Defendant's drug-induced mental illness was not a defense to second degree murder under §707-701.5(1) as adoption of such a rule would be contrary to the statutory scheme and legislative intent of §702-230 and this section. 93 H. 224, 999 P.2d 230 (2000).

There was substantial evidence to support trial court's conclusion that defendant was penally responsible for defendant's conduct at the time defendant shot victim where doctors conducted a thorough examination of defendant, investigated defendant's mental status during the time before the shooting, and opined that defendant's delusional beliefs were not connected to the shooting and that defendant was not substantially impaired at the time of the shooting. 107 H. 469, 115 P.3d 648 (2005).

Standard of review for motions for judgment of acquittal in insanity cases. 1 H. App. 1, 612 P.2d 117 (1980).

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§704-400 Commentary:

1. 78 Ky. 183 (1897).

2. Id. at 188.

3. People v. Freeman, 61 Cal. App. 2d 110, 142 P.2d 435 (1943); People v. Magnus, 98 Misc. 80, 155 N.Y. Supp. 1013 (1915).

4. People v. Cox, 67 Cal. App. 2d 166, 152 P.2d 362 (1944).

5. People v. Hardy, 33 Cal. 2d 52, 198 P.2d 865 (1948).

6. In addition to Fain v. Commonwealth, supra note 1, see People v. Methever, 132 Cal. 326, 64 Pac. 481 (1901)(dictum).

7. M'Naghten's Case, 10 Clark & Finnelly 200, 210, 8 Eng. Rep. 718, 722 (1843).

8. See, e.g., Durham v. United States, 214 F.2d 862, 874-875 (1954), and M.P.C. §4.01.

9. Fox, Physical Disorder, Consciousness, and Criminal Liability, 63 Colum. L. Rev. 645 (1963).

10. Id.

11. Dewan & Spaulding, The Organic Psychoses: A Guide to Diagnosis 8 (1958).

12. Fox, op. cit.

13. Id.

14. Id. at 647.

15. Id. at 648.

16. M.P.C., Tentative Draft No. 4, comments at 119 (1955).

17. Id. at 121.

18. People v. Freeman, supra note 3; People v. Magnus, supra note 3.

19. People v. Furlong, 187 N.Y. 198, 79 N.E. 978 (1907); People v. Egnor, 175 N.Y. 419, 67 N.E. 906 (1903).

20. Fain v. Commonwealth, supra note 1; People v. Methever, supra note 6 (dictum).

21. Bradly v. State, 277 S.W. 147 (Tex. Cr. App. 1925).

22. Compare People v. Furlong, supra note 19, and People v. Egnor, supra note 19, with People v. Magnus, supra note 3.

23. See People v. Egnor, supra note 19, and Bratty v. Attorney-General for Northern Ireland, (1961) 3 Weekly L.R. 965 (H.L.). In the former case there was conflicting testimony by medical experts, and defendant's evidence of epilepsy, which was offered to disprove responsibility under a M'Naghten test for insanity, did not prevail. In the latter case, where medical testimony had labelled psychomotor epilepsy as a "defect of reason due to a disease of the mind," the House of Lords approved of the foreclosure by the trial judge of the issue of automatism based on the epilepsy, and, because the defendant could not carry the burden of proof on the issue of "insanity" (which English law

then placed on defendants who raised that issue), the resulting unqualified conviction of the defendant.

24. [1955] 1 Weekly L.R. 317 (Chester Assizes).

25. Id. at 321-322.

26. 1957 1 Q.B. 399 (1956).

27. Id. at 406.

28. Id. at 408.

29. 1961 3 Weekly L.R. 965 (H.L.).

30. Id. at 983.

31. Id. at 973.

32. Id. at 975.

33. Id. at 981.

34. United States v. Currens, 290 F.2d 751, 733 (3d Cir. 1961).

35. See text accompanying note 7.

36. M.P.C., Tentative Draft No. 4, comments at 156 (1955).

37. Id.

38. Id. at 161.

39. Id. at 157.

40. Id. at 157-158.

41. See Guttmacher, Principal Difficulties with the Present Criteria of Responsibility and Possible Alternatives, in M.P.C., Tentative Draft No. 4, appendix to comments at 170 (1955).

42. M.P.C., Tentative Draft No. 4, comments at 158 (1955) (emphasis added).

43. Id. at 159.

44. 214 F.2d 862 (1954).

45. M.P.C., Tentative Draft No. 4, comments at 159 (1955).

46. United States v. Currens, supra note 34. In Currens the test is stated thus: "The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated." Id. at 774. It seems clear that this formulation adequately accounts for impaired cognition. A defendant who lacks substantial capacity to appreciate the wrongfulness of the defendant's conduct also lacks, because of the defendant's impaired cognition, substantial capacity to conform the defendant's conduct to the requirements of the law. Were it not for the fact that at a hearing on this chapter many local psychiatrists indicated that, in their opinion, the Currens formulation did not account for impaired cognition, the Reporter would have been extremely tempted to recommend the Currens formulation as achieving greater clarity in expression and simplicity in application.

47. Wion v. United States, 325 F.2d 420 (10th Cir. 1963), cert. denied, 377 U.S. 946 (1964).

48. United States v. Freeman, 357 F.2d 606 (1966).

49. See Royal Commission on Capital Punishment, Report (1953).

50. Cleckley, The Mask of Sanity (1941) and White, The Abnormal Personality (1948).

51. 290 F.2d at 761-763.

52. M.P.C., §4.01(2).

53. M.P.C., Tentative Draft No. 4, comments at 160 (1955).

54. It is clear that Judge Biggs either had not read or was not referring to the Model Penal Code commentary when, in a footnote, after quoting from the complete language of M.P.C. §4.01, he said: "As we have indicated earlier in this opinion we agree fully with part '(2)' of the American Law Institute proposal set out above." 290 F.2d at 774n.

55. See State v. Matsuda, 50 Haw. 128, 432 P.2d 888 (1967).

56. H.R.S. §703-4.

57. State v. Moeller, 50 Haw. 110, 433 P.2d 136 (1967). The court however claimed that it was powerless to reinterpret the statutory language in the light of modern psychiatric knowledge, stating that "it is part of our statutory law and only the legislature can amend or repeal it."

58. Compare State v. Moeller supra note 57, with State v. Foster, 44 Haw. 403, 425, 354 P.2d 960, 972 (1960) ("In Hawaii emotional insanity, unassociated with a disease of the brain... is not an excuse for a crime."), and Territory v. Alcosiba, 36 Haw. 231, 238 (1942)("... Insanity or mental derangement is rather the result or manifestation in the mind of a disease of the brain, and by disease is meant any underdevelopment, pathological condition, lesion or malfunctioning of the brain or any morbid change or deterioration in the organic functions thereof.").

59. State v. Moeller, supra note 57, quoting from State v. Dhaemers, 150 N.W.2d 61, 66 (Minn. 1967).

" **§704-401 Evidence of physical or mental disease, disorder, or defect admissible when relevant to state of mind.** Evidence that the defendant was affected by a physical or mental disease, disorder, or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is required to establish an element of the offense. [L 1972, c 9, pt of §1; am L 2006, c 230, §5]

COMMENTARY ON §704-401

This section accords to evidence of physical or mental disease, disorder, or defect its full evidentiary significance. It assures "admissibility [of such evidence] co-extensive with its relevancy to prove or disprove a material state of mind."[1] While some jurisdictions have refused to admit medical evidence of the defendant's mental state other than on the issue of the complete foreclosure of defendant's responsibility, this all-or-nothing approach is totally inconsistent with the concept which accords certain states of mind legal significance. Any evidence relevant to prove or disprove the requisite state of mind ought to be admissible.

In its most recent case in this area, Hawaii has adopted the approach taken in this section. In a case involving a charge of murder (which under the previous definition requires malice, premeditation, and deliberation), where the defendant had raised the issues of "insanity" and lack of "malice", evidence of a

defendant's mental disease, disorder, or defect was held to be admissible on the issue of the defendant's ability to harbor malice, even if the defendant was considered "sane" and responsible.[2] Furthermore, the defendant was entitled to have the jury specifically instructed on this point.[3]

SUPPLEMENTAL COMMENTARY ON §704-401

Act 230, Session Laws 2006, amended this section by making technical nonsubstantive amendments.

§704-401 Commentary:

1. M.P.C., Tentative Draft No. 4, comments at 193 (1955).

2. State v. Moeller, 50 Haw. 110, 433 P.2d 136 (1967).

3. Id.

" **§704-402 Physical or mental disease, disorder, or defect excluding responsibility is an affirmative defense; form of verdict and judgment when finding of irresponsibility is made.** (1) Physical or mental disease, disorder, or defect excluding responsibility is an affirmative defense.

(2) When the defense provided for by subsection (1) is submitted to a jury, the court shall, if requested by the defendant, instruct the jury as to the consequences to the defendant of an acquittal on the ground of physical or mental disease, disorder, or defect excluding responsibility.

(3) When the defendant is acquitted on the ground of physical or mental disease, disorder, or defect excluding responsibility, the verdict and the judgment shall so state. [L 1972, c 9, pt of §1; am L 1973, c 136, §4(a); am L 1980, c 222, §1(1); am L 1982, c 229, §1; am L 1983, c 124, §14]

COMMENTARY ON §704-402

Subsection (1) provides that the issue of physical or mental disease, disorder, or defect excluding responsibility is a defense. By the use of the word "defense" in this section the Code does not intend to place a burden of proof upon the defendant. The intent of the Code is only to foreclose the issue of the defendant's lack of responsibility due to a physical or mental disease, disorder, or defect unless some evidence raises that issue. In most cases where the issue is raised it will be the defendant's evidence which raises the

issue; however it is not inconceivable that the prosecutor's evidence may raise the issue. Once evidence is introduced on this issue, the prosecution is required to prove the responsibility of the defendant beyond a reasonable doubt. If the prosecuting attorney has introduced evidence on the issue, the defendant may rely on the failure of the prosecution, once having raised the issue, to prove responsibility beyond a reasonable doubt. Subsection (1) conforms to prior Hawaii law.[1]

Subsection (3) merely provides for a special verdict on the issue of responsibility when evidence of physical or mental disease, disorder, or defect has raised that issue. A defendant may, and often does, rely on alternative defenses or theories. Since commitment or conditional release is authorized for some defendants acquitted because of physical or mental disease, disorder, or defect excluding responsibility, the necessity of a special verdict is obvious. This subsection is also in substantial conformity with prior law.[2]

SUPPLEMENTAL COMMENTARY ON §704-402

Subsection (2) was added by Act 136, Session Laws 1973. It should be noted that the defendant has the option; the defendant decides whether the defendant wishes the jury instructed on the consequences to the defendant of an acquittal on the ground of physical or mental disease, disorder, or defect excluding responsibility.

Act 229, Session Laws 1982, amended subsection (1) to provide that the defense of physical or mental disease, disorder, or defect excluding responsibility is an affirmative defense. Senate Standing Committee Report No. 384 states:

> The bill adopts the position of the United States Supreme Court in Leland v. Oregon that making the insanity defense an affirmative defense is not unconstitutional and does not violate the Due Process Clause of the Fourteenth Amendment. The courts have indicated that insanity is not an element of any offense. Thus, the establishing of insanity as an affirmative defense does not relieve the State of its burden of proof of the elements of the offense. The Oregon Supreme Court in State v. Stockett, 278 Or. 637, 565 P.2d 739, 743 (1977) reiterated the U.S. Supreme Court: "...the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime. For this reason, Oregon's placement of the burden of proof of insanity on Leland,...did not effect an unconstitutional

shift in the state's traditional burden of proof beyond a reasonable doubt of all necessary elements of the offense."

Case Notes

Instruction under subsection (2) is informational only and is not to be used to influence the decision of the jury. 58 H. 623, 574 P.2d 895 (1978).

§704-402 Commentary:

1. See State v. Moeller, 50 Haw. 110, 443 P.2d 136 (1967) ("The law in this jurisdiction is that the defendant is presumed to have been sane at the time he committed the offense; however, if any evidence introduced raises the question of the sanity of a defendant or insanity becomes a defense, then the State is required to establish the sanity of the defendant beyond a reasonable doubt."); Territory v. Alcosiba, 36 Haw. 231, 239 (1942) ("In order to justify the submission of a defense of mental derangement to the jury, there must therefore be some evidence showing or tending to show mental derangement..."); and Territory v. Adiarte, 37 Haw. 463, 470 (1947) ("...[C]onsonant with the presumption of innocence, insanity... may arise solely from the prosecution's evidence without any evidence being adduced by the defendant.").

2. H.R.S. §711-93.

" **§704-403 Physical or mental disease, disorder, or defect excluding fitness to proceed.** No person who as a result of a physical or mental disease, disorder, or defect lacks capacity to understand the proceedings against the person or to assist in the person's own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §704-403

The section sets forth the universally accepted position in Anglo-American law that a defendant cannot be proceeded against (with the exception of being charged) unless the defendant has the capacity to understand the proceedings against the defendant and assist in the defendant's own defense. The Code deliberately avoids terms such as "the then present insanity"[1] and focuses on those factors which call for a suspension of the

proceedings: (1) lack of capacity to understand the proceedings, or (2) lack of capacity to assist in the defense.

Previous Hawaii law is substantially in accord with this section except that the statutory language used vague, unfocused phrases such as "the then present insanity or mental irresponsibility of the accused," and "the then existing... mental irresponsibility."[2] However, in actual application the trial courts have focused on the capacity of the defendant to understand the proceedings and to assist in the defense.[3]

Law Journals and Reviews

Fitness to Proceed: Compassion or Prejudice? II HBJ, no. 13, at 135 (1998).

Case Notes

Facts did not support a finding that petitioner was mentally incompetent at relevant times. 79 H. 118 (App.), 899 P.2d 401 (1995).

Cited: 60 H. 17, 586 P.2d 1028 (1978).

§704-403 Commentary:

1. See H.R.S. §§711-91 and 711-92.

2. Id.

3. See State v. Wong, 47 Haw. 361, 365, 389 P.2d 439, 442 (1964).

" **§704-404 Examination of defendant with respect to physical or mental disease, disorder, or defect excluding fitness to proceed.** (1) Whenever there is reason to doubt the defendant's fitness to proceed, the court may immediately suspend all further proceedings in the prosecution; provided that for any defendant not subject to an order of commitment to a hospital for the purpose of the examination, neither the right to bail nor proceedings pursuant to chapter 804 shall be suspended. If a trial jury has been empanelled, it shall be discharged or retained at the discretion of the court. The discharge of the trial jury shall not be a bar to further prosecution.

(2) *[Subsection effective until June 30, 2018. For subsection effective July 1, 2018, see below.]* Upon suspension of further proceedings in the prosecution, the court shall appoint three qualified examiners in felony cases, and one

qualified examiner in nonfelony cases, to examine and report upon the defendant's fitness to proceed. In felony cases, the court shall appoint as examiners at least one psychiatrist and at least one licensed psychologist. The third examiner may be a psychiatrist, licensed psychologist, or qualified physician. One of the three examiners shall be a psychiatrist or licensed psychologist designated by the director of health. In nonfelony cases, the court may appoint as examiners either a psychiatrist or a licensed psychologist. All examiners shall be appointed from a list of certified examiners as determined by the department of health. The court, in appropriate circumstances, may appoint an additional examiner or examiners. The examination may be conducted while the defendant is in custody or on release or, in the court's discretion, when necessary the court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding thirty days, or a longer period as the court determines to be necessary for the purpose. The court may direct that one or more qualified physicians or psychologists retained by the defendant be permitted to witness the examination. As used in this section, the term "licensed psychologist" includes psychologists exempted from licensure by section 465-3(a)(3) and "qualified physician" means a physician qualified by the court for the specific evaluation ordered.

(2) *[Subsection effective July 1, 2018. For subsection effective until June 30, 2018, see above.]* Upon suspension of further proceedings in the prosecution, the court shall appoint three qualified examiners in felony cases, and one qualified examiner in nonfelony cases, to examine and report upon the defendant's fitness to proceed. In felony cases, the court shall appoint as examiners at least one psychiatrist and at least one licensed psychologist. The third examiner may be a psychiatrist, licensed psychologist, or qualified physician. One of the three examiners shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health. In nonfelony cases, the court may appoint as examiners either a psychiatrist or a licensed psychologist. All examiners shall be appointed from a list of certified examiners as determined by the department of health. The court, in appropriate circumstances, may appoint an additional examiner or examiners. The examination may be conducted while the defendant is in custody or on release or, in the court's discretion, when necessary the court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding thirty days, or a longer period as the court determines to be necessary for the purpose. The court may

direct that one or more qualified physicians or psychologists retained by the defendant be permitted to witness the examination. As used in this section, the term "licensed psychologist" includes psychologists exempted from licensure by section 465-3(a)(3) and "qualified physician" means a physician qualified by the court for the specific evaluation ordered.

(3) An examination performed under this section may employ any method that is accepted by the professions of medicine or psychology for the examination of those alleged to be affected by a physical or mental disease, disorder, or defect; provided that each examiner shall form and render an opinion upon the defendant's fitness to proceed independently from the other examiners, and the examiners, upon approval of the court, may secure the services of clinical psychologists and other medical or paramedical specialists to assist in the examination.

(4) For defendants charged with felonies, the examinations for fitness to proceed under this section and penal responsibility under section 704-407.5 shall be conducted separately unless a combined examination has been ordered by the court upon a request by the defendant or upon a showing of good cause to combine the examinations. The report of the examination for fitness to proceed shall be separate from the report of the examination for penal responsibility unless a combined examination has been ordered. For defendants charged with offenses other than felonies, a combined examination is permissible when ordered by the court.

(5) The report of the examination for fitness to proceed shall include the following:

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

(b) An opinion as to the defendant's capacity to understand the proceedings against the defendant and to assist in the defendant's own defense;

(c) An assessment of the risk of danger to the defendant or to the person or property of others for consideration and determination of the defendant's release on conditions; and

(d) Where more than one examiner is appointed, a statement that the opinion rendered was arrived at independently of any other examiner, unless there is a showing to the court of a clear need for communication between or among the examiners for clarification. A description of the communication shall be included in the report. After all reports are submitted to the court, examiners may confer without restriction.

(6) If the examination cannot be conducted by reason of the unwillingness of the defendant to participate in the examination, the report shall so state and shall include, if

possible, an opinion as to whether the unwillingness of the defendant was the result of physical or mental disease, disorder, or defect.

(7) Three copies of the report of the examination, including any supporting documents, shall be filed with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant.

(8) Any examiner shall be permitted to make a separate explanation reasonably serving to clarify the examiner's opinion.

(9) The court shall obtain all existing relevant medical, mental health, social, police, and juvenile records, including those expunged, and other pertinent records in the custody of public agencies, notwithstanding any other statute, and make the records available for inspection by the examiners in hard copy or digital format. The court may order that the records so obtained be made available to the prosecuting attorney and counsel for the defendant in either format, subject to conditions the court determines appropriate; provided that juvenile records shall not be made available unless constitutionally required. No further disclosure of records shall be made except as permitted by law. If, pursuant to this section, the court orders the defendant committed to a hospital or other suitable facility under the control of the director of health, then the county police departments shall provide to the director of health and the defendant copies of all police reports from cases filed against the defendant that have been adjudicated by the acceptance of a plea of guilty or no contest, a finding of guilt, acquittal, acquittal pursuant to section 704-400, or by the entry of plea of guilty or no contest made pursuant to chapter 853; provided that the disclosure to the director of health and the defendant does not frustrate a legitimate function of the county police departments, with the exception of expunged records, records of or pertaining to any adjudication or disposition rendered in the case of a juvenile, or records containing data from the United States National Crime Information Center. The county police departments shall segregate or sanitize from the police reports information that would result in the likely or actual identification of individuals who furnished information in connection with its investigation, or who were of investigatory interest. No further disclosure of records shall be made except as provided by law.

(10) All public agencies in possession of relevant medical, mental health, social, police, and juvenile records, and any other pertinent records of a defendant ordered to be

examined under this chapter, shall provide those records to the court, notwithstanding any other state statute.

(11) The compensation of persons making or assisting in the examination, other than those retained by a nonindigent defendant, who are not undertaking the examination upon designation by the director of health as part of their normal duties as employees of the State or a county, shall be paid by the State. [L 1972, c 9, pt of §1; am L 1973, c 136, §4(b); am L 1974, c 54, §1; am L 1979, c 3, §1 and c 105, §64; am L 1983, c 172, §1; am L 1987, c 145, §1; am L 1988, c 305, §5; am L 1992, c 88, §1; gen ch 1993; am L 1997, c 306, §1; am L 2006, c 230, §6; am L 2008, c 99, §1; am L 2014, c 192, §2; am L 2016, c 198, §3 and c 231, §§4, 5]

COMMENTARY ON §704-404

This section sets forth the provisions for appropriate medical examination of a defendant when the defendant's physical or mental condition is made an issue either with respect to the defendant's fitness to proceed, the defendant's responsibility for conduct, or the defendant's capacity to have a particular state of mind.

The Code provides that, whenever the defendant's responsibility, fitness to proceed, or physical or mental condition becomes an issue in the case, the proceedings shall be suspended and the designated medical examination shall take place. In taking this approach we reject the requirement of prior notice suggested by the Model Penal Code.[1] Such a requirement necessarily relies on the psychiatric and other medical insights of defendant's counsel--a person manifestly without proper training in these areas. If defense counsel does not recognize symptoms of a physical or mental disease, disorder, or defect--either because of lack of medical knowledge or because of lack of diligence--the consequences of his ineptness should not fall on his client. Especially is this so where the client is unable to "communicate" the disease, disorder, or defect to the client's attorney. The procedure provided for examination of the defendant assures that the prosecution will not be prejudiced in gathering evidence and in litigating these issues merely because the defendant did not raise these issues at a preliminary stage. The defendant or the prosecuting attorney may request, or the court may order, an examination of the defendant at a preliminary (or later) stage in the proceedings whenever it appears that fitness to proceed, responsibility, or physical or mental condition is or may become an issue in the case.

Previous law provided for an examination of the defendant, at the discretion of the court, before trial.[2] The Code allows the relevant issues to be raised at any stage.

If an examination is ordered after a trial jury has been empanelled, it shall be discretionary with the trial court whether or not to discharge the jury; however the dismissal of the jury shall not bar further prosecution by reason of former jeopardy or want or delay of prosecution.

Subsection (2) provides for the selection of examiners and is in substantial accord with prior law. However, modifications have been made to take into consideration the suggestions of local psychiatrists and representatives of the department of health[3] and to accommodate those cases involving diseases, disorders, and defects which require examination by physicians other than psychiatrists. Also, under the Code, the court may order that qualified physicians, which include psychiatrists, retained by the defendant be allowed to witness and participate in the examination.

Subsection (3) clarifies what methods may be used in the examination of the defendant; a point not covered in prior law.

Subsections (4) and (5) state explicitly what the report of the examining physicians shall contain. This was covered under pre- existing law by the vague provision that the defendant shall be examined "with a view to determine the mental condition of such person and the existence of any mental disease or defect which would affect his criminal responsibility."[4] These subsections are intended to assure the court and the parties "that the report will be adequate for the purpose for which the examinations and report were ordered."[5]

Subsection (7) is designed to achieve for the examiner the same freedom in reporting his examination that he would be afforded were he to testify orally.[6]

Other subsections are self-explanatory.

SUPPLEMENTAL COMMENTARY ON §704-404

Act 136, Session Laws 1973, amended subsection (1) to provide that where the issue of mental disease, disorder, or defect excluding responsibility is raised the court "*may* immediately suspend all further proceedings in the prosecution." (Emphasis added.) This eliminated the previous mandatory requirement of suspension of the proceedings and examination of the defendant when the issue of responsibility was introduced. The Committee Report is silent on the reason for this. It is believed, however, that the change arose because certain trial judges felt that defense counsel were acting in some instances with questionable sincerity in invoking the mandatory examination

procedure. (House Standing Committee Report No. 726 and Senate Standing Committee Report No. 858, 1973.)

Act 54, Session Laws 1974, amended subsection (2) to permit the use of a certified clinical psychologist as part of the examination panel.

Act 3, Session Laws 1979, amended subsections (2) and (3) by modifying the requirements for the composition of examination panels. The purpose was to allow the courts greater flexibility in appointing mental health professionals to examination panels, particularly in geographical areas where shortages of various types of mental health professionals made compliance with the requirements of the prior law burdensome and expensive.

Act 172, Session Laws 1983, amended subsections (3) and (4) to require forensic examiners in sanity examinations to arrive at their conclusions independently of the other examiners. Subsection (8) was amended to allow the examiners access to police and juvenile records, including those expunged. The legislature found that the accuracy and objectivity of sanity examinations would be enhanced if the examiners made their findings without collaborating with each other and if they were provided with a wider range of information. House Conference Committee Report No. 20.

Act 145, Session Laws 1987, replaced the term "certified clinical" psychologist with "licensed" psychologist because "certified clinical" psychologist is an outdated classification which is no longer applicable to current practice. Act 145 also permitted the department of health to set minimum standards for participation and appointment of a sanity examiner. The legislature felt this change would allow additional assurances of higher quality testimony by these examiners. Senate Standing Committee Report No. 691, House Standing Committee Report No. 1217.

Act 305, Session Laws 1988, included licensed psychologists among the professionals which may provide offender examination services to the Hawaii criminal justice system. The legislature stated that the present laws, which permit only psychiatric evaluation, are inconsistent with the many and varied uses the court has found for the services of licensed psychologists. Senate Standing Committee Report No. 2153.

Act 88, Session Laws 1992, amended this section by adding a reference to section 465-3(a)(3), which exempts psychologists employed under government certification or civil service rules from the licensure requirement. This is consistent with Act 314, Session Laws 1986, which intended to include this language in sections of chapter 704 that refer to licensed psychologists. Senate Standing Committee Report No. 2579.

Act 306, Session Laws 1997, amended subsections (2), (3), and (4), to, inter alia, allow mental health examinations to be conducted by one rather than three examiners, in nonfelony cases; the courts may appoint a psychiatrist or licensed psychologist as the examiner. In felony cases, three examiners are required, including at least one psychiatrist and one psychologist. The amendment streamlines the process for committing and releasing mentally incompetent defendants. Conference Committee Report No. 64.

Act 230, Session Laws 2006, amended this section to, among other things, (1) allow all certified examiners who evaluate a defendant's fitness to proceed or claims of physical or mental disease or disorder to confer without restriction upon submittal of all reports to the court; and (2) add all existing mental health records to the records that the court must obtain and make available for inspection by examiners. House Standing Committee Report No. 665-06.

Act 99, Session Laws 2008, amended subsection (8) by requiring the county police departments to provide to the director of health and a defendant who is committed to a hospital under the control of the director, copies of certain police reports regarding that defendant. Act 99 expedited the records disclosure process for clinical evaluation purposes while protecting a patient's right of privacy. Conference Committee Report No. 161-08.

Act 192, Session Laws 2014, amended this section to require public agencies with a defendant's medical, mental health, social, and juvenile records to release information to the court when the defendant is ordered to submit to a forensic mental health examination in order to expedite the process. The legislature found that the governor commissioned a special action team in June 2012 to analyze causes and identify ideas to address the systemic factors contributing to the increased rate of admission and increased length of stay of persons admitted to the Hawaii state hospital. Act 192 resulted from the special action team's efforts to improve the State's forensic mental health services. Conference Committee Report No. 51-14.

Act 198, Session Laws 2016, amended this section by separating the examination for fitness to proceed of a defendant with respect to physical or mental disease, disorder, or defect, from the examination for penal responsibility of the defendant with respect to physical or mental disease, disorder, or defect [§704-407.5], with certain exceptions, in criminal prosecutions where the defendant's capacity is at issue. The legislature found that under §704-404, when a defendant's fitness to proceed comes into question, the criminal proceedings are stopped, and the court must order a physical or mental examination of the

defendant to determine the defendant's fitness to proceed and whether the defendant was penally responsible for the alleged crime. The legislature further found that it is in the best interest of the defendants for the examination process to proceed in a timely, expedient manner by separating the fitness to stand trial and the penal responsibility components of examinations. Conference Committee Report No. 153-16.

Act 231, Session Laws 2016, amended subsections (1), (2), and (8) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

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Case Notes

Mental examination is within sound discretion of court. 57 H. 418, 558 P.2d 1012 (1976).

Motion made prior to trial for mental examination of defendant was not a notice of intention to rely on defense of mental irresponsibility. 57 H. 418, 558 P.2d 1012 (1976).

Failure to impanel a board of examiners, under the circumstances, did not violate defendant's due process rights. 60 H. 17, 586 P.2d 1028 (1978).

Impanelling of a board of examiners is within sound discretion of court. 60 H. 17, 586 P.2d 1028 (1978).

Court appointed psychiatrists entitled to absolute immunity from civil suit. 63 H. 516, 631 P.2d 173 (1981).

Court could have suspended trial and ordered examination pursuant to section if defendant raised defense of physical or emotional disease, disorder, or defect excluding capability of forming criminal intent. 73 H. 109, 831 P.2d 512 (1992).

Under subsections (1) and (2), the legislature intended that only some rational basis for convening a panel is necessary to trigger the trial court's power to stay the proceedings and, thereafter, to appoint examiners. 93 H. 424, 5 P.3d 414 (2000).

Where motion for mental examination and defense counsel's attached declaration articulated a rational basis upon which there was both "reason to doubt" defendant's fitness to proceed and "reason to believe" that defendant was suffering from a physical or mental disease, disorder, or defect that had affected defendant's ability to assist in defendant's own defense, trial court abused its discretion in refusing to stay proceedings, failing to appoint a panel of examiners, and

determining without assistance of panel that defendant was fit to proceed. 93 H. 424, 5 P.3d 414 (2000).

When a court orders an examination to determine whether a defendant is fit to proceed to trial pursuant to this section, and the defendant refuses to cooperate with the examiner, the examiner must produce a report of the examination that expressly states whether such "unwillingness of the defendant was the result of physical or mental disease, disorder, or defect", if possible; if it is not possible for the examiner to make that determination, the examiner must expressly state in the report that it is not possible to determine whether the defendant's unwillingness was the result of physical or mental disease, disorder, or defect. 127 H. 157, 277 P.3d 251 (2012).

Standard of review of motions for judgment of acquittal in insanity cases. 1 H. App. 1, 612 P.2d 117 (1980).

As it had no obligation under subsection (8) to unilaterally and on its own initiative provide the police reports and other pertinent records to its fitness examiners, trial court did not err; subsection only requires that court "obtain" the pertinent records and "make such records available for inspection by the examiners" and does not require that the court, unbidden, provide such records directly to the examiners. 97 H. 53 (App.), 33 P.3d 549 (2001).

Mentioned: 74 H. 141, 838 P.2d 1374 (1992).

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§704-404 Commentary:

1. M.P.C. §4.03.

2. H.R.S. §711-91; Territory v. Gaudia, 41 Haw. 231 (1955).

3. See S.B. 46 (S.D. 1) of the 1967 legislature, which passed the Senate but failed to pass the House of Representatives. As the Senate Committee Reports indicate, this bill was supported by many groups concerned with mental health.

4. H.R.S. §711-91.

5. M.P.C., Tentative Draft No. 4, comments at 197 (1955).

6. Cf. §704-410(3) and (4).

" **§704-405 Determination of fitness to proceed.** When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the finding of

the report filed pursuant to section 704-404, the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue. When the report is received in evidence upon such hearing, the party who contests the finding thereof shall have the right to summon and to cross-examine the persons who joined in the report or assisted in the examination and to offer evidence upon the issue. [L 1972, c 9, pt of §1]

COMMENTARY ON §704-405

This section departs from the prior law[1] and provides that the issue of the defendant's fitness to proceed will be determined solely by the court. In this the Code follows the Model Penal Code.[2] The fitness of the defendant to proceed is only tangentially related to the defendant's condition at the time of the conduct alleged and the defendant's responsibility for that conduct. Moreover, there might be several periodic hearings on the question of the defendant's fitness to be proceeded against. It seems unwise to afford the defendant a jury determination in each instance.

The Code also allows the court to make a determination of fitness to proceed on the basis of an uncontested report; which is in accord with prior law in felony cases.[3] The last sentence of this section allows a limited exception to the hearsay rule so that the report of an examining expert may be received in evidence without the necessity of calling the expert to the stand. The exception is not inconsistent with the purpose of the hearsay rule because the defendant is assured of the right to summon and to cross-examine the reporting examiner if the defendant wishes.

Law Journals and Reviews

Fitness to Proceed: Compassion or Prejudice? II HBJ, no. 13, at 135 (1998).

Case Notes

Consideration of the sanity commission report is permissible use of hearsay. 63 H. 186, 623 P.2d 881 (1981).

Where defendant's counsel declined to call and cross-examine the doctors who prepared the sanity report, counsel waived defendant's right of confrontation. 63 H. 186, 623 P.2d 881 (1981).

Cited: 60 H. 17, 586 P.2d 1028 (1978).

§704-405 Commentary:

1. H.R.S. §711-91.

2. M.P.C. §4.06.

3. See H.R.S. §711-91, which reads in part: "If the court deems such report conclusive of the then present insanity... of the accused, the court may allow a nolle prosequi to be entered in the case, and in such case shall forthwith, without other or further proceedings, adjudge the accused to be insane and commit him to the state hospital until discharged as provided by law...."

" **§704-406 Effect of finding of unfitness to proceed and regained fitness to proceed.** (1) If the court determines that the defendant lacks fitness to proceed, the proceeding against the defendant shall be suspended, except as provided in section 704-407, and the court shall commit the defendant to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment; provided that the commitment shall be limited in certain cases as follows:

(a) When the defendant is charged with a petty misdemeanor not involving violence or attempted violence, the commitment shall be limited to no longer than sixty days from the date the court determines the defendant lacks fitness to proceed; and

(b) When the defendant is charged with a misdemeanor not involving violence or attempted violence, the commitment shall be limited to no longer than one hundred twenty days from the date the court determines the defendant lacks fitness to proceed.

If the court is satisfied that the defendant may be released on conditions without danger to the defendant or to another or risk of substantial danger to property of others, the court shall order the defendant's release, which shall continue at the discretion of the court, on conditions the court determines necessary; provided that the release on conditions of a defendant charged with a petty misdemeanor not involving violence or attempted violence shall continue for no longer than sixty days, and the release on conditions of a defendant charged with a misdemeanor not involving violence or attempted violence shall continue for no longer than one hundred twenty days. A copy of all reports filed pursuant to section 704-404 shall be attached to the order of commitment or order of release on conditions that is provided to the department of health. When

the defendant is committed to the custody of the director of health for detention, care, and treatment, the county police departments shall provide to the director of health and the defendant copies of all police reports from cases filed against the defendant that have been adjudicated by the acceptance of a plea of guilty or nolo contendere, a finding of guilt, acquittal, acquittal pursuant to section 704-400, or by the entry of a plea of guilty or nolo contendere made pursuant to chapter 853; provided that the disclosure to the director of health and the defendant does not frustrate a legitimate function of the county police departments; provided further that expunged records, records of or pertaining to any adjudication or disposition rendered in the case of a juvenile, or records containing data from the United States National Crime Information Center shall not be provided. The county police departments shall segregate or sanitize from the police reports information that would result in the likely or actual identification of individuals who furnished information in connection with the investigation or who were of investigatory interest. No further disclosure of records shall be made except as provided by law.

(2) When the defendant is released on conditions after a finding of unfitness to proceed, the department of health shall establish and monitor a fitness restoration program consistent with conditions set by the court order of release, and shall inform the prosecuting attorney of the county that charged the defendant of the program and report the defendant's compliance therewith.

(3) When the court, on its own motion or upon the application of the director of health, the prosecuting attorney, or the defendant, has reason to believe that the defendant has regained fitness to proceed, for a defendant charged with the offense of murder in the first or second degree, attempted murder in the first or second degree, or a class A felony, the court shall appoint three qualified examiners and may appoint in all other cases one qualified examiner, to examine and report upon the physical and mental condition of the defendant. In cases in which the defendant has been charged with murder in the first or second degree, attempted murder in the first or second degree, or a class A felony, the court shall appoint as examiners at least one psychiatrist and at least one licensed psychologist. The third examiner may be a psychiatrist, licensed psychologist, or qualified physician. One of the three examiners shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health. In all other cases, the one qualified examiner shall be a psychiatrist or licensed psychologist designated by the

director of health from within the department of health. The court, in appropriate circumstances, may appoint an additional examiner or examiners. All examiners shall be appointed from a list of certified examiners as determined by the department of health. After a hearing, if a hearing is requested, if the court determines that the defendant has regained fitness to proceed, the penal proceeding shall be resumed and the defendant shall no longer be committed to the custody of the director of health. In cases where a defendant is charged with the offense of murder in the first or second degree, attempted murder in the first or second degree, or a class A felony, upon the request of the prosecuting attorney or the defendant, and in consideration of information provided by the defendant's clinical team, the court may order that the defendant remain in the custody of the director of health, for good cause shown, subject to bail or until a judgment on the verdict or a finding of guilt after a plea of guilty or nolo contendere. Thereafter, the court may consider a request from the director of health to rescind its order maintaining the defendant in the director's custody, for good cause shown. As used in this section, the term "qualified physician" means a physician qualified by the court for the specific evaluation ordered. If, however, the court is of the view that so much time has elapsed since the commitment or release on conditions of the defendant that it would be unjust to resume the proceeding, the court may dismiss the charge and:

(a) Order the defendant to be discharged;

(b) Subject to section 334-60.2 regarding involuntary hospitalization criteria, order the defendant to be committed to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment; or

(c) Subject to section 334-121 regarding assisted community treatment criteria, order the defendant to be released on conditions the court determines necessary.

(4) An examination for regained fitness to proceed performed under this section may employ any method that is accepted by the professions of medicine or psychology for the examination of those alleged to be affected by a physical or mental disease, disorder, or defect, and shall include a review of records where the defendant, while under the custody of the director of health, was placed; provided that each examiner shall form and render an opinion on the defendant's regained fitness to proceed independently from the other examiners and the examiners, upon approval of the court, may secure the services of clinical psychologists and other medical or paramedical specialists to assist in the examination.

(5) The report of the examination for regained fitness to proceed shall include the following:

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

(b) An opinion as to the defendant's capacity to understand the proceedings against the defendant and to assist in the defendant's own defense; and

(c) Where more than one examiner is appointed, a statement that the opinion rendered was arrived at independently of any other examiner, unless there is a showing to the court of a clear need for communication between or among the examiners for clarification. A description of the communication shall be included in the report. After all reports are submitted to the court, examiners may confer without restriction.

(6) All other procedures as set out in section 704-404(6) through (11) shall be followed for the completion of the report of the examination for regained fitness to proceed performed under this section.

(7) If a defendant committed to the custody of the director of health for a limited period pursuant to subsection (1) is not found fit to proceed prior to the expiration of the commitment, the charge for which the defendant was committed for a limited period shall be dismissed. Upon dismissal of the charge, the defendant shall be released from custody unless the defendant is subject to prosecution for other charges or subject to section 334-60.2 regarding involuntary hospitalization criteria, in which case the court shall order the defendant's commitment to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment. Within a reasonable time following any other commitment under subsection (1), the director of health shall report to the court on whether the defendant presents a substantial likelihood of becoming fit to proceed in the future. The court, in addition, may appoint a panel of three qualified examiners in felony cases or one qualified examiner in nonfelony cases to make a report. If, following the report, the court determines that the defendant probably will remain unfit to proceed, the court may dismiss the charge and:

(a) Release the defendant; or

(b) Subject to section 334-60.2 regarding involuntary hospitalization criteria, order the defendant to be committed to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment.

(8) If a defendant released on conditions for a limited period pursuant to subsection (1) is not found fit to proceed prior to the expiration of the release on conditions order, the

charge for which the defendant was released on conditions for a limited period shall be dismissed. Upon dismissal of the charge, the defendant shall be discharged from the release on conditions unless the defendant is subject to prosecution for other charges or subject to section 334-60.2 regarding involuntary hospitalization criteria, in which case the court shall order the defendant's commitment to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment. Within a reasonable time following any other release on conditions under subsection (1), the court shall appoint a panel of three qualified examiners in felony cases or one qualified examiner in nonfelony cases to report to the court on whether the defendant presents a substantial likelihood of becoming fit to proceed in the future. If, following the report, the court determines that the defendant probably will remain unfit to proceed, the court may dismiss the charge and:

(a) Release the defendant; or

(b) Subject to section 334-60.2 regarding involuntary hospitalization criteria, order the defendant to be committed to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment. [L 1972, c 9, pt of §1; am L 1986, c 314, §7; am L 1993, c 87, §1; am L 1997, c 306, §2; am L 2006, c 230, §7; am L 2008, c 99, §2; am L 2011, c 53, §2 and c 112, §2; am L 2016, c 198, §4 and c 231, §6]

COMMENTARY ON §704-406

Subsection (1) provides that following a determination of the defendant's unfitness to be proceeded against, the defendant shall be committed to the custody of the director of health or placed on conditional release for the duration of the defendant's unfitness.

The commitment or conditional release of the unfit defendant does not terminate until a determination by the court, after a hearing if one is requested, that the defendant is fit to be proceeded against. Upon such a determination, the penal proceedings resume unless the court finds that such resumption would be unjust. This section is designed to allow no hiatus in the procedure.

The Code, in its treatment of a defendant committed because of unfitness to proceed, conforms to the present Hawaii law which insures that a defendant so committed will remain in the custody of the director of health until the defendant has regained

fitness.[1] Previous Hawaii law had no provision for conditional release of unfit defendants.

The second sentence of subsection (2) follows the suggestion of the Model Penal Code[2] and permits "the court to dismiss the prosecution if because of lapse of time it would be unjust to continue."[3] Under the prior law the power to dismiss the prosecution was vested in the prosecutor's discretion to enter a nolle prosequi. The Code accepts the position that

> there is value ... in vesting such a power in the Court, to be exercised either where because of the lapse of time a defendant is unable to produce certain witnesses or other evidence once available which is essential to his defense, or where because of the length of the intervening period which he has spent in a mental institution subsequent to the alleged wrongful conduct it seems unjust to subject him to trial and punishment.[4]

SUPPLEMENTAL COMMENTARY ON §704-406

Act 314, Session Laws 1986, added subsection (3), which implements the holding in State v. Raitz, 63 Haw. 64 (1980). In Raitz, the court held that when a defendant is unlikely to become fit to proceed, due process requires that: (1) following commitment, there should be a timely determination of the likelihood of the defendant regaining fitness; and (2) if the court determines that the defendant will probably remain unfit, the defendant should be released or civilly committed. Conference Committee Report No. 51-86.

Act 87, Session Laws 1993, amended this section to require the court to appoint a panel of three qualified examiners to report on whether a defendant who has been conditionally released presents a substantial likelihood of becoming fit to proceed in the future. If the court determines that the defendant probably will remain unfit to proceed, it may dismiss the charge against the defendant or subject the defendant to involuntary civil commitment procedures. In addition, this Act allows the court, following the commitment of a defendant, to appoint a panel of three qualified examiners to report on the defendant's likelihood of becoming fit to proceed in the future. House Standing Committee Report No. 185, Senate Standing Committee Report Nos. 1061 and 1263.

Act 306, Session Laws 1997, amended subsections (3) and (4) to allow mental health examinations to be conducted by one rather than three examiners in nonfelony cases, and to require three examiners in felony cases. The amendment streamlines the process for committing and releasing mentally incompetent defendants. Conference Committee Report No. 64.

Act 230, Session Laws 2006, amended this section to, among other things, clarify that when a defendant is found to be affected by a physical or mental disease, disorder, or defect and therefore remains unfit to proceed, the defendant may be committed to the custody of the director of health for placement in an appropriate institution, but only subject to the law governing involuntary civil commitment. House Standing Committee Report No. 665-06.

Act 99, Session Laws 2008, amended subsection (1) by requiring the county police departments to provide to the director of health and a defendant who is committed to the custody of the director, copies of certain police reports regarding that defendant. Act 99 expedited the records disclosure process for clinical evaluation purposes while protecting a patient's right of privacy. Conference Committee Report No. 161-08.

Act 53, Session Laws 2011, established a maximum time frame for the mental health commitment or conditional release of a defendant found unfit to proceed for trial. The Act limited the time of commitment or conditional release to a maximum of: (1) sixty days for persons charged with petty misdemeanors and (2) one hundred twenty days for persons charged with misdemeanors, where the petty misdemeanor or misdemeanor did not involve violence or attempted violence. Act 53 also required the dismissal of charges for defendants committed or placed on conditional release who are not found fit to proceed prior to the expiration of the commitment or conditional release unless certain elements are met.

The legislature found that when a defendant lacks fitness to proceed, criminal proceedings are suspended, and the defendant is committed to the director of health to be placed in an appropriate institution for detention, care, and treatment. The commitment to the director of health can be indefinite if the defendant continues to be found unfit to proceed, and the defendant may be held by the director of health for a period that is longer than the period of incarceration that the defendant would have received if the defendant had been sentenced to the maximum incarceration period allowed by law. House Standing Committee Report No. 700, Senate Standing Committee Report No. 1125.

Act 112, Session Laws 2011, amended this section by requiring the department of health to establish and monitor a fitness restoration program consistent with the conditions set by a court order of release when a defendant is released on conditions after a finding of unfitness to proceed; and to inform the prosecuting attorney of the county that charged the defendant of the fitness restoration program and report the defendant's compliance with the program. Act 112 provided a

formal structure and mechanism to address community safety and monitoring concerns for persons found unfit to proceed and released on conditions. Conference Committee Report No. 79, Senate Standing Committee Report No. 1216, House Standing Committee Report No. 861.

Act 198, Session Laws 2016, amended this section by specifying procedures after a finding of unfitness to proceed and regained fitness to proceed. The legislature found that it is in the best interest of the defendants for the examination process to proceed in a timely, expedient manner by codifying procedures for appointing examiners for reevaluation of fitness. Conference Committee Report No. 153-16.

Act 231, Session Laws 2016, amended this section to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Law Journals and Reviews

Comments and Questions About Mental Health Law in Hawaii. 13 HBJ, no. 4, at 3 (1978).

Risky Business: Assessing Dangerousness in Hawai‘i. 24 UH L. Rev. 63 (2001).

Case Notes

Where defendant is unfit to proceed, a motion for judgment of acquittal by reason of mental irresponsibility under §704-408 will be deferred. 61 H. 313, 602 P.2d 944 (1979).

The phrase authorizing commitment "for so long as ... unfitness shall endure" is qualified by subsection (2); statute not constitutionally infirm. 63 H. 64, 621 P.2d 352 (1980).

Does not apply to postacquittal proceedings. 71 H. 198, 787 P.2d 221 (1990).

A court order authorizing the involuntary administration of antipsychotic drugs is included within the authority vested by this section. 91 H. 319, 984 P.2d 78 (1999).

§704-406 Commentary:

1. H.R.S. §334-76.

2. M.P.C. §4.06.

3. M.P.C. Tentative Draft No. 4, comments at 197 (1955).

4. Id. at 197-98.

" §704-407 **Special hearing following commitment or release on conditions.** (1) At any time after commitment as provided in section 704-406, the defendant or the defendant's counsel or the director of health may apply for a special post-commitment or post-release hearing. If the application is made by or on behalf of a defendant not represented by counsel, the defendant shall be afforded a reasonable opportunity to obtain counsel, and if the defendant lacks funds to do so, counsel shall be assigned by the court. The application shall be granted only if the counsel for the defendant satisfies the court by affidavit or otherwise that, as an attorney, the counsel has reasonable grounds for a good faith belief that the counsel's client has an objection based upon legal grounds to the charge.

(2) If the motion for a special post-commitment or post-release hearing is granted, the hearing shall be by the court without a jury. No evidence shall be offered at the hearing by either party on the issue of physical or mental disease, disorder, or defect as a defense to, or in mitigation of, the offense charged.

(3) After the hearing, the court shall rule on any legal objection raised by the application and, in an appropriate case, may quash the indictment or other charge, find it to be defective or insufficient, or otherwise terminate the proceedings on the law. Unless all defects in the proceedings are promptly cured, the court shall terminate the commitment or release ordered under section 704-406 and:

(a) Order the defendant to be discharged;

(b) Subject to section 334-60.2 regarding involuntary hospitalization criteria, order the defendant to be committed to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment; or

(c) Subject to section 334-121 regarding assisted community treatment criteria, order the defendant to be released on conditions as the court deems necessary. [L 1972, c 9, pt of §1; am L 1980, c 222, §1(2); gen ch 1993; am L 2006, c 230, §8; am L 2016, c 231, §7]

COMMENTARY ON §704-407

This section affords the defendant and the defendant's counsel the opportunity, notwithstanding the defendant's unfitness to proceed, to make any objection to the prosecution which is susceptible of a fair determination without the personal participation of the defendant. It seems clear that this is an

eminently sensible provision in view of the fact that it is the defendant's inability to participate in the defendant's defense (either because the defendant lacks capacity to either understand the proceedings or to assist in the defendant's own defense) that has rendered the defendant unfit to be proceeded against. If a valid objection to the continuance of the prosecution can be established without the participation of the defendant, there is no reason not to terminate it.

This section is an addition to the law. The concept was originally proposed by the Massachusetts Judicial Council[1] and adopted as an optional alternative by the Model Penal Code.[2]

SUPPLEMENTAL COMMENTARY ON §704-407

Act 222, Session Laws 1980, eliminated post-commitment release motions based upon factual grounds and limited such motions to those based upon legal grounds. The intent was to have all factual issues, including insanity, heard in one trial.

Act 230, Session Laws 2006, amended this section to, among other things, allow the court to order the release of the defendant on conditions, subject to the law governing involuntary outpatient treatment.

Act 231, Session Laws 2016, amended subsection (3) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

§704-407 Commentary:

1. Massachusetts Judicial Council, Thirty-Sixth Report 22-24, 27-28 (1960).

2. M.P.C. §4.06. The other alternative is to limit post-commitment hearings to legal objections to the prosecution which are susceptible of a determination prior to trial.

" **[§704-407.5] Examination of defendant with respect to physical or mental disease, disorder, or defect excluding penal responsibility.** (1) Whenever the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding penal responsibility, or there is reason to believe that the physical or mental disease, disorder, or defect of the defendant will or has become an issue in the case, the court may order an examination as to the defendant's physical or mental disease, disorder, or defect at the time of the conduct alleged.

(2) The court shall appoint three qualified examiners in felony cases and one qualified examiner in nonfelony cases to examine and report upon the physical or mental disease, disorder, or defect of the defendant at the time of the conduct. In felony cases, the court shall appoint at least one psychiatrist and at least one licensed psychologist. The third examiner may be a psychiatrist, licensed psychologist, or qualified physician. One of the three examiners shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health. In nonfelony cases, the court may appoint as examiners either a psychiatrist or a licensed psychologist. All examiners shall be appointed from a list of certified examiners as determined by the department of health. The court, in appropriate circumstances, may appoint an additional examiner or examiners. The court may direct that one or more qualified physicians or psychologists retained by the defendant be permitted to witness the examination. As used in this section, the term "licensed psychologist" includes psychologists exempted from licensure by section 465-3(a)(3) and "qualified physician" means a physician qualified by the court for the specific evaluation ordered.

(3) An examination performed under this section may employ any method that is accepted by the professions of medicine or psychology for the examination of those alleged to be affected by a physical or mental disease, disorder, or defect; provided that each examiner shall form and render diagnoses and opinions upon the physical and mental condition of the defendant independently from the other examiners, and the examiners, upon approval of the court, may secure the services of clinical psychologists and other medical or paramedical specialists to assist in the examination and diagnosis.

(4) For defendants charged with felonies, the examinations for fitness to proceed under section 704-404 and penal responsibility under this section shall be conducted separately unless a combined examination has been ordered by the court upon a request by the defendant or upon a showing of good cause to combine the examinations. When the examinations are separate, the examination for penal responsibility under this section shall not be ordered more than thirty days after a finding of fitness to proceed. The report of the examination for fitness to proceed shall be separate from the report of the examination for penal responsibility unless a combined examination has been ordered. For defendants charged with offenses other than felonies, a combined examination is permissible when ordered by the court.

(5) The court may order the examination to occur no sooner than one hundred twenty days of a finding of unfit to proceed under section 704-404 upon a showing of good cause.

(6) The report of the examination for penal responsibility shall include the following:

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

(b) A diagnosis of the physical or mental condition of the defendant;

(c) An opinion as to the extent, if any, to which the capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was impaired at the time of the conduct alleged;

(d) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind that is required to establish an element of the offense charged; and

(e) Where more than one examiner is appointed, a statement that the diagnosis and opinion rendered were arrived at independently of any other examiner, unless there is a showing to the court of a clear need for communication between or among the examiners for clarification. A description of the communication shall be included in the report. After all reports are submitted to the court, examiners may confer without restriction.

(7) If the examination cannot be conducted by reason of the unwillingness of the defendant to participate in the examination, the report shall so state and shall include, if possible, an opinion as to whether the unwillingness of the defendant was the result of physical or mental disease, disorder, or defect.

(8) Three copies of the report of the examination, including any supporting documents, shall be filed with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant.

(9) Any examiner shall be permitted to make a separate explanation reasonably serving to clarify the examiner's diagnosis or opinion.

(10) The court shall obtain all existing relevant medical, mental health, social, police, and juvenile records, including those expunged, and other pertinent records in the custody of public agencies, notwithstanding any other statute, and make the records available for inspection by the examiners in hard copy or digital format. The court may order that the records so obtained be made available to the prosecuting attorney and counsel for the defendant in either format, subject to

conditions the court determines appropriate; provided that juvenile records shall not be made available unless constitutionally required. No further disclosure of records shall be made except as permitted by law.

(11) All public agencies in possession of relevant medical, mental health, social, police, and juvenile records, and any other pertinent records of a defendant ordered to be examined under this chapter, shall provide those records to the court, notwithstanding any other state statute.

(12) The compensation of persons making or assisting in the examination, other than those retained by a nonindigent defendant, who are not undertaking the examination upon designation by the director of health as part of their normal duties as employees of the State or a county, shall be paid by the State.

(13) The time during which completion of an examination pursuant to this section is pending shall be excluded in computing the time for trial commencement. [L 2016, c 198, §2]

COMMENTARY ON §704-407.5

Act 198, Session Laws 2016, added this section when it separated the examination for fitness to proceed of a defendant with respect to physical or mental disease, disorder, or defect, from the examination for penal responsibility of the defendant with respect to physical or mental disease, disorder, or defect, with certain exceptions, in criminal prosecutions where the defendant's capacity is at issue. The legislature found that under §704-404, when a defendant's fitness to proceed comes into question, the criminal proceedings are stopped, and the court must order a physical or mental examination of the defendant to determine the defendant's fitness to proceed and whether the defendant was penally responsible for the alleged crime. The legislature further found that it is in the best interest of the defendants for the examination process to proceed in a timely, expedient manner by separating the fitness to stand trial and the penal responsibility components of examinations. Conference Committee Report No. 153-16.

" **§704-408 Determination of irresponsibility.** If the report of the examiners filed pursuant to section 704-404, or the report of examiners of the defendant's choice under section 704-409, states that the defendant at the time of the conduct alleged was affected by a physical or mental disease, disorder, or defect that substantially impaired the defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law, the

court shall submit the defense of physical or mental disease, disorder, or defect to the jury or the trier of fact at the trial of the charge against the defendant. [L 1972, c 9, pt of §1; am L 1980, c 222, §1(3); gen ch 1993; am L 2006, c 230, §9]

COMMENTARY ON §704-408

This section provides for the direct qualified acquittal of the defendant when the report filed pursuant to §704-404 satisfies the court that at the time of the conduct alleged the defendant suffered from a physical or mental disease, disorder, or defect which precluded responsibility. A hearing shall be had on the issue of the defendant's responsibility if it is requested by either party or the court. If the court is satisfied on the basis of the report or the hearing or both that the defendant should not be held responsible for the conduct alleged, it shall, upon motion by the defendant, acquit the defendant. Thus, a trial in such cases will be avoided. If the defendant maintains that the defendant did not engage in the conduct alleged, or has a defense in addition to that excluding responsibility, the defendant can, of course, withhold the motion and the case will proceed to trial.

The section changes the prior law in that it vests the power of direct acquittal in the court and does not make it dependent on prosecutorial discretion.[1]

SUPPLEMENTAL COMMENTARY ON §704-408

Act 222, Session Laws 1980, amended the section to require the submission of the insanity defense to the trier of fact at the trial. The intent was to eliminate bifurcated trials on the insanity defense and to have all factual issues, including insanity, heard at one trial. Conference Committee Report No. 38-80 (72-80).

Act 230, Session Laws 2006, made technical nonsubstantive amendments to this section.

Case Notes

Where defendant is unfit to proceed, §704-406 requires suspension of the proceedings, and a motion for judgment of acquittal will be deferred. 61 H. 313, 602 P.2d 944 (1979).

Discussion of standard by which motion for judgment of acquittal is to be determined. 62 H. 325, 614 P.2d 925 (1980).

Does not authorize court to bar the presentation to the jury of the issue of penal irresponsibility. 66 H. 300, 660 P.2d 33 (1983).

Application of section to multiple personality syndrome. 67 H. 70, 679 P.2d 615 (1984).

§704-408 Commentary:

1. See H.R.S. §711-91, which provides in part: "If the court deems such report conclusive of the... mental irresponsibility of the accused, the court may allow a nolle prosequi to be entered in the case, and in such case shall forthwith, without other or further proceedings, adjudge the accused to be insane and commit him to the state hospital until discharged as provided by law."

" **§704-409 Access to defendant by examiners of defendant's choice.** When, notwithstanding the report filed pursuant to section 704-404, the defendant wishes to be examined by one or more qualified physicians or other experts of the defendant's own choice, such examiner or examiners shall be permitted to have reasonable access to the defendant for the purposes of such examination. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §704-409

The section makes it clear that a defendant in custody pending determination of the defendant's fitness to proceed or the defendant's penal responsibility shall be entitled to examination by medical experts of the defendant's own choice notwithstanding rules or regulations of the prison or hospital or other facility in which the defendant is held. Final determination of the question of reasonable access should reside with the court and not with the warden or hospital administrator.

" **§704-410 Form of expert testimony regarding physical or mental disease, disorder, or defect.** (1) At the hearing pursuant to section 704-405 or upon the trial, the examiners who reported pursuant to section 704-404 may be called as witnesses by the prosecution, the defendant, or the court. If the issue is being tried before a jury, the jury may be informed that the examiners or any of them were designated by the court or by the director of health at the request of the court, as the case may be. If called by the court, the witness shall be subject to cross-examination by the prosecution and the defendant. Both the prosecution and the defendant may summon any other qualified physician or licensed psychologist or other expert to testify, but no one who has not examined the defendant shall be competent

to testify to an expert opinion with respect to the physical or mental condition of the defendant, as distinguished from the validity of the procedure followed by, or the general scientific propositions stated by, another witness.

(2) When an examiner testifies on the issue of the defendant's fitness to proceed, the examiner shall be permitted to make a statement as to the nature of the examiner's examination, the examiner's diagnosis of the physical or mental condition of the defendant, and the examiner's opinion of the extent, if any, to which the capacity of the defendant to understand the proceedings against the defendant or to assist in the defendant's own defense is impaired as a result of physical or mental disease, disorder, or defect.

(3) When an examiner testifies on the issue of the defendant's responsibility for conduct alleged or the issue of the defendant's capacity to have a particular state of mind which is necessary to establish an element of the offense charged, the examiner shall be permitted to make a statement as to the nature of the examiner's examination, the examiner's diagnosis of the physical or mental condition of the defendant at the time of the conduct alleged, and the examiner's opinion of the extent, if any, to which the capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law or to have a particular state of mind which is necessary to establish an element of the offense charged was impaired as a result of physical or mental disease, disorder, or defect at that time.

(4) When an examiner testifies, the examiner shall be permitted to make any explanation reasonably serving to clarify the examiner's diagnosis and opinion and may be cross-examined as to any matter bearing on the examiner's competency or credibility or the validity of the examiner's diagnosis or opinion. [L 1972, c 9, pt of §1; am L 1980, c 222, §1(4); am L 1988, c 305, §6; gen ch 1993]

COMMENTARY ON §704-410

This section sets forth the form in which expert testimony shall proceed at a hearing on the issue of fitness to proceed, at a hearing or trial on the issue of defendant's responsibility, or at a trial on the issue of defendant's capacity to have a particular state of mind.

Subsection (1) allows the court somewhat greater freedom than that which existed under the prior law by permitting it to call an examiner, who has reported pursuant to §704-404, as a witness. If the court does call an examiner, cross-examination is permitted by both parties. Subsection (1) also precludes

opinion testimony as to the defendant's condition by an expert who has not examined the defendant. The intent of the Code is to eliminate testimony in this area based solely on a hypothetical question or an observation in a courtroom or both.

Subsections (2), (3) and (4) assure that an expert who has examined the defendant will have an adequate opportunity to state and explain the expert's diagnosis of the defendant's relevant physical or mental condition and to state and explain the expert's opinion as to the impairment of the defendant's relevant capacities without being restricted to examination by means of the hypothetical question. The expert is, of course, subject to cross-examination on any statement which the expert makes by way of diagnosis, opinion, or explanation and on any other matter bearing on the expert's competency or credibility.

SUPPLEMENTAL COMMENTARY ON §704-410

Act 305, Session Laws 1988, included licensed psychologists among the professionals which may provide offender examination services to the Hawaii criminal justice system. The legislature stated that the present laws, which permit only psychiatric evaluation, are inconsistent with the many and varied uses the court has found for the services of licensed psychologists. Senate Standing Committee Report No. 2153.

Case Notes

No conflict of interest where examiner was paid by State to be on defendant's panel of neutral examiners and later retained by State to testify on issue of defendant's responsibility for conduct or state of mind comprising offense. 74 H. 141, 838 P.2d 1374 (1992).

" **[§704-410.5] Conditional release; duration limited in nonfelony cases.** For any defendant granted conditional release in a nonfelony case pursuant to section 704-411(1)(b), 704-412, 704-414, or 704-415, the period of conditional release shall not exceed one year. [L 2016, c 231, pt of §3]

COMMENTARY ON §704-410.5

Act 231, Session Laws 2016, added this section to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

" **§704-411 Legal effect of acquittal on the ground of physical or mental disease, disorder, or defect excluding**

responsibility; commitment; conditional release; discharge; procedure for separate post-acquittal hearing. (1) When a defendant is acquitted on the ground of physical or mental disease, disorder, or defect excluding responsibility, the court, on the basis of the report made pursuant to section 704-404, if uncontested, or the medical or psychological evidence given at the trial or at a separate hearing, shall order that:

(a) The defendant shall be committed to the custody of the director of health to be placed in an appropriate institution for custody, care, and treatment if the court finds that the defendant:

(i) Is affected by a physical or mental disease, disorder, or defect;

(ii) Presents a risk of danger to self or others; and

(iii) Is not a proper subject for conditional release;

provided that the director of health shall place defendants charged with misdemeanors or felonies not involving violence or attempted violence in the least restrictive environment appropriate in light of the defendant's treatment needs and the need to prevent harm to the person confined and others. The county police departments shall provide to the director of health and the defendant copies of all police reports from cases filed against the defendant that have been adjudicated by the acceptance of a plea of guilty or nolo contendere, a finding of guilt, acquittal, acquittal pursuant to section 704-400, or by the entry of a plea of guilty or nolo contendere made pursuant to chapter 853; provided that the disclosure to the director of health and the defendant does not frustrate a legitimate function of the county police departments; provided further that expunged records, records of or pertaining to any adjudication or disposition rendered in the case of a juvenile, or records containing data from the United States National Crime Information Center shall not be provided. The county police departments shall segregate or sanitize from the police reports information that would result in the likelihood or actual identification of individuals who furnished information in connection with the investigation or who were of investigatory interest. Records shall not be re-disclosed except to the extent permitted by law;

(b) The defendant shall be granted conditional release with conditions as the court deems necessary if the court finds that the defendant is affected by physical or mental disease, disorder, or defect and that the

defendant presents a danger to self or others, but that the defendant can be controlled adequately and given proper care, supervision, and treatment if the defendant is released on condition; or

(c) The defendant shall be discharged if the court finds that the defendant is no longer affected by physical or mental disease, disorder, or defect or, if so affected, that the defendant no longer presents a danger to self or others and is not in need of care, supervision, or treatment.

(2) The court, upon its own motion or on the motion of the prosecuting attorney or the defendant, shall order a separate post-acquittal hearing for the purpose of taking evidence on the issue of physical or mental disease, disorder, or defect and the risk of danger that the defendant presents to self or others.

(3) *[Subsection effective until June 30, 2018. For subsection effective July 1, 2018, see below.]* When ordering a hearing pursuant to subsection (2):

(a) In nonfelony cases, the court shall appoint a qualified examiner to examine and report upon the physical and mental condition of the defendant. The court may appoint either a psychiatrist or a licensed psychologist. The examiner may be designated by the director of health from within the department of health. The examiner shall be appointed from a list of certified examiners as determined by the department of health. The court, in appropriate circumstances, may appoint an additional examiner or examiners; and

(b) In felony cases, the court shall appoint three qualified examiners to examine and report upon the physical and mental condition of the defendant. In each case, the court shall appoint at least one psychiatrist and at least one licensed psychologist. The third member may be a psychiatrist, a licensed psychologist, or a qualified physician. One of the three shall be a psychiatrist or licensed psychologist designated by the director of health. The three examiners shall be appointed from a list of certified examiners as determined by the department of health.

To facilitate the examination and the proceedings thereon, the court may cause the defendant, if not then confined, to be committed to a hospital or other suitable facility for the purpose of examination for a period not exceeding thirty days or a longer period as the court determines to be necessary for the purpose upon written findings for good cause shown. The court may direct that qualified physicians or psychologists retained by the defendant be permitted to witness the examination. The

examination and report and the compensation of persons making or assisting in the examination shall be in accordance with section 704-404(3), (5)(a) and (b), (7), (8), (9), (10), and (11). As used in this section, the term "licensed psychologist" includes psychologists exempted from licensure by section 465-3(a)(3) and "qualified physician" means a physician qualified by the court for the specific evaluation ordered.

(3) *[Subsection effective July 1, 2018. For subsection effective until June 30, 2018, see above.]* When ordering a hearing pursuant to subsection (2):

(a) In nonfelony cases, the court shall appoint a qualified examiner to examine and report upon the physical and mental condition of the defendant. The court may appoint either a psychiatrist or a licensed psychologist. The examiner may be designated by the director of health from within the department of health. The examiner shall be appointed from a list of certified examiners as determined by the department of health. The court, in appropriate circumstances, may appoint an additional examiner or examiners; and

(b) In felony cases, the court shall appoint three qualified examiners to examine and report upon the physical and mental condition of the defendant. In each case, the court shall appoint at least one psychiatrist and at least one licensed psychologist. The third member may be a psychiatrist, a licensed psychologist, or a qualified physician. One of the three shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health. The three examiners shall be appointed from a list of certified examiners as determined by the department of health.

To facilitate the examination and the proceedings thereon, the court may cause the defendant, if not then confined, to be committed to a hospital or other suitable facility for the purpose of examination for a period not exceeding thirty days or a longer period as the court determines to be necessary for the purpose upon written findings for good cause shown. The court may direct that qualified physicians or psychologists retained by the defendant be permitted to witness the examination. The examination and report and the compensation of persons making or assisting in the examination shall be in accordance with section 704-404(3), (5)(a) and (b), (7), (8), (9), (10), and (11). As used in this section, the term "licensed psychologist" includes psychologists exempted from licensure by section 465-3(a)(3) and "qualified physician" means a physician qualified by the court for the specific evaluation ordered.

(4) Whether the court's order under subsection (1) is made on the basis of the medical or psychological evidence given at the trial, or on the basis of the report made pursuant to section 704-404, or the medical or psychological evidence given at a separate hearing, the burden shall be upon the State to prove, by a preponderance of the evidence, that the defendant is affected by a physical or mental disease, disorder, or defect and may not safely be discharged and that the defendant should be either committed or conditionally released as provided in subsection (1).

(5) In any proceeding governed by this section, the defendant's fitness shall not be an issue. [L 1972, c 9, pt of §1; am L 1974, c 54, §2; am L 1979, c 3, §2; am L 1983, c 281, §1; am L 1986, c 314, §8; am L 1987, c 145, §2; am L 1988, c 305, §7; am L 1992, c 88, §2; gen ch 1992; am L 1997, c 306, §3; am L 2006, c 230, §10; am L 2008, c 99, §3 and c 100, §3; am L 2009, c 127, §2; am L 2011, c 99, §2; am L 2016, c 198, §5 and c 231, §§8, 9]

COMMENTARY ON §704-411

This section rejects the concept of mandatory commitment following a qualified acquittal on the basis of a physical or mental disease, disorder, or defect which precluded defendant's responsibility.[1] The Code instead authorizes a flexible mode of disposition of defendants thus acquitted, which depends on (1) the restraint necessary to protect other members of society and the defendant from the consequences of a recurrence of the prohibited conduct, and (2) the conditions necessary to afford the defendant proper care and supervision.

The Code recognizes three types of dispositions: commitment, conditional release, and discharge. The Code utilizes the concept of conditional release, which is presently recognized in the field of civil commitment, but leaves the ultimate determination of the conditions of release with the court, rather than with the medical authority to whom the defendant is entrusted.

Since the defendant has been detained for a substantial period of time for purposes of examination prior to the determination of the defendant's lack of responsibility, the examiners, in an appropriate case, may be able to indicate, at the trial or at a separate hearing, that commitment is not called for. In such a case, mandatory commitment followed by an application for release or discharge would be abusive and wasteful. Furthermore, a disease, disorder, or defect excluding responsibility which is influenced by biological or organic factors may be susceptible to adequate treatment (by means of

drugs or otherwise) on an out-patient basis without danger to other members of society or may be such that repetition of the prohibited conduct is foreclosed. In such cases commitment should not be made mandatory.

Proof of penally prohibited conduct at the time of the alleged offense cannot be used as a justification for automatic commitment following an acquittal based on lack of responsibility.[2] A determination by the court will have to be made as to whether the defendant's condition at the time of disposition requires commitment, conditional release, or discharge. While proof of the commission of prohibited conduct and an acquittal predicated on lack of responsibility at the time of the conduct are relevant to and probative of present dangerousness, they are not substitutes for such a finding. Although the evidence at trial will be primarily devoted to a determination of the defendant's physical and mental condition at the time of the alleged offense, in certain cases the examiners may be able to indicate the risks which the defendant presents. In some cases a defendant, seeking to avoid penal liability on the basis of physical or mental disease, disorder, or defect excluding responsibility, may be quite willing to stipulate to the need for commitment or conditional release following acquittal. In such cases, it should not be necessary to require that the court hold a separate hearing for the purpose of determining the defendant's present condition and the risks the defendant presents.

The Code, therefore, provides in subsection (1) that the disposition order may be made on the basis of medical evidence given either at the trial or at a separate hearing. In those instances where the court believes that the evidence at trial is not sufficiently addressed to the risk of danger which the defendant presents to allow a determination of that issue, the court may order a separate hearing. Where either the prosecution or the defense believes that the evidence at the trial (including stipulations) is not dispositive of the issue of present danger, each is free to move for a separate post-acquittal hearing on that issue.

Subsection (3) provides that the procedure to be followed with respect to a separate post-acquittal hearing shall conform to §704-404 to the extent applicable.

Subsection (4) provides that the burden of proof with respect to the issue of present danger is on the government and that proof shall be by a preponderance of the evidence. This section is consistent with the burden the government must bear under §704-415 with respect to applications for discharge, conditional release, or modification of conditions of release.

Previous Hawaii law, which provided "that upon presentment of due proof that... [the defendant] has regained his sanity at the time of acquittal, the judge may release such person without... commital [sic],"[3] fell short of the flexibility and safeguards provided in the Code. By making dangerousness the relevant criterion, the Code provides for possible commitment of a dangerous person even though the person's physical or mental condition at the time of commitment does not preclude penal responsibility. Furthermore, the Code specifically provides that the court, the prosecution, or the defendant may move for a separate post-acquittal hearing directed to the limited issue of present dangerousness. Consistent with the concept of tailoring the disposition of the irresponsible defendant to the condition of the defendant and the protection of others, the Code also recognizes conditional release (in addition to commitment and discharge) and provides for physical as well as mental conditions which preclude responsibility.

SUPPLEMENTAL COMMENTARY ON §704-411

Act 54, Session Laws 1974, amended subsection (3) to permit the use of a certified clinical psychologist as a member of the examination panel.

Act 3, Session Laws 1979, amended subsection (3) by modifying the requirements for the composition of examination panels to allow the courts greater flexibility in appointing mental health professionals.

Act 281, Session Laws 1983, amended subsection (1)(a) so that defendants charged with nonviolent crimes who are acquitted pursuant to chapter 704, may be placed in the least restrictive environment which takes into account the defendant's treatment needs and the need to prevent harm to the defendant and others. Also, subsections (1) and (2) were amended to delete a person's "danger to property" as a criteria justifying commitment, based on Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980), in which the court found that criteria unconstitutionally broad. House Conference Committee Report No. 27.

Act 314, Session Laws 1986, amended "certified clinical psychologists" to "licensed psychologists." This change was made because psychologists are licensed and not certified and the term "clinical" does not accurately describe psychologists qualified to determine penal responsibility and fitness to proceed. Act 314 also provided an exception to the licensure requirement which recognizes that under §465-3(4), psychologists employed under government certification or civil service rules are exempt from the licensure requirement. Conference Committee Report No. 51-86.

Act 145, Session Laws 1987, permitted the department of health to set minimum standards for participation and appointment of a sanity examiner. The legislature felt this change would allow additional assurances of higher quality testimony by these examiners. Senate Standing Committee Report No. 691, House Standing Committee Report No. 1217.

Act 305, Session Laws 1988, included licensed psychologists among the professionals which may provide offender examination services to the Hawaii criminal justice system. The legislature stated that the present laws, which permit only psychiatric evaluation, are inconsistent with the many and varied uses the court has found for the services of licensed psychologists. Senate Standing Committee Report No. 2153.

Act 88, Session Laws 1992, made technical amendments to the section for purposes of clarity, consistency, and style. Senate Standing Committee Report No. 2579.

Act 306, Session Laws 1997, amended subsection (3) by, inter alia, allowing mental health examinations to be conducted by one rather than three examiners in nonfelony cases; the courts are allowed to appoint either a psychiatrist or a licensed psychologist as the examiner. In felony cases, three examiners are required, including at least one psychiatrist and one psychologist. The Act also limited the time period during which a defendant, if not then confined, may be committed by the court for examination, to not more than thirty days unless the court determines it necessary upon written findings. The amendment streamlines the process for committing and releasing mentally incompetent defendants. Conference Committee Report No. 64.

Act 230, Session Laws 2006, amended this section to, among other things, require that in a post-acquittal hearing, a defendant's fitness shall not be an issue for a defendant who has been acquitted on the grounds of physical or mental disease, disorder, or defect. House Standing Committee Report No. 665-06.

Act 99, Session Laws 2008, amended subsection (1) by requiring the county police departments to provide to the director of health and a defendant who is committed to the custody of the director, copies of certain police reports regarding that defendant. Act 99 expedited the records disclosure process for clinical evaluation purposes while protecting a patient's right of privacy. Conference Committee Report No. 161-08.

Act 100, Session Laws 2008, amended this section by authorizing the director of health or a committed person to apply to the court to conduct a hearing to assess any further need for inpatient hospitalization of a person who is acquitted on the ground of physical or mental disease, disorder, or defect excluding responsibility. Act 100 also required the court to

complete the hearing process and render a decision within sixty days of the application, provided that for good cause, the court may extend the sixty day time frame upon the request of the director of health or the committed person. Conference Committee Report No. 37-08.

Act 127, Session Laws 2009, amended this section by repealing subsections (5), (6), and (7), which had been interpreted as having established an additional hearing and application procedure for persons committed to the Hawaii state hospital due to an acquittal based on the ground of physical or mental disease, disorder, or defect excluding responsibility. The repeal of the subsections clarified that §704-412 governs the timing and standards for conditional release or discharge from the custody of the director of health. Senate Standing Committee Report No. 533.

Act 99, Session Laws 2011, established a maximum one-year period of post-acquittal conditional release for persons charged with a petty misdemeanor, misdemeanor, or violation to promote the efficient use of criminal justice resources. The legislature found that although persons acquitted of criminal charges by reason of physical or mental disease, disorder, or defect may be released to the community on a post-acquittal conditional release after a court determines that the persons can be adequately controlled and given proper care, supervision, and treatment, there are many instances where people remain on conditional release far longer than the maximum penalty allowed for the offense charged. According to the department of health, ninety per cent of persons on conditional release in Hawaii for a misdemeanor or petty misdemeanor are kept on conditional release longer than they would have spent on maximum jail time or on probation for the same offense, sometimes up to twenty times longer. This increases the burden on staff and financial resources at district courts, probation offices, mental health centers, and hospitals. By establishing a specific time limit on the conditional release of persons charged with lesser offenses, Act 99 increases the availability of resources for more serious offenders. Senate Standing Committee Report No. 1170.

Act 198, Session Laws 2016, amended this section by making conforming amendments. Senate Standing Committee Report No. 2261. Act 198 also amended this section by adding the definition of "qualified physician."

Act 231, Session Laws 2016, amended subsections (1) and (3) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Law Journals and Reviews

Unfair Punishment of the Mentally Disabled? The Constitutionality of Treating Extremely Dangerous and Mentally Ill Insanity Acquittees in Prison Facilities. 23 UH L. Rev. 623 (2001).

Risky Business: Assessing Dangerousness in Hawai‘i. 24 UH L. Rev. 63 (2001).

Case Notes

Prosecutor's comment that defendant, whose defense was insanity, would "walk the streets" if acquitted was improper. 58 H. 623, 574 P.2d 895 (1978).

Liability for subsequent harm done by criminal defendant placed on conditional release. 61 H. 253, 602 P.2d 532 (1979).

The difference in the burden of proof required for commitment under this section and under §334-60(b)(4)(I) does not render this section violative of due process or equal protection. 63 H. 186, 623 P.2d 881 (1981).

Where defendant failed to follow the procedural mechanisms set forth in this section by failing to request a post-acquittal hearing to address the issue of dangerousness in a proceeding separate from the trial proceedings, supreme court lacked appellate jurisdiction to review trial court's decision. 102 H. 130, 73 P.3d 668 (2003).

§704-411 Commentary:

1. M.P.C. §4.08.

2. Bolton v. Harris, 395 F.2d 642 (1968).

3. H.R.S. §711-93.

" **§704-412 Committed person; application for conditional release or discharge; by the director of health; by the person.** (1) After the expiration of at least ninety days following an original order of commitment pursuant to section 704-411(1)(a), or after the expiration of at least sixty days following the revocation of conditional release pursuant to section 704-413, if the director of health is of the opinion that the person committed is still affected by a physical or mental disease, disorder, or defect and may be granted conditional release or discharged without danger to self or to the person or property of others or that the person is no longer affected by a physical

or mental disease, disorder, or defect, the director shall make an application for either the conditional release or discharge of the person, as appropriate. In such a case, the director shall submit a report to the court by which the person was ordered committed and shall transmit copies of the application and report to the prosecuting attorney of the county from which the person was committed and to the person committed.

(2) After the expiration of ninety days from the date of the order of commitment pursuant to section 704-411, or after the expiration of sixty days following the revocation of conditional release pursuant to section 704-413, the person committed may apply to the court from which the person was committed for an order of discharge upon the ground that the person is no longer affected by a physical or mental disease, disorder, or defect. The person committed may apply for conditional release or discharge upon the ground that, though still affected by a physical or mental disease, disorder, or defect, the person may be released without danger to self or to the person or property of others. A copy of the application shall be transmitted to the prosecuting attorney of the county from which the person was committed. If the court denies the application, the person shall not be permitted to file another application for either conditional release or discharge until one year after the date of the hearing held on the immediate prior application.

(3) Upon application to the court by either the director of health or the person committed, the court shall complete the hearing process and render a decision within sixty days of the application; provided that for good cause the court may extend the sixty-day time frame upon the request of the director of health or the person committed. [L 1972, c 9, pt of §1; am L 2006, c 230, §11; am L 2008, c 100, §4; am L 2009, c 127, §3]

COMMENTARY ON §704-412

This section provides that the continued custody of a person who has been committed following a qualified acquittal shall depend on whether he can be discharged or conditionally released without danger to himself or to the person or property of others. The criterion is not whether continued hospitalization is medically indicated or whether the committed person has been restored to physical or mental health according to laws governing other forms of commitment. The criterion is dangerousness. The necessity of avoiding confusion here is paramount. In the case of the defendant acquitted on the basis of mental disease, it has been pointed out that:

> Although his mental disease may have greatly improved, such person may still be dangerous because of factors in his personality and background other than mental disease. Also, such a standard [dangerousness] provides a possible means for control of the occasional defendant who may be quite dangerous but who successfully feigned mental disease to gain an acquittal.[1]

The section also provides for the procedure to be followed in making the application, whether application is made by the director of health or by the committed person. The requirement of notice to the prosecuting attorney and to the defendant (if application is made by the director) and the independent examination provided by §704-414 are designed to protect both the public and the committed person.

Previous Hawaii law provided that a person committed because of lack of criminal responsibility was to be "discharged by a circuit court or judge upon proof of termination of his insanity."[2] The Code focuses on the relevant criterion and specifically provides for procedures which adequately safeguard the interest of the public and the committed person.

SUPPLEMENTAL COMMENTARY ON §704-412

Section 412(2) of the Proposed Draft of the Code provided for a "waiting period" of one year from the date of the order of commitment pursuant to §704-411 before the committed person could apply to the court for an order of discharge or conditional release. The legislature reduced the waiting period to ninety days. The Conference Committee said: "Your Committee, after thorough consideration, finds that a one year period is too long and that the term of this period is not sufficiently related to the psychiatric facts upon which discharge or conditional release turn." Conference Committee Report No. 2 (1972).

Act 230, Session Laws 2006, amended this section to ensure that the person's physical or mental disease, disorder, or defect is considered in commitment and release provisions. House Standing Committee Report No. 665-06.

Act 100, Session Laws 2008, provided for the application for the conditional release or discharge from hospitalization of a committed person after [the expiration of] sixty days following the revocation of conditional release. Conference Committee Report No. 37-08.

Act 127, Session Laws 2009, amended this section by setting a sixty-day deadline for judicial decisions on motions for conditional release or discharge, while providing for an

extension if necessary. House Standing Committee Report No. 1595, Senate Standing Committee Report No. 533.

§704-412 Commentary:

1. M.P.C., Tentative Draft No. 4, comments at 199 (1955).

2. H.R.S. §711-94.

" **§704-413 Conditional release; application for modification or discharge; termination of conditional release and commitment.** (1) Any person granted conditional release pursuant to this chapter shall continue to receive mental health or other treatment and care deemed appropriate by the director of health until discharged from conditional release. The person shall follow all prescribed treatments and take all prescribed medications according to the instructions of the person's treating mental health professional. If a mental health professional who is treating a person granted conditional release believes that either the person is not complying with the requirements of this section or there is other evidence that hospitalization is appropriate, the mental health professional shall report the matter to the probation officer of the person granted conditional release. The probation officer may order the person granted conditional release to be hospitalized for a period not to exceed seventy-two hours if the probation officer has probable cause to believe the person has violated the requirements of this subsection. No person shall be hospitalized beyond the seventy-two-hour period, as computed pursuant to section 1-29, unless a hearing has been held pursuant to subsection (4); provided that on or before the expiration of the seventy-two-hour period, a court may conduct a hearing to determine whether the person would benefit from further hospitalization, which may render a revocation of conditional release unnecessary. If satisfied, the court may order further temporary hospitalization for a period not to exceed ninety days, subject to extension as appropriate, but in no event for a period longer than one year. At any time within that period, the court may determine that a hearing pursuant to subsection (4) should be conducted.

(2) The director of health may apply to the court ordering any person released pursuant to this chapter, for the person's discharge from, or modification of, the order granting conditional release; provided that the person receives community-based mental health services from or contracted by the department of health, and the director is of the opinion that

the person on conditional release is no longer affected by a physical or mental disease, disorder, or defect and may be discharged, or the order may be modified, without danger to the person or to others. The director shall make an application for the discharge from, or modification of, the order of conditional release in a report to the circuit from which the order was issued. The director shall transmit a copy of the application and report to the prosecuting attorney of the county from which the conditional release order was issued, to the person's treating mental health professionals, and to the probation officer supervising the conditional release. The person on conditional release shall be given notice of the application.

(3) Any person granted conditional release pursuant to this chapter may apply to the court ordering the conditional release for discharge from, or modification of, the order granting conditional release on the ground that the person is no longer affected by a physical or mental disease, disorder, or defect and may be discharged, or the order may be modified, without danger to the person or to others. The application shall be accompanied by a letter from or supporting affidavit of a qualified physician or licensed psychologist. A copy of the application and letter or affidavit shall be transmitted to the prosecuting attorney of the circuit from which the order issued and to any persons supervising the release, and the hearing on the application shall be held following notice to such persons. If the court denies the application, the person shall not be permitted to file another application for either discharge or modification of conditional release until one year after the date of the denial.

(4) If, at any time after the order pursuant to this chapter granting conditional release, the court determines, after hearing evidence, that:

(a) The person is still affected by a physical or mental disease, disorder, or defect, and the conditions of release have not been fulfilled; or

(b) For the safety of the person or others, the person's conditional release should be revoked,

the court may forthwith modify the conditions of release or order the person to be committed to the custody of the director of health, subject to discharge or release in accordance with the procedure prescribed in section 704-412; provided that, if satisfied that the person would benefit from temporary hospitalization that may render a revocation of conditional release unnecessary, the court, in lieu of revocation, may order hospitalization for a period not to exceed ninety days, subject to extension as appropriate, but in no event for a period exceeding a total of one year, and may reinstate or revoke

conditional release at any time during the temporary hospitalization.

(5) Upon application for discharge from, or modification of, the order of conditional release by either the director of health or the person, the court shall complete the hearing process and render a decision within sixty days of the application, provided that for good cause the court may extend the sixty day time frame upon the request of the director of health or the person. [L 1972, c 9, pt of §1; am L 1983, c 189, §1; am L 1988, c 305, §8; am L 1997, c 306, §4; am L 2006, c 230, §12; am L 2008, c 100, §5; am L 2016, c 231, §10]

COMMENTARY ON §704-413

What has been said in the commentary to §704-412 applies with equal force to applications, by a person released on condition, for discharge or for modification of conditions of release. The criterion of dangerousness is still applicable.

Subsection (2) limits the time during which a person released on condition remains subject to recommitment.

SUPPLEMENTAL COMMENTARY ON §704-413

Act 189, Session Laws 1983, added a new subsection (1) which requires continued psychological or psychiatric treatment of persons conditionally released after being committed pursuant to §704-411. Assurance of continued treatment was felt necessary for the safety and welfare of both the community and the person conditionally released. This section was further amended to provide for the recommittal of persons conditionally released or the modification of the conditions of their release. Senate Conference Committee Report No. 26.

Act 305, Session Laws 1988, included licensed psychologists among the professionals which may provide offender examination services to the Hawaii criminal justice system. The legislature stated that the present laws, which permit only psychiatric evaluation, are inconsistent with the many and varied uses the court has found for the services of licensed psychologists. Senate Standing Committee Report No. 2153.

Act 306, Session Laws 1997, amended this section to require that any person released on condition pursuant to §704-411 shall receive mental health or other appropriate treatment and care until discharged from conditional release. The amendment streamlines the process for committing and releasing mentally incompetent defendants. Senate Standing Committee Report No. 98.

Act 230, Session Laws 2006, amended this section, among others, to ensure that the person's physical or mental disease, disorder, or defect is considered in commitment and release provisions. House Standing Committee Report No. 665-06.

Act 100, Session Laws 2008, amended this section by, among other things, providing an alternative of further temporary hospitalization through a court hearing rather than proceeding immediately to a revocation of a person's conditional release when the person is in violation of the conditions of the conditional release. House Standing Committee Report No. 1133-08.

Act 231, Session Laws 2016, amended subsection (4) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

" **§704-414 Procedure upon application for discharge, conditional release, or modification of conditions of release.** (1) *[Subsection effective until June 30, 2018. For subsection effective July 1, 2018, see below.]* Upon filing of an application pursuant to section 704-412 for discharge or conditional release, or upon the filing of an application pursuant to section 704-413 for discharge, the court shall appoint three qualified examiners in felony cases, and one qualified examiner in nonfelony cases, to examine and report upon the physical and mental condition of the defendant. In felony cases, the court shall appoint at least one psychiatrist and at least one licensed psychologist. The third member may be a psychiatrist, a licensed psychologist, or a qualified physician. One of the three shall be a psychiatrist or licensed psychologist designated by the director of health. The examiners shall be appointed from a list of certified examiners as determined by the department of health. To facilitate the examination and the proceedings thereon, the court may cause the defendant, if not then confined, to be committed to a hospital or other suitable facility for the purpose of the examination and may direct that qualified physicians or psychologists retained by the defendant be permitted to witness the examination. The examination and report and the compensation of persons making or assisting in the examination shall be in accordance with section 704-404(3), (5)(a) and (b), (7), (8), (9), (10), and (11). As used in this section, the term "licensed psychologist" includes psychologists exempted from licensure by section 465-3(a)(3) and "qualified physician" means a physician qualified by the court for the specific evaluation ordered.

(1) *[Subsection effective July 1, 2018. For subsection effective until June 30, 2018, see above.]* Upon filing of an application pursuant to section 704-412 for discharge or conditional release, or upon the filing of an application pursuant to section 704-413 for discharge, the court shall appoint three qualified examiners in felony cases, and one qualified examiner in nonfelony cases, to examine and report upon the physical and mental condition of the defendant. In felony cases, the court shall appoint at least one psychiatrist and at least one licensed psychologist. The third member may be a psychiatrist, a licensed psychologist, or a qualified physician. One of the three shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health. The examiners shall be appointed from a list of certified examiners as determined by the department of health. To facilitate the examination and the proceedings thereon, the court may cause the defendant, if not then confined, to be committed to a hospital or other suitable facility for the purpose of the examination and may direct that qualified physicians or psychologists retained by the defendant be permitted to witness the examination. The examination and report and the compensation of persons making or assisting in the examination shall be in accordance with section 704-404(3), (5)(a) and (b), (7), (8), (9), (10), and (11). As used in this section, the term "licensed psychologist" includes psychologists exempted from licensure by section 465-3(a)(3) and "qualified physician" means a physician qualified by the court for the specific evaluation ordered.

(2) Upon the filing of an application pursuant to section 704-413 for modification of conditions of release, the court may proceed as provided in subsection (1). [L 1972, c 9, pt of §1; am L 1974, c 54, §3; am L 1979, c 3, §3; am L 1986, c 314, §9; am L 1987, c 145, §3; am L 1988, c 305, §9; am L 1992, c 88, §3; am L 1997, c 306, §5; am L 2006, c 230, §13; am L 2016, c 198, §6 and c 231, §§11, 12]

COMMENTARY ON §704-414

This section provides for the appointment of independent examiners for the purpose of reporting and possibly testifying on the former defendant's condition prior to action on an application for discharge, conditional release, or modification of conditions of release. The procedure for examination is substantially similar to that prescribed for the initial determination of the issues of fitness to proceed and penal responsibility; however, the relevant condition is the person's present condition and the relevant criterion is whether the

application can be granted without danger to the person himself, or to the person or property of others.

Prior Hawaii law merely required "proof of termination of... [the committed person's] insanity."[1] The mandatory requirement of an independent review before change in commitment or conditional release status is an addition to the law. It affords the defendant and the public a more deliberate determination of the application.

SUPPLEMENTAL COMMENTARY ON §704-414

In conformity with the changes made in §§704-404 and 411, Act 54, Session Laws 1974, also changed §704-414 to permit the use of one certified clinical psychologist as part of the examination panel.

Act 3, Session Laws 1979, modified the requirements for the composition of examination panels to allow the courts greater flexibility in appointing mental health professionals.

Act 314, Session Laws 1986, amended "certified clinical psychologists" to "licensed psychologists." This change was made because psychologists are licensed and not certified and the term "clinical" does not accurately describe psychologists qualified to determine penal responsibility and fitness to proceed. Act 314 also provided an exception to the licensure requirement which recognizes that under §465-3(4), psychologists employed under government certification or civil service rules are exempt from the licensure requirement. Conference Committee Report No. 51-86.

Act 145, Session Laws 1987, permitted the department of health to set minimum standards for participation and appointment of a sanity examiner. The legislature felt this change would allow additional assurances of higher quality testimony by these examiners. Senate Standing Committee Report No. 691, House Standing Committee Report No. 1217.

Act 305, Session Laws 1988, included licensed psychologists among the professionals which may provide offender examination services to the Hawaii criminal justice system. The legislature stated that the present laws, which permit only psychiatric evaluation, are inconsistent with the many and varied uses the court has found for the services of licensed psychologists. Senate Standing Committee Report No. 2153.

Act 88, Session Laws 1992, made technical amendments to the section for purposes of clarity, consistency, and style. Senate Standing Committee Report No. 2579.

Act 306, Session Laws 1997, amended this section to allow mental health examinations to be conducted by one rather than three examiners in nonfelony cases, and to require three

examiners, which include at least one psychiatrist and one psychologist, in felony cases. The amendment streamlines the process for committing and releasing mentally incompetent defendants. Conference Committee Report No. 64.

Act 230, Session Laws 2006, amended this section by omitting in the sixth sentence, the words "and participate in" from the phrase that formerly read "to witness and participate in the examination."

Act 198, Session Laws 2016, amended this section by making conforming amendments. Senate Standing Committee Report No. 2261. Act 198 also amended this section by adding the definition of "qualified physician."

Act 231, Session Laws 2016, amended this section to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

§704-414 Commentary:

1. H.R.S. §711-94.

" **§704-415 Disposition of application for discharge, conditional release, or modification of conditions of release.** (1) If the court is satisfied from the report filed pursuant to section 704-414, and such testimony of the reporting examiners as the court deems necessary, that:

(a) The person is affected by a physical or mental disease, disorder, or defect and the discharge, conditional release, or modification of conditions of release applied for may be granted without danger to the committed or conditionally released person or to the person or property of others; or

(b) The person is no longer affected by a physical or mental disease, disorder, or defect,

the court shall grant the application and order the relief. If the court is not so satisfied, it shall promptly order a hearing.

(2) Any such hearing shall be deemed a civil proceeding and the burden shall be upon the applicant to prove that the person is no longer affected by a physical or mental disease, disorder, or defect or may safely be either released on the conditions applied for or discharged. According to the determination of the court upon the hearing, the person shall be:

(a) Discharged;

(b) Released on such conditions as the court determines to be necessary; or

(c) Recommitted to the custody of the director of health, subject to discharge or release only in accordance with the procedure prescribed in section 704-412. [L 1972, c 9, pt of §1; am L 1982, c 232, §1; am L 2006, c 230, §14]

COMMENTARY ON §704-415

Following the filing of the report pursuant to §704-414, the court may grant the application summarily if it is convinced that it can be granted without danger to the defendant or to the person or property of others. The Code allows the court some flexibility in taking testimony of examiners without the necessity of a full hearing. If the testimony of the examiners, in addition to the report, satisfies the court that favorable action on the application is appropriate, it may be granted summarily. If the court is not satisfied, a full hearing is indicated, following which the court shall make a determination consistent with the danger the committed or conditionally released person presents to oneself and to others.

The Code takes the position that the burden should remain with the State to prove that the freedom applied for cannot be safely granted.

SUPPLEMENTAL COMMENTARY ON §704-415

Act 232, Session Laws 1982, shifted from the State to the applicant, the burden to prove that a conditional release, discharge, or modification of condition of release may be safely granted without danger to the person or community following a judgment of acquittal on the grounds of disease, disorder, or defect excluding responsibility.

Act 230, Session Laws 2006, amended this section, among others, to ensure that the person's physical or mental disease, disorder, or defect is considered in commitment and release provisions. House Standing Committee Report No. 665-06.

Attorney General Opinions

Determination of whether person may be safely released--standard of proof; nature of evidence. Att. Gen. Op. 79-5.

State must prove by "clear and convincing evidence" that the person may not safely be released. Att. Gen. Op. 79-5.

Law Journals and Reviews

Foucha v. Louisiana: The Keys to the Asylum for Sane But Potentially Dangerous Insanity Acquittees? 15 UH L. Rev. 215 (1993).

Case Notes

Section does not violate due process clauses of state and U.S. Constitutions; at release hearing, insanity acquittee bears burden of proving by preponderance of evidence freedom from mental illness and dangerous propensities. 84 H. 269, 933 P.2d 606 (1997).

Section does not violate equal protection clauses of state and U.S. Constitutions; State may place burden on insanity acquittee to prove by preponderance of evidence that acquittee should be released. 84 H. 269, 933 P.2d 606 (1997).

" **§704-416 Statements for purposes of examination or treatment inadmissible except on issue of physical or mental condition.** A statement made by a person subjected to examination or treatment pursuant to this chapter for the purposes of such examination or treatment shall not be admissible in evidence against the person in any penal proceeding on any issue other than that of the person's physical or mental condition, but it shall be admissible upon that issue, whether or not it would otherwise be deemed a privileged communication, unless such statement constitutes an admission of guilt of the offense charged. [L 1972, c 9, pt of §1; gen ch 1993]

Cross References

Physician-patient privilege, psychologist-client privilege, see §626-1, rules 504 and 504.1.

COMMENTARY ON §704-416

The Code takes the position that statements made by the defendant to an examiner in the course of an examination under this chapter should be admissible in penal proceedings on the issue of the defendant's physical or mental condition notwithstanding any privilege which might be imported from the law of evidence.[1] However, "to safeguard the defendant's rights and to make possible the feeling of confidence essential for effective psychiatric [and other medical] diagnosis or treatment, the defendant's statements made for this purpose may not be put in evidence on any other issue,"[2] e.g., whether the

defendant in fact engaged in the proscribed conduct, in penal proceedings.

The final clause of this section provides that any statement made for the purpose of examination and treatment pursuant to this chapter, which constitutes an admission of guilt of the offense charged, in addition to being inadmissible on other issues, will also not be admissible in evidence on the issue of defendant's mental or physical condition. The intent of the Code is to meet two problems: (1) the inability of a jury to divorce a statement containing an admission of guilt from the determination of all issues, and (2) an objection to the examination of the defendant on the basis of defendant's privilege against self-incrimination.[3]

Case Notes

Error to admit defendant's statement to physician to attack defendant's credibility; cannot be said error harmless. 69 H. 68, 733 P.2d 690 (1987).

Overrides Hawaii rules of evidence rule 702.1. 71 H. 591, 801 P.2d 27 (1990).

Statements not prejudicial where elicited to show declarant's emotional state and no objection made by declarant's counsel. 74 H. 141, 838 P.2d 1374 (1992).

Because the plain language of this section does not address non-statements, and because an ordinary reading of the statute does not produce an absurd result, this section does not govern non-statements. 116 H. 200, 172 P.3d 512 (2007).

Trial court did not err in permitting prosecution to cross-examine defendant regarding defendant's non-statements to defendant's mental examiners where defendant's failure to mention defendant's concerns regarding aliens was clearly relevant to the question of whether defendant was being truthful when defendant testified at trial about having those concerns at the time of the incident, and this section only addresses the admissibility of defendant's statements, not non-statements; thus, as the introduction of defendant's non-statements did not violate this chapter, defendant's right to a fair trial was not prejudiced by admission of the testimony. 116 H. 200, 172 P.3d 512 (2007).

§704-416 Commentary:

1. See H.R.S. §621-20.5, which also limits the physician-patient privilege to civil proceedings.

2. M.P.C., Tentative Draft No. 4, comments at 201 (1955).

3. See M.P.C. §4.09, notes at 78 (1962).

" **§704-416.5 Supervision of person on conditional release.** (1) Any person hospitalized under this chapter who is subsequently placed on conditional release shall be subject to the supervision of a probation officer until such time as that supervision is terminated by order of the court.

(2) The probation officer shall report, as the court may order, whether the conditionally released person is complying with the conditions of the release. [L 1983, c 69, §1; am L 2006, c 230, §15]

COMMENTARY ON §704-416.5

Act 69, Session Laws 1983, added this section to this chapter so that a defendant who is acquitted and committed pursuant to this chapter shall be supervised by the adult probation division upon that person's conditional release. The legislature felt that supervision is necessary for the safety and welfare of the individual as well as the community. Senate Standing Committee Report No. 719, House Standing Committee Report No. 506.

Act 230, Session Laws 2006, made technical nonsubstantive amendments to this section.

" **§704-417 Use of out-of-state institutions.** The term "appropriate institution" includes any institution within or without this State to which the defendant may be eligible for admission and treatment for physical or mental disease, disorder, or defect. [L 1972, c 9, pt of §1]

COMMENTARY ON §704-417

This section is intended to permit the court (acting through the director of health) or the director of health to utilize institutions outside the jurisdiction of the State.

" **§704-418 Immaturity excluding penal conviction; transfer of proceedings to family court.** (1) A person shall not be tried for or convicted of an offense if the person is subject to the exclusive original jurisdiction of the family court, unless the family court has waived jurisdiction over the person.

(2) No court shall have jurisdiction to try or convict a person of an offense if penal proceedings against the person are barred by subsection (1). When it appears that a person charged with the commission of an offense may be of such an age that

penal proceedings may be barred under subsection (1), the court shall hold a hearing thereon, and the burden shall be on the prosecution to establish to the satisfaction of the court that the penal proceeding is not barred upon such grounds. If the court determines the penal proceeding is barred, custody of the person charged shall be surrendered to the family court, and the case, including all papers and processes relating thereto, shall be transferred. [L 1972, c 9, pt of §1; am L 1981, c 206, §1; gen ch 1993]

Cross References

Jurisdiction of the family court, see §571-11.
Waiver of jurisdiction; transfer to other courts, see §571-22.

COMMENTARY ON §704-418

This section defines those instances when penal proceedings are barred because of the immaturity of the accused. The Code precludes such proceedings entirely if the accused is less than 16 years of age at the time of the conduct alleged. In such cases the family court retains exclusive jurisdiction.[1] If the accused is 16 or 17 years of age, concurrent jurisdiction is provided in both the family court and the division of the circuit court handling penal proceedings. In such cases, primary jurisdiction is vested in the family court, and only upon waiver by that court[2] does jurisdiction vest in the other division of the circuit court handling penal proceedings.

Previous Hawaii law on penal prosecution of an immature defendant was self-contradictory. Chapter 703 (as codified prior to this Code) provided that persons under seven years of age were to be deemed incompetent to commit an offense[3] and that the competency of persons between the ages of 7 and 14 years was to be determined, without a presumption as to competency or incompetency, on the basis of "whether the accused acted with intelligence and understanding of the nature of the act."[4] On the other hand, chapter 571 vests in the family court jurisdiction over cases involving conduct by an immature person which would be penal if engaged in by an adult. Exclusive original jurisdiction is provided if the person, at the time of the conduct, is less than 16 years of age, and primary concurrent jurisdiction is provided if the person, at the time of the conduct, is 16 or 17 years of age.[5] Chapter 571 thus effectively nullified the provisions of previous chapter 703 dealing with lack of penal responsibility based on immaturity and rendered them dead letters in the law. As the Model Penal Code commentary has pointed out, this inconsistency

in the law is not uncommon and it can be alleviated by dealing with the problem of the immature person as one of jurisdiction rather than as one of capacity or responsibility.

> In treating the problem of accountability of juveniles solely in terms of the respective jurisdiction of the juvenile court and the criminal courts, rather than in terms of criminal capacity, the draft attempts to integrate two related problems which are treated separately and largely inconsistently under existing law. The traditional penal law has long fixed ages of absolute and presumptive incapacity, which are drawn from a period prior to the development of the modern juvenile court. The juvenile court acts have merely been superimposed on these provisions, though they have established their own jurisdictional age limits, reflecting an entirely new departure in the policies involved.[6]

This Code bars penal proceedings against persons under the age of 16 years and thus renders moot the question of their penal responsibility.

§704-418 Commentary:

1. H.R.S. §§571-11 and 571-22.

2. According to the standards set forth in H.R.S. §571-22.

3. H.R.S. §703-1.

4. Id. §703-2.

5. Id. §§571-11, 571-12, 571-22.

6. M.P.C., Tentative Draft No. 7, comments at 14 (1957).

" **§704-419 REPEALED.** L 1980, c 306, §2.

" **[§704-420] Examination reports; provided to director of health.** Copies of all examination reports made pursuant to sections 704-404, 704-406, 704-411, and 704-414 shall be provided to the director of health. [L 2016, c 231, pt of §3]

COMMENTARY ON §704-420

Act 231, Session Laws 2016, added this section to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).