

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

Friday, February 7, 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

and

Melanie M. May
Deputy Chief Judge
District Court of the First Circuit

Bill No. and Title: Senate Bill No. 2631, Relating to the Mental Health of Defendants

Purpose: Permits judicial discretion for suspension of criminal proceedings for assessment and treatment should the defendant have serious and persistent mental health illness.

Judiciary's Position:

The Judiciary appreciates the intent of this bill, however, cautions that the bill raises constitutional due process concerns, may violate a defendant's right to a speedy trial, and lacks clarity that will render implementation difficult. The Judiciary respectfully notes that the intent of this bill could be addressed with expansion of diversion programs already in place in most parts of the state.

The bill provides the court with discretion to “suspend all further proceedings” in a prosecution if the court has reason to believe that the defendant has a mental illness that does not rise to the level of incompetence. In its current form, the bill allows the court to suspend proceedings without the defendant’s consent. However, defendants in a criminal prosecution have a constitutional right to a speedy trial.¹ Further, Hawaii Rules of Penal Procedure (HRPP) Rule 48 requires criminal trials to commence within 6 months. Suspending proceedings in this manner may violate HRPP Rule 48 and defendants’ rights to a speedy trial. The bill in its current form is also inconsistent with Act 179 (2019), which requires “release under the least restrictive conditions required to ensure the defendant’s appearance and to protect the public.”

The bill also provides the court with discretion to “order the defendant to undergo a mental health assessment” prior to an adjudication of guilt. Ordering a competent, pre-trial defendant who is presumed innocent to undergo a mental health evaluation raises due process concerns.² Requiring evaluations for those who may be mentally ill, as opposed to any other class of criminal defendants, raises equal protection concerns.

The current form of the bill is vague and ambiguous as to whom it applies. The bill in its current form does not contain criteria to determine whether there is “reason to believe that the defendant has an untreated serious and persistent mental health illness” except that it is behavior that does not rise to the level of section 704-404 (a “reason to doubt defendant’s fitness to proceed”).

The bill does not specify the offenses for which the bill is applicable. In its current form, the bill would encompass Class A and B felonies, including serious and violent offenses in which mandatory imprisonment may apply. Implementation will be difficult without parameters for a court to determine whether a case is appropriate for mental health assessment and diversion.

The current form of the bill does not offer instruction as to who would be conducting the mental health assessment of the defendant, the timeframe in which this is to occur, who would be responsible for supervising and reporting on the treatment of the defendant, and who would incur the costs associated therewith. The current bill does not set forth a consequence if a defendant objects and refuses to participate in the assessment and/or treatment. In addition,

¹ (*State v. Lau*, 890 P.2d 291, 299, 78 Hawai‘i 54, 62 (Hawaii, 1995) (under the sixth amendment to the United States Constitution and article I, section 14 of the Hawai‘i Constitution, an accused is guaranteed the right to a speedy trial in all criminal prosecutions.)).

² Specifically, because the statute explicitly excludes the criteria under Chapter 704, there appears to be no rational nexus between the Court unilaterally ordering a defendant to undergo a mental health evaluation and either his status in the criminal justice system or the underlying crime alleged. In Chapter 704, the defendant can be ordered to undergo a competency determination as the conviction of an accused person who is mentally incompetent violates due process (*Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)) and therefore it is incumbent on the Court to ensure a defendant is fit; further, when there is a valid reason to doubt the defendant's competence at a relevant time, the trial court must have the benefit of the “professional determination of the examiners appointed” pursuant to HRS § 704-404. *State v. Castro*, 5 P.3d 444, 451, 93 Hawai‘i 454, 461 (Hawaii App. 2000). In contrast, in the current form of this bill, a trial court is allowed to order a mental health evaluation of a defendant who by all accounts is legally fit to proceed and who has only been charged with, but not convicted of, a crime.

implementation would be difficult because the bill does not set forth what happens to the criminal charge following the application of the statute.

Respectfully, the Judiciary notes that the intent of this bill could be addressed by expanding diversion programs already in place for what appears to be the target population of the bill—those who are suffering from a mental illness while legally fit to proceed: (1) Jail Diversion in District Court and (2) Mental Health Court in Circuit Court.

In the Honolulu District Court, the Judiciary and Department of Health (DOH) partner in the Jail Diversion Program.³ The program’s mission it is to provide time-limited mental health and substance abuse treatment services for persons with “severe and persistent mental illness” (SPMI). The intent of the service is to reduce criminal recidivism by diverting eligible, non-dangerous mentally ill arrestees from incarceration and into the appropriate level of community behavioral health services. The program strives to balance the individual service needs of the arrestee, the legal requirements of the courts, and the safety needs of the community. Individuals who are arrested and charged with an eligible misdemeanor or petty misdemeanor (where a primary factor in the offender’s criminal behavior is an underlying mental illness or mental illness and co-occurring substance abuse disorder) may be considered for admission into the program. Individual entry into the program is reviewed on a case-by-case basis and participation in the program is voluntary. Each participant needs to meet: (a) clinical diagnostic and functional impairment criteria for SPMI; and (b) legal criteria for petty misdemeanor and misdemeanor non-violent offenses.⁴ Upon successful completion of the program, the defendant is eligible to have his/her criminal charges dismissed. Expansion of the Jail Diversion Program would further the intent of this bill to divert the mentally ill from our criminal justice system.

In Circuit Court, the Judiciary and DOH partner in Mental Health Court to divert or treat those who are suffering from a mental illness but do not rise to the level of legal incompetence. Since 2005, Mental Health Court has employed evidence-based policies and procedures

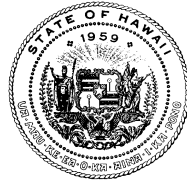
³ Similarly, in the Third Circuit, the jail diversion program (“Hawaii County Jail Diversion Program” or “JDP”) is run through the Hawaii County Community Mental Health Branch of the Department of Health Adult Mental Health Division. Upon arrest while at police cellblock the program is contacted by police for possible referrals. A case manager will go directly to the jail to evaluate and ascertain if a referral to the JDP will be recommended. At the jail hearing on the same day, Defendant is brought to Court and if a referral is recommended to JDP then a decision is made whether to grant supervised release with a condition that Defendant must comply with JDP. All parties (DPA, Defense counsel, and Court) must agree to refer to JDP. If a referral is made to JDP then Defendant is evaluated by JDP to see if he is eligible for the program. If Defendant is found to be eligible and accepted into program then Defendant will come to court once per month for six months for proof of compliance in the JDP program. Defendants are usually ordered to obtain a mental health assessment and complete any treatment recommended. Defendants may also be required to undergo a substance abuse assessment and complete any treatment recommended with drug conditions. If Defendant is in compliance with the JDP for six months, the charges are dismissed with prejudice and the services can usually continue after court supervision is over. The Second Circuit currently does not have a Jail Diversion program in place.

⁴ However, even if an individual meets these criteria, the Office of the Prosecuting Attorney must give final approval before an individual can be accepted in the program. Due to this discretionary authority, fewer than optimal individuals are allowed entry into the program. A statute providing the Court with final discretionary authority to admit into the jail diversion program individuals who meet the admissions criteria and volunteer to participate would allow more individuals to benefit from the program.

implemented by dedicated staff who are specially trained to treat the legally competent, but mentally ill. Mental Health Court participants are eligible for an array of services through the DOH, Adult Mental Health Division, and they are under close court supervision. Further, Mental Health Court is available not only to post-conviction defendants, but also to pre-trial defendants, and there are procedures in place that address the concerns noted above.

Finally, if the concern is that our current system does not reach enough defendants, the Judiciary respectfully suggests a review and perhaps broadening of admissions policies, or more resources such as positions and funding, to expand the District Court Jail Diversion and/or Circuit Court Mental Health Court programs.

Thank you for the opportunity to testify on this measure.



STATE OF HAWAII
DEPARTMENT OF HEALTH
P. O. Box 3378
Honolulu, HI 96801-3378
doh.testimony@doh.hawaii.gov

LATE

**Testimony in SUPPORT of S.B. 2631
RELATING TO THE MENTAL HEALTH OF DEFENDANTS**

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

Hearing Date and Time: Friday, February 7, 2020 at 8:30 a.m.

Room: 229

1 **Department Position:** The Department of Health (“Department”) supports this measure and
2 offers comments.

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

10 The Department supports the development of opportunities for individuals who are
11 living with behavioral health issues to be assessed and, if appropriate, referred to appropriate
12 mental health services in a timely manner including providing opportunities for judicial
13 discretion for suspension of criminal proceedings if the judge has reason to believe that the
14 defendant has an untreated severe and persistent mental illness (SPMI).

15 The Department has worked closely with the Judiciary to develop more appropriate and
16 effective pathways for this population.

1 Respectfully, the Department defers to the Judiciary on items in the bill that impact
2 judicial proceedings.

3 **Offered Amendments:** None.

4 Thank you for the opportunity to testify.

5 **Fiscal Implications:** Undetermined.

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

LATE

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

February 6, 2020

S.B. 2631: RELATING TO THE MENTAL HEALTH OF DEFENDANTS

Hearing: Friday, February 7, 2020, 8:30 a.m.

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

The Office of the Public Defender respectfully opposes S.B. No. 2631, which would permit a judge to suspend criminal proceedings for assessment and treatment should the defendant have serious and persistent mental health issues that does not meet the fitness to proceed criteria of section 704-404 of the Hawai‘i Revised Statutes.

If a defendant is deemed fit to proceed (that is, he/she is able to demonstrate the capacity to understand the proceedings against him/her, to assist in his/her defense at the present time, and to consult with his/her attorney with a reasonable degree of rational understanding), the defendant should not be forced to essentially waive his/her right to a speedy trial and the rights afforded to him/her under Rule 48 of the Hawai‘i Rules of Penal Procedure. A defendant who is deemed fit to proceed may on his own volition undergo assessment and treatment for a mental illness -- even a serious and persistent mental illness -- without having to suspend criminal proceedings. Nothing prevents the defendant from receiving treatment while his/her case is pending trial.

Moreover, the law is unnecessary. If the defendant who is fit to proceed is truly suffering from a serious and persistent mental illness and the illness is hindering his/her ability to attend court proceedings, there is nothing to prevent the defendant and/or defense counsel to request a continuance of the proceedings to address the serious and persistent mental illness. Said defendant is no different than an individual who is suffering from a serious and persistent physical illness. Continuances by the defense have been requested and have been granted by the courts in situations where defendants are physically unable to attend court proceedings or proceed to trial. For example, a defendant undergoing chemotherapy treatment may not be able physically attend court hearings or participate in a three-day trial will request a continuance until he/she is physically able to participate in the proceedings. A defendant who has a serious and persistent substance abuse issue may also request a continuance of his criminal case until he/she has completed a residential substance abuse program.

We are also concerned with the several of the proposed options listed after a mental health assessment has been completed:

Option (2): Transfer the proceedings to mental health court within the judiciary.

Currently, the defendants participating in mental court are those who have had their cases adjudicated. That is, the defendants have been found guilty (either by trial or by plea) and are on probation. Will the mental health court accept defendants whose cases are still pending trial?

Option (3): Further stay the proceedings while defendant obtains appropriate mental health treatment services,

As stated above, this option is available to a defendant who is fit to proceed but is suffering from a severe and persistent mental illness. The defendant may request a continuance for him/her to address the illness.

Option (4): Authorize the defendant to be placed on probation. . . .

This option is already available to the judge once a defendant is found guilty (either by trial or by plea). The judge has the discretion to impose conditions, including the condition to seek mental health treatment.

Thank you for the opportunity to comment on S.B. No. 2631.

SB2631 Mental Health Assessments for Criminal Defendants

COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH:

- Sen. Rosalyn Baker, Chair; Sen. Stanley Chang, Vice Chair
- Friday, Feb. 7th, 2020: 8:30 am
- Conference Room 229

Hawaii Substance Abuse Coalition Supports SB2631:

GOOD MORNING CHAIR, VICE CHAIR AND DISTINGUISHED COMMITTEE MEMBERS. My name is Alan Johnson. I am the current chair of the Hawaii Substance Abuse Coalition (HSAC), a statewide organization of over 30 non-profit alcohol and drug treatment and prevention agencies.

HSAC supports that the Judiciary and Department of Health want to partner to use mental health assessments to divert mentally ill defendants away from the judicial system and into treatment.

Mental illness is a largely untreated or under-treated concern with criminality because the prevalence of serious mental illnesses among all people entering jails is estimated to be 16.9%, according to the [Consensus Project.org](https://www.consensusproject.org/). One in 5 Americans suffer from mental illness, and 1 in 12 adults has a serious mental illness. The National Alliance of Mental Illness estimates that severe mental illness costs an estimated \$193.2 billion in lost earnings.¹

Contrary to what many people fear, being ordered to get a mental health assessment from a qualified professional is often a positive sign that the court is approaching you from a favorable position.² A mental health assessment can help a Judge have a better idea of the context and possible causes or factors involved in their legal charge. Issues such as depression, anxiety, PTSD, bipolar disorder or substance dependence need to be evaluated by a professional along with recommendations provided to treat any conditions found. Consequently, providing treatment for any existing conditions is going to have a better outcome for society than simply sending a person to jail. From the perspective of reducing repeat offenses, this is much more effective than simply punishing offenders in hopes that they will make changes. It also takes pressure off of the local government to pay for the expenses of incarcerating individuals.

Courts can help people with mental illness by combining court supervision with community-based mental treatment, while avoiding expensive court, or jailhouse, costs.³

¹ Star Advertiser, February 4th, 2020, Report calls for treatment for nonviolent, mentally ill defendants <https://www.staradvertiser.com/2020/02/04/hawaii-news/report-calls-for-treatment-for-nonviolent-mentally-ill-defendants/>

² New Directions: What a Mental Health Assessment is and How it May Help You in Court, 2018, <https://www.ndsbs.com/blog/how-does-court-ordered-mental-health-assessment-work>

³ Psychology Today: Are Judges Reluctant to Order Mental Health Evaluations? Not only criminal defendants need mental health assessment, 2012) <https://www.psychologytoday.com/us/blog/black-womens-health-and-happiness/201204/are-judges-reluctant-order-mental-health-evaluations>

Most courts request mental services for conditions such as depression, bipolar disorder, schizophrenia, paranoid, antisocial, borderline personality disorder, and substance use disorders. However, mental illness does not occur only in criminal defendants, but also with civil court defendants, debtors and others brought before the court who might also suffer from mental disorders. Judges could order mental health evaluations in civil cases because this is a concern for many, including loved ones of those who have these disorders, and also many of our veterans who fight for better PTSD (and other) mental health services and treatment.

We appreciate the opportunity to provide testimony and are available for questions.

SB-2631

Submitted on: 2/4/2020 6:36:34 PM

Testimony for CPH on 2/7/2020 8:30:00 AM

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

Comments:

We definitely support the idea of providing judicial discretion to divert the case into an evaluation/treatment of the defendant, especially involving a specialized court. We believe this is a very enlightened approach.

SB-2631

Submitted on: 2/6/2020 11:26:44 AM

Testimony for CPH on 2/7/2020 8:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
sheree revilla	Testifying for island integrated health	Support	No

Comments:

Hawaii Substance Abuse Coalition Supports SB2631:

GOOD MORNING CHAIR, VICE CHAIR AND DISTINGUISHED COMMITTEE MEMBERS. My name is Sheree Revilla. I am the clinical director of Island Integrated Health and a current member of the Hawaii Substance Abuse Coalition (HSAC), a statewide organization of over 30 non-profit alcohol and drug treatment and prevention agencies.

HSAC supports that the Judiciary and Department of Health want to partner to use mental health assessments to divert mentally ill defendants away from the judicial system and into treatment.

SB-2631

Submitted on: 1/30/2020 10:27:44 PM

Testimony for CPH on 2/7/2020 8:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Mike Goodman	Individual	Support	Yes

Comments:

Thank you very much for the opportunity to testify in strong support of SB2631.

The importance of this bill for mentally impaired offenders can't be overstated. In particular, this bill will help chronic homeless with severe mental illness and acute addiction who're charged with crimes.

Exposed to the elements and unsanitary living conditions, chronic homeless live about thirty-years less than the average. They frequently congregate in illegal homeless camps which incubate disease, fill public spaces with trash, pose a fire danger to surrounding communities and increase crime.

Chronic homeless are also notoriously "service resistant". They resist shelter and other forms of assistance because their impairments interfere with their ability to make sound decisions. Unless they are convicted of a crime or are proved to be a danger to themselves or others, government and service providers are constitutionally powerless to compel them to accept mental health treatment and shelter, because to do so would interfere with their basic rights of liberty and self-determination.

The irony, is that most service-resistant chronic homeless, become ensnared in the criminal justice system, caught up in a dystopian misery-go-round, cycled endlessly between jails, emergency rooms and the streets.

This bill uses this unfortunate reality to compel them to accept treatment, while enabling them to avoid jail. Courts can order defendants convicted of crimes to undergo mental health treatment as part of probation, for as long, but no longer, than the length of their sentences. There's no violation of constitutionally protected rights, because their "loss of liberty", is predicated upon a criminal conviction in a proceeding where they are presumptively afforded due process.

There is a similar measure in the house; HB2730, with certain provisions that should be added to SB2631: Impaired offenders, many of them homeless, who recover from addiction, or who're undergoing treatment for mental illness, find their criminal records are a barrier to employment and even housing. HB2730 allows certain individuals to have their records sealed for as long as they don't re-offend. Also,

HB2730 has important language that enables defendants to get court ordered treatment instead of jail *after conviction*. SB2631 only pertains on-going proceedings.

Thank you for considering this bill.

SB-2631

Submitted on: 1/31/2020 8:14:35 AM

Testimony for CPH on 2/7/2020 8:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Victor K. Ramos	Individual	Support	No

Comments:

SB-2631

Submitted on: 2/6/2020 11:53:21 AM

Testimony for CPH on 2/7/2020 8:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
dave sprouse	Individual	Support	No

Comments:

The root of criminal behavior is often psychological. Proper assessment and treatment greatly increases rehabilitation and decreases recidivism. We should at least allow assessment and entertain the potential of needed mental health services.