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December 9, 2021

Via electronic submission

The Honorable Ronald D. Kouchi
President of the Senate
State Capitol, Room 409
Honolulu, HI 96813

The Honorable Scott Saiki
Speaker of the House of Representatives
State Capitol, Room 431
Honolulu, HI 96813

Dear President Kouchi and Speaker Saiki:

Pursuant to Act 26, Session Laws of Hawai‘i 2020, the Judiciary is transmitting a copy of the *Report on the Administration of Justice*.

In accordance with Section 93-16, Hawai‘i Revised Statutes, we are also transmitting a copy of this report to the Legislative Reference Bureau Library.

The public may view an electronic copy of this report on the Judiciary’s website at the following link: https://www.courts.state.hi.us/news_and_reports/reports/reports.

Should you have any questions regarding this report, please feel free to contact Karen Takahashi of the Judiciary’s Legislative Coordinating Office at 808-539-4896, or via e-mail at Karen.T.Takahashi@courts.hawaii.gov.

Sincerely,

A handwritten signature in blue ink that reads "Rodney A. Maile".

Rodney A. Maile
Administrative Director of the Courts

Attachment

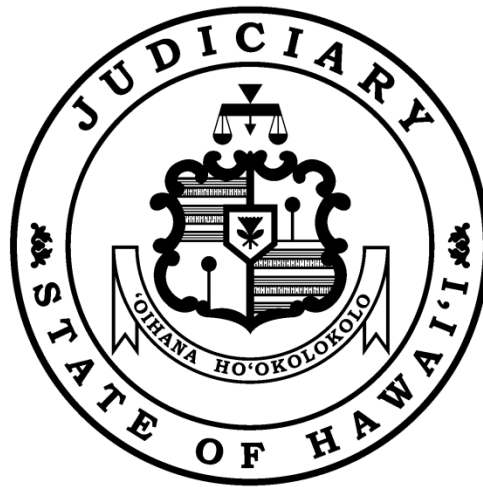
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Office of the Clerk, Hawai‘i House of Representatives

**ANNUAL REPORT TO THE THIRTY-FIRST LEGISLATURE
2022 REGULAR SESSION**

ON

**ACT 26, SESSION LAWS OF HAWAI'I 2020
PART III, SECTION 8**

**A Report of the Judiciary's Findings and Recommendations on the Effectiveness
of Act 26, SLH 2020, Relating to the Administration of Justice**



Prepared by:

The Judiciary, State of Hawai'i

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**A Report of the Judiciary's Findings and Recommendations on the Effectiveness
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This report is respectfully submitted pursuant to Act 26, Session Laws of Hawai'i 2020, Part III, Section 8, which requires the Judiciary, in consultation with the prosecuting attorney of each county, to submit a report to the legislature of its findings and recommendations, including any proposed legislation, on the effectiveness of Act 26.

Act 26, was signed into law on September 15, 2020. The Act:

- 1) amends the effect of finding a defendant charged with a petty misdemeanor not involving violence or attempted violence unfit to proceed;
- 2) amends the requirements for fitness determination hearings, court-appointed examiners, and examination reports;
- 3) authorizes the courts to enter into agreements to divert into residential, rehabilitative, and other treatment those defendants whose physical or mental disease, disorder, or defect is believed to have become or will become an issue in a judicial case;
- 4) amends the requirements for appointing qualified examiners to perform examinations for penal responsibility;
- 5) removes the time requirement for the ordering of the penal responsibility evaluation; and
- 6) requires the Judiciary, in consultation with county prosecutors, to report to the Legislature on the effectiveness of the Act in 2021, 2022, and 2023.

The genesis of Act 26 (2020) were collaborative discussions between the Judiciary and Department of Health (DOH) at a National Center for State Courts summit in May 2019 that pertained to improving the court and community response to those with mental illness.

Following this summit, the Judiciary, DOH, Department of Public Safety, and others planned and held a summit in Honolulu in late 2019. The Hawai'i summit, supported by the State Justice Institute and National Center for State Courts, included over 100 attendees representing the Judiciary, DOH, the Office of the Attorney General, the Department of Public Safety, the Federal Courts, the police departments from each county, Federal Probation, each county's office of the prosecuting attorney, the Office of the Public Defender, the Hawai'i Association of Criminal Defense Lawyers, local

hospitals and health service providers, the Office of Hawaiian Affairs, and members of the Hawai'i State Legislature.

Before, during, and since the Hawai'i summit, stakeholders from across the state have been involved in efforts to improve this critical aspect of the justice system. Legislators have been tremendous leaders in this regard.

Also before, during, and since the Hawai'i summit, DOH and judges in the First Circuit identified specific improvements that may be most impactful--in the high volume district courts and even circuit courts, considering the high percentage of cases that involve mental illness.

Accordingly, throughout the 2020 legislative session, First Circuit judges and DOH leadership planned to initiate implementation of certain aspects of the bill that are more natural to begin on O'ahu, where certain DOH resources currently exist--namely, court-based examiners.

With this backdrop, with judges and others across the state eager to fully implement Act 26 as related resources become available in each community, with current and likely future budgetary challenges across the state, and with Act 26 being enacted into law about a year ago (enacted on September 15, 2020), the below reports on progress towards implementation and the effectiveness of Act 26 thus far.

Report of the First Circuit

A. Circuit Court

This is a report from the First Circuit Court on the effectiveness of the portions of the Act relevant to the Circuit Court caseload, specifically, items two through six on page one. Please refer to the District Court section below for comment on item one.

With respect to the elimination of the mandatory psychiatrist provision, at this time, in the First Circuit, we have 10 doctors (nine psychologists and one psychiatrist) on the DOH-certified list who are willing and able to take court appointments for the Chapter 704 examinations at the rate currently offered by the State. As of October 31, 2021, the Circuit Court has ordered two hundred and fourteen (214) Chapter 704 examinations for fitness, penal responsibility, conditional release, and/or discharge from conditional release in two hundred and seventy-four (274) total cases. Of the 214 examinations ordered, four (4) of them were situations where a one-panel was ordered as the case was a misdemeanor offense where the defendant had demanded a jury trial, and four (4) were instances where the parties requested a neuropsychological examination to assist the three panel doctors in their evaluations. As noted in last year's report, here in the First Circuit, the elimination of the psychiatrist requirement has alleviated the strain on the sole psychiatrist on the DOH-certified list. While we still try to assign our sole psychiatrist to three panel examinations wherein he has previously examined the defendant, as we continue to wean out the cases where a psychiatrist

was previously on the panel, the number assigned to the psychiatrist will decrease, resulting in fewer delays in the conducting of the examinations for that reason.

With respect to the effect of the Act on the timeliness of the reports, it should continue to be noted that due to the global pandemic, there have been significant delays in the reports over the last year for those defendants held in custody at the O'ahu Community Correctional Center (OCCC) and the Hawai'i State Hospital (HSH). This is due to defendants being in quarantine as well as the limited appointment times for such evaluations.

With respect to the determination of the effectiveness of this amended provision on the integrity of the reports and the determinations to be made by the court under Chapter 704, the cases in the First Circuit have noted no problems with the reports and in some come cases, the reports may have in fact improved. Therefore, it appears that the elimination of the psychiatrist requirement has caused no significant impact on the integrity of the reports or on the Chapter 704 determinations made by the court.

With respect to the amendments made to section 704-407.5, allowing for agreements between the parties and the court to "divert the case into an evaluation of the defendant, treatment of the defendant, including residential or rehabilitation treatment," here in the First Circuit, there have been no cases diverted into residential, rehabilitative, or other treatment utilizing this provision and the court has not been presented with any requests nor agreements to divert applicable defendants into treatment under this provision. Approximately thirty-seven (37) cases were referred pre-trial to either drug court or mental health court since September 2020, but a number of these were referred as part of the terms and conditions of probation/deferment. The courts continue to refer such defendants to mental health court, drug court, and veterans' court on a regular basis. Further, defendants who are found not penally responsible are ordered into treatment with the DOH either in-patient or out-patient depending on the determination of dangerousness of the defendant. Finally, with respect to the amendment to section 704-407.5 permitting the appointment of either a one or three panel of examiners to determine penal responsibility for "C" felonies not involving violence, no one-examiner panels have been ordered for these types of cases.

We have consulted with the Department of the Prosecuting Attorney (DPA) for the City and County of Honolulu regarding the effectiveness of the changes to the statutory provisions relevant to the circuit court cases, and they have provided the following recommendations for the Legislature to consider: (1) expand the examination period for Act 26 cases to give defendants more time to receive treatment so they can be stabilized; and (2) grant judges the discretion to set a single return hearing in instances where a defendant has both an Act 26 case and a non-Act 26 case. The DPA's comments and recommendations are detailed further in the following section from the District Court.

B. District Court

This is a report from the First Circuit on the effectiveness of the portions of the Act relevant to the District Court caseload. Item one applies specifically to District Court cases and amends the effect of finding a defendant charged with a petty misdemeanor not involving violence or attempted violence unfit to proceed.

With respect to the diversion of defendants charged with a petty misdemeanor not involving violence or attempted violence from the criminal justice system, since the enactment into law of Act 26 on September 15, 2020, the District Court has ordered expedited fitness examination in 49 cases encompassing 89 criminal offenses.¹ In most of these cases, the court ordered expedited exams with a turn-around time of two days. For those defendants that were ultimately found to be unfit after a second “expedited exam” (within approximately ten days from initial appearance), 22 were discharged to the community and linked to services, 11 were civilly committed to the HSH, two remained at HSH on other charges, and six remained at OCCC on other charges. The median stay at HSH was eight days.

Eight defendants were found to be fit to proceed and the proceedings in their cases resumed on the regular trial track.

The following information was provided by the State of Hawai‘i Department of Health Adult Mental Health Division and is an estimate of the cost impact and health impact of Act 26 since its effective date:

- OCCC has saved approximately \$359,370.00 due to the reduced number of days (1815) defendants were incarcerated at their facility.
- HSH has saved approximately \$1,285,856.00 due to the reduced number of days (1144) that defendants were housed at their facility.
- Court Evaluation Branch has saved approximately \$15,000.00 due to the reduced hours (300) spent on conducting 1-panel examinations.
- Adult Client Services Branch has saved approximately one-hundred hours of estimated time spent on interviews and preparing documentation and record collection.
- Judiciary has saved countless hours of court time due to reduction in contested hearings challenging fitness to proceed.
- DPA and Office of the Public Defender has saved countless hours due to reduction in the time to prepare for and participate in contested hearings challenging fitness to proceed.
- 35 people were diverted from incarceration and linked to services.

The positive impact of Act 26 is clear and profound. Preventing non-violent offenders who suffer from a mental illness from serving extended terms of incarceration provides the best opportunity to extend case management services and peer specialist

¹ Twenty-eight of the defendants were homeless prior to arrest.

support. In order to expand the reach and effect of Act 26, the Legislature should consider modifying the Act to allow the retroactive application of the Act to defendants who have non-violent petty misdemeanors where proceedings were begun before the effective date of the Act. This is because some of the defendants will appear in court with a new charge that is subject to Act 26, but may not be able to take full advantage of the available treatment services offered because of the need to resolve the older, non-violent petty misdemeanors under the prior “restoration” model of 704-404. This delay and uncertainty in the disposition of prior non-violent petty misdemeanor charges that would otherwise qualify under Act 26, is an unnecessary obstacle for the defendant and results in additional costs for the DOH and the criminal justice system. All of which Act 26 was designed, in part, to reduce.

We have consulted with the DPA and they have this to report regarding the effectiveness of the changes to the statutory provisions:

I. Act 26 in Practice

The vast majority of Act 26 cases have been in District Court; we have seen very few in Circuit Court. Most Act 26 cases are dual diagnosis cases, i.e., the defendant has a mental health diagnosis coupled with a substance abuse issue. Dr. Amy Curtis, Administrator of the Adult Mental Health Division of the Department of Health, State of Hawai'i, has been working with the Hawai'i State Hospital to coordinate case management services and peer specialist support when a defendant is discharged from the Hawai'i State Hospital pursuant to Act 26. Dr. Curtis has provided anecdotal evidence to our Department, the Judiciary, and the Office of the Public Defender that case management and peer specialist support services greatly reduce recidivism when defendants participate in these services. These wraparound services have the potential to make a real difference in the lives of defendants.

II. Act 26's Strengths

Act 26 provides immediate intervention and treatment at the Hawai'i State Hospital. That being said, it does not give the hospital enough time to truly stabilize each defendant. In general, most clinical psychiatrists estimate that it takes between 60 to 90 days to stabilize a patient. This takes into consideration cases where defendants have a history of non-compliance in the community.

In addition. Act 26 is highly effective in cases where a defendant accepts case management and peer specialist support. Defendants who have case management and peer support are more likely to continue treatment and remain stable in the

community. Anecdotally there is a lower rate of recidivism with these defendants as compared to those defendants who refuse these services.

III. Act 26's Weaknesses

First, Act 26 does not provide enough time to truly stabilize defendants. According to our statistics, which are enclosed with this letter, only 11 of 49 defendants were found fit.² The cases where defendants were found fit fall into the following two categories: (1) defendants were under the influence of an intoxicant at the time; or (2) their exhibited behaviors were volitional. Of the eleven cases where defendants were found fit, only one defendant became fit after PRNs (medications given as needed to reduce agitation and dangerousness) were administered.

Second, a defendant's participation in treatment is purely voluntary. There is no incentive for defendants to participate in treatment. If they do not participate in treatment, their case will be dismissed by operation of law. If they do participate, they could subject themselves to legal jeopardy by becoming fit.

Finally, Act 26 works best in only one scenario: when defendant is in custody for a single or multiple non-violent petty misdemeanor(s). If a defendant has an Act 26 case and another violent case (i.e., Assault in the Third Degree), the defendant would need to be examined twice because the nature and scope of examinations differ between an Act 26 case and a non-Act 26 case. However, there are separate return dates for these examinations, with the Act 26 examination having a much tighter deadline (two or nine days), compared to non-Act 26 examinations which have a 30-day deadline. Judges currently do not have discretion to set a single return hearing for these dual examinations and cases are being dismissed under Act 26 before the non-Act 26 examinations have finished.

IV. Recommendations

The Department has two recommendations for the Legislature to consider: (1) expanding the examination period for Act 26 cases to give defendants more time to receive treatment so they can be stabilized; and (2) grant judges the discretion to set a single return hearing in instances where a defendant has both an Act 26 case and a non-Act 26 case.

² The DPA letter, dated November 10, 2021, can be made available upon request.

The DPA's recommendation to expand the examination period to provide additional time to receive treatment to "stabilize" the defendant would be a move toward competence restoration treatment. This is not advisable because it is exactly what Act 26 was designed, in part, to avoid due to the fact that it delays linking these individuals to services and places an unnecessary burden on the HSH.

The DPA's second recommendation to grant judges the discretion to set a single return hearing for defendants with both Act 26 and non-Act 26 cases is moot as judges have always had the discretion to do so when warranted. Many times, the Act 26 case is resolved expeditiously as a practical matter so that defendant can: (1) be offered and linked to services as soon as possible; (2) to prevent the unnecessary delay in the final resolution of non-violent petty misdemeanor cases; and (3) to comply with the time limitations of Act 26.

Report of the Second Circuit

As indicated above, before and during the 2020 legislative session that culminated in Act 26, those involved planned to initiate implementation of certain aspects of the bill that are more natural to begin on O'ahu, where certain DOH resources currently exist--namely, court-based examiners. Moreover, existing resource challenges such as community treatment locations and providers across the tri-isle Maui County have precluded full implementation of Act 26. Nevertheless, the Second Circuit has a robust approach to assist and address those with mental health challenges who interact with the criminal justice system, and the Second Circuit continuously seeks to leverage existing and potential resources to improve its approach. Per this statute and for purposes of this report, we have conferred with the Office of the Maui County Prosecuting Attorney and it agrees.

Report of the Third Circuit

Implementation of a case management program to assess and treat individuals with mental health issues in the Third Circuit has commenced. In March of 2021, the Chief Judge for the Third Circuit and judges in the First Circuit began discussing procedures that were successfully employed in implementing the same program on O'ahu. Planned objectives were established, but delayed due to the pandemic. Representatives from the DOH and the judges in the Third Circuit collaborated in formal meetings to implement the legislative mandates in Act 26. To this end, a two (2)-hour formal training was presented by the DOH via Zoom to the judges in the Third Circuit on July 22, 2021.

The legislative objective of diverting mentally ill defendants to DOH stabilization units island-wide has been established as a primary goal. Included in this vision is the implementation of expedited fitness examinations. Originally, there had only been one (1) stabilization center on the island of Hawai'i. That unit, "Palekana," is a short-term, eight (8)-bed stabilization unit located in Hilo. As a reserve unit, there is also a licensed crisis center in Hilo with eight (8) beds.

In September 2021, the DOH opened a stabilization center located in Kealahou with eight (8) beds. Meetings and consultations continued between the DOH and the Third Circuit through October and November 2021.

Consultations with the Office of the Prosecuting Attorney's Office for the County of Hawai'i have occurred and steps are being taken to establish procedures diverting non-violent petty misdemeanor defendants to rehabilitative and other treatment centers starting in 2022. These diversions are to happen without any referral to the courts, where appropriate. Further consultations with the prosecutors and the police are planned throughout the coming year.

Report of the Fifth Circuit

As indicated above, before and during the 2020 legislative session that culminated in Act 26, those involved planned to initiate implementation of certain aspects of the bill that are more natural to begin on O'ahu, where certain DOH resources currently exist--namely, court-based examiners. Moreover, existing resource challenges such as community treatment locations and providers across Kaua'i County have precluded full implementation of Act 26. Nevertheless, the Fifth Circuit has a robust approach to assist and address those with mental health challenges who interact with the criminal justice system, and the Fifth Circuit continuously seeks to leverage existing and potential resources to improve its approach.

This concludes the report of the Judiciary, submitted pursuant to Act 26, Session Laws of Hawai'i 2020, Part III, Section 8.