

## **HRS §704-404**

### **Examination of defendant with respect to physical or mental disease, disorder, or defect.**

(1) Whenever the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding responsibility, or there is reason to doubt the defendant's fitness to proceed, or reason to believe that the physical or mental disease, disorder, or defect of the defendant will or has become an issue in the case, the court may immediately suspend all further proceedings in the prosecution. If a trial jury has been empanelled, it shall be discharged or retained at the discretion of the court. The discharge of the trial jury shall not be a bar to further prosecution.

(2) Upon suspension of further proceedings in the prosecution, the court shall appoint three qualified examiners in felony cases and one qualified examiner in nonfelony cases to examine and report upon the physical and mental condition of the defendant. In felony cases the court shall appoint at least one psychiatrist and at least one licensed psychologist. The third member may be a psychiatrist, licensed psychologist, or qualified physician. One of the three shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health. In nonfelony cases the court may appoint either a psychiatrist or a licensed psychologist. All examiners shall be appointed from a list of certified examiners as determined by the department of health. The court, in appropriate circumstances, may appoint an additional examiner or examiners. The examination may be conducted on an out-patient basis or, in the court's discretion, when necessary the court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding thirty days, or such longer period as the court determines to be necessary for the purpose. The court may direct that one or more qualified physicians or psychologists retained by the defendant be permitted to witness the examination. As used in this section, the term "licensed psychologist" includes psychologists exempted from licensure by section 465-3(a)(3).

(3) An examination performed under this section may employ any method that is accepted by the professions of medicine or psychology for the examination of those alleged to be affected by a physical or mental disease, disorder, or defect; provided that each examiner shall form and render diagnoses and opinions upon the physical and mental condition of the defendant independently from the other examiners, and the examiners, upon approval of the court, may secure the services of clinical psychologists and other medical or paramedical specialists to assist in the examination and diagnosis.

(4) The report of the examination shall include the following:

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

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

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

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

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

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

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

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

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

(8) The court shall obtain all existing medical, mental health, social, police, and juvenile records, including those expunged, and other pertinent records in the custody of public agencies, notwithstanding any other statutes, and make such records available for inspection by the examiners. If, pursuant to this section, the court orders the defendant committed to a hospital or other suitable facility under the control of the director of health, then the county police departments shall provide to the director of health and the defendant copies of all police reports from cases filed against the defendant which have been adjudicated by the acceptance of a plea of guilty or no contest, a finding of guilt, acquittal, acquittal pursuant to section 704-400, or by the entry of plea of guilty or no contest made pursuant to chapter 853, so long as the disclosure to the director of health and the defendant does not frustrate a legitimate function of the county police departments, with the exception of expunged records, records of or pertaining to any adjudication or disposition rendered in the case of a juvenile, or records containing data from the United States National Crime Information Center. The county police departments shall segregate or sanitize from the police reports information that would result in the likelihood or actual identification of individuals who furnished information in connection with its investigation, or who were of investigatory interest. Records shall not be re-disclosed except to the extent permitted by law.

(9) The compensation of persons making or assisting in the examination, other than those retained by the nonindigent defendant, who are not undertaking the examination upon designation by the director of health as part of their normal duties as employees of the State or a county, shall be paid by the State. [L 1972, c 9, pt of §1; am L 1973, c 136, §4(b); am L 1974, c

54, §1; am L 1979, c 3, §1 and c 105, §64; am L 1983, c 172, §1; am L 1987, c 145, §1; am L 1988, c 305, §5; am L 1992, c 88, §1; gen ch 1993; am L 1997, c 306, §1; am L 2006, c 230, §6; am L 2008, c 99, §1]

#### **COMMENTARY ON §704-404**

This section sets forth the provisions for appropriate medical examination of a defendant when the defendant's physical or mental condition is made an issue either with respect to the defendant's fitness to proceed, the defendant's responsibility for conduct, or the defendant's capacity to have a particular state of mind.

The Code provides that, whenever the defendant's responsibility, fitness to proceed, or physical or mental condition becomes an issue in the case, the proceedings shall be suspended and the designated medical examination shall take place. In taking this approach we reject the requirement of prior notice suggested by the Model Penal Code.[1] Such a requirement necessarily relies on the psychiatric and other medical insights of defendant's counsel--a person manifestly without proper training in these areas. If defense counsel does not recognize symptoms of a physical or mental disease, disorder, or defect--either because of lack of medical knowledge or because of lack of diligence--the consequences of his ineptness should not fall on his client. Especially is this so where the client is unable to "communicate" the disease, disorder, or defect to the client's attorney. The procedure provided for examination of the defendant assures that the prosecution will not be prejudiced in gathering evidence and in litigating these issues merely because the defendant did not raise these issues at a preliminary stage. The defendant or the prosecuting attorney may request, or the court may order, an examination of the defendant at a preliminary (or later) stage in the proceedings whenever it appears that fitness to proceed, responsibility, or physical or mental condition is or may become an issue in the case.

Previous law provided for an examination of the defendant, at the discretion of the court, before trial.[2] The Code allows the relevant issues to be raised at any stage.

If an examination is ordered after a trial jury has been empanelled, it shall be discretionary with the trial court whether or not to discharge the jury; however the dismissal of the jury shall not bar further prosecution by reason of former jeopardy or want or delay of prosecution.

Subsection (2) provides for the selection of examiners and is in substantial accord with prior law. However, modifications have been made to take into consideration the suggestions of local psychiatrists and representatives of the department of health[3] and to accommodate those cases involving diseases, disorders, and defects which require examination by physicians other than psychiatrists. Also, under the Code, the court may order that qualified physicians, which include psychiatrists, retained by the defendant be allowed to witness and participate in the examination.

Subsection (3) clarifies what methods may be used in the examination of the defendant; a point not covered in prior law.

Subsections (4) and (5) state explicitly what the report of the examining physicians shall contain. This was covered under pre-existing law by the vague provision that the defendant shall be

examined "with a view to determine the mental condition of such person and the existence of any mental disease or defect which would affect his criminal responsibility." [4] These subsections are intended to assure the court and the parties "that the report will be adequate for the purpose for which the examinations and report were ordered." [5]

Subsection (7) is designed to achieve for the examiner the same freedom in reporting his examination that he would be afforded were he to testify orally. [6]

Other subsections are self-explanatory.

#### **SUPPLEMENTAL COMMENTARY ON §704-404**

Act 136, Session Laws 1973, amended subsection (1) to provide that where the issue of mental disease, disorder, or defect excluding responsibility is raised the court "may immediately suspend all further proceedings in the prosecution." (Emphasis added.) This eliminated the previous mandatory requirement of suspension of the proceedings and examination of the defendant when the issue of responsibility was introduced. The Committee Report is silent on the reason for this. It is believed, however, that the change arose because certain trial judges felt that defense counsel were acting in some instances with questionable sincerity in invoking the mandatory examination procedure. (House Standing Committee Report No. 726 and Senate Standing Committee Report No. 858, 1973.)

Act 54, Session Laws 1974, amended subsection (2) to permit the use of a certified clinical psychologist as part of the examination panel.

Act 3, Session Laws 1979, amended subsections (2) and (3) by modifying the requirements for the composition of examination panels. The purpose was to allow the courts greater flexibility in appointing mental health professionals to examination panels, particularly in geographical areas where shortages of various types of mental health professionals made compliance with the requirements of the prior law burdensome and expensive.

Act 172, Session Laws 1983, amended subsections (3) and (4) to require forensic examiners in sanity examinations to arrive at their conclusions independently of the other examiners. Subsection (8) was amended to allow the examiners access to police and juvenile records, including those expunged. The legislature found that the accuracy and objectivity of sanity examinations would be enhanced if the examiners made their findings without collaborating with each other and if they were provided with a wider range of information. House Conference Committee Report No. 20.

Act 145, Session Laws 1987, replaced the term "certified clinical" psychologist with "licensed" psychologist because "certified clinical" psychologist is an outdated classification which is no longer applicable to current practice. Act 145 also permitted the department of health to set minimum standards for participation and appointment of a sanity examiner. The legislature felt this change would allow additional assurances of higher quality testimony by these examiners. Senate Standing Committee Report No. 691, House Standing Committee Report No. 1217.

Act 305, Session Laws 1988, included licensed psychologists among the professionals which may provide offender examination services to the Hawaii criminal justice system. The Legislature stated that the present laws, which permit only psychiatric evaluation, are inconsistent with the many and varied uses the court has found for the services of licensed psychologists. Senate Standing Committee Report No. 2153.

Act 88, Session Laws 1992, amended this section by adding a reference to section 465-3(a)(3), which exempts psychologists employed under government certification or civil service rules from the licensure requirement. This is consistent with Act 314, Session Laws 1986, which intended to include this language in sections of chapter 704 that refer to licensed psychologists. Senate Standing Committee Report No. 2579.

Act 306, Session Laws 1997, amended subsections (2), (3), and (4), to, inter alia, allow mental health examinations to be conducted by one rather than three examiners, in nonfelony cases; the courts may appoint a psychiatrist or licensed psychologist as the examiner. In felony cases, three examiners are required, including at least one psychiatrist and one psychologist. The amendment streamlines the process for committing and releasing mentally incompetent defendants. Conference Committee Report No. 64.

Act 230, Session Laws 2006, amended this section to, among other things, (1) allow all certified examiners who evaluate a defendant's fitness to proceed or claims of physical or mental disease or disorder to confer without restriction upon submittal of all reports to the court; and (2) add all existing mental health records to the records that the court must obtain and make available for inspection by examiners. House Standing Committee Report No. 665-06.

Act 99, Session Laws 2008, amended subsection (8) by requiring the county police departments to provide to the director of health and a defendant who is committed to a hospital under the control of the director, copies of certain police reports regarding that defendant. Act 99 expedited the records disclosure process for clinical evaluation purposes while protecting a patient's right of privacy. Conference Committee Report No. 161-08.

### **Law Journals and Reviews**

Fitness to Proceed: Compassion or Prejudice? II HBJ No. 13, at pg. 135.

### **Case Notes**

Mental examination is within sound discretion of court. 57 H. 418, 558 P.2d 1012.

Motion made prior to trial for mental examination of defendant was not a notice of intention to rely on defense of mental irresponsibility. 57 H. 418, 558 P.2d 1012.

Failure to impanel a board of examiners, under the circumstances, did not violate defendant's due process rights. 60 H. 17, 586 P.2d 1028.

Impanelling of a board of examiners is within sound discretion of court. 60 H. 17, 586 P.2d 1028.

Court appointed psychiatrists entitled to absolute immunity from civil suit. 63 H. 516, 631 P.2d 173.

Court could have suspended trial and ordered examination pursuant to section if defendant raised defense of physical or emotional disease, disorder, or defect excluding capability of forming criminal intent. 73 H. 109, 831 P.2d 512.

Under subsections (1) and (2), the legislature intended that only some rational basis for convening a panel is necessary to trigger the trial court's power to stay the proceedings and, thereafter, to appoint examiners. 93 H. 424, 5 P.3d 414.

Where motion for mental examination and defense counsel's attached declaration articulated a rational basis upon which there was both "reason to doubt" defendant's fitness to proceed and "reason to believe" that defendant was suffering from a physical or mental disease, disorder, or defect that had affected defendant's ability to assist in defendant's own defense, trial court abused its discretion in refusing to stay proceedings, failing to appoint a panel of examiners, and determining without assistance of panel that defendant was fit to proceed. 93 H. 424, 5 P.3d 414.

Standard of review of motions for judgment of acquittal in insanity cases. 1 H. App. 1, 612 P.2d 117.

As it had no obligation under subsection (8) to unilaterally and on its own initiative provide the police reports and other pertinent records to its fitness examiners, trial court did not err; subsection only requires that court "obtain" the pertinent records and "make such records available for inspection by the examiners" and does not require that the court, unbidden, provide such records directly to the examiners. 97 H. 53 (App.), 33 P.3d 549.

Mentioned: 74 H. 141, 838 P.2d 1374.

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#### **§704-404 Commentary:**

1. M.P.C. §4.03.
2. H.R.S. §711-91; Territory v. Gaudia, 41 Haw. 231 (1955).
3. See S.B. 46 (S.D. 1) of the 1967 Legislature, which passed the Senate but failed to pass the House of Representatives. As the Senate Committee Reports indicate, this bill was supported by many groups concerned with mental health.
4. H.R.S. §711-91.
5. M.P.C., Tentative Draft No. 4, comments at 197 (1955).
6. Cf. §704-410(3) and (4).