The Judiciary, State of Hawai'i

Testimony to the Thirty-Third Legislature, 2025 Regular Session

House Committee on Health
Representative Gregg Takayama, Chair
Representative Sue L. Keohokapu-Lee Loy, Vice Chair

Wednesday, March 12, 2025, 9:00 a.m.
State Capitol, Conference Room 329 & Videoconference

By

Ronald G. Johnson
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Bill No. and Title: Senate Bill No. 955, SD2, Relating to Fitness to Proceed.

Purpose: Clarifies the term of commitment for a defendant being held at a hospital or mental health facility for a fitness-to-proceed examination. Clarifies who may serve as a qualified examiner. Reduces the number of qualified examiners required for a fitness-to-proceed examination in a felony case from 3 to 1. Establishes the rate of compensation for conducting the examinations. Establishes a reduced penalty, except in certain circumstances, for a person who commits the offense of escape in the second degree while in the custody of the Director of Health. Sunsets the amendments to subsection 707-404(2) on 12/31/26. (SD2)

Judiciary's Position:

The Judiciary notes that the Judicial Council is currently conducting the Penal Code Review as required by Act 245 (2024). Included in the Penal Code Review, as one of the subcommittees, is a committee conducting a comprehensive review of Chapter 704 where all of

these provisions will be more thoroughly addressed. Included as members on that subcommittee are representatives from the Office of the Governor, the Legislature, the Department of Health, the Office of the Attorney General, the Office of the Public Defender, the Offices of the Prosecuting Attorney of the counties of Hawai‘i and Kaua‘i, the defense bar, and the Judiciary. The report from the advisory committee will be presented to the Legislature at the end of this year. Therefore, the Judiciary respectfully requests that this bill be deferred until the next legislative session to allow these proposed revisions to Chapter 704 to be considered by the subcommittee and the advisory committee. Should the proposed legislation not be deferred, the Judiciary provides the following testimony regarding the provisions of the bill.

The Judiciary appreciates this bill's focus on improving the provisions of the penal code as they relate to individuals who may be suffering from a serious mental disease, disorder, or defect and **supports portions** of the bill that will go a long way towards accomplishing that goal. However, the Judiciary must respectfully **oppose the remaining provisions** of the proposed legislation as they, in many cases, will cause more individuals to unnecessarily be committed to the custody of the director of health and, in other cases, will exacerbate the time necessary to determine a defendant's fitness to proceed under section 704-404 of the Hawai‘i Revised Statutes. Further, the amendments made to the proposed legislation in Senate Draft 2 which require the court to hold weekly hearings on the grounds of the Hawai‘i State Hospital will require significant resources from the judiciary, the office of the public defender, and the prosecutor's offices of each county and will require significant renovations to the facilities at Hawai‘i State Hospital as noted below.

A. The Judiciary **Opposes, and Provides Comment on, Portions Of The Bill.**

The Judiciary respectfully **opposes the following provisions of the bill** and provides the following comments with respect to each provision. As background, criminal prosecutions cannot proceed against a person if the person, "as a result of a physical or mental disease, disorder, or defect lacks capacity to understand the proceedings against [them] or to assist in [their] own defense" for so long as that incapacity endures. Hawai‘i Revised Statute Section ("HRS §") 704-403. Whenever there is reason to believe that such incapacity exists, the court suspends the criminal prosecution and orders an examination of the defendant to determine if they have the capacity to understand the proceedings against them and the capacity to assist in their own defense.[1] HRS § 704-404. Currently, for felony cases, the court appoints three examiners, two of which are appointed from a list of certified private examiners as determined by the director of health and the third is a certified examiner from within the Department of Health ("DOH"), to conduct an examination in accordance with sections 704-404(5) – (10). For non-violent petty misdemeanor cases, under section 704-404(2)(a) as established by Act 26 (2020), the court will appoint a single examiner to conduct an expedited examination to determine if the defendant should be placed in the criminal justice diversion program outlined in

[1] If the defendant possesses both of these capacities, then they are "fit to proceed." If they lack one or both, then they are "unfit to proceed" and are either committed to the custody of the director of health or release on conditions pursuant to section 704-406(1).

section 704-421. These section 704-404(2)(a) expedited examinations are not the complete examination outlined in sections 704-404 (5) – (10) for all other offenders. In all other petty misdemeanor cases and in misdemeanor cases, the court appoints a single examiner from within DOH, to conduct an examination in accordance with sections 704-404(5) – (10). Finally, in the court's discretion, when necessary, the court can order that the defendant be "committed to a hospital or other suitable facility for the purposes of this examination." HRS § 704-404(2). This examination takes place in DOH custody as opposed to a defendant remaining in the Department of Corrections and Rehabilitation ("DCR") custody due to the current condition of the defendant. The return hearing for the determination of fitness is always set by the court noting the next court date in the pending matter.

1. Proposed Changes to HRS § 704-404(2)(a) to Include all Non-Violent Crimes in Act 26's Expedited Examination and to HRS § 704-404(2)(b) to Remove all Non-Felony and Violent Petty Misdemeanors From the One-Panel Examinations

Although not referenced in Section 1, which sets forth the purposes of the proposed legislation, Section 2 seeks amendments to sections 704-404(2)(a) and (2)(b) that would very likely **increase** the number of defendants that would be committed to the custody of the director of health under section 704-406. While it is unclear what the ultimate purpose of the revisions are, the Judiciary **opposes** these revisions as they will needlessly **increase** the number of defendants transferred to the custody of the director of health and removes the court's authority to order a one-panel fitness examination for any defendant charged with petty misdemeanor or misdemeanor offenses involving violence or attempted violence.

First, the proposed revision in section 704-404(2)(a) on page 2, lines 8-9, will apply the expedited evaluation procedure outlined above (a procedure that was created strictly for the purposes of the diversion program of section 704-421 and specifically for defendants charged with non-violent petty misdemeanor that were to be diverted from the criminal justice system) to **all defendants** charged with non-violent crimes. This includes both felony and misdemeanor offenders. The purpose of the two-day evaluation is to determine if a non-violent petty misdemeanor defendant is a viable candidate for a diversion program by determining if the defendant's fitness to proceed is an outstanding issue in the case. If it was, then rather than requiring the defendant to wait for a full examination (which could take 30 to 90 days), the defendant would be diverted under section 704-421. **The expedited evaluation is not intended to be a full examination and is explicitly excluded from the provisions of sections 704-404(5) – (10). Among other things, the expedited fitness evaluations for petty misdemeanors under section 704-404(2)(a) do not consider a defendant's medical diagnosis or their previous medical records, nor provide an opinion on the defendant's dangerousness.** Instead, the expedited evaluation is limited to an opinion of whether the defendant is clearly fit to proceed, clearly unfit to proceed, or an opinion that their fitness to proceed remains an outstanding issue. Expanding this provision to all other non-violent crimes **will have the unintended effect of causing all individuals to be transferred to the custody of the director of health unless the defendant is clearly fit to proceed as the court will not have any**

information on the defendant's actual diagnosis or their dangerousness.[2] This will include all such individuals who are suffering the "temporary" effects of illicit drug use as opposed to a mental illness, i.e. those individuals who, if seen by the examiner a week or two later, may present as fit to proceed. This could increase – rather than decrease – the census at the Hawai'i State Hospital with individuals who could have otherwise remained either in the custody of the Department of Corrections and Rehabilitation or on release status pending the return of the normal one- or three-panel examination as to fitness (and, in some cases, penal responsibility). **Section 704-404(2)(a) should remain for those individuals who may be eligible for diversion from the criminal justice system under section 704-421.**

Further, the proposed amendment to section 704-404(2)(b) on page 3, line 3, has the unintended consequence of removing all those individuals charged with misdemeanors or petty misdemeanors involving violence or attempted violence from the provisions of section 704-404 altogether. As noted, the proposed revision to section 704-404(2)(a) (page 2, lines 8-9) would require the expedited evaluation process to be applied to all defendants charged with non-violent petty misdemeanors, non-violent misdemeanors, and non-violent felonies. The proposed amendment to section 704-404(2)(b) (page 3, line 3) then states that when the court-based certified examiner is not available under subsection (a), the court shall appoint one examiner to conduct the examination. However, under this bill, subsection (a) only applies to defendants charged with non-violent "crimes." By removing the "[i]n all other nonfelony cases" provision the bill leaves no specific provisions or authority to order an examination for all those charged with violent petty misdemeanors and violent misdemeanors. **Section 704-404(2)(b) should remain for defendants charged with offenses not covered under sections 704-404(a) or 704-404(c) and whenever a court-based certified examiner is not available in non-violent petty misdemeanor cases.**

2. Examinations Conducted While Committed Under Hawai'i Revised Statute Section 704-404(2) Pending a Determination of Their Fitness and Weekly Hearings to be Held at Hawai'i State Hospital

Section 2 of the bill also proposes to "reduce overcrowding at hospitals and mental health facilities by clarifying the term of a defendant's commitment to a hospital or facility for purposes of a fitness-to-proceed examination." The bill seeks to accomplish this goal by requiring the court to hold a "status" hearing within fourteen days of any such necessary commitment under HRS § 704-404(2) and, if the defendant remains committed after that fourteen-day hearing, requiring a further "status" hearing thirty days after commitment. Page 4, lines 15-21 and page 5, lines 1-6. The bill mandates these additional hearings in all cases where a defendant is committed pending the examination and does not require any assertion of a change in the circumstances which necessitated the commitment nor does it require any supporting evidence be

[2] Section 704-406(1) requires a defendant to be committed to the custody of the director of health if the defendant lacks fitness to proceed. The only exception is when a 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" then they shall release the defendant on conditions. HRS § 704-406(1).

presented to the court to seek the court's reconsideration of its prior ruling. In addition, SD2 adopted revisions to the bill which will require the court to hold weekly "status hearings" of these defendants at the Hawai'i State Hospital.

First, Defendants committed under section 704-404 are committed pending their return hearing which is typically set 30 – 90 days after the commitment. **These defendants are not committed lightly nor are they committed for a period longer than necessary to complete the court ordered examination.** In light of that, the Judiciary **opposes** this portion of the bill as it unnecessarily requires multiple mandatory and inefficient hearings in all section 704-404(2) cases including those where there has been absolutely no change in circumstances that would alter the necessity finding made by the court. In reality, DOH **already has the ability to challenge a section 704-404(2) commitment and to seek review of a court's finding of necessity in any particular case**. Indeed, until the first quarter of 2021, DOH's deputy attorney general routinely appeared and stated their position at all hearings on motions to transfer a defendant's custody to the director of health under section 704-404(2). The deputy attorney general also, routinely, filed their own motions to transfer a defendant back to the custody of the Department of Corrections and Rehabilitation[3] when, after DOH took custody of a defendant, they determined that, in their view, the commitment under section 704-404(2) was not necessary.[4] There is absolutely nothing stopping the deputy attorney general, representing the director of health, from filing these motions again in any and all cases where DOH believes that a defendant being held under section 704-404(2) does not require hospital level care. A blanket provision requiring multiple hearings on every section 704-404 case, hearings where the defendant, the deputy prosecuting attorney, defense counsel, the deputy attorney general, and the court must take time and appear, and where DOH must submit written reports to the court, would be a waste of resources in light of the availability of such a targeted review and would provide minimal returns.

Second, in all review hearings held before the court for individuals committed to the custody of the director of health[5] a report from the treating physician at DOH is required prior to the hearing in order for the court to determine what further action should be taken and the parties to determine and argue their positions. If such hearings set forth in the bill are mandated, the court and the parties would need a report at least two days prior to each hearing, providing an opinion on whether it is still necessary for defendant to be committed to the hospital and the basis for the opinion. The reason for the report would again be two-fold: (1) to assist the court in making a decision on defendant's placement (i.e. should they be returned to DCR custody or released); and (2) to assist counsel for the State and defendant in determining whether to request

[3] The entity at that time was known as the Department of Public Safety.
[4] These positions and motions were filed by the Department of the Attorney General on behalf of the director of health and were heard as soon as practicable but generally within one week.
[5] These include those committed under sections 704-404 (at the return hearing on fitness to proceed), 704-406 (at all fitness review hearings), and 704-413 (at all temporarily hospitalization review hearings) while their adjudications are pending.

a contested hearing on the issue of placement.[6] Given the current caseload and limited resources of DOH, these hearings will create an additional burden on the treating physicians and DOH and will require additional time and resources of the Judiciary, the prosecution, and the defense even in those cases where the report from the DOH doctor recommends that the defendant remain in DOH custody.

Finally, requiring these weekly status hearings to be held at the Hawai‘i State Hospital will be a tremendous strain on the resources of the Judiciary, the department of law enforcement, the department of health, the office of the public defender, and the offices of the prosecuting attorney of each county. These hearings will require the judge, clerk, bailiff, court reporter, sheriff, prosecutor, and defense attorney to appear at the Hawai‘i State Hospital at least once per week (and likely more often as individuals are not necessarily committed on the same day of the week). For cases filed in other circuits this will require all court personnel as well as the prosecutor and defense attorney to travel from their island to O‘ahu at least once per week. **The Hawai‘i State Hospital would have to be renovated to provide a courtroom facility that has room for all these participants and staff as well as, at a minimum full audio equipment. Further, as all court hearings must be public, the space provided must include additional space for the public to appear and observe and the public must be permitted entry to the hospital to attend all of these hearings. Should this provision remain, the Department of Health would require an additional appropriation to accommodate the required court proceedings.**

3. Reducing the Examiners from Three to One for Felony Offenses

Finally, Section 2 of the bill also proposes to “reduce from three to one the number of qualified examiners required for a fitness-to-proceed examination in a felony case.” The Judiciary **opposes** this amendment which will increase the time required to determine a defendant’s fitness to proceed and will require additional appropriations to the Office of the Public Defender, the Office of the Prosecuting Attorney, and the Judiciary. The reduction of the evaluation for fitness to proceed from a three-panel to a one-panel will have little to no effect on the time it takes to conduct an initial determination of a defendant’s fitness to proceed in felony cases. In fact, it will increase the amount of time it takes for the court to make a determination of fitness in practically all cases. Currently, when a three-panel is returned, the parties generally will stipulate to the reports and permit the court to determine the issue strictly on the reports provided by the examiners. Only in a very limited number of cases do one of the parties request a contested hearing on the matter. *See* HRS § 704-405. This bill would require an additional 12 – 16 weeks after the initial period in order to obtain the additional reports that will inevitably result from the party who does not agree with the single examiner’s finding. Under section 704-409, a defendant has a right to a further examination by a doctor of their choice. Thus, for every case where the examiner determines a defendant is fit to proceed, the court will need to await a new examination report from a defendant’s expert witness before a decision can be made

[6] In cases where a party requests a contested hearing on the issue of placement, the treating physician and any other relevant hospital staff(case manager, social worker, etc.) would be required to be present in person to testify at court.

regarding fitness, a decision that will likely only occur after a contested hearing. In most cases these experts will be paid for by the State (and without the current $1,000 limitation on the cost) as the vast majority of defendants are indigent and qualify for their litigation expenses to be paid by the State under section 802-7. This will require additional appropriations to both the Judiciary (for court appointed attorney cases) and the Office of the Public Defender. Where the single report determines a defendant is unfit, the State will seek a contested hearing on the issue, and perhaps hire their own expert witness,[7] thus further prolonging both the determination of fitness and the defendant obtaining the treatment they may need.

In addition, all of these reports, especially on fitness issues, must be viewed by the court in relation to <u>when</u> the defendant was evaluated. Waiting an additional 12 – 16 weeks will enable parties to argue that the first examination report is "stale" with respect to a defendant's current fitness thus leaving the parties to argue and the court to determine which report to give more weight. It may also lead to the court having to order a re-evaluation by the first, court-appointed, doctor, thus extending the time even further. While reducing the number of examiners required to conduct a section 704-404 examination may in the short term alleviate the strain on the limited number of examiners the department of health currently has on the certified list, in the long term it will increase the time necessary for the determinations of fitness to be made, will increase the costs associated therewith, and ultimately may require more court-ordered examinations.[8]

Should the Legislature wish to proceed with the reduction of examiners on the initial examination in all felony matters from three to one, the Judiciary respectfully suggests amendments be made to other provisions of Chapter 704 to ensure that these delays do not occur.

B. <u>The Judiciary **Supports, and Provides Comment on, Portions Of The Bill**:</u>

- Subject to the support from the department of health, the Judiciary supports the provisions of Section 2 to "[i]ncrease the number of available private examiners and expedite examination reports" by adding advanced practice registered nurses specializing in psychiatry to the examiners that may be certified by DOH to conduct the examinations required under section 704-404. [9]

[7] This would require additional appropriations to the prosecutors statewide to obtain these expert witnesses.
[8] It should also be noted that the proposed revision is only being made in section 704-404. Sections 704-406, 704-407.5, 704-411, and 704-414 all require a three-panel examination (with the only exception being a section 704-406(3) examination in "B" and "C" felony cases where the defendant is not concurrently seeking a section 704-407.5 examination and in a section 704-407.5 examination for a non-violent "C" felony offense with the agreement of the parties). Therefore, in instances where a defendant seeks an examination on both fitness and penal responsibility, an examination for conditional release or discharge from conditional release, or when there is reason be believe a defendant has regained fitness or is unlikely to ever regain fitness, a three-panel would still be required or ordered.
[9] When appointing examiners in Chapter 704 cases, the Judiciary, the State, and the defense primarily seek consistency in the evaluations by appointing the same examiners for the defendant whenever possible. In that regard, the same three examiners would be appointed for a defendant for all examinations subsequently ordered,

- The provisions of Section 2 to "[i]ncrease the number of available private examiners and expedite examination reports by increasing compensation for" and codifying the amount to be paid by the State for the private certified examiners appointed by the court under most provisions of Chapter 704. The Judiciary supports the revisions outlined for section 704-404(11) as they are similar to Senate Bill 264 SD1 that is part of the Judiciary's legislative package. However, the current bill does not make the same revision in section 704-407.5, thus leaving an inconsistency in the provision of the Chapter based solely on the type of examination ordered. In addition, the bill contains no appropriation. The Judiciary respectfully requests that these revisions be deferred in favor of Senate Bill 264 SD1. Should these provisions remain in the bill, the Judiciary requests that the amount per examination be set at $2,000 and an appropriation from the general revenues of the State of Hawai‘i be included in the bill in the amount of $975,000 or so much thereof as may be necessary for fiscal year 2025-2026 and the same sum or so much thereof as may be necessary for fiscal year 2026-2027. The Judiciary further requests that any appropriations that may be added to this bill not supplant the Judiciary's existing funding and current budget requests.

- The provisions of Section 3 which reduce the felony offense of escape in the second degree to a petty misdemeanor if committed by a defendant who was in the custody of the director of health pursuant to section 704-421.

  Thank you for the opportunity to testify.

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including under sections 704-404, 704-406, 704-407.5, 704-411, and 704-414. Without the same change to those provisions, the court would be unable to appoint the same examiners in each of those instances.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA ʻOIHANA O KA LOIO KUHINA
THIRTY-THIRD LEGISLATURE, 2025

ON THE FOLLOWING MEASURE:
S.B. NO. 955, S.D. 2, RELATING TO FITNESS TO PROCEED.

BEFORE THE:
HOUSE COMMITTEE ON HEALTH

DATE: Wednesday, March 12, 2025 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 329

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Tricia M. Nakamatsu, Deputy Attorney General

Chair Takayama and Members of the Committee:

The Department of the Attorney General (Department) submits the following testimony regarding this bill, opposing in part and supporting in part, with suggested amendments.

The purposes of this bill are to reduce overcrowding in the State's hospitals and mental health facilities and to expedite certain criminal cases through the legal system by amending the requirements for fitness-to-proceed examinations. Specifically, it (1) requires a partial fitness report within two days, for every level of criminal offense; (2) reduces wait times for fitness examinations by attempting to attract more private examiners and reduces the number of examiners required in felony cases from three to one; (3) requires courts to hold hearings once a week after any defendant is committed to a hospital or other suitable facility for fitness examination; and (4) reduce the offense of escape in the second degree to a petty misdemeanor, for certain types of offenders with behavioral health issues.

THREE-PANEL IN FELONY CASES

The Department is concerned about the amendment to section 704-404(2)(c), Hawaii Revised Statutes (HRS), reducing fitness examinations in all felony cases from the current requirement for a "three-panel" (i.e., three health professionals independently assessing a defendant's mental state) to a "one-panel" (i.e., only one health professional assessing a defendant's mental state) (page 3, line 15, to page 4,

line 6), and recommends deleting that amendment. Because assessment of one's mental condition is not an exact science and is often subject to differing opinions, and because felony cases carry such high stakes both for an individual's freedom and for public safety and welfare, the Department believes it is important that the court and all stakeholders have the benefit of a three-panel in every felony-level fitness proceeding, to ensure the most accurate determination.

Ensuring that defendants are physically and mentally able to understand the criminal proceedings against them and assist in their own defense is one of the cornerstones of justice in our criminal justice system. Reducing the number of health professionals involved in making this assessment for each felony defendant inherently decreases the reliability of such assessments, and increases the risk of forcing a defendant who is unable to understand what is happening and/or assist in that defendant's own defense to proceed with a criminal case. It also increases the risk of finding a defendant "unfit," and keeping the defendant committed to a hospital or other behavioral health facility pending regaining of fitness, when the defendant may be able to continue with proceedings.

Under the current three-panel system, there are many instances when one or all of the examiners differ in their opinions of a defendant's fitness to proceed. Even if two examiners share the same conclusion, it is not uncommon for the specific diagnoses, observations, or other aspects of the assessments to differ. All these differences may be argued by the prosecution and defense, and may impact the court's ultimate findings. Decreasing the number of examiners from three to one also eliminates the possibility of having at least one psychiatrist and at least one psychologist per felony fitness examination. Psychiatrists and psychologists have different areas of expertise and can provide different though equally valuable perspectives on each defendant.

The Department understands that section 704-404(2), HRS, provides that "[t]he court, in appropriate circumstances, may appoint an additional examiner or examiners" (page 4, lines 8-10). This provision, however, is typically used for exceptional circumstances—such as when the assistance of a neuropsychiatrist or other specialist is needed—rather than a mechanism to be used in every case. The current

requirement of three examiners provided by the State creates an environment in which the opinions of all the examiners are generally well-respected and equally weighted by all parties, and the court is typically able to make a determination on the basis of the reports without resorting to a contested hearing. If the Department of Health regularly provides only one examiner, and each party is then permitted to hire its own psychiatrist or psychologist to examine the defendant, this will greatly increase the chances of having a contested hearing in every case, as parties will likely interpret each other's chosen examiner as being biased, similar to civil lawsuits in which many cases become a "battle of experts." This will only increase the amount of time and resources spent by the State and the defendant. These foreseeably higher costs for independent examiners would still be borne by taxpayers, as the attorneys in these cases are state and county prosecutors and typically state public defenders. In practice, not only would this expend a great deal of time and resources for prosecution, defense, examiners, and the courts, it would also create an adversarial environment where one does not currently exist in most cases.

The Department strongly recommends removing these amendments from the bill. In lieu of decreasing the number of examiners in felony cases, the Department supports the proposal to increase compensation for examiners who conduct fitness examinations and standardize expectations as to what the job entails, to improve in the recruitment and retention of private examiners (amendments to section 704-404(11), HRS, at page 5, line 20, to page 6, line 6).

COMPLETE FITNESS EXAMINATIONS

The Department recommends deleting the amendments on page 2, lines 8-9, and conforming amendments on page 3, line 3. While the bill proposes to expand section 704-404(2)(a), HRS, to all levels of crime "not involving violence or attempted violence" (page 2, lines 9-10), the intended effects of this change are unclear, and the Department does not believe this will serve to reduce overcrowding in the State's hospitals and mental health facilities. Moreover, if the intent is for the court to accept the "expedited report" described under section 704-404(2)(a), HRS, as a replacement

for a complete fitness examination report for all levels of crime, this may result in a higher number of unfit defendants being committed to Hawaii State Hospital.

Section 704-404(2)(a), HRS, was created in conjunction with section 704-421, HRS, to expedite the commitment of defendants charged with a "petty misdemeanor not involving violence or attempted violence" to a hospital or other suitable facility, even when it is unknown whether the defendant is truly unfit to proceed. *See* Act 26, Session Laws of Hawaii 2020, sections 1 and 2. Section 704-421, HRS, however, provides a unique diversion program that is narrowly tailored to "non-violent" petty misdemeanor cases. All other cases go through a process for the court to consider potential release on conditions pursuant to section 704-406(1), HRS. If the court is not satisfied that a defendant may be released on conditions, or does not know what kind of conditions would be suitable for a defendant's release, section 704-406(1) dictates that, "the court shall commit the defendant to the custody of the director of health to be placed in an appropriate institution for detention, assessment, care, and treatment."

Inevitably, the court's most comprehensive sources of information about a defendant's medical condition, and any suitable conditions for release, are fitness examination reports. Pursuant to section 704-404(5), HRS, all examination reports—aside from those done for the diversion program under section 704-404(2)(a), HRS—must include:

> (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 defendant's capacity to understand the proceedings against the defendant and to assist in the defendant's own defense; [and]
> (d) 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 . . . .

Of these four things, only one—the defendant's capacity to understand the proceedings against the defendant and assist in the defendant's own defense—is addressed in the expedited report produced under section 704-404(2)(a). Moreover, the expedited

reports do not require an examiner to consider any of the "existing relevant medical, mental health, social, police, and juvenile records, including those expunged, and other pertinent records in the custody of public agencies," as is required for complete fitness examinations under section 704-404(9).

If the bill's intent is to require that these expedited reports be relied upon to determine a defendant's fitness to proceed, the Department is concerned that it may be very rare for a court to ever have sufficient information upon which to release a defendant on conditions, upon a finding of unfitness, and it is thus likely that more individuals would have to be committed to the Hawaii State Hospital. As noted above, the expedited reports produced pursuant to section 704-404(2)(a) were never designed to provide the breadth and depth of information contained in a complete fitness examination report, because they simply do not serve the same purpose.

Rather than using the expedited reports from section 704-404(2)(a) for a purpose for which they are not well-suited, the Department recommends removing the amendments on page 2, lines 8-9, and page 3, line 3, from the bill.

The Department respectfully asks the Committee to incorporate the amendments described in our testimony. Thank you for the opportunity to testify on this matter.

JOSH GREEN, M.D.
GOVERNOR OF HAWAII
KE KIA'ĀINA O KA MOKU'ĀINA 'O HAWAI'I

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Testimony in SUPPORT of SB 955 SD2
RELATING TO FITNESS TO PROCEED

REPRESENTATIVE GREGG TAKAYAMA, CHAIR
REPRESENTATIVE SUE L. KEOHOKAPU-LEE LOY, VICE CHAIR

HOUSE COMMITTEE ON HEALTH

Hearing Date and Time: March 12, 2025, 9:00 a.m. Location: Room 329 and Videoconference

Fiscal Implications: Undetermined.

Department Position: The Department of Health ("Department") supports the intent of the bill and provides the following comments on this measure.

Department Testimony: The Adult Mental Health Division (AMHD) provides the following testimony on behalf of the Department.

The Department appreciates the efforts of the legislature in supporting and bringing forth new approaches to solving the issues surrounding mental health and the justice system.

SB 955 proposes modifications to the Chapter 704 evaluation process in an effort to expedite cases through the legal system and reduce overcrowding at hospitals and mental health facilities. The measure also proposes to reduce penalties, with exceptions, for a person who commits the offense of escape in the second degree while in the custody of the Director under HRS 704-421(1).

Currently, HRS 704-421 allows for the evaluation of competency for individuals charged with a non-violent, petty misdemeanor, to occur within a two-day turnaround. In order to meet the time requirement of statute, examiners are forced in those expedited cases to conduct evaluations relying heavily on interview and limited collateral data as sources of

information. The Department is concerned that this measure proposes to expand the practice of conducting non-standard evaluations by including all offenses not involving violence.

The Department also highlights findings from FY 24 data. A review of the current "Act 87" process shows that approximately 95% of defendants evaluated within the two-day turnaround are opined unfit (many are intoxicated on alcohol and/or drugs) , found such by the courts and sent to the state hospital. Additionally, the Department recommends the turnaround time extend from two to five days for the initial exam for fitness .

In various sections of the measure, advanced practice registered nurses (APRNs) are proposed as a profession to conduct forensic evaluations. As with all clinicians, APRNs would be expected to be forensically trained before conducting evaluations.

The proposed measure attempts to expedite legal cases by reducing, from three to one, the number of qualified examiners appointed to provide an expert opinion on competency in felony cases. Reducing required examiners could help address delays associated with the chapter 704 process. At present, it takes several weeks to complete scheduled panel examinations and associated hearings. The Department also suggests that in addition to Fitness Evaluations being conducted by one panel, Penal Responsibility, dangerousness, and Conditional Release exams also be considered for one panel.

Finally, the measure proposes that the court shall hold additional hearings no later than fourteen days and on the thirtieth day after a defendant is committed to determine whether it is necessary to continue commitment. While the Department appreciates that the intent is to reduce the time a defendant may be held at the Hawaii State Hospital, a mechanism exists through the courts to expedite hearings and for a defendant's custody status to be reviewed. The proposed change would also inadvertently add to the workload of the state hospital by creating additional letters required to the court and hearings to attend.

Given the importance of accurate and expedient court proceedings, the Department believes it prudent to conduct a pilot of these changes and respectfully requests a sunset date for Section 2, #1 of this bill.

Offered Amendments:

The Department requests the following amendments be considered:

Page 3, Line 15 be amended from "…shall appoint one qualified examiner…" to "…shall appoint at least one qualified examiner…"

Page 5, Line 20 be amended from "…the rate of compensation paid by the State" to "rate of compensation paid by the State Judiciary."

Page 5, Line 3. The Department respectfully requests that the court hold status hearings required under 704-404 at the Hawaii State Hospital no less than once a week, and suggests an amendment to page 5, line 3 to read "…to commit the defendant; provided further that the court shall hold status hearings on the Hawaii State Hospital grounds no less than once a calendar week."

Section 2, #1. The Department requests a sunset date of December 31, 2026, for proposed modifications in Section 2, #1.

Thank you for the opportunity to testify.

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

STATE OF HAWAII
HAWAII CORRECTIONAL SYSTEM OVERSIGHT COMMISSION
E HUIKALA A MAʻEMAʻE NŌ
235 S. Beretania Street, 16th Floor
HONOLULU, HAWAII 96813
(808) 587-4160

TO: The Honorable Gregg Takayama, Chair
The Honorable Sue L. Keohokapu-Lee Loy, Vice Chair
House Committee on Health

FROM: Mark Patterson, Chair
Hawaii Correctional System Oversight Commission

SUBJECT: Senate Bill 955, Senate Draft 2, Relating to Fitness to Proceed
Hearing: Wednesday, March 12, 2025; 9:00 a.m.
State Capitol, Room 329

Chair Takayama, Vice Chair Keohokapu-Lee Loy, and Members of the Committee:

The Hawaii Correctional System Oversight Commission (HCSOC) **submits comments** on Senate Bill 955, Senate Draft 2, Relating to Fitness to Proceed, which clarifies the term of commitment for a defendant being held at a hospital or mental health facility for a fitness-to-proceed examination, clarifies who may serve as a qualified examiner, and reduces from 3 to 2 the number of qualified examiners required for a fitness-to-proceed examination in a felony case.

Fitness to proceed examinations are imperative to ensure defendants can participate in their case with full capacity. Individuals who are waiting for their examinations are often times waiting in the jails, and extended waiting periods is detrimental to their mental health. The Commission supports the intent of this bill to expedite the process, and lower overcrowding in not only the state hospitals, but also the jails, by clarifying types of individuals who may serve as a qualified examiner. It seems reasonable that healthcare professionals from within the Department of Health who are psychiatrists, advanced practice registered nurses specializing in psychiatry, or licensed psychologists could conduct these exams. It also seems reasonable that two qualified examiners can examine and report upon the individual's fitness to proceed given that in a disagreement, a third will be appointed to review.

Should you have additional questions, the Oversight Coordinator, Christin Johnson, can be reached at 808-900-2200 or at christin.m.johnson@hawaii.gov. Thank you for the opportunity to testify.

JON N. IKENAGA
STATE PUBLIC DEFENDER

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Testimony of the Office of the Public Defender to House Committee on Health re: SB 955, SD 2: Relating to Fitness to Proceed

Chair: Rep. Gregg Takayama, Vice Chair: Rep. Sue L. Keohokapu-Lee Loy and Members of the Committee:

The Office of the Public Defender respectfully **opposes in part and supports in part SB 955, SD 2** for the following reasons:

The OPD supports the purpose of SB 955, SD 2, and feels that it will aid in furthering some of the goals set out in the preamble. The OPD however, does strenuously oppose the proposed changes to HRS sub-section 704-404 (2)(c), which would reduce the number of examiners from 3 to 1 in felony cases. The OPD feels that this will lead to unnecessary delays in answering a threshold question in any 704 related criminal case and will lead to longer placements in custody and or the State Hospital at added cost. Since SB 955, SD 2 would also increase the number of available examiners with the inclusion of advanced practice registered nurses there should be no need to limit the number of examiners in felony cases. Currently, 3-examiners are required for any fitness examination in felony cases. This current policy considers the differences in the diagnostic opinions of medical professionals, and the presentation of a 704 related defendant/patient on any given day. These concerns are usually eliminated with 3-examiners seeing the defendant/patient at different times and allows for a more accurate picture of said person's fitness to proceed. The use of one examiner will result in requests for further examinations, including those that are privately retained by party litigants, which would not be governed by statutory cost limitations, and paid for by state funds for those defendants which are provided with court-appointed legal services. Furthermore, the requirements for status hearings within 14 days of commitment to the Hawaii State Hospital to determine if further hospitalization is required is also unnecessary, as subsequent

court dates are provided at the time of commitment to review fitness, and the HSH staff are allowed to request an earlier hearing at any time before scheduled hearings. Defendants that are hospitalized under this process do not become lost in the system. The requirement for weekly status hearings at the Hawaii State Hospital are unnecessary as well and would create a tremendous burden and added costs on all stake holders and would require HSH to prepare for "court hearings" at its facility. All costs and burdens caused by this language in SB 955, SD 2 would be greatly compounded for neighbor island cases. Please note, that for all status conferences or hearings the staff at HSH would be required to update the Court on the mental-health status of the individual defendant/patient. More hearings will require the staff to spend valuable time preparing reports which in many instances would elaborately state: "no-change from last week". It can take weeks or months to restore a person to mental fitness, and weekly reports will not speed up that process, nor will weekly monitoring of said patients by the court. It has been the experience of the OPD that the staff at HSH works diligently to restore patients to fitness and are prompt in reporting when a defendant/patient should be re-evaluated by the court regarding fitness to proceed.

The OPD applauds the proposed amendments to subsection (11) which would increase compensation for panel members, and most importantly would compensate panel members for their in-court preparation and testimony, as this will allow for the recruitment of more examiners. Furthermore, the OPD supports the proposed changes to HRS section 710-1021 (Escape in the Second Degree), as these types of cases usually involve those suffering from mental health issues and a diminished capacity to appreciate the wrongfulness of their conduct.

Thank you for the opportunity to comment upon this measure.

RICHARD T. BISSEN, JR.
Mayor

ANDREW H. MARTIN
Prosecuting Attorney

SHELLY C. MIYASHIRO
First Deputy Prosecuting Attorney

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TESTIMONY ON
S.B. 955 SD2
RELATING TO FITNESS TO PROCEED

March 10, 2025

The Honorable Gregg Takayama
Chair
The Honorable Sue L. Keohokapu-Lee Loy
Vice Chair
and Members of the Committee on Health

Chair Takayama, Vice Chair Keohokapu-Lee Loy, and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui respectfully submits the following comments **in opposition to S.B. 955 SD2,** Relating to Fitness to Proceed, and requests that the measure be deferred. *Inter alia*, this bill amends HRS § 704-404 to reduce the number of examiners required for felony fitness to proceed examinations from three to one.

It is our understanding that one purpose of this measure is to reduce the amount of time a defendant must wait for a fitness to proceed examination to be completed. This measure raises the following concerns in that regard.

First, the reduction to a single examiner from the beginning of the proceedings is likely to lengthen proceedings rather than shorten them in many instances. If either the State or the defendant disagree with the examiner's opinion, HRS § 704-405 requires that the court hold a contested evidentiary hearing. While this option is available regardless of the number of examiners, having more than one examiner render an opinion as to fitness to proceed up front reduces the likelihood that either party will contest the findings.

Second, the relatively subjective nature of a fitness to proceed examination and the nature of psychology as a discipline in general make a bright-line, fit/unfit opinion concerning in a single examiner scenario. Even in the current three-panel examination system, multiple examiners can reach different conclusions for the same defendant or can reach the same

conclusion for different reasons. We are concerned that reducing the number of examiners, especially to a single examiner, increases the possibility that a defendant will erroneously be found fit or unfit. Further, the reduction ensures that certain professions will be prevented from examining a defendant (e.g. a psychiatrist or a psychologist or a psychiatric-specialty APRN can examine a defendant, but not all three) or additional examiners will be requested (e.g. if the examination is done only by an APRN, one or both parties may request a psychiatrist be added).

Third, based upon the concerns raised above we are concerned that many, if not most, defendants will request additional examiners to avoid either: 1) the delay associated with having to hold a contested hearing (since multiple examiners finding a defendant unfit to proceed likely means the State will not contest the determination), or 2) the possibility that a single examiner will erroneously find the defendant fit to proceed. This would significantly reduce any examination time reduction benefits.

Finally, we note that the prior testimony of the Judiciary, the Office of the Public Defender, and the Department of the Prosecuting Attorney for the City and County of Honolulu all expressed concerns with and/or opposed this measure due to the reduction in the number of examiners. In our experience it is rare that these three agencies, representing the spectrum of interests in the criminal justice system, are aligned in their opposition to proposed legislation.

For these reasons, the Department of the Prosecuting Attorney, County of Maui **opposes S.B. 955 SD2**. Please feel free to contact our office at (808) 270-7777 if you have any questions or inquiries.

Thank you very much for the opportunity to provide testimony on this bill.

SB-955-SD-2
Submitted on: 3/7/2025 6:48:26 PM
Testimony for HLT on 3/12/2025 9:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Louis Erteschik	Hawaii Disability Rights Center	Comments	Remotely Via Zoom

Comments:

Over the years there have been many attempts to reduce the number of examiners required for fitness to proceed evaluations. We have generally not been supportive, although in more minor cases there was always a legitimate policy debate about whether the reduction might be reasonable in the sense it might streamline the judicial system and reduce wait times.

However, we believe this Bill goes too far since it applies to felony cases where quite frankly the "stakes are too high" and reliability of the exam is the paramount concern. We note the testimony of the Hawaii Psychological Association and Dr. Acklin which point out the data reflecting levels of accuracy and that seems compelling.

Moreover, both the Prosecuting Attorneys and the Public Defender all seem to be opposed to the idea of reducing the number of examiners to one. Given that they are always on opposite sides of any case and are often not in agreement on policy questions this should speak volumes to the Committee.

Hawai‘i Psychological Association

For a Healthy Hawai‘i

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www.hawaiipsychology.org
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HOUSE COMMITTEE ON HEALTH
Representative Gregg Takayama, Chair
Representative Sue L. Keohokapu-Lee Loy, Vice Chair

Wednesday, March 12, 2025 - 9:00 AM - Conference Room 329 & Videoconference

Strong Opposition to SB955, SD2
RELATING TO FITNESS TO PROCEED

The Hawai‘i Psychological Association (HPA) strongly opposes SB955, SD2 - which would address the acute shortage of qualified individuals to conduct fitness to proceed evaluations for the criminal courts by reducing information received by judges, lowering standards, increasing the error rate dramatically and increasing State Hospital admissions with the potential to delay the process and increase examiner bias. SB955, SD2 is the opposite of best practice recommendations and destroys Hawaii's current three-panel system, which is a model envied by other states.

A bill to increase the number of examiners by raising fees, is moving through the legislature. Other sensible remedies have been neglected for years: annual forensic examiner training by the Department of Health was eliminated, record gathering remains a low priority for Adult Client Services, and Hawaii needs more civil commitment hospital beds so people can receive needed psychiatric hospitalization without having to break the law.

SB955, SD2 would reduce the number of fitness examinations on felony cases from three to one, leaving no correction mechanism for inter-rater reliability error. **This provision is opposed by judges, defense attorneys and prosecutors.** The agreement rate between examiners for fitness to proceed is roughly 70% on first time fitness evaluations. The inter-rater reliability for penal responsibility and dangerousness exams, which are typically ordered simultaneously with fitness to proceed, is lower. In other words, reliance on just one fitness exam would lead to a wrong conclusion in approximately 30% of first-time fitness cases.

The language in this bill allows the treating doctor to conduct the one panel examination which is an egregious ethical violation, i.e. a psychiatrist or psychologist from within the Department of Health. To avoid ethical violations, the language should specify that the clinician be employed by the Court Evaluation Branch of the Adult Mental Health Division, which does only assessment, not treatment. Mixing the two roles is flat-out unethical.

SB955, SD2 also calls for completing fitness examinations within two to five days for non-violent offenses, before past treatment records can be reviewed by examiners, thus making it easy for malingerers to be found unfit to proceed because the examiner would be unable to determine if an examine has a bona fide mental illness as established by collateral treatment records. The majority of defendants who are referred for fitness to proceed exams use crystal methamphetamine. Most cases of crystal methamphetamine-induced psychosis resolve within a month, but not within two to five days. **The number of people committed to the State Hospital as Unfit to Proceed** who are malingering or suffering from crystal methamphetamine-induced psychosis would thus increase if this bill is passed. **The Department of Health has testified that 95% of individuals evaluated under these conditions are found Unfit to Proceed.** In contrast the national average is that approximately 30% of examinees are found Unfit to Proceed. The proponents of SB955, SD2 do not appear to adequately understand the difference between a screening assessment and a complete assessment of fitness to proceed; it is best practice to conduct screens of fitness to proceed within two days for triage purposes, not for legal determinations of fitness.

SB955, SD2 also allows advanced practice nurses, without sufficient assessment or psycho-legal training to conduct fitness to proceed evaluations. **Fitness to proceed exams require advanced forensic assessment training beyond the doctoral level,** after one receives a doctoral degree in psychology or psychiatry, both of which require extensive coursework in mental health assessment. The existing forensic nursing programs train nurses to counsel forensically encumbered individuals who are charged with crimes; forensic assessment training in forensic nursing programs is minimal, at most.

Given the potential inadequacy of reports, which could be done hastily without review of records by just one improperly trained examiner, **one can expect the prosecution and defense to hire their own fitness examiners, as is done in other states, which would slow down the process and increase costs to the State.** Research has firmly established the existence of an unconscious bias on the part of examiners retained by the defense or prosecution to favor or agree with the party that is paying them. A task force of experts developed Hawaii's current three panel system to minimize bias, whereby examiners are paid by the Courts, not the prosecution or defense.

Outside my role as HPA Legislative Chair I have performed over 1,000 fitness to proceed exams in Hawaii since 2008. Thank you for the opportunity to provide input into this very destructive bill which includes several bad ideas that the legislature has previously rejected.

Sincerely,

Alex Lichton, Ph.D.

Alex Lichton, Ph.D.
Chair, HPA Legislative Action Committee

SB-955-SD-2
Submitted on: 3/10/2025 2:33:46 PM
Testimony for HLT on 3/12/2025 9:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Ellen Awai	Individual	Support	Written Testimony Only

Comments:

I support SB955.SD2. It took months before I could get out of the HSH on picking leaves and grass at the Maui Memorial since I was refused 3 times to be admitted for a concussion and they had to add in other charges, such as assault on an officer, and verbally abusing the security guard. But did anyone take into account that I was beaten by 6 women in an overcrowded cell when the adjacent cell whose open connecting door had only one person. So gathering 3 doctors took a few months and then I had to be sent back a couple times because of the doctors didn't think I should be released. I couldn't return to my position as a claims examiner at HMSA, trying to correct doctors' medical billings in the Professional Adjudication Unit 240 claims accurately/daily, working with 5 other women who bragged that they processed 350/day but was all wrong! Why would HMSA hire people who couldn't do the job, EEOC??? Something is definitely wrong in our system!

Then my whole life ruined as someone labeled with a mental illness and sent to Hawaii State Hospital, but part of the target population, supposedly tracked in my progress in 1991, why was HSH was listed as the worst in the nation? I argued with the staff that people from other countries, like Pakistan, could not teach me how to live in our "American" society. Or that we could have Christmas parties to relieve the anger of "patients" or was it staff with live music groups like anyone else and go out in to the public to doctor appointments and other events. We are the training grounds for the world and the role model, so we need to make the changes necessary! Not to depend on professionals that only want to find what is "wrong" with us and not our abilities, gifts, and talents! Support dropping the number of doctors needed.

SB-955-SD-2
Submitted on: 3/11/2025 12:12:36 AM
Testimony for HLT on 3/12/2025 9:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Dave Fields	Individual	Oppose	Written Testimony Only

Comments:

I submit this testimony in strong opposition to S.B. 955, now before the House Committee on Health and Homelessness (HLT). As someone who served as a clinician at Hawai‘i State Hospital (HSH) and who is also a law student, I offer a dual perspective on the clinical and legal flaws in this measure.

First and foremost, it is vital to recognize that **nearly the entire judiciary opposes this bill**, including at least one circuit court judge who went so far as to submit formal testimony against it. Judicial officers rarely speak out so strongly on pending legislation. When they warn that a proposal could be detrimental—potentially increasing procedural chaos and backlog—it would be prudent to take their concerns seriously.

I understand the bill’s well-intentioned aim to reduce overcrowding and accelerate fitness-to-proceed evaluations. Overcrowding is dire. When I worked at HSH, I saw patients sleeping in classrooms, in restraint rooms, even in the lobby. Plumbing and HVAC failures added to the crisis. These conditions are unacceptable and must be addressed.

However, leadership dysfunction at HSH is a root cause that procedural changes alone won’t fix. Discharges are delayed because the hospital is perpetually understaffed, and administrators create an environment of mismanagement and retaliation. During my tenure, I witnessed key leaders—Deputy Directors Valerie Kato and Marian Tsuji (who was also acting administrator for a time), Administrator Mark Linscott, and Medical Director Dr. Celia Ona—oversee a culture where problems fester. A stark example of this was the firing of Dr. Mark Chinen for contacting a legislator, effectively silencing staff who might raise legitimate concerns. Meanwhile, issues like mold in the $160 million Hale Hoʻōla building remain unresolved, and older facilities suffer from broken plumbing. S.B. 955 glosses over these systemic failings by focusing on court processes instead.

The measure’s proposal to reduce the number of examiners in felony cases from three to one (except when a second opinion is needed) might appear efficient but, in reality, could cause more delays if a third examiner must be introduced later. The Judiciary itself has reported frequent “two-to-one” splits, suggesting evaluations will not necessarily be faster. Moreover, the bill mandates additional status hearings, forcing all parties to expend more time and resources without addressing HSH’s deeper administrative problems.

If we truly want to reduce costs and overcrowding, we must insist on accountability at HSH. Instead of passing S.B. 955 as-is, consider amendments that impose real oversight, such as:

-Caps on the length of commitment in line with the maximum sentence for the charged offense.

-Detailed reporting on staff vacancies, evaluation turnaround times, mold remediation, and discharge processes.

-Penalties for retaliation against employees who blow the whistle on safety or operational issues.

Without these checks, we risk a scenario where the courts "streamline" their procedures while HSH continues to lose qualified clinicians and struggle with mismanagement, inevitably driving up costs and prolonging patient stays.

For these reasons, I strongly urge this Committee to reject S.B. 955 in its current form. The voices of the judiciary—including a circuit court judge—should not be ignored, and neither should the experiences of those who have worked inside the hospital. True reform requires confronting leadership failures at HSH, not just reshuffling the legal rules that govern fitness-to-proceed.