

JAN 18 2007

A BILL FOR AN ACT

RELATING TO PENAL RESPONSIBILITY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 704-400, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "§704-400 [~~Physical or mental disease, disorder, or defect~~
4 ~~excluding penal responsibility.~~ (1) A person is not
5 responsible, under this Code, for conduct if at the time of the
6 conduct as a result of physical or mental disease, disorder, or
7 defect the person lacks substantial capacity either to
8 appreciate the wrongfulness of the person's conduct or to
9 conform the person's conduct to the requirements of law.

10 ~~(2) As used in this chapter, the terms "physical or mental~~
11 ~~disease, disorder, or defect" do not include an abnormality~~
12 ~~manifested only by repeated penal or otherwise anti-social~~
13 ~~conduct.] Mental condition not a defense. A person's mental
14 condition shall not be a defense to any charge of criminal
15 conduct."~~

16 SECTION 2. Section 704-402, Hawaii Revised Statutes, is
17 repealed.



1 ~~["§704-402 Physical or mental disease, disorder, or defect~~
2 ~~excluding responsibility is an affirmative defense, form of~~
3 ~~verdict and judgment when finding of irresponsibility is made.~~

4 ~~(1) Physical or mental disease, disorder, or defect~~
5 ~~excluding responsibility is an affirmative defense.~~

6 ~~(2) When the defense provided for by subsection (1) is~~
7 ~~submitted to a jury, the court shall, if requested by the~~
8 ~~defendant, instruct the jury as to the consequences to the~~
9 ~~defendant of an acquittal on the ground of physical or mental~~
10 ~~disease, disorder, or defect excluding responsibility.~~

11 ~~(3) When the defendant is acquitted on the ground of~~
12 ~~physical or mental disease, disorder, or defect excluding~~
13 ~~responsibility, the verdict and the judgment shall so state."]~~

14 SECTION 3. Section 704-404, Hawaii Revised Statutes, is
15 amended as follows:

16 (1) By amending subsection (1) to read: "(1) Whenever [the
17 ~~defendant has filed a notice of intention to rely on the defense~~
18 ~~of physical or mental disease, disorder, or defect excluding~~
19 ~~responsibility, or] there is reason to doubt the defendant's~~
20 ~~fitness to proceed, [or reason to believe that the physical or~~
21 ~~mental disease, disorder, or defect of the defendant will or has~~
22 ~~become an issue in the case,] the court may immediately suspend~~



1 all further proceedings in the prosecution. If a trial jury has
2 been empanelled, it shall be discharged or retained at the
3 discretion of the court. The discharge of the trial jury shall
4 not be a bar to further prosecution."

5 (2) By amending subsection (4) to read:

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

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

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

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

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

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



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

9 SECTION 4. Section 704-408, Hawaii Revised Statutes, is
10 repealed.

11 ~~["§704-408 Determination of irresponsibility. If the
12 report of the examiners filed pursuant to section 704-404, or
13 the report of examiners of the defendant's choice under section
14 704-409, states that the defendant at the time of the conduct
15 alleged was affected by a physical or mental disease, disorder,
16 or defect that substantially impaired the defendant's capacity
17 to appreciate the wrongfulness of the defendant's conduct or to
18 conform the defendant's conduct to the requirements of law, the
19 court shall submit the defense of physical or mental disease,
20 disorder, or defect to the jury or the trier of fact at the
21 trial of the charge against the defendant."]~~



1 SECTION 5. Section 704-410, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "§704-410 Form of expert testimony regarding [~~physical or~~
4 ~~mental disease, disorder, or defect.~~] fitness to proceed. (1)

5 At the hearing pursuant to section 704-405 [~~or upon the trial~~],
6 the examiners who reported pursuant to section 704-404 may be
7 called as witnesses by the prosecution, the defendant, or the
8 court. [~~If the issue is being tried before a jury, the jury may~~
9 ~~be informed that the examiners or any of them were designated by~~
10 ~~the court or by the director of health at the request of the~~
11 ~~court, as the case may be.~~] If called by the court, the witness
12 shall be subject to cross-examination by the prosecution and the
13 defendant. Both the prosecution and the defendant may summon
14 any other qualified physician or licensed psychologist or other
15 expert to testify, but no one who has not examined the defendant
16 shall be competent to testify to an expert opinion with respect
17 to the physical or mental condition of the defendant, as
18 distinguished from the validity of the procedure followed by, or
19 the general scientific propositions stated by, another witness.

20 (2) When an examiner testifies on the issue of the
21 defendant's fitness to proceed, the examiner shall be permitted
22 to make a statement as to the nature of the examiner's



1 examination, the examiner's diagnosis of the physical or mental
2 condition of the defendant, and the examiner's opinion of the
3 extent, if any, to which the capacity of the defendant to
4 understand the proceedings against the defendant or to assist in
5 the defendant's own defense is impaired as a result of physical
6 or mental disease, disorder, or defect.

7 ~~[(3) When an examiner testifies on the issue of the~~
8 ~~defendant's responsibility for conduct alleged or the issue of~~
9 ~~the defendant's capacity to have a particular state of mind~~
10 ~~which is necessary to establish an element of the offense~~
11 ~~charged, the examiner shall be permitted to make a statement as~~
12 ~~to the nature of the examiner's examination, the examiner's~~
13 ~~diagnosis of the physical or mental condition of the defendant~~
14 ~~at the time of the conduct alleged, and the examiner's opinion~~
15 ~~of the extent, if any, to which the capacity of the defendant to~~
16 ~~appreciate the wrongfulness of the defendant's conduct or to~~
17 ~~conform the defendant's conduct to the requirements of law or to~~
18 ~~have a particular state of mind which is necessary to establish~~
19 ~~an element of the offense charged was impaired as a result of~~
20 ~~physical or mental disease, disorder, or defect at that time.]~~

21 ~~[(4)]~~ (3) When an examiner testifies, the examiner shall
22 be permitted to make any explanation reasonably serving to



1 clarify the examiner's diagnosis and opinion and may be cross-
2 examined as to any matter bearing on the examiner's competency
3 or credibility or the validity of the examiner's diagnosis or
4 opinion."

5 SECTION 6. Section 704-411, Hawaii Revised Statutes, is
6 repealed.

7 ~~["§704-411 Legal effect of acquittal on the ground of~~
8 ~~physical or mental disease, disorder, or defect excluding~~
9 ~~responsibility, commitment, conditional release, discharge,~~
10 ~~procedure for separate post-acquittal hearing.~~

11 ~~(1) When a defendant is acquitted on the ground of~~
12 ~~physical or mental disease, disorder, or defect excluding~~
13 ~~responsibility, the court, on the basis of the report made~~
14 ~~pursuant to section 704-404, if uncontested, or the medical or~~
15 ~~psychological evidence given at the trial or at a separate~~
16 ~~hearing, make an order as follows:~~

17 ~~(a) The court shall order the defendant to be committed to~~
18 ~~the custody of the director of health to be placed in an~~
19 ~~appropriate institution for custody, care, and treatment if the~~
20 ~~court finds that the defendant:~~

21 ~~(i) Is affected by a physical or mental disease, disorder, or~~
22 ~~defect,~~



1 ~~(ii) Presents a risk of danger to self or others, and~~
2 ~~(iii) Is not a proper subject for conditional release,~~
3 ~~provided that the director of health shall place defendants~~
4 ~~charged with misdemeanors or felonies not involving violence or~~
5 ~~attempted violence in the least restrictive environment~~
6 ~~appropriate in light of the defendant's treatment needs and the~~
7 ~~need to prevent harm to the person confined and others,~~

8 ~~(b) The court order the defendant to be released on such~~
9 ~~conditions as the court deems necessary if the court finds that~~
10 ~~the defendant is affected by physical or mental disease,~~
11 ~~disorder, or defect and that the defendant presents a danger to~~
12 ~~self or others, but that the defendant can be controlled~~
13 ~~adequately and given proper care, supervision, and treatment if~~
14 ~~the defendant is released on condition, or~~

15 ~~(c) The court shall order the defendant discharged if the~~
16 ~~court finds that the defendant is no longer affected by physical~~
17 ~~or mental disease, disorder, or defect or, if so affected, that~~
18 ~~the defendant no longer presents a danger to self or others and~~
19 ~~is not in need of care, supervision, or treatment.~~

20 ~~(2) The court, upon its own motion or on the motion of the~~
21 ~~prosecuting attorney or the defendant, shall order a separate~~
22 ~~post acquittal hearing for the purpose of taking evidence on the~~



1 ~~issue of physical or mental disease, disorder, or defect and the~~
2 ~~risk of danger that the defendant presents to self or others.~~

3 ~~(3) When ordering a hearing pursuant to subsection (2):~~

4 ~~(a) In non-felony cases, the court shall appoint a~~
5 ~~qualified examiner to examine and report upon the physical and~~
6 ~~mental condition of the defendant. The court may appoint either~~
7 ~~a psychiatrist or a licensed psychologist. The examiner may be~~
8 ~~designated by the director of health from within the department~~
9 ~~of health. The examiner shall be appointed from a list of~~
10 ~~certified examiners as determined by the department of health.~~

11 ~~The court, in appropriate circumstances, may appoint an~~
12 ~~additional examiner or examiners, and~~

13 ~~(b) In felony cases, the court shall appoint three~~
14 ~~qualified examiners to examine and report upon the physical and~~
15 ~~mental condition of the defendant. In each case, the court~~
16 ~~shall appoint at least one psychiatrist and at least one~~
17 ~~licensed psychologist. The third member may be a psychiatrist,~~
18 ~~a licensed psychologist, or a qualified physician. One of the~~
19 ~~three shall be a psychiatrist or licensed psychologist~~
20 ~~designated by the director of health from within the department~~
21 ~~of health. The three examiners shall be appointed from a list~~
22 ~~of certified examiners as determined by the department of~~



1 ~~health. To facilitate the examination and the proceedings~~
2 ~~thereon, the court may cause the defendant, if not then~~
3 ~~confined, to be committed to a hospital or other suitable~~
4 ~~facility for the purpose of examination for a period not~~
5 ~~exceeding thirty days or such longer period as the court~~
6 ~~determines to be necessary for the purpose upon written findings~~
7 ~~for good cause shown. The court may direct that qualified~~
8 ~~physicians or psychologists retained by the defendant be~~
9 ~~permitted to witness the examination. The examination and~~
10 ~~report and the compensation of persons making or assisting in~~
11 ~~the examination shall be in accord with section 704 404(3),~~
12 ~~(4)(a) and (b), (6), (7), (8), and (9). As used in this~~
13 ~~section, the term "licensed psychologist" includes psychologists~~
14 ~~exempted from licensure by section 465 3(a)(3).~~

15 ~~(4) Whether the court's order under subsection (1) is made~~
16 ~~on the basis of the medical or psychological evidence given at~~
17 ~~the trial, or on the basis of the report made pursuant to~~
18 ~~section 704 404, or the medical or psychological evidence given~~
19 ~~at a separate hearing, the burden shall be upon the State to~~
20 ~~prove, by a preponderance of the evidence, that the defendant is~~
21 ~~affected by a physical or mental disease, disorder, or defect~~
22 ~~and may not safely be discharged and that the defendant should~~



1 ~~be either committed or conditionally released as provided in~~
2 ~~subsection (1).~~

3 ~~(5) In any proceeding governed by this section, the~~
4 ~~defendant's fitness shall not be an issue."~~

5 SECTION 7. Section 704-412, Hawaii Revised Statutes, is
6 repealed.

7 ~~["§704-412 Committed person; application for conditional release~~
8 ~~or discharge, by the director of health, by the person. (1)~~

9 ~~After the expiration of at least ninety days following the order~~
10 ~~of commitment pursuant to section 704-411, if the director of~~
11 ~~health is of the opinion that the person committed to [his] the~~
12 ~~director's custody is still affected by a physical or mental~~
13 ~~disease, disorder, or defect and may be released on condition or~~
14 ~~discharged without danger to [himself] self or to the person or~~
15 ~~property of others[, he] or that the person is no longer~~
16 ~~affected by a physical or mental disease, disorder, or defect,~~
17 ~~the director shall make application for the discharge or~~
18 ~~conditional release of [such] the person in a report to the~~
19 ~~court [by] from which [such] the person was committed and shall~~
20 ~~transmit a copy of the application and report to the prosecuting~~
21 ~~attorney of the county from which the [defendant] person was~~



1 committed. The ~~[defendant] person~~ shall be given notice of such
2 application.

3 ~~(2) After the expiration of ninety days from the date of the~~
4 ~~order of commitment pursuant to section 704-411, the person~~
5 ~~committed may apply to the court [by] from which [he] the person~~
6 ~~was committed for an order of discharge [or conditional release]~~
7 ~~upon the ground that the [same may be ordered] person is no~~
8 ~~longer affected by a physical or mental disease, disorder, or~~
9 ~~defect. The person committed may apply for discharge or~~
10 ~~conditional release upon the ground that, though still affected~~
11 ~~by a physical or mental disease, disorder, or defect, the person~~
12 ~~may be released without danger to [himself] self or to the~~
13 ~~person or property of others. A copy of the application shall be~~
14 ~~transmitted to the prosecuting attorney of the county from which~~
15 ~~the defendant was committed. If the determination of the court~~
16 ~~is adverse to the application, [such] the person shall not be~~
17 ~~permitted to file a further application until one year has~~
18 ~~elapsed from the date of any preceding hearing on an application~~
19 ~~for [his] the person's discharge or conditional release."]~~

20 SECTION 8. Section 704-413, Hawaii Revised Statutes, is
21 repealed.



1 ~~["§704 413 Conditional release; application for~~
2 ~~modification or discharge; termination of conditional release~~
3 ~~and commitment. (1) Any person released [on condition] pursuant~~
4 ~~to section 704 411 shall continue to receive mental health or~~
5 ~~other [appropriate] treatment and care deemed appropriate by the~~
6 ~~director of health until discharged from conditional release.~~
7 ~~The person shall follow all prescribed treatments and take all~~
8 ~~prescribed medications according to the instructions of the~~
9 ~~person's treating mental health professional. If any mental~~
10 ~~health professional treating any conditionally released person~~
11 ~~believes either the person is [either] not complying with the~~
12 ~~requirements of this section[,] or there is other evidence that~~
13 ~~hospitalization is appropriate, the mental health professional~~
14 ~~shall report the matter to the probation officer of the~~
15 ~~conditionally released person. The probation officer may order~~
16 ~~the conditionally released person to be hospitalized for a~~
17 ~~period not to exceed seventy two hours if the probation officer~~
18 ~~has probable cause to believe the person has violated the~~
19 ~~requirements of this subsection. No person shall be hospitalized~~
20 ~~beyond the seventy two hour period, as computed pursuant to~~
21 ~~section 1 29, unless a hearing has been held pursuant to~~
22 ~~subsection (3).~~



1 ~~(2) Any person released [on condition] pursuant to section 704-~~
2 ~~411 may apply to the court ordering the conditional release for~~
3 ~~discharge from, or modification of, the order granting~~
4 ~~conditional release on the ground that [he] the person is no~~
5 ~~longer affected by a physical or mental disease, disorder, or~~
6 ~~defect and may be discharged, or the order may be modified,~~
7 ~~without danger to [himself] the person or to others. The~~
8 ~~application shall be accompanied by a letter from or supporting~~
9 ~~affidavit of a qualified physician or licensed psychologist. A~~
10 ~~copy of the application and letter or affidavit shall be~~
11 ~~transmitted to the prosecuting attorney of the [county in which~~
12 ~~the person is confined] circuit from which the order issued and~~
13 ~~to any persons supervising [his] the release, and the hearing on~~
14 ~~the application shall be held following notice to such persons.~~
15 ~~If the determination of the court is adverse to the application,~~
16 ~~[such] the person shall not be permitted to file further~~
17 ~~application until one year has elapsed from the date of any~~
18 ~~preceding hearing on an application for modification of~~
19 ~~conditions of release or for discharge.~~
20 ~~(3) If, at any time after the order pursuant to section 704-411~~
21 ~~granting conditional release, the court [shall determine,]~~
22 ~~determines, after hearing evidence, that,~~



S.B. NO. 728

1 ~~(a) The person is still affected by a physical or mental~~
2 ~~disease, disorder, or defect, and the conditions of release have~~
3 ~~not been fulfilled, or [that for]~~
4 ~~(b) For the safety of [such] the person or others [his], the~~
5 ~~person's conditional release should be revoked,~~
6 ~~the court may forthwith modify the conditions of release or~~
7 ~~order the person to be committed to the custody of the director~~
8 ~~of health, subject to discharge or release only in accordance~~
9 ~~with the procedure prescribed in section 704-412."]~~
10]

11 SECTION 9. Section 704-414, Hawaii Revised Statutes, is
12 repealed.

13 ~~["§704-414 Procedure upon application for discharge,~~
14 ~~conditional release, or modification of conditions of release.~~
15 ~~Upon filing of an application pursuant to section 704-412 for~~
16 ~~discharge or conditional release, or upon the filing of an~~
17 ~~application pursuant to section 704-413 for discharge or for~~
18 ~~modification of conditions of release, the court shall appoint~~
19 ~~three qualified examiners in felony cases and one qualified~~
20 ~~examiner in non-felony cases to examine and report upon the~~
21 ~~physical and mental condition of the defendant. In felony cases~~
22 ~~the court shall appoint at least one psychiatrist and at least~~



1 ~~one licensed psychologist. The third member may be [either] a~~
2 ~~psychiatrist, a licensed psychologist, or a qualified physician.~~
3 ~~One of the three shall be a psychiatrist or licensed~~
4 ~~psychologist designated by the director of health from within~~
5 ~~the department of health. The examiners shall be appointed from~~
6 ~~a list of certified examiners as determined by the department of~~
7 ~~health. To facilitate the examination and the proceedings~~
8 ~~thereon, the court may cause the defendant, if not then~~
9 ~~confined, to be committed to a hospital or other suitable~~
10 ~~facility for the purpose of the examination and may direct that~~
11 ~~qualified physicians or psychologists retained by the defendant~~
12 ~~be permitted to witness [and participate in] the examination.~~
13 ~~The examination and report and the compensation of persons~~
14 ~~making or assisting in the examination shall be in accord with~~
15 ~~section 704 404(3), (4) (a) and (b), (6), (7), (8), and (9). As~~
16 ~~used in this section, the term "licensed psychologist" includes~~
17 ~~psychologists exempted from licensure by section 465 3(a)(3)."]~~

18 SECTION 10. Section 704-415, Hawaii Revised Statutes, is
19 repealed.

20 ~~["§704 415 Disposition of application for discharge,~~
21 ~~conditional release, or modification of conditions of release.~~
22 ~~(1) If the court is satisfied [by] from the report filed~~
23 ~~pursuant to section 704 414, and such testimony of the reporting~~
24 ~~examiners as the court deems necessary, that:~~



S.B. NO. 728

1 ~~(a) The person is affected by a physical or~~
 2 ~~mental disease, disorder, or defect and the~~
 3 ~~discharge, conditional release, or~~
 4 ~~modification of conditions of release~~
 5 ~~applied for may be granted without danger to~~
 6 ~~the committed or conditionally released~~
 7 ~~person or to the person or property of~~
 8 ~~others[,], or~~

9 ~~(b) The person is no longer affected by a~~
 10 ~~physical or mental disease, disorder, or~~
 11 ~~defect,~~

12 ~~the court shall grant the application and order the relief. If~~
 13 ~~the court is not so satisfied, it shall promptly order a hearing~~
 14 ~~[to determine whether such person may safely be discharged or~~
 15 ~~released].~~

16 ~~(2) Any such hearing shall be deemed a civil proceeding and the~~
 17 ~~burden shall be upon the applicant to prove that the person is~~
 18 ~~no longer affected by a physical or mental disease, disorder, or~~
 19 ~~defect or may safely be either released on the conditions~~
 20 ~~applied for or discharged. According to the determination of the~~
 21 ~~court upon the hearing, the person shall [thereupon] be~~
 22 ~~[discharged, or released].~~

23 ~~(a) Discharged;~~

24 ~~(b) Released on such conditions as the court~~
 25 ~~determines to be necessary[,], or [shall be~~
 26 ~~recommitted]~~

27 ~~(c) Recommited to the custody of the~~
 28 ~~director of health, subject to discharge or~~
 29 ~~release only in accordance with the~~
 30 ~~procedure prescribed in section 704 412."]~~

31]

32 SECTION 11. The legislative reference bureau shall prepare
 33 proposed conforming legislation to make necessary amendments to
 34 statutes affected by the repeal of sections 704-402, 704-408,



S.B. NO. 728

1 704-411, 704-412, 704-413, 704-414, and 704-415. The
2 legislative reference bureau shall transmit such proposed
3 legislation to the legislature not later than twenty days prior
4 to the convening of the regular session of 2008.

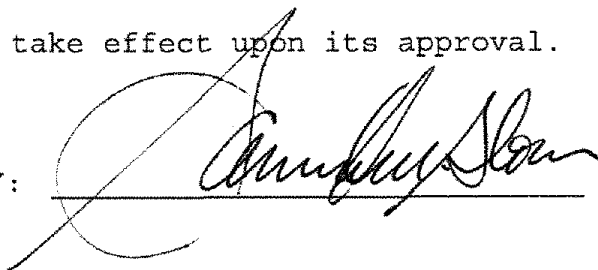
5 SECTION 12. This Act does not affect rights and duties
6 that matured, penalties that were incurred, and proceedings that
7 were begun, before its effective date.

8 SECTION 13. Statutory material to be repealed in bracketed
9 and stricken. New statutory material is underscored.

10 SECTION 14. This Act shall take effect upon its approval.

11

INTRODUCED BY:



A handwritten signature in black ink, appearing to read "Andy Stone", is written over a horizontal line. The signature is stylized and cursive.



S.B. NO. **728**

Report Title:

Insanity Defense

Description:

Eliminates the insanity defense.

SB SMO 07-013.doc

