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THE HONORABLE BRIAN T. TANIGUCHI, CHAIR
SENATE COMMITTEE ON JUDICIARY
Twenty-Ninth State Legislature
Regular Session of 2018
State of Hawai`i

February 14, 2018

RE: S.B. 2179; RELATING TO DNA COLLECTION FOR VIOLENT CRIMES.

Chair Taniguchi, Vice-Chair Rhoads, and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in strong support of S.B. 2179. This bill is part of the Department's 2018 legislative package.

The purpose of this bill is to ensure that individuals arrested for a serious felony offense (with applicable offenses enumerated) provide a DNA sample, which is then analyzed upon the individual being charged with the alleged offense, and results uploaded to state and national DNA databases. S.B. 2179 would also provide the necessary safeguards and procedures for expungement and destruction of DNA samples, similar to those already in place for fingerprints and photographs.

On June 3, 2013, the U.S. Supreme Court issued a landmark decision, unequivocally holding that "taking [and analyzing] a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment," so long as it is done in accordance with appropriate safeguards and restrictions. [1]In the years since then, over a dozen cases across the country have positively cited *Maryland v. King* on this issue, spanning California, Washington, Iowa, New York, New Jersey, and others. Currently, 31 U.S. states, as well the federal government, maintain statutes permitting the collection and analysis of DNA samples from various types of arrestees.

[1] *Maryland v. King*, 596 U.S. ___, 133 S.Ct. 1958, 1980, 186 L.Ed.2d 1 (2013).

As emphasized by the Court in *Maryland v. King*, an arrestee's "identification" is not merely the name on his or her driver's license, but "his or her public persona, as reflected in records of his or her actions that are available to the police."[2] Thus, the information obtained through DNA analysis helps to confirm the arrestee's true identity, and also helps to provide background information that increases the safety of staff, the safety of the detainee population, and the safety of the new detainee.[3] This information also assists the State in calculating the risk that an arrestee will attempt to flee the instant charges; assists the pre-trial court in assessing appropriate release, conditions for release or bail amounts; and may even free a person wrongfully imprisoned for the same offense.[4]

In reviewing Maryland's DNA Collection Act ("Act"), the Court emphasized that sufficient scientific and statutory safeguards were in place, where the DNA loci that are analyzed by law enforcement "do not reveal the genetic traits of the arrestee," and the Act expressly limits the purpose for which law enforcement may analyze a DNA sample, as well as the DNA records that may be collected and stored.[5] California's DNA collection law has also been upheld, by its Fourth District Court of Appeals, on similar bases.[6] Based on this guidance from the Court, the language of S.B. 2179 provides similar parameters and safeguards as Maryland's statutes, and also incorporates recommendations provided by various stakeholders, which were provided when the Legislature considered a similar bill in 2014 (S.B. 2615). To ensure that Hawai'i's provisions include appropriate safeguards, and establish a workable and enforceable system for the collection and analysis of DNA, the Department primarily adopted the amended language of S.B. 2615, S.D. 1, while narrowing the testing procedures to encompass only individuals charged with the alleged offense.

In addition to assisting law enforcement in the identification of charged individuals, S.B. 2179 may also identify potential suspects in unsolved crimes, and thus serve as a valuable tool for law enforcement. In *Maryland v. King*, the defendant was initially arrested and charged with assault in the first and second degree in 2009, but the DNA collected at time of arrest matched to an unsolved rape that had occurred years ago, in 2003. After further investigation, that defendant was later convicted of first degree rape in the 2003 case.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports the passage of S.B. 2179. Thank you for the opportunity to testify on this matter.

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[2] *Id*, at 1972.
[3] *Id*.
[4] *Id*, at 1973-1974.
[55] *Id*, at 1979.
[6] *People v. Lowe*, 221 Cal.App.4th 1276, 1296-1297, 165 Cal.Rptr.3d 107, 121-122 (December 4, 2013).

Office of the Public Defender
State of Hawaii

Amended Testimony of the Office of the Public Defender
to the Senate Committee on Judiciary

February 14, 2018

S.B. No. 2179: RELATING TO DNA COLLECTION FOR SERIOUS FELONY OFFENSES

Chair Taniguchi, and Members of the Committee:

The Office of the Public Defender strongly opposes S.B. 2179, which would require DNA collection from arrestees charged with serious felonies. While the proponents of this measure believe there are sufficient safeguards in place to pass 4th Amendment protection from unreasonable search and seizures, we believe it does not meet the constitutional protections afforded to citizens of this state by the Hawaii Constitution.

The U.S. Supreme Court upheld Maryland's law requiring DNA collection from arrestees of crimes of violence and burglary in *Maryland v. King*, 569 U.S. 435 (2013). As this committee is well-aware, the Hawaii Constitution affords its citizens greater protection than the U.S. Constitution. The right to privacy is written into our constitution. Our appellate courts have found searches and seizures to have violated our state constitution where it would have been permissible under the U.S. Constitution. Absent a compelling state interest, any intrusion into the privacy of our citizens and any warrantless search is strictly prohibited.

Our response to the argument that the collection of DNA via a buccal swap is no less intrusive than the recovery of a fingerprint, is that the forced opening of an orifice is a "search," and many times more intrusive that the taking of a fingerprint. Furthermore, fingerprints and mugshots are used for identification purposes. It is used to ensure that the correct individual is being prosecuted. No jurisdiction will be using DNA profiles for identification purposes. It is purely being used as a fishing expedition for the possible prosecution of an individual where no evidence, probable cause or even suspicion exists. The Fourth Amendment of the U.S. Constitution and Section Seven of the Hawaii Constitution prohibits the searching of a person for evidence of a crime when there is no basis for believing in that person's guilt or possession of incriminating evidence. For example, of a person is arrested on suspicion of a sexual assault, the police could obtain a warrant to compel the suspect to provide a DNA sample. That situation differs completely from the what is anticipated in this measure. Please read the late Justice Antonin Scalia's dissent in Maryland v. King (attached) in the context of the Hawaii Constitution, particularly Sections Six and Seven. In his dissent, Justice Scalia, joined by Justices Ginsberg, Sotomayer and Kagan, disagreed with the majority opinion and would have found the DNA

collection from arrestees to have been an unreasonable search in violation of the Fourth Amendment.

We are concerned that this measure will spurn the use of "sham" arrests purely to obtain a DNA sample from a suspect without evidence, probable cause or reasonable suspicion. Why should we be concerned with the integrity of our police force as it applies to the citizens of our state? Do you even need to ask? We have a police chief, his subordinates and wife, a deputy prosecutor, facing trial for framing an innocent man, fabricating evidence and destroying evidence. Throughout the nation, thousands of convictions have been vacated because of overzealous police criminalists who have fabricated test results in order to obtain convictions.

We stand in strong opposition to S.B. 2179. Thank you for the opportunity to provide testimony in this matter.

SB-2179
Submitted on: 2/10/2018 10:16:47 AM
Testimony for JDC on 2/14/2018 10:25:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Dara Carlin, M.A.	Individual	Support	No

Comments:

SB-2179
Submitted on: 2/12/2018 1:47:04 PM
Testimony for JDC on 2/14/2018 10:25:00 AM

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

Comments: