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DEPARTMENT OF HEALTH
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**Testimony in SUPPORT of SB955 SD1
RELATING TO MENTAL HEALTH**

SENATOR DONOVAN M. DELA CRUZ, CHAIR
SENATOR SHARON Y. MORIWAKI, VICE CHAIR
SENATE COMMITTEE ON WAYS AND MEANS

Hearing Date and Time: February 19, 2025, 10:02 a.m. Location: Room 211 and Video

1 **Fiscal Implications:** Undetermined.

2 **Department Position:** The Department of Health (“Department”) supports the bill and provides
3 the following comments on this measure.

4 **Department Testimony:** The Department appreciates the efforts of the legislature in
5 supporting and bringing forth new approaches to solving the issues surrounding mental health
6 and the justice system.

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

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

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

3 The Department also highlights findings from FY 24 data. A review of the current “Act
4 87” process shows that approximately 95% of defendants evaluated within the two-day
5 turnaround are opined unfit (many are intoxicated on alcohol and/or drugs), found such by the
6 courts and sent to the state hospital. The expansion of eligible individuals to the program as
7 proposed under 404 (2) without the explicit provisions defined in 704-421 would result in
8 increasing the census at the Hawaii State Hospital, rather than having the intended effect of
9 reducing overcrowding. The Department recommends that non-violent misdemeanors be
10 added to the charges eligible under 704-421. Additionally, the Department recommends the
11 turnaround time extend from two to five days for the initial exam as it takes 48 hours for the
12 body to eliminate the alcohol and or drugs.

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

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

23 Finally, the measure proposes that the court shall hold additional hearings no later than
24 fourteen days and on the thirtieth day after a defendant is committed to determine whether it
25 is necessary to continue commitment. While the Department appreciates that the intent is to
26 reduce the time a defendant may be held at the Hawaii State Hospital, there already exists a
27 mechanism through the courts to expedite hearings and for a defendant’s custody status to be

1 reviewed. The proposed change would also inadvertently add to the workload of the state
2 hospital by creating additional letters required to the court and hearings to attend.

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

6 **Offered Amendments:**

7 The Department respectfully requests that the court hold status hearings required
8 under 704-404 at Hawaii State Hospital no less than once a week by amending page 5, line 4 to
9 read as follows: “to commit the defendant; provided further that the court shall hold status
10 hearings on the Hawaii State Hospital grounds no less than once a calendar week.”

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

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

JOSH GREEN, M.D.
GOVERNOR



MARK PATTERSON
CHAIR

CHRISTIN M. JOHNSON
OVERSIGHT COORDINATOR

COMMISSIONERS
HON. R. MARK BROWNING (ret.)

HON. RONALD IBARRA (ret.)

MARTHA TORNEY

HON. MICHAEL A. TOWN (ret.)

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TO: The Honorable Donovan M. Dela Cruz, Chair
The Honorable Sharon Y. Moriwaki, Vice Chair
Senate Committee on Ways and Means

FROM: Mark Patterson, Chair
Hawaii Correctional System Oversight Commission

SUBJECT: Senate Bill 955 SD1, Relating to Fitness to Proceed
Hearing: Wednesday, February 19, 2025; 10:02 a.m.
State Capitol, Room 211

Chair Dela Cruz, Vice Chair Moriwaki, and Members of the Committee:

The Hawaii Correctional System Oversight Commission (HCSOC) **submits comments** on Senate Bill 955, Senate Draft 1, 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.



The Judiciary, State of Hawai‘i

Testimony to the Thirty-Third Legislature, 2025 Regular Session

Senate Committee on Ways and Means
Senator Donovan M. Dela Cruz, Chair
Senator Sharon Y. Moriwaki, Vice Chair

Wednesday, February 19, 2025 at 10:02 a.m.
State Capitol, Conference Room 211

WRITTEN TESTIMONY ONLY

By

Ronald G. Johnson
Deputy Chief Judge, Criminal Administrative Judge
Circuit Court of the First Circuit

Bill No. and Title: Senate Bill No. 955, SD1, 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 three to one. 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. (SD1)

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. This subcommittee includes 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 held until the next legislative session to allow these proposed revisions to Chapter 704 to be considered by the subcommittee and the advisory committee. Should this Committee prefer to consider the proposals in this measure now, the Judiciary provides the following comments and proposed amendments.

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. The Judiciary stands firmly behind the testimony submitted last week to the joint hearing held before the Senate Committees on Health and Human Services and Judiciary. As noted in that testimony, the Judiciary **supports** portions of the bill that will go a long way towards accomplishing that goal. However, the Judiciary must also respectfully **oppose** those parts of the proposed legislation that, 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.

I. Background

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 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

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).



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, with the report(s) from the examiner(s) due to the court the week before the next court hearing. Because the issues of defendant's fitness and dangerousness are key to the required level of care and custody, they are required in all examiner's evaluation reports except those ordered under section 704-404(2)(a).

In all instances under Chapter 704, the Court works cooperatively with the doctors and treatment teams at the Hawaii State Hospital to closely monitor defendants, via updated treatment reports, for regular review hearings. The review hearings are required, and they provide the basis by which the Court determines whether placement of the defendant at the Hawaii State Hospital is still required.

II. The Addition of Advanced Practice Registered Nurse Specializing in Psychiatry

The Judiciary **supports the intent** of the provisions of page 3, lines 10-11, 20-21, and page 4 lines 3-4, and requests that the change be made to other sections in HRS Chapter 704 for consistency in the examiner’s reports. Those provisions seek to “[i]ncrease the number of available private examiners and expedite examination reports” by adding advanced practice registered nurses (APRN) specializing in psychiatry to the examiners that may be certified by Department of Health to conduct the examinations required under section 704-404.

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, 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.

III. The Rate of Compensation for Private Examiners

The Judiciary **supports efforts** to increase the rate of compensation for private examiners, but respectfully requests that this portion of the measure be held in light of similar bills in the Judiciary’s legislative package. 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. For these reasons, the Judiciary respectfully requests that these revisions be deferred in favor of Senate Bill 264 SD1 and its companion. 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.

IV. Reducing Penalties for Escape in the Second Degree While Committed Under Section 704-421

The Judiciary **supports 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.

V. 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

The Judiciary understands the interest in amending HRS § 704-404(2)(a) and (2)(b) to address the number of individuals at the Hawai'i State Hospital, but must **respectfully oppose** the proposed amendments as they will have the opposite effect of what was intended. These revisions will needlessly increase the number of defendants transferred to the custody of the director of health under section 704-406, and removes the court's authority to order a one-panel fitness examination for any defendant charged with petty misdemeanors or misdemeanor offenses involving violence or attempted violence, which could lead to further delays. Utilization of the expedited examination process for crimes other than non-violent petty misdemeanors will result in numerous defendants needlessly being transferred to the custody of the director of health. These concerns were outlined in more detail in the Judiciary's testimony before Senate HHS/JDC, and the Judiciary remains available to discuss further if there are any questions.

VI. Examinations Conducted While Committed Under Hawai'i Revised Statute Section 704-404(2) Pending a Determination of Fitness

The Judiciary must **respectfully oppose** the provision in Section 2, page 4, lines 15-21 and page 5, lines 1-5, which would mandate status hearings when a defendant is committed to the Hawai'i State Hospital under HRS § 704-404(2), as this will be operational inefficient for the Judiciary, the Department of Health, the prosecution, and the defense, and is ultimately not necessary given available processes. 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 that necessitated the commitment in the first place, nor does it require any supporting evidence be presented to the court to seek the court's reconsideration of its prior ruling. In fact, as proposed in this measure, these hearings are required even where the treating physician agrees that the individual requires hospital level care.

HRS § 704-404(2) is one of the few statutes that authorizes the court to commit a defendant to a hospital or other suitable facility pending a fitness determination, but only upon a



finding of necessity. This is not done lightly by the court nor are individuals committed for a period longer than necessary to complete the fitness examination. Defendants committed under section 704-404(2) are committed pending their return hearing, which is typically set 30 – 90 days after the commitment. Currently the Department of Health (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. There is absolutely nothing stopping the deputy attorney general, representing the director of health, from filing these motions 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.²

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

Finally, Section 2, page 3, lines 15-21 and page 4, lines 1-4, 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 **respectfully 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.

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 would likely change if the court were required to only appoint one examiner.

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 regarding fitness, a decision that will likely only occur after a contested hearing. 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. Further there is a significant likelihood that one or both parties will

² In all review hearings held before the court for individuals committed to the custody of the director of health 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. While the treating physician may in some instances be permitted to appear at the hearing remotely, this would still require the submittal of a written report at least two days prior to each hearing, as they are required to do at all review hearings, opining on whether it is still necessary for defendant to be committed to the hospital and the basis for the opinion. In most cases where the defendant seeks to remain at the hospital, 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.



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request a re-examination by the appointed doctor due the length of time that will have transpired between the examination and the contested hearing. This will further prolong the determination of fitness and **delay the placement of a seriously ill defendant at Hawaii State Hospital to obtain the treatment they need to be restored to fitness.**

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 DOH 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.³ For this reason, the Judiciary respectfully opposes this proposed change.

The Judiciary is available to discuss further and answer any questions that this committee might have. Thank you for the opportunity to testify.

³ 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 a few exceptions. 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 to believe a defendant has regained fitness or is unlikely to ever regain fitness, a three-panel would still be required or ordered.

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Testimony of the Office of the Public Defender to Senate Committee on Ways and Means re:

SB 955, SD 1 Relating to Fitness to Proceed

LATE

Chair: Senator Donovan M. Dela Cruz, Vice Chair: Senator Sharon Y. Moriwaki and Members of the Committee:

The Office of the Public Defender respectfully **opposes in part and supports in part SB 955, SD 1** for the following reasons:

The OPD supports the purpose of SB 955, SD 1 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 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 limit of just one examiner will result in requests for further examinations, the addition of other examiners to the case and delays in answering a threshold question resulting in added costs.

Furthermore, the requirement for additional mandatory status hearings in Section 2, subsection (2)(a) for those defendants that are committed to the Hawaii State

Hospital (HSH) are unnecessary, as currently any person committed under a 704 hold is given a subsequent hearing date which can be held earlier at the request of hospital staff. It is unheard of that any defendant is “lost in the system” while being held at HSH. These added status hearings would be an unnecessary burden upon the court, defense attorneys, prosecutors, and HSH staff which could be required to provide status reports for said hearings and would lead to added costs for each case.

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.

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SB955 RELATING TO FITNESS TO PROCEED

Chair Dela Cruz, Vice Chair Moriwaki, and Members of the Committee,

LATE

The Office of the Public Defender (OPD) **OPPOSES THIS BILL AND OFFERS AN AMENDMENT**

The Office of the Public Defender respectfully supports in part and opposes in part. The OPD supports the purpose of SB 955 and feels that in great part it will aid in the goals set out in the preamble. 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.

The OPD opposes the proposed changes to HRS sub-section 704-404 (2)(c), which would reduce the number of examiners from 3 to 2 in felony cases unless there is a disagreement between the first two examiners.

The OPD feels that this will lead to unnecessary delays in answering a threshold question in any 704 related criminal case and would lead to longer placements at the State Hospital or other facilities. Since SB 955 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*. The OPD greatly 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.

SUGGESTED AMENDMENT

DELETE:

(3) Reduce the number of qualified examiners required for a fitness-to-proceed examination in a felony case from three to one;

Thank you for the opportunity to comment upon this measure.

**DEPARTMENT OF THE PROSECUTING ATTORNEY
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**THE HONORABLE DONOVAN M. DELA CRUZ, CHAIR
SENATE COMMITTEE ON WAYS AND MEANS
Thirty-Third State Legislature
Regular Session of 2025
State of Hawai'i**

LATE

February 18, 2025

RE: S.B. 955 S.D. 1; RELATING TO FITNESS TO PROCEED.

Chair Dela Cruz, Vice-Chair Moriwaki, and members of the Senate Committee on Ways and Means, the Department of the Prosecuting Attorney for the City and County of Honolulu submits the following testimony in **opposition** to S.B. 955 S.D. 1.

A. The reduction in examiners from three to one will not expedite proceedings; instead, it will cause further delay through added litigation.

S.B. 955 S.D. 1 reduces the number of qualified examiners from three to one for fitness-to-proceed hearings in felony cases.

Criminal defendants must be capable of understanding the proceedings and assisting in their own defense. This is a simple matter of fairness that separates a legitimate criminal prosecution from a show trial. So if a physical or mental condition prevents the defendant from understanding and participating in the proceedings, we do not try, convict, or sentence that person.¹ By the same token, if the person is fit to proceed, then all participants—the prosecution, the defendant, and the court—have a responsibility to facilitate timely resolution of the case.²

Under the current system, qualified examiners interview the defendant and submit a written opinion on whether the defendant is fit to proceed. Both the prosecution and the defense have the right to contest these findings because expert opinions are not infallible.

¹ HRS § 704-403 (“No person who, as a result of a physical or mental disease, disorder, or defect lacks capacity to understand the proceedings against the person or to assist in the person’s own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures.”).

² See *State v. Fukuoka*, 141 Hawai‘i 48, 62, 404 P.3d 314, 328 (2017) (“Accordingly, the court, the prosecution, and the defendant have a responsibility to facilitate timely resolution of the proceedings, including discovery issues involved in a case and moving the case forward.”).

But some cases can be resolved. If three independent examiners arrive at similar conclusions, both the court and the parties are likely to accept these findings. Even one dissenting opinion would not necessarily preclude efficient settlement. Unless the dissent was especially persuasive, the parties might still adopt the majority view. Of course, neither the prosecution nor the defense is required to accept the consensus. If there is a genuine dispute, each side has a responsibility to press its claim.

Neither the prosecution nor the defense is likely to accept the view of a single examiner in a felony case. Instead, the contesting party will seek appointment of an additional examiner or examiners.³ If refused, the party may still hire its own expert.⁴ Far from expediting proceedings, this change practically ensures additional contested hearings and protracted litigation.

B. Qualified examiners should be limited to practitioners in psychology or psychiatry.

S.B. 955 S.D. 1 expands the requisite credentials for qualified examiners from psychiatrists and psychologists to any “health care professional.”⁵

Each party has the right to contest the qualifications of an expert witness. Under the current system, these challenges are comparatively rare. Psychologists and psychiatrists have long been recognized as experts on mental health. Instead of bickering over qualifications, parties contesting an examiner’s opinion will usually focus instead on the methodology and reasoning reflected in the report.

But where the examiner simply is a health care professional, the contesting party will likely challenge the credentials of the examiner. And a judge is not obliged to accept designations by the Department of Health as authoritative. This not only increases the volume of litigation, but will foreseeably create inconsistent outcomes regarding witness competency.

C. Amending HRS § 704-404(2)(a) from “petty misdemeanor” to “crime” creates ambiguity regarding the felony provisions in HRS § 704-404(2)(c).

Finally, S.B. 955 S.D. 1 amends HRS § 704-404(2)(a) to apply to “crimes not involving violence or attempted violence” rather than non-violent “petty misdemeanors.” This creates ambiguity regarding the provisions in HRS § 704-404(2)(c), which governs felony prosecutions. The word “crime” includes a felony, and not all felonies are crimes of violence. In most cases, though, a specific condition prevails over the general.⁶ But under the rule of lenity, an ambiguity should be resolved in the defendant’s favor.⁷ This bill provides no guidance on which provision controls non-violent felonies and will encourage needless litigation over that issue as well.

Thank you for the opportunity to testify.

³ See S.B. 955 S.D. 1, p. 4, ll. 8-10.

⁴ See HRS § 704-409 (statutory right of the defendant to qualified examiner of defendant’s choice). See also HRS § 704-410 (“Both the prosecution and the defendant may summon any other qualified physician or licensed psychologist or other expert to testify . . .”).

⁵ See S.B. 955 S.D. 1, p. 3, ll. 8-12.

⁶ *State v. Casugay-Badiang*, 130 Hawai‘i 21, 27, 305 P.3d 437, 443 (2013).

⁷ *State v. Woodfall*, 120 Hawai‘i 387, 396, 206 P.3d 841, 850 (2009)

LATE

RICHARD T. BISSEN, JR.
Mayor

ANDREW H. MARTIN
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TESTIMONY ON
S.B. 955 SD1
RELATING TO FITNESS TO PROCEED

February 18, 2025

The Honorable Donovan M. Dela Cruz
Chair
The Honorable Sharon Y. Moriwaki
Vice Chair
and Members of the Committee on Ways and Means

Chair Dela Cruz, Vice Chairs Moriwaki, 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 SD1**, 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).

Finally, 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.

For these reasons, the Department of the Prosecuting Attorney, County of Maui **opposes S.B. 955 SD1**. 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.



Hawai'i Psychological Association

For a Healthy Hawai'i

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COMMITTEE ON WAYS AND MEANS
Senator Donovan M. Dela Cruz, Chair
Senator Sharon Y. Moriwaki, Vice Chair

Wednesday, February 19, 2025 - 10:02 AM - Conference Room 211 & videoconference

Strong Opposition to SB955 RELATING TO FITNESS TO PROCEED

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

The current examiner shortage is already being addressed with the two bills to raise examiner fees which are currently moving through the legislature. If enacted into law, the fee increase would increase the number of available examiners. 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 allows advanced practice nurses 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.

SB955 would reduce the number of fitness examinations on felony cases from three to one, leaving no correction mechanism for inter-rater reliability error. 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 at the

same time as 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.

This bill also calls for completing fitness examinations within two days 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 examinee 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 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 proponents of SB955 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.

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. Hawaii's current three panel was developed by a task force of experts in order to minimize bias, whereby examiners are paid by the State, 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 which the legislature has previously rejected.

Sincerely,

A handwritten signature in cursive script that reads "Alex Lichton, Ph.D.".

Alex Lichton, Ph.D.

Chair, HPA Legislative Action Committee

SB-955-SD-1

Submitted on: 2/14/2025 10:55:30 PM

Testimony for WAM on 2/19/2025 10:02:00 AM

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

Comments:

Aloha Chair, Vice Chair, and Members of the Ways and Means Committee. My name is Dave Fields, and I submit this testimony in strong opposition to S.B. 955. I served as a clinician at Hawai'i State Hospital, and I am also a law student. I am in a unique position as both a clinician and someone entering the legal field to comment on this bill. I recognize the bill's intent to reduce overcrowding and speed up fitness-to-proceed evaluations, and this is very important. While I was at Hawaii State Hospital, the census was so big, that patients were sleeping in classrooms, "restraint rooms" and even in the lobby. Making matters worse, there were times plumbing wouldnt work, and HVAC was down. During my time at the State Hospital, I have seen firsthand why this bill cannot succeed without confronting the leadership failures at HSH that ultimately stall discharge decisions, overload staff, and inflate costs for the State.

During my time at the hospital, I witnessed a culture of mismanagement under key figures such as Deputy Directors Valerie Kato and Marian Tsuji (who was also acting administrator for a time, and made several questionable decisions), and this mismanagement continues under current Administrator Mark Linscott and Medical Director Dr. Celia Ona. There are documented reports of favoritism and retaliation, including the firing of a highly qualified local psychiatrist, Dr. Mark Chinen, for merely contacting a legislator during the last legislative session (shocking, really, considering this was his civic right, he's a local boy, and the hospital is severely understaffed). Because of the Chinen firing, HSH staff are scared to report concerns due to possible retaliation. Numerous staff have been pushed out under questionable circumstances, and concerns are going unanswered about unsafe conditions, including mold in a \$160 million facility. Instead of addressing those fundamental issues, this bill places blame almost entirely on the courts for slow processing while ignoring the chronic staff shortages and overburdened clinicians at HSH who sometimes handle upward of forty severely mentally ill patients apiece. That ratio leads to lengthy evaluations and, by extension, indefinite patient holds. It also forces additional costs on the State, since indefinite confinement of patients who could be effectively managed by robust staffing is far more expensive than a well-run system of triage and discharge.

S.B. 955 reduces from three to two examiners in felony cases, only to require a third if there is disagreement. This shift may actually cause more delays, not fewer, if that third examiner enters late in the process and re-opens or prolongs evaluations. The frequent "two-to-one" split the Judiciary has reported could add months before fitness determinations are made, resulting in even higher expenditures for detention, legal proceedings, and hospital resources. Mandating extra status hearings that force all parties to appear also drives up costs without addressing HSH's dysfunctional internal process, where incompetent leadership keeps patient census levels

high. I encourage the Committee to be wary of allocating funds to implement these new mandates without building in real accountability measures or performance metrics for the hospital administration.

I oppose S.B. 955 unless it is significantly amended to include concrete oversight that holds HSH leadership to measurable standards. There might be a place for Oregon-style amendments imposing a cap on commitment length—no more than the maximum sentence for the charged offense—and requiring HSH to submit regular, detailed updates on staff vacancies, evaluation turnaround times, mold remediation, and overall patient flow. Ways and Means Committee members should also consider that the current environment at HSH, with questionable terminations and unresolved discrimination complaints, is driving away skilled clinicians and saddling the State with high legal and operational costs. Merely streamlining the court side of the Chapter 704 process will not reduce overcrowding or expenditures if the hospital itself remains in disarray.

For these reasons, I urge this Committee to reject S.B. 955 as drafted. Absent forceful provisions that tackle the deep-seated management issues at HSH, including the willingness of certain administrators to retaliate against staff and ignore hazardous conditions, the State will continue to bear the fiscal burden of indefinite commitments, re-litigation, and further mold-related or staffing crises. Mahalo for your consideration of my testimony, and I am available to provide any further information the Committee may require.

SB-955-SD-1

Submitted on: 2/16/2025 10:48:08 PM

Testimony for WAM on 2/19/2025 10:02:00 AM

Submitted By	Organization	Testifier Position	Testify
Ruth Love	Individual	Support	Written Testimony Only

Comments:

1) are they also allowing exam by telehealth for this purpose and do we need to add that wording?

2) I believe there is a typo and that you have accidentally inserted the word thirtieth in two places where you meant thirteenth.

Thank you

Mrs Ruth Love

MARVIN W. ACKLIN, PH.D.

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February 17, 2015

COMMITTEE ON WAYS AND MEANS

Senator Donovan M. Dela Cruz, Chair
Senator Sharon Y. Moriwaki, Vice Chair

Wednesday, February 19, 2015 - 10:00 AM - Conference Room 211 & videoconference

TESTIMONY IN OPPOSITION TO SENATE BILL 955 SD 1

RELATING TO FITNESS TO PROCEED

While the motivation for SB 955 Sd1 is laudable, as currently written, the bill demonstrates significant problems.

Reduction of Number of Examiners in a Felony Case. The proposal to reduce the number of qualified examiners required for fitness to proceed examination in a felony case from three to one is especially problematic. Research conducted nationally and in Hawaii has demonstrated the healthy impact on reliability of examiner opinions and judicial determinations. The primary effect is the management of examiner bias, well recognized in the profession and verified in research conducted in Hawaii. Researchers demonstrated that one panel examinations are significantly less reliable than three examiner panels.

The consequences of unreliable court examinations and judicial determinations have significant impacts for the justice system, including trying incompetent defendants.

Two-day turnaround for forensic reports. The proposal to require court examiners to produce reports within two days of the appointment of the examiner is unrealistic. This would preclude community examiners and likely require on-site evaluators to be practicable. Unless there are statutory provisions for staffing such a program, the legislation is unlikely to succeed in its aim. An accurate and reliable determination of fitness to proceed in defendants who may be psychotic from methamphetamine is highly problematic.

APRNs as Forensic Examiners. The proposal to have advanced practice registered nurses specializing in psychiatry appointed as forensic examiners is problematic. This type of forensic practice lies outside of the scope of professional nurse's education and

scope of practice. Forensic mental health evaluation is an advanced professional specialty. Furthermore, the bill makes no provisions for how this new cadre of examiners would be trained to the level of competency necessary to provide ethical and competent evidence in a court of law.

Recruitment of Examiners. It is certainly appropriate that examiners should be appointed from a list of certified examiners as determined by the Department of Health. However, recruiting examiners from agencies in the Department of Health, including personnel from Hawaii State Hospital or community mental health clinics, raises inevitable conflicts of interest.

Reimbursement of Examiners. The proposed legislation addressing compensation for forensic examiners is a laudable motivation since appropriate compensation is necessary to recruit the necessary cadre of competent forensic examiners.

I am a licensed psychologist in the State of Hawaii (PSY#394) and have been performing court ordered forensic evaluations since 1995. At the current time, I have conducted approximately 900 evaluations. I have published peer-reviewed empirical research in national forensic journals concerning Hawaii's 704 system for competency to stand trial and criminal responsibility evaluations (references attached). I lecture in the UH school of medicine and law school. I have been a close observer of the 707 panel system in all five circuits in the State of Hawaii.

It is essential that the 704 system remain one of the best systems in the United States.

A handwritten signature in black ink that reads "Marvin W. Acklin PhD". The signature is fluid and cursive, with the initials "MWA" and "PhD" clearly visible.

Marvin W. Acklin, PhD, ABAP, ABPP
Board-Certified Clinical & Forensic Psychologist
Clinical & Forensic Neuropsychology
Licensed Psychologist
Hawaii #394
Associate Clinical Professor of Psychiatry
Department of Psychiatry
JABSOM, University of Hawaii
Honolulu, Hawaii

References

Acklin, M. W. (2021). Psychiatry in the Everyday Practice of Law (5th edition). *Journal of the American Academy of Psychiatry and the Law*, 49(4), 654-655.

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SB-955-SD-1

Submitted on: 2/18/2025 5:38:41 PM

Testimony for WAM on 2/19/2025 10:02:00 AM

LATE

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

Comments:

I support SB955.SD1.lowering the number from 3 to 1 and preferably a local that understands both the actions of women and men.