



**GOV. MSG. NO. 1300**

EXECUTIVE CHAMBERS  
HONOLULU

DAVID Y. IGE  
GOVERNOR

July 1, 2016

The Honorable Ronald D. Kouchi,  
President  
and Members of the Senate  
Twenty-Eighth State Legislature  
State Capitol, Room 409  
Honolulu, Hawai'i 96813

The Honorable Joseph M. Souki,  
Speaker and Members of the  
House of Representatives  
Twenty-Eighth State Legislature  
State Capitol, Room 431  
Honolulu, Hawai'i 96813

Dear President Kouchi, Speaker Souki, and Members of the Legislature:

This is to inform you that on July 1, 2016, the following bill was signed into law:

SB2888 SD2 HD2 CD1

RELATING TO FORENSIC MENTAL HEALTH  
PROCEDURES  
**ACT 198 (16)**

Sincerely,

A handwritten signature in black ink, reading "David Y. Ige".

DAVID Y. IGE  
Governor, State of Hawai'i

Approved by the Governor

JUL 1 2016

on

THE SENATE

TWENTY-EIGHTH LEGISLATURE, 2016

STATE OF HAWAII

**ACT 198**  
**S.B. NO.**

2888  
S.D. 2  
H.D. 2  
C.D. 1

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# A BILL FOR AN ACT

RELATING TO FORENSIC MENTAL HEALTH PROCEDURES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1       SECTION 1. The legislature finds that under section  
2       704-404, Hawaii Revised Statutes, when a defendant's fitness to  
3       proceed is questioned, criminal proceedings stop, and the court  
4       orders a physical or mental examination of the defendant to  
5       determine the defendant's fitness to proceed and the defendant's  
6       capacity to be subject to penal responsibility for the alleged  
7       crime. Section 704-404(4), Hawaii Revised Statutes, requires  
8       the court to order a forensic examiner to conduct an evaluation  
9       and report on several elements including fitness to stand trial,  
10      a clinical diagnosis, and penal responsibility.

11      Penal responsibility is a measure of the capacity of the  
12      defendant to appreciate the wrongfulness of the defendant's  
13      conduct or to conform the defendant's conduct to the  
14      requirements of law at the time of the alleged conduct. An  
15      evaluation of fitness includes an examination of the defendant's  
16      current cognitive capacity and state of mind, but does not  
17      always require a clinical diagnosis or an exhaustive review of  
18      the defendant's records. Evaluation of penal responsibility and



1 clinical diagnosis are complex and time-consuming. The  
2 evaluations require a thorough record review and a comprehensive  
3 examination of the defendant's current cognitive status and the  
4 defendant's state of mind at various points in the past.  
5 Evaluations of fitness to proceed are used by the courts in each  
6 instance they are ordered, but evaluations of penal  
7 responsibility are rarely used because they are relevant only if  
8 the affirmative defense of lack of penal responsibility is  
9 asserted in criminal proceedings. Pairing the evaluations  
10 together is burdensome to the process, lengthens the time to  
11 complete the evaluation and report to the court, and generates a  
12 report that may not be used during adjudication.

13 An evaluation that combines determinations of fitness to  
14 proceed and penal responsibility into one evaluation raises  
15 ethical and legal concerns. Defendants who are unfit to  
16 proceed, by definition, may not have the capacity to consult  
17 with defense counsel to determine the impact of providing the  
18 examiner with information that could be potentially  
19 incriminating. The American Bar Association's Criminal Justice  
20 Mental Health Standards, Standard 7-4.4, recommends that an  
21 evaluation of a defendant's mental condition at the time of the

1 alleged offense and capacity for penal responsibility should not  
2 be combined in an evaluation to determine fitness to stand trial  
3 unless requested by the defense or upon a showing of good cause.

4 Section 704-406, Hawaii Revised Statutes, does not provide  
5 a process for the reevaluation of a defendant who was found  
6 unfit to proceed but has since participated in fitness  
7 restoration services provided at either the Hawaii state  
8 hospital or in the community. Instead, courts have ordered new  
9 evaluations by a panel of three examiners for all defendants  
10 charged with felonies.

11 This Act establishes a procedure that requires evaluations  
12 for regained fitness to proceed by one examiner for all  
13 defendants except for defendants charged with murder in the  
14 first or second degrees, attempted murder in the first or second  
15 degrees, or class A felonies.

16 The purpose of this Act is to decrease the time defendants  
17 spend in state custody waiting for forensic mental health  
18 examinations and shorten the time to reach rulings on fitness to  
19 proceed and penal responsibility. This Act establishes  
20 evaluations for determining initial fitness to proceed and  
21 capacity for penal responsibility by one examiner for certain



1 defendants, separates evaluation for fitness to proceed and for  
2 penal responsibility, and codifies procedures for reevaluation  
3 of fitness to proceed.

4 SECTION 2. Chapter 704, Hawaii Revised Statutes, is  
5 amended by adding a new section to be appropriately designated  
6 and to read as follows:

7 "§704- Examination of defendant with respect to physical  
8 or mental disease, disorder, or defect excluding penal  
9 responsibility. (1) Whenever the defendant has filed a notice  
10 of intention to rely on the defense of physical or mental  
11 disease, disorder, or defect excluding penal responsibility, or  
12 there is reason to believe that the physical or mental disease,  
13 disorder, or defect of the defendant will or has become an issue  
14 in the case, the court may order an examination as to the  
15 defendant's physical or mental disease, disorder, or defect at  
16 the time of the conduct alleged.

17 (2) The court shall appoint three qualified examiners in  
18 felony cases and one qualified examiner in nonfelony cases to  
19 examine and report upon the physical or mental disease,  
20 disorder, or defect of the defendant at the time of the conduct.  
21 In felony cases, the court shall appoint at least one

1 psychiatrist and at least one licensed psychologist. The third  
2 examiner may be a psychiatrist, licensed psychologist, or  
3 qualified physician. One of the three examiners shall be a  
4 psychiatrist or licensed psychologist designated by the director  
5 of health from within the department of health. In nonfelony  
6 cases, the court may appoint as examiners either a psychiatrist  
7 or a licensed psychologist. All examiners shall be appointed  
8 from a list of certified examiners as determined by the  
9 department of health. The court, in appropriate circumstances,  
10 may appoint an additional examiner or examiners. The court may  
11 direct that one or more qualified physicians or psychologists  
12 retained by the defendant be permitted to witness the  
13 examination. As used in this section, the term "licensed  
14 psychologist" includes psychologists exempted from licensure by  
15 section 465-3(a)(3) and "qualified physician" means a physician  
16 qualified by the court for the specific evaluation ordered.

17 (3) An examination performed under this section may employ  
18 any method that is accepted by the professions of medicine or  
19 psychology for the examination of those alleged to be affected  
20 by a physical or mental disease, disorder, or defect; provided  
21 that each examiner shall form and render diagnoses and opinions



1 upon the physical and mental condition of the defendant  
2 independently from the other examiners, and the examiners, upon  
3 approval of the court, may secure the services of clinical  
4 psychologists and other medical or paramedical specialists to  
5 assist in the examination and diagnosis.

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



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

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

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

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

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

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

18        (e) Where more than one examiner is appointed, a statement  
19 that the diagnosis and opinion rendered were arrived  
20 at independently of any other examiner, unless there  
21 is a showing to the court of a clear need for





1           communication between or among the examiners for  
2           clarification. A description of the communication  
3           shall be included in the report. After all reports  
4           are submitted to the court, examiners may confer  
5           without restriction.

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

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

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

19           (10) The court shall obtain all existing relevant medical,  
20           mental health, social, police, and juvenile records, including  
21           those expunged, and other pertinent records in the custody of



1 public agencies, notwithstanding any other statute, and make the  
2 records available for inspection by the examiners in hard copy  
3 or digital format. The court may order that the records so  
4 obtained be made available to the prosecuting attorney and  
5 counsel for the defendant in either format, subject to  
6 conditions the court determines appropriate; provided that  
7 juvenile records shall not be made available unless  
8 constitutionally required. No further disclosure of records  
9 shall be made except as permitted by law.

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

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



1        (13) The time during which completion of an examination  
2 pursuant to this section is pending shall be excluded in  
3 computing the time for trial commencement."

4        SECTION 3. Section 704-404, Hawaii Revised Statutes, is  
5 amended to read as follows:

6        "§704-404 Examination of defendant with respect to  
7 physical or mental disease, disorder, or defect~~[-]~~ excluding  
8 fitness to proceed. (1) Whenever ~~[the defendant has filed a~~  
9 ~~notice of intention to rely on the defense of physical or mental~~  
10 ~~disease, disorder, or defect excluding responsibility, or]~~ there  
11 is reason to doubt the defendant's fitness to proceed, ~~[or~~  
12 ~~reason to believe that the physical or mental disease, disorder,~~  
13 ~~or defect of the defendant will or has become an issue in the~~  
14 ~~ease,]~~ the court may immediately suspend all further proceedings  
15 in the prosecution. If a trial jury has been empanelled, it  
16 shall be discharged or retained at the discretion of the court.  
17 The discharge of the trial jury shall not be a bar to further  
18 prosecution.

19        (2) Upon suspension of further proceedings in the  
20 prosecution, the court shall appoint three qualified examiners  
21 in felony cases and one qualified examiner in nonfelony cases to

1 examine and report upon the [~~physical and mental condition of~~  
2 ~~the defendant.~~] defendant's fitness to proceed. In felony  
3 cases, the court shall appoint as examiners at least one  
4 psychiatrist and at least one licensed psychologist. The third  
5 [~~member~~] examiner may be a psychiatrist, licensed psychologist,  
6 or qualified physician. One of the three examiners shall be a  
7 psychiatrist or licensed psychologist designated by the director  
8 of health from within the department of health. In nonfelony  
9 cases, the court may appoint as examiners either a psychiatrist  
10 or a licensed psychologist. All examiners shall be appointed  
11 from a list of certified examiners as determined by the  
12 department of health. The court, in appropriate circumstances,  
13 may appoint an additional examiner or examiners. The  
14 examination may be conducted on an out-patient basis or, in the  
15 court's discretion, when necessary the court may order the  
16 defendant to be committed to a hospital or other suitable  
17 facility for the purpose of the examination for a period not  
18 exceeding thirty days, or such longer period as the court  
19 determines to be necessary for the purpose. The court may  
20 direct that one or more qualified physicians or psychologists  
21 retained by the defendant be permitted to witness the

1 examination. As used in this section, the term "licensed  
2 psychologist" includes psychologists exempted from licensure by  
3 section 465-3(a)(3) [-] and "qualified physician" means a  
4 physician qualified by the court for the specific evaluation  
5 ordered.

6 (3) An examination performed under this section may employ  
7 any method that is accepted by the professions of medicine or  
8 psychology for the examination of those alleged to be affected  
9 by a physical or mental disease, disorder, or defect; provided  
10 that each examiner shall form and render ~~[diagnoses and~~  
11 ~~opinions]~~ an opinion upon the ~~[physical and mental condition of~~  
12 ~~the defendant]~~ defendant's fitness to proceed independently from  
13 the other examiners, and the examiners, upon approval of the  
14 court, may secure the services of clinical psychologists and  
15 other medical or paramedical specialists to assist in the  
16 examination ~~[and diagnosis]~~.

17 (4) For defendants charged with felonies, the examinations  
18 for fitness to proceed under this section and penal  
19 responsibility under section 704- shall be conducted  
20 separately unless a combined examination has been ordered by the  
21 court upon a request by the defendant or upon a showing of good



1 cause to combine the examinations. The report of the  
2 examination for fitness to proceed shall be separate from the  
3 report of the examination for penal responsibility unless a  
4 combined examination has been ordered. For defendants charged  
5 with offenses other than felonies, a combined examination is  
6 permissible when ordered by the court.

7       ~~[(4)]~~ (5) The report of the examination for fitness to  
8 proceed shall include the following:

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

10       ~~[(b)] A diagnosis of the physical or mental condition of the~~  
11       ~~defendant;~~

12       ~~[(e)]~~ (b) An opinion as to the defendant's capacity to  
13       understand the proceedings against the defendant and  
14       to assist in the defendant's own defense;

15       ~~[(d)] An opinion as to the extent, if any, to which the~~  
16       ~~capacity of the defendant to appreciate the~~  
17       ~~wrongfulness of the defendant's conduct or to conform~~  
18       ~~the defendant's conduct to the requirements of law was~~  
19       ~~impaired at the time of the conduct alleged;~~

20       ~~[(e)] When directed by the court, an opinion as to the~~  
21       ~~capacity of the defendant to have a particular state~~

1 ~~of mind that is required to establish an element of~~  
2 ~~the offense charged, and~~

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

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

16 (d) Where more than one examiner is appointed, a statement  
17 that the opinion rendered was arrived at independently  
18 of any other examiner, unless there is a showing to  
19 the court of a clear need for communication between or  
20 among the examiners for clarification. A description  
21 of the communication shall be included in the report.



1           After all reports are submitted to the court,  
2           examiners may confer without restriction.

3           ~~[(+5)]~~ (6) If the examination cannot be conducted by reason  
4 of the unwillingness of the defendant to participate ~~[therein,]~~  
5 in the examination, the report shall so state and shall include,  
6 if possible, an opinion as to whether ~~[such]~~ the unwillingness  
7 of the defendant was the result of physical or mental disease,  
8 disorder, or defect.

9           ~~[(+6)]~~ (7) Three copies of the report of the examination,  
10 including any supporting documents, shall be filed with the  
11 clerk of the court, who shall cause copies to be delivered to  
12 the prosecuting attorney and to counsel for the defendant.

13           ~~[(+7)]~~ (8) Any examiner shall be permitted to make a  
14 separate explanation reasonably serving to clarify the  
15 examiner's ~~[diagnosis-of]~~ opinion.

16           ~~[(+8)]~~ (9) The court shall obtain all existing relevant  
17 medical, mental health, social, police, and juvenile records,  
18 including those expunged, and other pertinent records in the  
19 custody of public agencies, notwithstanding any other  
20 ~~[statutes,]~~ statute, and make ~~[such]~~ the records available for  
21 inspection by the examiners~~[-]~~ in hard copy or digital format.



1 The court may order that the records so obtained be made  
2 available to the prosecuting attorney and counsel for the  
3 defendant in either format, subject to conditions the court  
4 determines appropriate; provided that juvenile records shall not  
5 be made available unless constitutionally required. No further  
6 disclosure of records shall be made except as permitted by law.  
7 If, pursuant to this section, the court orders the defendant  
8 committed to a hospital or other suitable facility under the  
9 control of the director of health, then the county police  
10 departments shall provide to the director of health and the  
11 defendant copies of all police reports from cases filed against  
12 the defendant [~~which~~] that have been adjudicated by the  
13 acceptance of a plea of guilty or no contest, a finding of  
14 guilt, acquittal, acquittal pursuant to section 704-400, or by  
15 the entry of plea of guilty or no contest made pursuant to  
16 chapter 853, so long as the disclosure to the director of health  
17 and the defendant does not frustrate a legitimate function of  
18 the county police departments, with the exception of expunged  
19 records, records of or pertaining to any adjudication or  
20 disposition rendered in the case of a juvenile, or records  
21 containing data from the United States National Crime



1 Information Center. The county police departments shall  
2 segregate or sanitize from the police reports information that  
3 would result in the [~~likelihood~~] likely or actual identification  
4 of individuals who furnished information in connection with its  
5 investigation, or who were of investigatory interest. [~~Records~~  
6 ~~shall not be re-disclosed except to the extent permitted by~~  
7 ~~law.~~] No further disclosure of records shall be made except as  
8 provided by law.

9 [~~9~~] (10) All public agencies in possession of relevant  
10 medical, mental health, social, police, and juvenile records,  
11 and any other pertinent records of a defendant ordered to be  
12 examined under this chapter, shall provide those records to the  
13 court, notwithstanding any other state statute.

14 [~~10~~] (11) The compensation of persons making or  
15 assisting in the examination, other than those retained by ~~the~~  
16 a nonindigent defendant, who are not undertaking the examination  
17 upon designation by the director of health as part of their  
18 normal duties as employees of the State or a county, shall be  
19 paid by the State."

20 SECTION 4. Section 704-406, Hawaii Revised Statutes, is  
21 amended to read as follows:



1       "§704-406 / Effect of finding of unfitness to proceed[?] and  
2       regained fitness to proceed. (1) If the court determines that  
3       the defendant lacks fitness to proceed, the proceeding against  
4       the defendant shall be suspended, except as provided in section  
5       704-407, and the court shall commit the defendant to the custody  
6       of the director of health to be placed in an appropriate  
7       institution for detention, care, and treatment; provided that  
8       the commitment shall be limited in certain cases as follows:

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

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

19       If the court is satisfied that the defendant may be released on  
20       conditions without danger to the defendant or to [~~the person~~]  
21       another or risk of substantial danger to property of others, the

1 court shall order the defendant's release, which shall continue  
2 at the discretion of the court, on conditions the court  
3 determines necessary; provided that the release on conditions of  
4 a defendant charged with a petty misdemeanor not involving  
5 violence or attempted violence shall continue for no longer than  
6 sixty days, and the release on conditions of a defendant charged  
7 with a misdemeanor not involving violence or attempted violence  
8 shall continue for no longer than one hundred twenty days. A  
9 copy of the report filed pursuant to section 704-404 shall be  
10 attached to the order of commitment or order of release on  
11 conditions. When the defendant is committed to the custody of  
12 the director of health for detention, care, and treatment, the  
13 county police departments shall provide to the director of  
14 health and the defendant copies of all police reports from cases  
15 filed against the defendant that have been adjudicated by the  
16 acceptance of a plea of guilty or nolo contendere, a finding of  
17 guilt, acquittal, acquittal pursuant to section 704-400, or by  
18 the entry of a plea of guilty or nolo contendere made pursuant  
19 to chapter 853, so long as the disclosure to the director of  
20 health and the defendant does not frustrate a legitimate  
21 function of the county police departments; provided that

1 expunged records, records of or pertaining to any adjudication  
2 or disposition rendered in the case of a juvenile, or records  
3 containing data from the United States National Crime  
4 Information Center shall not be provided. The county police  
5 departments shall segregate or sanitize from the police reports  
6 information that would result in the [+]likely[+] or actual  
7 identification of individuals who furnished information in  
8 connection with the investigation or who were of investigatory  
9 interest. ~~[Records shall not be re-disclosed except to the~~  
10 ~~extent permitted by law.]~~ No further disclosure of records shall  
11 be made except as provided by law.

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

19 [+] (3) [+] When the court, on its own motion or upon the  
20 application of the director of health, the prosecuting attorney,  
21 or the defendant, ~~[determines, after a hearing if a hearing is~~

1 ~~requested,]~~ has reason to believe that the defendant has  
2 regained fitness to proceed, ~~[the penal proceeding shall be~~  
3 ~~resumed.]~~ for a defendant charged with the offense of murder in  
4 the first or second degree, attempted murder in the first or  
5 second degree, or a class A felony, the court shall appoint  
6 three qualified examiners and may appoint in all other cases one  
7 qualified examiner, to examine and report upon the physical and  
8 mental condition of the defendant. In cases in which the  
9 defendant has been charged with murder in the first or second  
10 degree, attempted murder in the first or second degree, or a  
11 class A felony, the court shall appoint as examiners at least  
12 one psychiatrist and at least one licensed psychologist. The  
13 third examiner may be a psychiatrist, licensed psychologist, or  
14 qualified physician. One of the three examiners shall be a  
15 psychiatrist or licensed psychologist designated by the director  
16 of health from within the department of health. In all other  
17 cases, the one qualified examiner shall be a psychiatrist or  
18 licensed psychologist designated by the director of health from  
19 within the department of health. The court, in appropriate  
20 circumstances, may appoint an additional examiner or examiners.  
21 All examiners shall be appointed from a list of certified

1 examiners as determined by the department of health. After a  
2 hearing, if a hearing is requested, if the court determines that  
3 the defendant has regained fitness to proceed, the penal  
4 proceeding shall be resumed and the defendant shall no longer be  
5 committed to the custody of the director of health. In cases  
6 where a defendant is charged with the offense of murder in the  
7 first or second degree, attempted murder in the first or second  
8 degree, or a class A felony, upon the request of the prosecuting  
9 attorney or the defendant, and in consideration of information  
10 provided by the defendant's clinical team, the court may order  
11 that the defendant remain in the custody of the director of  
12 health, for good cause shown, subject to bail or until a  
13 judgment on the verdict or a finding of guilt after a plea of  
14 guilty or nolo contendere. Thereafter, the court may consider a  
15 request from the director of health to rescind its order  
16 maintaining the defendant in the director's custody, for good  
17 cause shown. As used in this section, the term "qualified  
18 physician" means a physician qualified by the court for the  
19 specific evaluation ordered. If, however, the court is of the  
20 view that so much time has elapsed since the commitment or



1 release on conditions of the defendant that it would be unjust  
2 to resume the proceeding, the court may dismiss the charge and:

3 (a) Order the defendant to be discharged;

4 (b) Subject to the law governing the involuntary civil  
5 commitment of persons affected by physical or mental  
6 disease, disorder, or defect, order the defendant to  
7 be committed to the custody of the director of health  
8 to be placed in an appropriate institution for  
9 detention, care, and treatment; or

10 (c) Subject to the law governing involuntary outpatient  
11 treatment, order the defendant to be released on  
12 conditions the court determines necessary.

13 (4) An examination for regained fitness to proceed  
14 performed under this section may employ any method that is  
15 accepted by the professions of medicine or psychology for the  
16 examination of those alleged to be affected by a physical or  
17 mental disease, disorder, or defect, and shall include a review  
18 of records where the defendant, while under the custody of the  
19 director of health, was placed; provided that each examiner  
20 shall form and render an opinion on the defendant's regained  
21 fitness to proceed independently from the other examiners and





1 the examiners, upon approval of the court, may secure the  
2 services of clinical psychologists and other medical or  
3 paramedical specialists to assist in the examination.

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

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

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

10 (c) Where more than one examiner is appointed, a statement  
11 that the opinion rendered was arrived at independently  
12 of any other examiner, unless there is a showing to  
13 the court of a clear need for communication between or  
14 among the examiners for clarification. A description  
15 of the communication shall be included in the report.

16 After all reports are submitted to the court,  
17 examiners may confer without restriction.

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



1       ~~[(4)]~~ (7) If a defendant committed to the custody of the  
2 director of health for a limited period pursuant to subsection  
3 (1) is not found fit to proceed prior to the expiration of the  
4 commitment, the charge for which the defendant was committed for  
5 a limited period shall be dismissed. Upon dismissal of the  
6 charge, the defendant shall be released from custody unless the  
7 defendant is subject to prosecution for other charges, in which  
8 case, unless the defendant is subject to the law governing  
9 involuntary civil commitment, the court shall order the  
10 defendant's commitment to the custody of the director of health  
11 to be placed in an appropriate institution for detention, care,  
12 and treatment. Within a reasonable time following any other  
13 commitment under subsection (1), the director of health shall  
14 report to the court on whether the defendant presents a  
15 substantial likelihood of becoming fit to proceed in the future.  
16 The court, in addition, may appoint a panel of three qualified  
17 examiners in felony cases or one qualified examiner in nonfelony  
18 cases to make a report. If, following a report, the court  
19 determines that the defendant probably will remain unfit to  
20 proceed, the court may dismiss the charge and:

21       (a) Release the defendant; or



1 (b) Subject to the law governing involuntary civil  
2 commitment, order the defendant to be committed to the  
3 custody of the director of health to be placed in an  
4 appropriate institution for detention, care, and  
5 treatment.

6 ~~[(5)]~~ (8) If a defendant released on conditions for a  
7 limited period pursuant to subsection (1) is not found fit to  
8 proceed prior to the expiration of the release on conditions  
9 order, the charge for which the defendant was released on  
10 conditions for a limited period shall be dismissed. Upon  
11 dismissal of the charge, the defendant shall be discharged from  
12 the release on conditions unless the defendant is subject to  
13 prosecution for other charges or subject to the law governing  
14 involuntary civil commitment, in which case the court shall  
15 order the defendant's commitment to the custody of the director  
16 of health to be placed in an appropriate institution for  
17 detention, care, and treatment. Within a reasonable time  
18 following any other release on conditions under subsection (1),  
19 the court shall appoint a panel of three qualified examiners in  
20 felony cases or one qualified examiner in nonfelony cases to  
21 report to the court on whether the defendant presents a



1 substantial likelihood of becoming fit to proceed in the future.  
2 If, following the report, the court determines that the  
3 defendant probably will remain unfit to proceed, the court may  
4 dismiss the charge and:

5 (a) Release the defendant; or

6 (b) Subject to the law governing involuntary civil  
7 commitment, order the defendant to be committed to the  
8 custody of the director of health to be placed in an  
9 appropriate institution for detention, care, and  
10 treatment."

11 SECTION 5. Section 704-411, Hawaii Revised Statutes, is  
12 amended by amending subsection (3) to read as follows:

13 "(3) When ordering a hearing pursuant to subsection (2):

14 (a) In nonfelony cases, the court shall appoint a  
15 qualified examiner to examine and report upon the  
16 physical and mental condition of the defendant. The  
17 court may appoint either a psychiatrist or a licensed  
18 psychologist. The examiner may be designated by the  
19 director of health from within the department of  
20 health. The examiner shall be appointed from a list  
21 of certified examiners as determined by the department

1 of health. The court, in appropriate circumstances,,  
2 may appoint an additional examiner or examiners; and  
3 (b) In felony cases, the court shall appoint three  
4 qualified examiners to examine and report upon the  
5 physical and mental condition of the defendant. In  
6 each case, the court shall appoint at least one  
7 psychiatrist and at least one licensed psychologist.  
8 The third member may be a psychiatrist, a licensed  
9 psychologist, or a qualified physician. One of the  
10 three shall be a psychiatrist or licensed psychologist  
11 designated by the director of health from within the  
12 department of health. The three examiners shall be  
13 appointed from a list of certified examiners as  
14 determined by the department of health.

15 To facilitate the examination and the proceedings thereon, the  
16 court may cause the defendant, if not then confined, to be  
17 committed to a hospital or other suitable facility for the  
18 purpose of examination for a period not exceeding thirty days or  
19 [sueh] a longer period as the court determines to be necessary  
20 for the purpose upon written findings for good cause shown. The  
21 court may direct that qualified physicians or psychologists

1 retained by the defendant be permitted to witness the  
2 examination. The examination and report and the compensation of  
3 persons making or assisting in the examination shall be in  
4 ~~[accord]~~ accordance with section 704-404(3), ~~[(4)(a)]~~ (5)(a) and  
5 (b), ~~[(6), (7), (8), and (9)]~~ (7), (8), (9), (10), and (11).

6 As used in this section, the term "licensed psychologist"  
7 includes psychologists exempted from licensure by section  
8 465-3(a)(3) ~~[-]~~ and "qualified physician" means a physician  
9 qualified by the court for the specific evaluation ordered."

10 SECTION 6. Section 704-414, Hawaii Revised Statutes, is  
11 amended to read as follows:

12 "§704-414 Procedure upon application for discharge,  
13 conditional release, or modification of conditions of release.  
14 Upon filing of an application pursuant to section 704-412 for  
15 discharge or conditional release, or upon the filing of an  
16 application pursuant to section 704-413 for discharge or for  
17 modification of conditions of release, the court shall appoint  
18 three qualified examiners in felony cases and one qualified  
19 examiner in nonfelony cases to examine and report upon the  
20 physical and mental condition of the defendant. In felony cases  
21 the court shall appoint at least one psychiatrist and at least



1 one licensed psychologist. The third member may be a  
2 psychiatrist, a licensed psychologist, or a qualified physician.  
3 One of the three shall be a psychiatrist or licensed  
4 psychologist designated by the director of health from within  
5 the department of health. The examiners shall be appointed from  
6 a list of certified examiners as determined by the department of  
7 health. To facilitate the examination and the proceedings  
8 thereon, the court may cause the defendant, if not then  
9 confined, to be committed to a hospital or other suitable  
10 facility for the purpose of the examination and may direct that  
11 qualified physicians or psychologists retained by the defendant  
12 be permitted to witness the examination. The examination and  
13 report and the compensation of persons making or assisting in  
14 the examination shall be in ~~[accord]~~ accordance with section  
15 704-404(3), ~~[(4)(a)]~~ (5)(a) and (b), ~~[(6), (7), (8), and (9)].~~  
16 (7), (8), (9), (10), and (11). As used in this section, the  
17 term "licensed psychologist" includes psychologists exempted  
18 from licensure by section 465-3(a)(3) ~~[-]~~ and "qualified  
19 physician" means a physician qualified by the court for the  
20 specific evaluation ordered."



S.B. NO. 2888  
S.D. 2  
H.D. 2  
C.D. 1

- 1       SECTION 7. Statutory material to be repealed is bracketed  
2 and stricken. New statutory material is underscored.  
3       SECTION 8. This Act shall take effect upon its approval.

APPROVED this       1       day of       JUL       , 2016

A handwritten signature in black ink, appearing to read "David Y. Ige". The signature is fluid and cursive, with a large loop at the end.

GOVERNOR OF THE STATE OF HAWAII