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Testimony COMMENTS ONLY on HB1806
Relating to Criminal Proceedings

REPRESENTATIVE DELLA AU BELATTI, CHAIR
HOUSE COMMITTEE ON HEALTH
Hearing Date: February 5, 2016, 10:15 a.m. Room Number: 329

Fiscal Implications: Undetermined at this time.

Department Testimony: We thank the Legislature for its continued support and, in particular, the intent of the initiatives in the bills on today's committee agenda. Only through a combination of support in building a new facility, support in rebuilding community programs, and fundamental policy changes will Hawaii be able to effectively address the needs of its citizens, the operation of the Hawaii State Hospital (HSH), and be able to provide an effective continuum of mental health supports. Clearly, all three branches of government play a critical role in making this system function effectively.

The Department of Health (DOH) supports general intent of this bill in part, has concerns in others, and would like to offer comments. The bill proposes to provide flexibility regarding assigning the number of examiners in a felony case. The DOH supports the intent of this proposal. The Governor has submitted bills in the administrative package (HB 2359 and SB 2888) that propose a number of changes to HRS §704 to ensure the timely and relevant administration of mental health examinations, support the process of expedient administration of justice, and clarify the procedure for re-evaluation of fitness to proceed after a finding of

unfitness and attempts at restoration have been made. The DOH prefers the changes proposed in the Governor's bill to accomplish improving the efficiency of court ordered mental health examinations and believes this is the best way to move forward.

Hawaii's insanity statute (HRS §704) is based on the American Law Institute's Model Penal Code. The purpose of this bill is to change Hawaii's insanity statute and also to provide courts with flexibility regarding the number of mental health professionals required to complete a court ordered examination of a felony defendant. The bill also proposes to change language regarding the professional discipline of appointed examiners.

This bill proposes changing the insanity statute pertaining to penal responsibility to a more restricted test by eliminating the volitional prong (e.g., an ability to conform behavior to the requirements of the law) while increasing the burden of proof on the defendant from a preponderance of the evidence to clear and convincing evidence. The proposed changes may have effects which the DOH is not able to adequately assess.

Eliminating the volition prong as proposed will significantly diminish or eliminate the ability of a defendant to have the impact of a physical or mental disease, disorder, or defect on his/her ability to conform conduct to the requirements of law be considered by the court when determining responsibility. Increasing the burden of proof on the defendant will make it more difficult for a defendant to prove the impact that a physical or mental disease, disorder, or defect may have had on his/her understanding of what is required by the law at the time of an alleged offense. The proposed changes do not represent updated language per se; however, they do represent an alternative approach to determining the role that a mental disease or disorder played

in a defendant's alleged conduct and are consistent with changes made to the federal insanity statute in 1984. Many states currently utilize a strict or modified version of the Model Penal Code's recommended insanity statute along with Hawaii and have not changed their state's statute to mirror the federal standard.

The bill proposes to change the language regarding the professional discipline of appointed examiners. In felony cases, HRS currently provides for the court appointing at least one psychiatrist and at least one licensed psychologist and a third professional which may be a psychiatrist, licensed psychologist, or qualified physician. In non-felony cases the court may appoint either a psychiatrist or a licensed psychologist. The proposed changes in this bill eliminate a "psychiatrist" as one of the professionals and replace it with a "qualified physician." The proposed changes may have effects which the DOH is not able to adequately assess.

Examinations ordered by courts pursuant to HRS §704-404 in almost all cases, involve an evaluation of a mental disease, disorder, or defect which requires the expertise of a forensic mental health professional. Current statutory language allows the addition of a qualified non-psychiatric physician if indicated. There is no clear purpose served by changing the statutory language to eliminate the term psychiatrist and enable the addition of two non-psychiatric physicians to a panel of three examiners in felony cases.

We have indicated to you previously and indicated to other stakeholders that policy changes will be required. We have determined that some modest adjustment in statute pertaining to (e.g. forensic exam procedures) will be critical in improving the efficient utilization of resources, addressing public safety and supporting the rights of defendants. We appreciate this

committee's willingness to be open to modifying fundamental issues of policy. We continue to be willing to work with this committee and other stakeholders on future revisions addressing potential policy changes.

Thank you for the opportunity to testify.

Offered Amendments: None.

Testimony of the Office of the Public Defender, State of Hawaii to the House Committee on Health

February 5, 2016

H.B. No. 1806: RELATING TO CRIMINAL PROCEDURES

Chair Belatti and Members of the Committee:

We oppose passage of H.B. No. 1806. This bill would radically change the legal standard under which a criminal defendant would be declared not penally responsible due to physical or mental disease, disorder or defect in our state courts. Under this measure, our current standard would be replaced by the standard used in the federal court system.

There is no justification for changing the standard by which our state courts have been governed for decades. Changing this standard would abolish many years of Hawaii caselaw and jurisprudence which have interpreted this area of the criminal law. There has been no stated need for changing the standard nor have there been any cited instances of injustice which have occurred as a result of the present rule of law.

The bill also imposes a higher burden of proving the defense on the defendant. The proposal would change the burden of proof from the present "preponderance of the evidence" to "clear and convincing evidence." A defense of non-responsibility due to mental disease, disorder or defect is already a very difficult defense to assert. The proposed change in the burden of proof is not justified. The subjective nature of the field of psychology and psychiatry makes it very difficult for professionals to state their conclusions in terms of "clear and convincing evidence."

Finally, the bill allows for one or three examiners to be appointed in felony cases on the issue of fitness to proceed. We would oppose the option to decrease the numbers of examiners in fitness examinations from the current required number of three. We find that oftentimes, there is a disagreement on fitness to proceed between examiners on current panels. The appointment of a single examiner would not assure a correct resolution on this issue.

Thank you for the opportunity to provide testimony in this matter.

DEPARTMENT OF THE PROSECUTING ATTORNEY
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THE HONORABLE DELLA AU BELATTI, CHAIR
HOUSE COMMITTEE ON HEALTH
Twenty-Eighth State Legislature
Regular Session of 2016
State of Hawai`i

February 5, 2016

RE: H.B. 1806; RELATING TO FORENSIC CRIMINAL PROCEEDINGS.

Chair Au Belatti, Vice-Chair Creagan, and members of the House Committee on Health, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony, in opposition to H.B. 1806.

The purpose of H.B. 1806 is to (1) revise the statutory provisions regarding a defendant's mental capacity, (2) provide courts with more flexibility regarding the number of examiners required to complete a mental health evaluation of a felony defendant, (3) alleviate delays in a defendant's mental competency determinations, and (4) to protect the procedural due process rights of defendants. By allowing the court to appoint any less than three (3) health professionals to conduct a mental health evaluation in a felony case would no doubt assist in judicial efficiency. However, the reduction in the amount of health professionals involved would inherently decrease the reliability of the results. If this change went into law, every class B and class C felony case that calls for a mental fitness determination would be decided on the opinion of 1 examiner, without the benefit of a "second (or third / 'tie-breaker') opinion." Perhaps most alarming, even the mental fitness of a defendant charged with class A felonies—the most serious crimes in Hawai'i—could be determined by 1 examiner.

Because assessment of one's mental condition is not a black-and-white science, and is often subject to differing opinions, it is crucial that the court and all stakeholders have the benefit of receiving multiple opinions in every felony case, to most accurately assess that defendant's mental condition. Please keep in mind that, while our criminal code categorizes offenses into class A, B and C felonies, that alone does not distinguish the "dangerousness" of an individual. In fact, there are very dangerous people coming through our court system at every level of felony crime, and limiting these mental examinations to the opinion of 1 examiner would be detrimental to accurately determining whether these individuals are fit to stand trial.

Decreasing the number of examiners from 3 down to 1 would also eliminate the additional precaution of having at least one psychiatrist and at least one psychologist per felony fitness

examination. It is our understanding that psychiatrists and psychologists have different areas of expertise, and thus provide slightly different perspectives on each defendant.

The Department strongly believes that HRS §707-704 currently contains appropriate safeguards that are crucial to ensuring the most accurate result in felony fitness proceedings, and further believes that these safeguards are warranted for all class A, B and C felony cases where the defendant's mental fitness is in question.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes H.B. 1806. Thank for you the opportunity to testify on this matter.

Testimony on HB 1806

Scheduled for Friday, February 5, 2016 at 1015 am

Harold V. Hall, PhD, ABPP, Director

Pacific Institute for the Study of Conflict and Aggression

I am in strong support of HB 1806 relating to criminal proceedings and mental health evaluations as described under HRS Sections 704-400, 704-402, and 704-404. As the director and founder of the nonprofit Pacific Institute, I have held many approved workshops in Hawaii on methamphetamine abuse, violence risk analysis, forensic evaluation, and domestic and criminal violence, and authored 14 peer-viewed books and on forensics and violence-related topics which form the basis for the empirically grounded recommendations in this bill. Since the 1970s, I have conducted over 1000 sanity evaluations for both the State of Hawaii and the federal government. Representative Cindy Evans, a long-term advocate for mental health and homelessness, helped formulate this bill in a manner that is of benefit to almost all stakeholders.

If enacted into law, the proposed legislation has a real chance of producing substantial savings for Hawaii and incorporates other compelling advantages as listed below. The purpose of this bill is to help alleviate a worsening but largely preventable mental health crisis in Hawaii's detention facilities and bring about overdue changes in Hawaii Revised Statutes (HRS) where mental health professionals are involved in sanity evaluations.

The proposed legislation has significant advantages and benefits and was designed to: (1) replace our current obsolete and confusing test of insanity in Hawaii with that utilized by the federal government in the majority of states, (2) expand the availability of much-needed qualified mental health examiners to conduct sanity examinations, thus helping alleviate the backlog in sanity evaluations, and (3) give judges the discretion in felony cases to appoint 1 instead of 3 qualified mental health experts to conduct stand-alone examinations for fitness to proceed. This is already done in misdemeanor cases and would likely reduce the number of defendants coming to trial with no loss of procedural (due process) safeguards. The effect of the bill if enacted into law would likely (4) reduce the onset/exacerbation of mental conditions caused by the oftentimes toxic and debilitating detention environment in our County jails and Hawaii State Hospital. Since a significant number of defendants are both mentally ill and homeless, indirect beneficial effects for the homeless population can be anticipated; (5) lessen cumulative stress and time involvement by the court and those persons involved in custody, forensic evaluation, legal representation, and pre-sentence evaluation; and (6) increase the reliability and validity of defendant-specific information in the criminal responsibility evaluations. This would provide the basis for sound program evaluation.

Some history and a detailed analysis of the basis for the recommended changes follow:

(1) Regarding our current test of insanity, numerous problems for sanity examiners and other forensic professionals have emerged in Hawaii and other states when using the outmoded American Law Institute/Model Penal Code (ALI/MPC) formation. These include

but are not limited to: (a) the near-impossibility of defining what is "substantial", the definitions varying among sanity examiners, authoritative writings, and government publications; (b) the conceptual difficulty in assuming *mens rea,* which always involves the intention to commit the alleged crime and is clearly a cognitive event, caused by a volitional/behavioral impairment in regards to conforming one's behavior to the requirements of the law. Historically, the insanity defense reflects the centuries-old notion that persons who cannot appreciate the consequences of their actions should not be punished for criminal acts caused by mental incapacity. The addition of volitional impairment came in the first half of the 20th century on the heels of psychoanalysts who, generally using psychodynamic theories of behavior that were not empirically supported, encouraged courts to recognize an irresistible-impulse defense. This test of insanity enjoyed a short life but was rejected by most states, and only survived when added to tests of insanity that had a cognitive component; (c) the emergence nationally and in Hawaii of more psychopathic/sociopathic personality disordered defendants over the last several decades who have exploited the conceptually more inclusive ALI/MPC formulation and utilized other strategies to receive a diagnosis reflecting a genuine, sufficiently severe psychiatric disorder, and/or have attempted a crossover to the mental health system to avoid the correctional system. Hawaii has unfortunately had its share of severe psychopaths/sociopaths who were exculpated on the grounds of insanity, were sent to Hawaii State Hospital or other forensic facilities, and continued in their psychopathic ways, sometimes becoming a major disruption on particular wards and psychiatric programs, and recidivating criminally when released. (Nationally and in Hawaii, 95+% of all persons found Not Guilty by Reason of Insanity (NGRI) are committed to a state hospital). To add to the confusion, many psychopaths/sociopaths, who cannot be diagnosed as such in Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), meet the criteria for Antisocial Personality Disorder (APD) even while mental health professionals including forensic professionals tend to avoid this diagnosis. HRS 704-400 weakly attempts to deal with this problem by stating: "As used in this chapter, the terms physical or mental disease, disorder, or defect do not include an abnormality manifested only by repeated penal or otherwise anti-social conduct".

Other problems with the volitional arm are redundancy and obsolescence. The volitional arm is redundant in light of advances in behavioral science and neurosciences that have yielded more reliable and valid information that can be utilized for forensic purposes. There is no need for the volitional arm. Any diagnosed physical or mental disorder that gives rise to a mental disease, disorder or defect can be subsumed under the cognitive arm of the test of insanity in Hawaii using the DSM-5 or International Classification of Diseases, 10th Edition. Neuropsychological testing, in the last several decades, as an illustration, allows the sanity board member to proffer well-validated conclusions referable to neurocognitive conditions associated with disinhibition, motor deficiencies, and problems in frontal/anterior integration. The Dense-Array EEG (DEEG), as another illustration of a technological advance, administered to measure cognitive events such as cortical dysfunction, is many times more accurate than the traditional EEG or Quantitative EEG (QEEG), yielding far fewer false negatives. In general, sanity examiners, in deference to the well-established principle that *cognition* is the driving force behind actions, can use newer methods and models that incorporate most if not all of the

deficiencies and incapacities of the defendant, even those associated with loss of self-control or impulsivity.

In 1984, the Federal standard was changed to the stricter version that limits the insanity defense to those with severe mental illness who are unable to appreciate the wrongfulness of their acts. The volitional arm was dropped and only the cognitive component remained. The defendant's ability to control behavior was no longer a consideration. Studies in the mental health-law literature, suggest that the Federal statute lessened the number of inappropriate insanity pleas. (Nationally, the insanity defense is used only in about 1 % of the cases and is successful in less than 25% of the time). Besides representing a more parsimonious test of insanity, the literature indicates that the *federal test of insanity does not diminish the procedural (due process) safeguards for the defendant.* Other studies point to increased pre-trial collaboration between the defense and prosecution.

Concerning competency to stand trial, the HRS requirement for a 3-member sanity panel examination in felony cases for both fitness to proceed and criminal responsibility (as part of a single examination) is unnecessary and a major impediment in bringing defendants to trial. This is true as well for stand-alone fitness evaluations in felony cases with the current HRS language. The delays are burdensome to the defendant, examiners, court officers, pre-sentence probation officers, and others. Upon the defendant filing notice of intention to rely on an insanity defense, the court will likely suspend all further proceedings, thus delaying the trial and making it more likely that defendants who are not on bail or released on their own recognizance, will suffer from the effects of incarceration or untoward events, as discussed above, allowing for the onset or exacerbation of mental conditions in defendants. In almost all cases, pretrial detention of significant duration makes the question of determining criminal responsibility of the defendant an exceptionally difficult task. Sometimes it cannot be done except at further suffering by the mentally ill defendant. Where defendants are suffering from the effects of incarceration superimposed a mental illness, the sanity examiner has the extremely difficult task of (1) differentiating between mental conditions or deficiencies suffered by the defendant prior to detainment from mental conditions or deficiencies occurring after detention in County jails and/or forensic facilities, (2) attempting to contact knowledgeable/significant others for the sanity report database who may be unavailable due to delays, (3) assessing for deception and distortion for both the time of the alleged offense and time of the evaluation; new or exacerbated conditions as a result of detainment will likely confuse the issue and render an examination suspect, and (4) occasionally conducting repeat examinations, and (5) after the sanity examination, in court or other venues, attempting to maintain that proffered conclusions for the time of the instant offense are reliable and valid despite the introduction of new information, confounds, contaminated data, and the potential biasing effects of additional (non-sanity board) examiners who may examine the defendant, for example, at Hawaii State Hospital.

Fitness to proceed examinations are focused on current status as opposed to the much greater difficulty in analyzing the past for criminal responsibility or prognosticating the future for violence risk, the latter a HRS requirement if an exculpating disorder is rendered. There are several brief but reliable and valid psychological tests available to

ascertain whether the defendant knows the nature of the legal proceedings, can cooperate and can rationally consult with the his or her attorney in preparation for court, or has a mental condition that precludes fitness to proceed.

In sum, the enactment of HB 1806 into law would likely provide substantial benefit to the courts, forensic professionals, defendants, the State of Hawaii in terms of logistical considerations, and to the greater community.

End of testimony

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, February 03, 2016 10:55 PM
To: HLTtestimony
Cc: louis@hawaiidisabilityrights.org
Subject: Submitted testimony for HB1806 on Feb 5, 2016 10:15AM

HB1806
Submitted on: 2/3/2016
Testimony for HLT on Feb 5, 2016 10:15AM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Hawaii Disability Rights Center	Comments Only	No

Comments: We have been very concerned about the backlog in evaluations of defendants for penal responsibility or fitness to proceed. However, rather than seeing a diminution in the quality of justice provided to these individuals, hiring more evaluators is preferable.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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Hawai‘i Psychological Association

For a Healthy Hawai‘i

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TO: Representative Della Au Belatti, Chair
Representative Richard P. Creagan, Vice Chair
Committee on Health

TESTIMONY IN OPPOSITION TO HB 1806
RELATING TO CRIMINAL PROCEEDINGS
Friday, February 05, 2016, 10:15 a.m., Room 329

The Hawaii Psychological Association is opposed to HB1806. Recent research in Hawaii by Drs. Neil Gowensmith and Marvin Acklin indicates that the level of agreement between three panelists is relatively low for all areas of forensic mental health decisions. Agreement is highest for fitness to proceed, lowest for dangerousness and intermediate for penal responsibility. In following patients on conditional release (CR), Dr. Gowensmith found that the only differentiating factor between those who succeeded on CR and those who were re-hospitalized was evaluator agreement on their original application for CR. When all evaluators agreed on a person's readiness for CR, people were re-hospitalized 35% of the time. In cases in which evaluators disagreed the re-hospitalization rate skyrocketed to 75% so disagreement is a very strong predictor. Examiners are not interchangeable.

Without a three panel system, judges would lack important information. Judges strongly benefit from consensus panels (three agreements or two versus one), utilizing the consensus in almost 100% of cases in their determinations. When there are non-consensus three panels, usually when there is disagreement between two raters and a no opinion rating which occurs surprisingly often, judges at least have the benefit of seeing the three independent reports. The bottom line is that the quality of justice meted out in cases of mentally ill defendants will be sacrificed due to financial considerations if HB1806 is passed into law. The cost of errors in judicial decision making is highly consequential in that a dangerous defendant may be released, a safe defendant may be detained, a non-competent defendant may go on trial, a competent defendant may be hospitalized, an insane defendant may go to prison and a sane defendant may be acquitted.

Currently there is no system in place to certify the quality of three panel examinations in Hawaii. Passage of HB1806 without implementation of quality controls means judges may be relying on just one or two evaluations of relatively low quality. Without three evaluations judges would often be lacking an adequate database to support their opinions.
Hawaii's three panel system has been held out as a national model to ensure the independence of evaluations. Dr. Dan Murrie of the University of Virginia has conclusively demonstrated systematic bias in defense/prosecutor retained evaluations. Without a three panel system, there is likely to be an increase in evaluations paid by the defense and/or prosecution which occurs frequently in other states.

Evidence from other states also demonstrates that there will likely be increased court delays if SB1806 is passed. Delays can best be addressed by training and hiring more examiners. Colorado has a one panel system. Often one evaluation is considered insufficient and another exam is ordered which is time consuming. New York has a two panel system. If there is disagreement in New York, then a third evaluation is ordered which also slows the process.

Finally we are not convinced that the current insanity criterion leads to court delays or wrong decisions. Approximately 22 other states also use the American Law Institute insanity criterion, used in Hawaii, without adverse results. We are concerned that eliminating the volitional prong could lead to wrongful conviction of defendants suffering from acute manic states. We are unaware of any consensus from the legal community to change the insanity criteria in Hawaii and believe it is unwise to proceed in the absence of such a consensus.

Thank you for the opportunity to testify against HB1806.

Sincerely,

Ray Folen, Ph.D.
Executive Director

To: Health Committee, hearing on Friday, February 5, 2015, 10:15 AM

Re: Testimony submitted for HB 1806

From: Marvin W. Acklin, PhD, Independent Practice, Honolulu (Marvin W. Acklin, PhD, PC).

To the Committee:

I am a clinical and forensic psychologist practicing in Honolulu since 1989.

I have conducted approximately 500 court-appointed mental examinations ("three panels") for fitness to proceed, criminal responsibility, conditional release, and discharge from conditional release.

I have undertaken research on three panels since 2007. We have published 5 peer-reviewed articles in forensic mental health journals, examining report quality, decision-making in examiners, and judges, and consensus between examiners and judges. Citations to these studies are listed below.

HB 1806 is a complex piece of proposed legislation that several important topics in the functioning of the public forensic mental health system and Judiciary. These include redefining the insanity statute and reconstitution of three panels where a defendant is mentally ill. Accordingly, it deserves careful consideration.

This written testimony will only address the issue constitution of three panels.

The legislation proposes changing the current constitution of examiners.

The preamble to the bill makes assertions that Hawaii's three panel system is "problematic and inefficient." Further, it is asserted that "requiring three examiners in all felony fitness examinations has contributed to delays of some defendants from penal custody to more appropriate hospitalization."

First, these are unsubstantiated assertions. Those making these assertions should produce data supporting their assertions, specifically on the issue of

inefficiencies and delay. Legislative reform should be based on sound empirical information to clearly identify inefficiencies and impacts od various stakeholders in the system (defendants, mnetal health and penal systems, and the Judiciary).

Second, the alleged causes of these inefficiencies and delays are wrongly attributed to Hawaii's approach to the adjudication of mentally ill defendants. It is well known in the professional and legal community that problems in the Courts and Corrections branch of the Department of Health, including under staffing of examiners and organizational dysfunction, has been a source of delay.

To function efficiently, the C & C branch, which under the current statutory scheme plays an important role, needs to be fully staffed with competent forensic examiners and support staff. This includes appropriate compensation structures for these highly trained mental health specialists.

Third, our research examined panel agreement and how judges utilize three panels in their determinations. These studies were conducted against a background of national concerns about the quality of forensic evidence submitted to courts (National Research Council, 2009). Of particular concern are shoddy methods, bias, and errors in forensic and judicial decision-making.

We applied statistical techniques which model judicial consensus using one, two, and three examiner opinions in the case of fitness to proceed (CST), criminal responsibility (NGRI), and post-acquittal conditional release (CR).

Generally speaking, levels of agreement for CST meet minimal scientific requirements. This is likely a function of the lower degree of complexity and inference in the examination process, based on the defendant's *current* mental status. Although not entirely satisfactory, this means that judge's will receive reliable information regardless of the examiner on CST.

For NGRI, level of agreement for three panels was fair to poor. This is likely due to the fact that NGRI determinations are complex and require a high level

of inference, making a *retrospective* determination of a defendant's mental state at the time of the crime.

For CR, levels of agreement were very poor to inferior. These highly consequential decisions, about the release of a postacquittal defendant, often involving crimes of violence, are also highly complex, inferential, and require a risk assessment of *future* dangerousness.

These findings indicate that the findings submitted to judges for NGRI and CR are highly inconsistent, that is, examiners are not interchangeable. When you have poor agreement in the panel, it means the judge is not getting good information.

In other words, judges cannot count on the examiners to be consistent in their decision-making. The three panel system is a powerful antidote to this problem, since the judge has three independent examinations at his or her disposal.

We also examined the manner in which judges used panel consensus in their determinations. In cases where the was a consensus of three or two examiner opinions, judges tended to agree with the panel upward of 90% of the time.

Bottom line, three panels improve the reliability of judicial determinations.

Until three panels achieve acceptable levels of NGRI and CR agreement, examiners are not interchangeable and under the proposed legislation judges will be getting only one (or two) opinions. Our study examined split decisions on panels and judicial determinations, the most difficult situations.

Poor agreement for NGRI and CR limits the reliability of information provided to the judge and introduces errors into the determinations. The costs of errors are significant to defendants, the legal system, and society.

For this reason, I would urge the committee to defer this bill for further study, if it is not actually tabled. Examination of the assertions upon which the bill is proposed demand empirical support, including whether a shift to create

"efficiency" will undercut the quality of forensic evidence and decision-making upon which the Judiciary is vitally dependent.

Thank you for your attention and consideration.

Marvin W. Acklin, PhD, ABAP, ABPP
Board-certified Clinical, Assessment, & Forensic Psychologist
Associate Clinical Professor of Psychiatry, John A Burns School of Medicine
Honolulu, Hawaii

References

Acklin, M.W., & Fuger, K. (in press). Assessing field reliability of forensic decision-making. *Journal of Forensic Psychology Practice.*

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Testimony HB 1806
February 5, 2016
Neil Gowensmith, PhD

To: Health Committee, hearing on Friday, February 5, 2015, 10:15 AM

Re: Testimony submitted for HB 1806

From: Neil Gowensmith, PhD (Denver Colorado)

To the Committee:

I am a clinical and forensic psychologist. I am the former forensic chief for the Adult Mental Health Division (AMHD).

I have consulted and testified on competency wait times in several states, including Hawaii, Iowa, Washington, Colorado, and Texas. The issue is sadly not limited to Hawaii.

I have undertaken research on three panels since 2007. My co-authors and I have published multiple peer-reviewed articles in forensic mental health journals, examining report quality, decision-making in examiners, and judges, and consensus between examiners and judges.

I would like to address the issue constitution of three panels embedded in several bills before the committee, including HB 1806. The legislation proposes changing the current constitution of examiners.

The preamble to the bill makes assertions that Hawaii's three panel system is "problematic and inefficient." Further, it is asserted that "requiring three examiners in all felony fitness examinations has contributed to delays of some defendants from penal custody to more appropriate hospitalization."

These are unsubstantiated assertions which deserve empirical evidence in order to be taken seriously. Delays occur in Hawaii, as they do all over the country, for a variety of issues. Waiting for evaluators is not an issue in other states or jurisdictions, and yet those states continue to face long wait times and delays. Reducing the number of evaluators will have a minimal impact on wait times, whereas improvements to other systems barriers will yield greater results (more

screenings at court, education with courts and legal professionals regarding referrals, preventative mental health care, etc.).

A major fix would be to bolster the current staffing and resources for the Courts and Corrections branch of AMHD. As the former chief of that department, I can vouch for the dedication and expertise of the staff currently employed there – as well as the woefully substandard professional conditions to which they are subjected. Forensic mental health evaluations cannot be conducted on an ever-increasingly fast conveyor belt, yet that is what the C&C branch is facing. Referrals go up, staffing stays low, delays result. I have made recommendations to the state of Washington to increase the number of evaluators as well as the pay for those evaluators. Those measures have been adopted (they employ more than 50 evaluators currently, an increase of nearly 100%), and the delays have been minimized.

Third, our research examined panel agreement and how judges utilize three panels in their determinations. These studies were conducted against a background of national concerns about the quality of forensic evidence submitted to courts (National Research Council, 2009). Of particular concern are shoddy methods, bias, and errors in forensic and judicial decision-making. In a snapshot, reliability was poor – just relying on one evaluation will put the defendant and the pursuit of justice in peril. These are tough, complex, high-profile cases that merit multiple pairs of eyes on them to ensure that the court makes the most well-informed opinions possible. We should not cut corners on this process. The defendant's civil liberties, the public's safety, and the taxpayer's dollars are all at stake.

For these reasons, I urge the committee to defer or table this bill for further study. Examination of the assertions upon which the bill is proposed demand empirical support, including whether a shift to create "efficiency" will undercut the quality of forensic evidence and decision-making upon which the Judiciary is vitally dependent.

Thank you for your attention and consideration.

Neil Gowensmith, PhD
Clinical & Forensic Psychologist
Assistant Clinical Professor, University of Denver
Director, Denver Forensic Institute for Research, Service, and Training
Denver, CO