TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2020

ON THE FOLLOWING MEASURE:
S.B. NO. 2033, RELATING TO THE ADMINISTRATION OF JUSTICE.

BEFORE THE:

SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

DATE: Wednesday, January 29, 2020 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): Clare E. Connors, Attorney General, or
Debbie L. Tanakaya, Deputy Attorney General

Chair Baker and Members of the Committee:

The Department of the Attorney General offers the following comments.

This bill, in part, adds a section to the Hawaii Penal Code that supplants current procedures when a non-violent petty misdemeanor or non-violent misdemeanor defendant is determined to lack fitness to proceed. This bill would require a dismissal of charges and a diversion to the custody of the director of health to be placed in an appropriate facility for assessment, care, and treatment for up to seven days. It also amends the requirements for fitness determination hearings, court-appointed examiners, and examination reports.

The mandatory diversion of defendants lacking fitness to proceed in a criminal case, found in section 1, page 1, lines 4-17, of the bill, raises constitutional due process concerns because it does not require a finding that the defendant poses a danger to self or others. The Ninth Circuit Court of Appeals, in Suzuki v. Yuen, 617 F.2d 173 (1980), held that it is unconstitutional to commit a defendant who does not pose an imminent danger, and opined that "in drafting involuntary commitment statutes, states should be cognizant of the 'significant deprivation of liberty.' "

Current law allows for the commitment of a non-violent petty misdemeanor and non-violent misdemeanor defendant found unfit to proceed. Upon a finding of unfitness to proceed, section 704-406(1), Hawaii Revised Statutes (HRS), provides for the

commitment of a defendant, found to be a danger to self or others, to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment for up to sixty days for non-violent petty misdemeanors and one hundred twenty days for non-violent misdemeanors.

Furthermore, section 704-406(7), HRS, provides that upon the dismissal of non-violent petty misdemeanor or non-violent misdemeanor charge(s), and a finding of imminent danger to self or others, the court may commit an individual to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment for up to ninety days.

Our office is available to work further with the Committee to address the intent of this measure.

Thank you for considering our comments.

DAVID Y. IGE
GOVERNOR OF HAWAII

BRUCE S. ANDERSON, PHD
DIRECTOR OF HEALTH

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LATE

Testimony COMMENTING on S.B. 2033
RELATING TO ADMINISTRATION OF JUSTICE

SENATOR ROSALYN H. BAKER, CHAIR
SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

Hearing Date and Time: Wednesday, January 29, 2020 at 9:30 a.m. Room: 229

Department Position: The Department of Health ("Department") strongly supports the intent of this measure offering comments and proposed amendments.

Department Testimony: The subject matter of this measure intersects with the scope of the Department's Behavioral Health Administration (BHA) whose statutory mandate is to assure a comprehensive statewide behavioral health care system by leveraging and coordinating public, private and community resources. Through the BHA, the Department is committed to carrying out this mandate by reducing silos, ensuring behavioral health care is readily accessible, and person-centered. The BHA's Adult Mental Health Division (AMHD) provides the following testimony on behalf of the Department.

The Department supports the development of opportunities for diversion of individuals who are living with behavioral health issues into treatment. Providing alternative pathways for individuals with lower level charges when found unfit though an expedited fitness evaluation process is a goal we share in common with the Judiciary. The Department has worked closely with the Judiciary to develop more appropriate and effective pathways for this population. If the court-based certified examiner concept is adopted for non-felony cases, the AMHD intends to implement this process starting with the First Circuit while building additional capacity to implement at remaining Circuit court locations.

Respectfully, the Department defers to the Judiciary on items in the bill that impact judicial proceedings but generally agrees with the amendments offered in their testimony. Additionally, we would like to emphasize the following suggested amendments:

Offered Amendments:

1) We respectfully propose that page 11, lines 13-20 AND page 13, lines 5-10 be amended to read: "In each case, the court shall appoint as examiners psychiatrists, licensed psychologists, or qualified physicians. One of the three shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health"
2) We respectfully recommend that the term "appropriate institution" be replaced with "hospital or other suitable facility" throughout the measure for consistency and to allow for flexibility of placement of patients committed to the custody of the Director of Health.

Thank you for the opportunity to testify.

Fiscal Implications: Undetermined.

STATE OF HAWAI'I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai'i to the Senate Committee on Commerce,
Consumer Protection, and Health**

January 27, 2020

S.B. 2033: RELATING TO THE ADMINISTRATION OF JUSTICE

Chair Baker, Vice Chair Chang, and Members of the Committee:

The Office of the Public Defender respectfully opposes S.B. No. 2033, which would greatly increase the pre-trial (pre-hearing) incarceration time for criminal defendants charged with petty misdemeanors and misdemeanors. The length of time for a determination of fitness and for an outcome of a petition for assisted community treatment will be substantial. Therefore, if this bill is enacted, the pre-trial/pre-hearing incarceration time for a defendant charged with a petty misdemeanor offense will far exceed the maximum jail sentence.

Litigating a petition for assisted community treatment is a very lengthy process. Currently, there are five petitions pending in the family court:

Date Filed	Case Name	Next Court Date	"Trial" Date
09.18.19	J.Y.	03.17.20	03.17.20
11.27.19	J.W.	01.29.20	02.25.20
11.27.19	Z.G.	02.13.20	03.09.20
11.27.19	E.H.	01.30.20	
11.27.19	S.L.	02.20.20	03.04.20

Based on the above, a defendant who is found unfit and recommended for assisted community treatment can expect lengthy delays before his/her petition will be resolved. While waiting for the outcome of his/her petition for assisted community treatment, the defendant will likely be placed in a correctional facility such as the Oahu Community Correctional Center (O.C.C.C.) despite the bill's language stating that they "may be held at the appropriate institution pending the family court hearing on the petition for assisted community treatment." (Currently, many, if not all, of the defendants who are pending a determination of fitness are held at O.C.C.C.). This is in addition to the time spent in custody at O.C.C.C. while waiting for a determination of fitness, which is a minimum of thirty days. (Also, it is not uncommon that additional time is required for the completion of a fitness evaluation). Therefore, a defendant charged with a petty misdemeanor or misdemeanor will spend several months in custody before his/her petition for assisted community treatment is resolved.

Litigating a petition for assisted community treatment is time consuming because the subject of a petition for assisted community treatment often cannot assist his/her attorney. Therefore, the attorney cannot obtain consent from the subject to stipulate to the admission of any evidence or stipulate to the petition. Indeed, the family court may not even accept any stipulations, as the family court is not able to conduct a meaningful colloquy with the subject in waiving any procedural matters.

Another consequence of referring defendants who are found unfit to proceed to assisted community treatment is that the outcome of petitions for those subjects who are not in the care of custody of the director of health (i.e., the homeless) will be delayed. Petitions for defendants detained (i.e., incarcerated) will certainly take (or at least, should take) precedent over petitions for subjects who are in the community.

Finally, the judiciary already has diversion programs in place for mentally ill defendants charged with petty misdemeanors and misdemeanors. The jail diversion program focuses specifically on defendants who have been diagnosed with serious permanent mental illnesses (SPMI) and provides for alternatives to adjudication and incarceration. The current involuntary outpatient treatment laws strike an appropriate balance between individual rights and public safety.

Thank you for the opportunity to comment on S.B. No. 2033.

The Judiciary, State of Hawai'i

Testimony to the Thirtieth State Legislature, 2020 Session

Senate Committee on Commerce, Consumer Protection, and Health
Senator Rosalyn H. Baker, Chair
Senator Stanley Chang, Vice-Chair

Wednesday, January 29, 2020, 9:30 a.m.
State Capitol, Conference Room 229

WRITTEN TESTIMONY ONLY

By
Shirley M. Kawamura
Deputy Chief Judge, Criminal Administrative Judge, Circuit Court of the First Circuit

Bill No. and Title: Senate Bill No. 2033, Relating to the Administration of Justice

Purpose: Amends the effect of finding a defendant charged with a misdemeanor or petty misdemeanor not involving violence or attempted violence unfit to proceed. Amends the requirements of fitness determination hearings, court-appointed examiners, and examination reports.

Judiciary's Position:

The Judiciary appreciates the intent of this proposed bill and in most respects supports the proposed bill, but respectfully suggests that the Committee amend certain provisions for consistency and to correct an error in the previous version of sections 704-411 and 704-414.

SECTION 1, addition of new section to chapter 704-:

The Judiciary respectfully proposes that page 1, lines 12-17 of the bill should be changed to amend proposed additional section to read:

> . . . the court determines that the defendant lacks fitness to proceed, the court may (1) suspend the proceedings and order the defendant to be transferred to the custody of the director of health and placed in an appropriate institution for further examination and assessment, for up to seven days; and/or (2) dismiss the charge(s) with or without prejudice.

SECTION 4, amendment of section 704-411:

The Judiciary respectfully proposes that page 11, lines 13-20 of the bill should be changed to amend subsection (3)(b) to be consistent with the examinations ordered under Section 704-404 (page 5, lines 10-20 of HB1620) and state:

> . . . In each case, the court shall appoint as examiners [~~at least one psychiatrist and at least one licensed psychologist. The third member may be a psychiatrist, a licensed psychologist, or a qualified physician. One~~] psychiatrists, licensed psychologists, or qualified physicians; provided that one of the three shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health. The three examiners shall be . . .

In addition, the Judiciary respectfully requests that the proposed change on page 12, line 13 not be made as it will continue to require an opinion from the examiners on fitness to proceed for reports submitted for the issues of discharge, conditional release, and discharge from conditional release.

As background, the 2016 amendment of section 704-404 removed the diagnosis requirement (what was 704-404(4)(b)), and moved all of the other requirements of what was previously 704-404(4) up a letter and shifting all the requirements from 404(4) to 404(5) (thus making 5(b) a fitness determination), however this change was not carried through to §§ 704-411(3) and 414(3). Therefore, currently, our court-ordered examination reports for post-acquittal dangerousness hearing (704-411(2)) and conditional release, discharge from conditional release, and discharge (704-412 and 413) require the doctors to opine on fitness to proceed despite the statutory provision of § 704-411(5) (which states that defendant's fitness shall not be an issue) and the irrelevance of fitness on a determination of conditional release and/or discharge.

The Judiciary would propose instead the change at page 12, line 13 be:

> 704-404(3), (5)(a), [~~and~~] (b), (d), and (e), (7), (8), (9), (10), and . . .

SECTION 5, amendment of section 404-414:

Similar to the comments on Section 4 above, the Judiciary respectfully proposes that page 13, lines 5-10 should be changed to amend subsection (1) to be consistent with the examinations ordered under Section 704-404 (page 5, lines 10-20 of HB1620) and state:

> In felony cases, the court shall appoint as examiners [~~at least one psychiatrist and at least one licensed psychologist. The third member may be a psychiatrist, a licensed psychologist, or a qualified physician. One~~] psychiatrists, licensed psychologists, or qualified physicians; provided that one of the three shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health. . .

In addition, for the same reasons noted in paragraph above, the Judiciary would propose instead the change at page 13, line 20 be:

> (5)(a), [~~and~~] (b), (d), and (e), (7), (8), (9), (10), and (11).

Thank you for the opportunity to testify on this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY

CITY AND COUNTY OF HONOLULU

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LATE

THE HONORABLE ROSALYN H. BAKER, CHAIR
SENATE COMMITTEE ON HEALTH
Thirtieth State Legislature
Regular Session of 2020
State of Hawai`i

January 29, 2020

RE: S.B. 2033; RELATING TO THE ADMINISTRATION OF JUSTICE.

Chair Baker, Vice-Chair Chang, and members of the Senate Committee on Health, the Department of the Prosecuting Attorney of the City and County of Honolulu (Department) submits the following testimony in strong opposition to S.B. 2033.

The purpose of this bill is to dismiss with prejudice all criminal cases in which the defendant is charged with a misdemeanor or petty misdemeanor "not involving violence or attempted violence" if, at any time during the proceedings, the defendant lacks (mental) fitness to proceed. Such defendant would then be placed in an appropriate institution for up to seven days, while a determination is made whether to pursue involuntary hospitalization, pursue assisted community treatment, or simply discharge and refer to an outpatient mental health program.

First, it is unclear which offenses the new section would be applicable to, as the term "not involving violence or attempted violence" is not defined For example, it is unclear whether the following offenses would be among those dismissed, anytime a defendant is unfit:

- Violation of temporary restraining order (HRS §586-4 or §604-10.5)
- Reckless endangering in the 2nd degree (HRS §707-714)
- Terroristic threatening in the 2nd degree (HRS §707-717)
- Unlawful imprisonment in the 2nd degree (HRS §707-722)
- Custodial interference in the 2nd degree (HRS §707-727)
- Sexual assault in the 4th degree (HRS §707-733)
- Criminal property damage (3rd degree HRS §708-822; 4th degree HRS §708-823)
- Endangering the welfare of a minor in the 2nd degree (HRS §709-904)

- Endangering the welfare of an incompetent person (HRS §709-905)
- Harassment by stalking (HRS §711-1100)
- Soliciation of prostitution near schools or public parks (HRS §712-1209)

The Department is deeply concerned that these types of cases—and perhaps others not yet contemplated—could be summarily dismissed, simply because a defendant is found unfit to proceed. Being unfit for purposes of court proceedings is completely separate and apart from one's mental state at the time the offense took place, and many defendants who are found unfit during the course of a case will "regain fitness" when they receive appropriate treatment.

While it is conceivable that 7 days of treatment could occasionally be sufficient to put a defendant back on course—such that they would regain fitness—the procedure proposed in S.B. 2033 would already have dismissed the case by the time that occurs. As written, we note that S.B. 2033 would not give the court any discretion to consider defendant's past arrest records, or their history of criminal or violent acts, if any, nor could the court consider the likelihood of regaining fitness. The Department is deeply concerned that the State could (potentially) charge someone with a crime—perhaps even a property crime or other "non-violent" offense, which still has a negative impact on the public—then be forced to dismiss the case because the person is unfit...then discharge and refer that person to an outpatient mental health program, with no actual requirement or oversight for that person to obtain or maintain treatment. This could actually occur multiple times, but with no chance of getting a conviction on those lesser offenses, there would be no basis for charging "habitual property crime" or other habitual offenses.

Finally, the Department strongly opposes the proposal to change the current requirement in felony cases—where three examiners are appointed to determine a defendant's fitness to proceed—to have at least one psychiatrist and at least one licensed psychologist among those examining the defendant. It is our understanding that these are two distinct but equally important fields that specialize in addressing different aspects of a person's mental state. If one of these views is lost, it inherently increases the likelihood of missing some important aspect of the analysis, and decreases the reliability of the outcome.

While the Department can appreciate efforts to streamline mental health assessments that are done for court purposes, S.B. 2033 would do so at the expense of public safety and welfare—which is the Department's primary concern—and as such, the Department cannot support this measure.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly opposes the passage of S.B. 2033. Thank you for the opportunity to testify on this matter.

MICHAEL P. VICTORINO
MAYOR

OUR REFERENCE

YOUR REFERENCE

POLICE DEPARTMENT
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TIVOLI S. FAAUMU
CHIEF OF POLICE

DEAN M. RICKARD
DEPUTY CHIEF OF POLICE

January 24, 2020

The Honorable Rosalyn H. Baker, Chair
The Honorable Stanley Chang, Vice Chair, and
Members of the Committee on Commerce,
Consumer Protection, and Health
The Senate
Hawaii State Capitol
Honolulu, Hawaii 96813

RE: Senate Bill No. 2033 – Relating to the Administration of Justice

Dear Chair Baker and Members of the Committee on Commerce, Consumer Protection, and Health:

The Maui Police Department supports the passage of S.B. No. 2033. The issue of mental health has plagued our community over the years resulting in the incarceration of numerous non-violent defendants charged with low-level and petty misdemeanors within our already over populated state prison facilities. As a result, the defendants who are in need of mental health treatment are sitting idle within these facilities without receiving much needed services. The cost of incarceration is costing taxpayer money as well as a high rate of recidivism upon release of these defendants because of the lack of treatment available.

This bill would enable the defendant an opportunity to be turned over to the custody of the Director of Health and placed in an institution for detention, assessment, care, and treatment for up to seven days. This is a win-win situation for the defendant, their family members and the community as a whole. It would allow the defendant's mental health clinical team to adequately focus on the proper treatment plan for the defendant which will ultimately lower the recidivism rate, decrease the prison population, allow the defendant to reintegrate back into the family and society to include re-employment, and lower the burden on taxpayers.

The Maui Police Department asks that you support the passage of S.B. No. 2033

Thank you for the opportunity to testify.

Sincerely,

Tivoli S Faaumu

TIVOLI S. FAAUMU
Chief of Police

SB-2033
Submitted on: 1/24/2020 7:35:12 PM
Testimony for CPH on 1/29/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Testifying for Hawaii Disability Rights Center	Comments	Yes

Comments:

We think the intent of this bill has merit and deserves further discussion. It appears to seek to screen defendants found not fit to proceed for either civil commitment or assisted community treatment. That makes sense and might be a way to bring people into the system and provide treatment that would not be available currently. don't know how many people who are found unfit to proceed will actually meet these criteria so it remains to be seen if this will be successful. But it is worth exploring. We do like the idea of dismissing the charges in the minor non violent cases as it would help avoid clogging up the courts and jails with people who really do not need to be there. It also would avoid some of the stigma that comes from the "criminalization of the mentally ill". Some of the timelines that are specified might need to be looked at more closely. For instance, we are not sure if a two day timeline for a fitness evaluation is realistic. suspect it may not be. would certainly be interested in working with the Committee and relevant stakeholders to further develop and refine this proposal if the measure is advanced.

Hawai‘i Psychological Association

For a Healthy Hawai‘i

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Committee on Commerce, Consumer Protection and Health
Senator Rosalyn H. Baker, Chair
Senator Stanley Chang, Vice Chair

Wednesday January 29, 2020, 9:30 AM
Conference Room 229

Testimony in STRONG OPPOSITION to SB 2033

SB 2033 aims to achieve the laudable goal of reducing the criminalization of mental illness in Hawai‘i. It is our opinion that, if passed, this bill would unfortunately fail to achieve this aim because it departs from the Massachusetts best-practice model of two-day screening for defendants with court-ordered fitness to proceed evaluations. Instead, SB 2033 mandates a final opinion, not a screening, on fitness to proceed within two days. This does not allow an examiner to review previous treatment or jail records. The examiner would be "flying blind" which would result in an unacceptably high error rate, thus increasing the likelihood that a truly unfit to proceed individual would be prosecuted.

This bill is a critical departure from acceptable assessment practice such that in many, if not most, cases an ethical examiner would not be able to arrive at an opinion. Massachusetts has a two-step process: a screening is administered within two days and then a full evaluation of fitness to proceed is conducted after the necessary information is gathered. SB 2033 does not address the need for funding to hire additional examiners who could perform screens and then recommend cases be evaluated in the hospital, civilly committed instead of prosecuted, or diverted into community treatment.

Under SB 2033 persons who are found unfit to proceed within two days of referral would be committed to the Hawai‘i State Hospital for seven days and then have their charges dropped. However, this bill is only applicable when a court-based clinician is available. On our neighbor islands especially, a court-based evaluator would likely not be available, and thus defendants would have differential procedures based on geography and staffing. If this bill becomes law, some individuals found unfit to proceed would have their charges dropped after seven days while others would wait at least four weeks in jail for the fitness exams.

Other consequences of the seven day State Hospital commitment are that individuals who are found unfit to proceed within two days secondary to the effects of crystal methamphetamine would not be allowed fitness to proceed even if their their substance-induced psychotic symptoms clear within four to six weeks. The State Hospital census would then increase becuase currently many patients in jail respond adequately to psychiatric medication within four to six weeks and are subsequently found fit to proceed. State Hospital intakes and discharges are very time consuming; the influx of new seven-day State Hospital commitments would divert resources from the care of patients with longer hospitalizations.

The Hawai‘i Psychological Association strongly urges you to oppose SB 2033.

Thank you for your consideration.

Julie Takishima-Lacasa, PhD, President
Chair, Legislative Action Committee
Hawai‘i Psychological Association

LATE

SB-2033
Submitted on: 1/28/2020 9:39:04 PM
Testimony for CPH on 1/29/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Pat McManaman	Individual	Support	No

Comments: