



The Judiciary, State of Hawai‘i

Testimony to the House Committee on Judiciary

Representative Chris Lee, Chair

Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 25, 2020, 2:00 p.m.

State Capitol, Conference Room 325

by

Judge Shirley M. Kawamura

Deputy Chief Judge, Criminal Administrative Judge

Circuit Court of the First Circuit

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 2068, H.D. 1, Relating to the Administration of Justice.

Purpose: Limits DOH commitment to one hundred eighty days for those defendants charged with a non-violent class C felony and found to be unfit to proceed under chapter 704, HRS. Limits to one hundred eighty days the period of conditional release granted to defendants charged with a non-violent class C felony. Effective 7/1/2050. (HD1)

Judiciary's Position:

The Judiciary appreciates the intent of this proposed bill, but respectfully opposes the bill in its current form. This would lead to defendants who would be penally responsible and convicted if they were guilty of the conduct alleged being released without conviction or any requirements for drug treatment.

Currently, if a defendant is found unfit to proceed they are either committed to the custody of the director of health for detention, care, and treatment, or, if they are not a danger to self or others, then they are released to complete a community based fitness restoration program. The determination of fitness, i.e., whether a defendant has the capacity to understand the proceedings against him/her and the capacity to assist in his/her own defense, is not a determination that the defendant suffers from a mental illness. When a defendant is determined to be initially unfit, it is difficult to determine whether the lack of fitness to proceed is drug-induced (and therefore would resolve given time) or is actually the result of a mental disease,



disorder, or defect. Treatment for each type of condition would be different and having a mandatory time frame of 180 days for a determination of regained fitness (or likelihood of regaining fitness) in every case would be problematic for C felonies.

Many of the non-violent C felony cases in the First Circuit on the Chapter 704 track are either drug offenses or property-based crimes which can be directly linked back to drugs (unauthorized control of a propelled vehicle, unauthorized entry into a motor vehicle, burglary in the second degree, identity theft, forgery, etc). C felonies are serious crimes, subject to a term of imprisonment of five years. Although some drug-induced psychosis would likely resolve before a defendant completes an evaluation on fitness, due to forced detox or treatment due to the pending case, those defendants who are actually found unfit due to a drug-induced psychosis, would likely not be ready for or complete a panel examination for regained fitness within the time limitations set forth in this proposed bill.

This would lead to defendants who would be penally responsible and convicted if they were guilty of the conduct alleged being released without conviction or any requirements for drug treatment.

Moreover, these defendants could not be diverted into the community programs currently available to them to help with drug addiction or to the treatment courts that may assist them (drug court, veteran's court, mental health court, and HOPE) as they likely will not be ready to proceed in these programs in the 180 days allowed under this proposal. This would subvert the intent of the bill by potentially creating a revolving door on these drug-related property crime cases as defendants are not offered or engaged in drug treatment, and released and may commit new crimes.

In those cases where a defendant has a mental illness, and that mental illness is the reason they are unfit to proceed, forcing the release of an unfit, possibly dangerous, defendant into the community without services right when they may be responding to treatment would be contrary to the intent of the bill. The current statute contemplates the release of unfit defendants who are not dangerous to self or others through a release on conditions order requiring community-based treatment to obtain fitness, and this is done on a regular basis. Restricting the amount of time that these individuals are given supervised community-based treatment aimed at regaining fitness to six months may lead to insufficient treatment and further recidivism.

If a mandatory time limitation for the restoration to fitness of a non-violent C felony defendant is determined to be necessary to advance the purposes of the proposed bill, the Judiciary respectfully proposes a two-year time limitation.

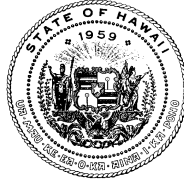
As to the proposal to limit the term of conditional release in non-violent C felony cases to 180 days, this limitation is far shorter than the current one-year limitation placed on non-violent



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misdemeanors. Conditional release of a defendant who, but for his/her mental illness is guilty of the conduct charged, is analogous to probation for a defendant who has been found guilty of the offense. Respectfully the Judiciary proposes if a term limitation is to be placed on non-violent C felonies, it should be equal to the term of probation a conviction would result in (four or five years).

Thank you for the opportunity to testify on this measure.



STATE OF HAWAII
DEPARTMENT OF HEALTH
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**Testimony COMMENTING on H.B. 2068 H.D. 1
RELATING TO THE ADMINISTRATION OF JUSTICE**

REPRESENTATIVE CHRIS LEE, CHAIR
HOUSE COMMITTEE ON JUDICIARY

Hearing Date and Time: Tuesday, February 25, 2020 at 2:00 p.m. Room: 325

1 **Department Position:** The Department of Health (“Department”) strongly supports the intent
2 of this measure and offers comments.

3 **Department Testimony:** The subject matter of this measure intersects with the scope of the
4 Department’s Behavioral Health Administration (“BHA”) whose statutory mandate is to assure a
5 comprehensive statewide behavioral health care system by leveraging and coordinating public,
6 private and community resources. Through the BHA, the Department is committed to carrying
7 out this mandate by reducing silos, ensuring behavioral health care is readily accessible, and
8 person centered. The BHA’s Adult Mental Health Division (“AMHD”) provides the following
9 testimony on behalf of the Department.

10 The Department supports the intent of this measure to avoid keeping individuals who
11 have been charged with non-violent offenses and committed to the custody of the Director of
12 Health for periods of time that are longer than necessary while ensuring that the State’s finite
13 resources are used appropriately.

14 We respectfully note that if this measure is adopted in its current form, individuals with
15 misdemeanor and petty misdemeanor charges who are acquitted and committed would have a
16 longer period of maximum time on conditional release (one year) than individuals with non-
17 violent felony C charges (six months).

1 The Department respectfully defers to the Judiciary for comments and proposed
2 amendments regarding the maximum limitation of days that a defendant is granted conditional
3 release when charged with a non-violent C felony.

4 **Offered Amendments:** None.

5 Thank you for the opportunity to testify on this measure.

6 **Fiscal Implications:** Undetermined.

STATE OF HAWAI'I
OFFICE OF THE PUBLIC DEFENDER



**Testimony of the Office of the Public Defender,
State of Hawai'i to the House Committee on Judiciary**

February 25, 2020

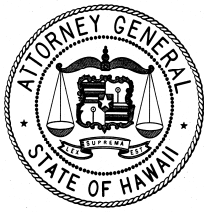
H.B. No. 2068 HD1: RELATING TO THE ADMINISTRATION OF JUSTICE

Chair Lee, Vice Chair San Buenaventura, and Members of the Committee:

The Office of the Public Defender supports the intent of H.B. No. 2068 HD1. Currently, for defendants who are charged with non-violent class C felonies but are unfit to proceed, there is no time limit as to the how long these defendants must remain in the custody or under the supervision of the department of health.

We agree that the period of conditional release or the period of commitment to the department of health should be limited. At the very least, unfit defendants who have never been convicted of the charged crime should not be under the custody and supervision of the department of health for a period longer than the term of probation or the term of incarceration would have been if they were convicted of the non-violent class felony.

Thank you for the opportunity to comment on H.B. No. 2068 HD1.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2020**

ON THE FOLLOWING MEASURE:

H.B. NO. 2068, H.D. 1, RELATING TO THE ADMINISTRATION OF JUSTICE.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

LATE

DATE: Tuesday, February 25, 2020 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Clare E. Connors, Attorney General, or
Lance Goto, Deputy Attorney General

Chair Lee and Members of the Committee:

The Department of the Attorney General (Department) opposes this bill.

The purposes of this bill are to: (1) limit commitments to the Department of Health to one hundred eighty days for those defendants charged with a non-violent class C felony and found to be unfit to proceed under chapter 704, Hawaii Revised Statutes (HRS); (2) limit the period of release on condition to one hundred eighty days for those defendants charged with a non-violent class C felony and found to be unfit to proceed; and (3) limit the period of conditional release to one hundred eighty days for those defendants who are fit, tried, acquitted on the ground of physical or mental disease disorder, or defect excluding penal responsibility, and granted conditional release with conditions the court deems necessary to address the risks presented by the defendant.

This bill addresses defendants in two completely different situations. The first two purposes address a situation where defendants are found unfit to proceed with their criminal case. The third purpose addresses a second situation where defendants are fit to proceed, have a trial, and are acquitted on the ground of physical or mental disease, disorder, or defect excluding responsibility.

In the first situation, defendants are unfit to proceed when they are unable to understand the proceedings against them and are unable to assist in their own defense. In this mental state, defendants cannot proceed to trial. As provided in section 704-406,

HRS, upon the finding of unfitness, the court shall commit such a defendant to the custody of the Director of Health, unless the court is satisfied that the defendant may be released on conditions without danger to self or another or risk of substantial danger to the property of others.

This bill would require a defendant, found unfit and committed to the Director of Health because the court was not satisfied that the defendant could be released without danger, to be released from custody after one hundred eighty days and discharged from prosecution of the class C felony charge.

This bill also would require a defendant, found unfit and released on conditions, to be discharged from prosecution of the class C felony charge after just one hundred eighty days.

The Department is concerned about the release and discharge of defendants charged with serious class C felony offenses after they were just recently charged, found unfit to proceed, and never prosecuted for the felony offenses. This bill would have those defendants, found unfit to proceed and committed or released on conditions, discharged from commitment or release on conditions after just one hundred eighty days, without any prosecution. It appears that the felony prosecutions would be terminated at that time, regardless of whether the time period was inadequate to evaluate a defendant's fitness to proceed with his or her defense. These felony offenses very likely involve victims and witnesses to the crimes, and could result in up to five years imprisonment. The current process, in contrast, better contemplates public safety and the interests of the defendants, in that an action to discharge is made only on a determination that the defendant will probably remain unfit to proceed, or so much time has elapsed that it would be unjust to resume proceedings.

In the second situation, defendants who are fit to proceed to trial and are acquitted on the ground of physical or mental disease, disorder, or defect excluding responsibility, may be committed if they present a risk of danger to self or others, and are not proper subjects for conditional release. Or, they may be granted conditional release if the court finds that they are affected by physical or mental disease, disorder, or defect, and present a risk of danger to self or others, but may be controlled

adequately with the proper care, supervision, and treatment. See section 704-412, HRS. This bill would require a defendant granted conditional release after trial and acquittal to be discharged after just one hundred eighty days.

The Department is concerned about the discharge of such a defendant, when it is known that the defendant did commit the crime, even though a disease, disorder, or defect prevented the defendant from facing penal responsibility. It is also a concern because a court found the defendant presented a risk of danger to self or others.

The Department is also concerned about an inconsistency in the law. Under section 704-410.5, HRS, defendants granted conditional release in a nonfelony case must be discharged after one year. This bill proposes to limit the conditional release for class C felony offenders to just one hundred eighty days. It is proposing a shorter term for the more serious offenses.

Based on the foregoing concerns, the Department respectfully requests that this measure be deferred.

HB-2068-HD-1

Submitted on: 2/21/2020 6:59:52 PM

Testimony for JUD on 2/25/2020 2:00:00 PM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------------------|---------------------------|---------------------------|
| Louis Erteschik | Hawaii Disability Rights Center | Comments | Yes |

Comments:

We were involved with the drafting of the current law that limits the period of conditional release as well as the commitment of individuals who are not fit to proceed, and we believe that extending it as proposed in this bill has merit. At some point if the person cannot be restored to fitness and they did not commit a violent offense, then they are basically just being deprived of their liberty because they are mentally ill. That said, we are under the impression that the periods of time suggested in this bill may actually be shorter than the current law provides for lesser offenses. While we are conceptually in support of the proposal, that might certainly be an anomalous result.