



Rodney A. Maile
ADMINISTRATIVE DIRECTOR

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December 9, 2022

Via electronic submission

The Honorable Ronald D. Kouchi
President of the Senate
State Capitol, Room 409
Honolulu, HI 96813

The Honorable Scott Saiki
Speaker of the House of Representatives
State Capitol, Room 431
Honolulu, HI 96813

Dear President Kouchi and Speaker Saiki:

Pursuant to Act 26, Session Laws of Hawai'i 2020, the Judiciary is transmitting a copy of the *Report on the Administration of Justice*.

In accordance with Section 93-16, Hawai'i Revised Statutes, we are also transmitting a copy of this report to the Legislative Reference Bureau Library.

The public may view an electronic copy of this report on the Judiciary's website at the following link: https://www.courts.state.hi.us/news_and_reports/reports/reports.

Should you have any questions regarding this report, please feel free to contact Karen Takahashi of the Judiciary's Legislative Coordinating Office at 808-539-4896, or via e-mail at Karen.T.Takahashi@courts.hawaii.gov.

Sincerely,

A handwritten signature in blue ink that reads "Rodney A. Maile".

Rodney A. Maile
Administrative Director of the Courts

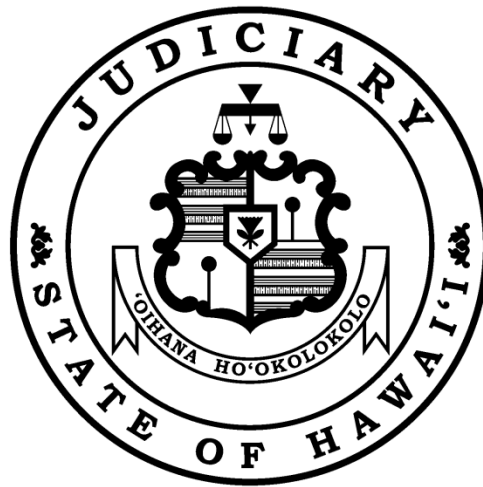
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**ANNUAL REPORT TO THE THIRTY-SECOND LEGISLATURE
2023 REGULAR SESSION**

**A Report of the Judiciary's Findings and Recommendations on the Effectiveness
of Act 26, SLH 2020, Relating to the Administration of Justice**

**Pursuant to ACT 26, SESSION LAWS OF HAWAI'I 2020
PART III, SECTION 8**



Prepared by:

The Judiciary, State of Hawai'i

December 2022

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**Pursuant to ACT 26, SESSION LAWS OF HAWAI‘I 2020
PART III, SECTION 8**

This report is respectfully submitted pursuant to Act 26, Session Laws of Hawai‘i 2020, Part III, Section 8, which requires the Judiciary, in consultation with the prosecuting attorney of each county, to submit a report to the Legislature of its findings and recommendations, including any proposed legislation, on the effectiveness of Act 26.

Act 26, was signed into law on September 15, 2020. The Act:

- 1) amends the effect of finding a defendant charged with a petty misdemeanor not involving violence or attempted violence unfit to proceed;
- 2) amends the requirements for fitness determination hearings, court-appointed examiners, and examination reports;
- 3) authorizes the courts to enter into agreements to divert into residential, rehabilitative, and other treatment those defendants whose physical or mental disease, disorder, or defect is believed to have become or will become an issue in a judicial case;
- 4) amends the requirements for appointing qualified examiners to perform examinations for penal responsibility;
- 5) removes the time requirement for the ordering of the penal responsibility evaluation; and
- 6) requires the Judiciary, in consultation with county prosecutors, to report to the Legislature on the effectiveness of the Act in 2021, 2022, and 2023.

Report of the First Circuit

A. Circuit Court

This is a report from the First Circuit on the effectiveness of the portions of the Act relevant to the circuit court caseload, specifically items two through six on page one. Please refer to the district court section below for comment on item one.

With respect to the elimination of the mandatory psychiatrist provision, at this time, in the First Circuit, we have nine examiners (eight psychologists and one psychiatrist) on the Department of Health (DOH) certified list. For the calendar year 2022, as of October 31 the First Circuit Court has ordered two hundred thirty-five (235) Chapter 704 examinations for fitness, penal responsibility, conditional release, and/or

discharge from conditional release in two hundred seventy-four (274) total cases. Of the 235 examinations ordered, eight (8) were situations where a one-panel was ordered as the case was a misdemeanor offense where the defendant had demanded a jury trial or a one-panel was requested in a re-examination, and ten (10) were instances where the parties requested a neuropsychological examination to assist the three-panel doctors in their evaluations. As noted in the reports for the last two years, in the First Circuit, the elimination of the psychiatrist requirement has alleviated the strain on the sole psychiatrist on the DOH-certified list as well as permitted the process to be conducted more efficiently utilizing the psychologists on the certified list. We continue to assign our sole psychiatrist to three-panel examinations wherein he has previously examined the defendant or in anticipation that a psychiatrist will be required in a future examination.

With respect to the effectiveness of the Act on the timeliness of the reports, it should continue to be noted that due to the global pandemic, there have been, and continue to be, significant delays in the reports for those defendants held in custody of the Department of Public Safety or held in custody of the Director of Health. This is due to defendants being in quarantine, the limited appointment times available, and/or the delay in records being available for the examiners' review. The lack of examiners (psychiatrists or psychologists) has also contributed to the timeliness of the reports. At this time, with the loosening of the pandemic restrictions we anticipate that the time period for receipt of the reports will decline.

With respect to the effect of this amended provision on the integrity of the reports and the determinations to be made by the court under Chapter 704, the divisions of the First Circuit have noted no problems with the reports. Therefore, it appears that this amended provision caused no significant impact on the integrity of the reports or on the Chapter 704 determinations made by the court.

With respect to the amendments made to section 704-407.5, allowing for agreements between the parties and the court to "divert the case into an evaluation of the defendant, treatment of the defendant, including residential or rehabilitation treatment," in the First Circuit, there have been no cases diverted into residential, rehabilitative, or other treatment utilizing solely this provision and the court has not been presented with, by either the State or the defense, any requests nor agreements to divert applicable defendants into treatment under this provision. The courts continue to refer defendants, a number of whom were referred as part of the terms and conditions of probation/deferral, to mental health court, drug court, and veterans' court on a regular basis. Defendants who are found not penally responsible are ordered into treatment with the DOH either in-patient or out-patient depending on the determination of dangerousness of the defendant. With respect to the amendment to section 704-407.5 permitting the appointment of either a one or three panel of examiners to determine penal responsibility for "C" felonies not involving violence, no one-examiner panels have been ordered for these types of cases and none have been requested.

We have consulted with the Department of the Prosecuting Attorney for the City and County of Honolulu regarding the effectiveness of the changes to the statutory provisions relevant to the Circuit Court cases and they have no comment.

We believe that having more doctors certified by DOH for the forensic examiner list and the concomitant (and necessary) increase in funding for, and increase in the payment for, the evaluations would make the Act more effective.

B. District Court

This is a report from the First Circuit on the effectiveness of the portions of the Act relevant to the district court caseload. Item one applies specifically to district court cases and amends the effect of finding a defendant charged with a petty misdemeanor not involving violence or attempted violence unfit to proceed.

With respect to the diversion of defendants charged with a petty misdemeanor not involving violence or attempted violence from the criminal justice system, since the enactment into law of Act 26 on September 15, 2020, the district court has ordered expedited fitness examinations for one hundred thirty-five (135) defendants encompassing one hundred ninety-two (192) criminal offenses.¹ In most of these cases, the court ordered expedited exams with a turn-around time of two days. For those defendants that were ultimately found to be unfit after a second “expedited exam” (within approximately ten days from initial appearance), eighty-six (86) were discharged to the community and linked to services, twelve (12) were civilly committed to the Hawai'i State Hospital (HSH), nine (9) remained at HSH on other charges, and seven (7) remained at O'ahu Community Correctional Center (OCCC) on other charges. The median stay at HSH was 7.5 days.

Twenty-one (21) defendants were found to be fit to proceed and the proceedings in their cases resumed on the regular trial track.

- OCCC has saved approximately \$1,000,350 due to the reduced number of days (4,050) defendants were incarcerated at their facility.

The following information was provided by the State of Hawai'i Department of Health Adult Mental Health Division and is an estimate of the cost impact and health impact of ACT 26 since its effective date:

- HSH has saved approximately \$7,222,500 due to the reduced number of days that defendants were housed at their facility.

¹ 54% (approximately 65) of the defendants were homeless prior to arrest.

- Court Evaluation Branch has saved approximately \$67,500 due to the reduced hours (1,350) spent on conducting 1-panel examinations.
- Adult Client Services Branch has saved approximately \$9,112 and four hundred five (405) hours of estimated time spent on interviews and preparing documentation and record collection.
- Judiciary has saved countless hours of court time due to reduction in contested hearings challenging fitness to proceed.
- Department of the Prosecuting Attorney and Office of the Public Defender has saved countless hours due to reduction in the time to prepare for and participate in contested hearings challenging fitness to proceed.
- One hundred fourteen (114) of the one hundred thirty-five (135) defendants were found unfit to proceed. Of those, one hundred seven (107) were able to avoid incarceration and receive treatment instead. Eighty-six (86) were discharged and linked to services. Approximately 76% of those discharged to the community have not been re-arrested.

The positive impact of ACT 26 is clear and profound. Preventing non-violent offenders who suffer from a mental illness from serving extended terms of incarceration provides the best opportunity to extend case management services and peer specialist support.

We have consulted with the City and County of Honolulu Prosecuting Attorney's office and they have indicated that their report on the effects of ACT 26 in Circuit and District Court will be submitted to the Judiciary very soon.

Report of the Second Circuit

Since the passage of Act 26, the district court's mental health calendar in the Second Circuit has not had any non-violent petty misdemeanor defendants. Despite existing resource challenges which preclude stable community treatment facilities in Maui County, including the absence of a court-based certified examiner, the designated mental health treatment team led by Dr. Charles Harding continues to collaborate with stakeholders to ensure a defendant's mental health needs are met to the greatest extent possible.

On September 30, 2022, the State of Hawai'i Department of Health Adult Mental Health Division sponsored a colloquium on *Improving Governmental Response to Community Mental Illness for Maui County*. Representatives from the Department of the Prosecuting Attorney for Maui County, Maui Office of the Public Defender, several state judges, and other members of the Second Circuit staff, including the supervising chief probation officer, Maui Drug Court director, and Maui Intake Service Center supervisor had an opportunity to meet and hear from the Honorable Steven Leifman, a renowned expert in addressing mental health issues and the courts. Based upon this

discussion, the colloquium participants explored expedited fitness evaluations for misdemeanants and persons charged with felonies.

The Second Circuit also recently launched its Community Outreach Court ("COC") in September 2022. Modeled after the First Circuit's COC, the COC seeks to promote compliance with court obligations fairly with the goal of providing participants an opportunity to be successful while at the same time offering social service resources to assist participants in getting back on their feet by linking participants to mental health or substance-abuse treatment services, if necessary, and housing opportunities. COC experienced its first graduate on November 18, 2022, after the participant successfully completed court-imposed community service thereby opening doors of opportunity for the participant's future.

In addition, the State of Hawai'i Department of Health Adult Mental Health Division has committed to providing training to Judiciary staff in this area through already available funding.

Based on this activity, there is the potential to provide community treatment and supervision to persons in the criminal justice system throughout Maui County.

Report of the Third Circuit

For 2022, the Third Circuit officially referred approximately forty-nine (49) cases to be reviewed under Haw. Rev. Stat. § 704-421² as of this date. The number of these cases is difficult to track the Third Circuit, as we do not have a Judiciary Information Management System (JIMS) code to track every referral. Since August 2022, there

² Proceedings for defendants charged with petty misdemeanors not involving violence or attempted violence; criminal justice diversion program. Section 704-421, Haw. Rev. Stat. reads in relevant part:

- (1) In cases where the defendant is charged with a petty misdemeanor not involving violence or attempted violence, if, at the hearing held pursuant to section 704-404(2)(a) or at a further hearing held after the appointment of an examiner pursuant to section 704-404(2)(b), the court determines that the defendant is fit to proceed, then the proceedings against the defendant shall resume. In all other cases where fitness remains an outstanding issue, the court shall continue the suspension of the proceedings and commit the defendant to the custody of the director of health to be placed in a hospital or other suitable facility for further examination and assessment.
- (2) Within seven days from the commitment of the defendant to the custody of the director of health, or as soon thereafter as is practicable, the director of health shall report to the court on the defendant's current capacity to understand the proceedings against defendant and defendant's current ability to assist in defendant's own defense. If, following the report, the court finds defendant fit to proceed, the proceedings against defendant shall resume. In all other cases, the court shall dismiss the charge with or without prejudice in the interest of justice. The director of health may at any time proceed under the provisions of section 334-60.2 or 334-121.

have been sixteen (16) referrals. All of these referrals took place in Kona. In Hilo, all similar cases that were previously motioned for ACT 26 are now in the criminal justice diversion program, also known as the jail diversion program.

The judges in the Third Circuit have actively supported this program and agree that it has benefit and potential. In preparing this final report, we discussed the status of the program with: (1) the police; (2) the prosecutors and public defenders; (3) the respective judges (including per diem judges) who have made referrals under Haw. Rev. Stat. § 704-406; and (4) Dr. Hawken Shields, the DOH's Forensic Services Section supervisor for the Third Circuit. We have also consulted with Judge Kenneth J. Shimozone from the First Circuit.

In discussions with the police, we are advised that they are unable to divert individuals to DOH stabilization units if the individual does not agree to go. The police have no legal authority to force a person to enter a police car for transport absent grounds for an arrest. Therefore, it is doubtful that individuals requiring mental health treatment will agree to voluntarily be transported to stabilization units for assessment and services.

In the Third Circuit, when an individual is arrested and brought to court and determined to be a candidate for the criminal justice diversion program, the following occurs: first, the prosecutor and the defense agree on an examination for fitness only, on an expedited basis; second, the court sets an expedited return date for disposition.

The difficulty arises as to the location of the examination and the staffing for the examination. Unlike O'ahu, the options on the Big Island are severely limited. We do not have access to the Hawai'i State Hospital (HSH), and the only place to hold a defendant is at the Hawai'i Community Correctional Center (HCCC), which is severely overcrowded and understaffed. Moreover, due to COVID-19, all pretrial inmates entering the facility must be quarantined for ten (10) days. If the inmate is exposed to COVID-19 in jail, the pretrial inmate is not allowed to leave isolation to have a video or telephone examination.

Currently, we only have one (1) psychologist to examine individuals under Haw. Rev. Stat. § 704-421 for the entire island of Hawai'i. There are no forensic peer specialists on the Big Island to assist with the clinical, risk, and needs assessments. Additionally, there is a critical shortage of stabilization beds for Hilo and Kona. There are limited options for the other smaller towns and areas of the island of Hawai'i. Similarly, there is confusion as to who will be responsible to transport defendants from HCCC to DOH stabilization units if that becomes an option. DOH does not have staffing for this situation, and HCCC, police, and sheriffs are not required to assist with transportation.

The island of Hawai'i is very large, and Hilo and Kona are over one hundred (100) miles apart. There is a dire need to have mental health hospitals on the neighbor islands to address the mental health needs in our communities. For example, the Second Circuit on Maui has three (3) separate islands under its jurisdiction.

The program should be amended to allow for holding of the defendant in a location other than HCCC. We need more evaluators to make the program succeed. There needs to be a change in the law to allow the police to transport individuals to stabilization units without an arrest.

In summation, DOH and the Judiciary are clearly in support of the program. However, there is a lack of staffing and stabilization units for the program to function as intended. The judges in the Third Circuit are ready and willing to bring the program to its full potential, but DOH requires the necessary resources and facilities on the neighbor islands to bring the program into fruition. There needs to be a statewide vision and funding to enhance the mental health facilities on each of the islands.

Report of the Fifth Circuit

During the past year, the Fifth Circuit has continued to work closely with the Office of the Prosecuting Attorney to divert cases during pre-trial conferences and/or court hearings, when appropriate. However, the Fifth Circuit lacks staffing and treatment resources to fully implement Act 26. The court(s) primarily rely on the State of Hawai'i Department of Health Adult Mental Health Division on O'ahu to fly a psychiatrist to Kaua'i to provide status reports to the court for specific cases. Without the appropriate psychiatrist/psychologist on-island, the Fifth Circuit has had to rely on the availability of these individuals to travel from the neighbor islands to provide the necessary assessment and/or related mental health services.

Nevertheless, the Fifth Circuit continuously seeks to leverage existing and potential resources to improve its approaches.

This concludes the report of the Judiciary, submitted pursuant to Act 26, Session Laws of Hawai'i 2020, Part III, Section 8.