TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019

ON THE FOLLOWING MEASURE:
H.B. NO. 508, RELATING TO DNA COLLECTION FOR CERTAIN FELONY OFFENSES.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Monday, February 11, 2019 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Clare E. Connors, Attorney General, or
Lance Goto, Deputy Attorney General

Chair Lee and Members of the Committee:

The Department of the Attorney General supports this bill.

The purpose of this bill is to require the collection of DNA from all persons arrested for the commission of specified felony sexual offenses; provide for the expungement of DNA records, in certain circumstances, when an individual is not convicted of the offense; and appropriate funds for the costs of DNA collection, processing, storage, and expungement responsibilities.

There is a growing trend to collect DNA samples from persons arrested for felony offenses. While every state now requires a DNA sample from persons convicted of a felony offense, thirty-one states and the federal government are now authorized to collect DNA samples from persons arrested or charged with felony offenses.
The practice of collecting DNA at the initiation of criminal cases, rather than after convictions, can help to assure accurate identification of the arrested person, solve crimes, provide early and accurate identification of serial offenders and thereby prevent the commission of further violent crimes and protect potential victims, exonerate the innocent and minimize wrongful incarceration, minimize racial bias, and reduce law enforcement investigative costs. The prosecution of a serious felony offense can take months or years before there is a final disposition of the case. The collection of DNA

from the offender at the initiation of the case could help to solve or prevent crimes during that period of time.

The United States Supreme Court supports the collection of DNA samples from arrestees. In its decision in *Maryland v. King*, 569 U.S. 435, 133 S. Ct. 1958 (2013), the Supreme Court found the collection of a cheek swab of an arrestee's DNA to be a legitimate police booking procedure that is reasonable under the Fourth Amendment, like fingerprinting and photographing.

In its decision, the Supreme Court discussed how DNA collection and identification plays a critical role in serving legitimate government interests. It went into great detail describing the interests:

> First, "[i]n every criminal case, it is known and must be known who has been arrested and who is being tried." *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.,* 542 U.S. 177, 191, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). An individual's identity is more than just his name or Social Security number, and the government's interest in identification goes beyond ensuring that the proper name is typed on the indictment. . . Second, law enforcement officers bear a responsibility for ensuring that the custody of an arrestee does not create inordinate "risks for facility staff, for the existing detainee population, and for a new detainee." *Florence,* supra, at ——, 132 S.Ct., at 1518. DNA identification can provide untainted information to those charged with detaining suspects and detaining the property of any felon. For these purposes officers must know the type of person whom they are detaining, and DNA allows them to make critical choices about how to proceed. . . Third, looking forward to future stages of criminal prosecution, "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials." . . . Fourth, an arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination whether the individual should be released on bail. "The government's interest in preventing crime by arrestees is both legitimate and compelling.". . . Finally, in the interests of justice, the identification of an arrestee as the perpetrator of some heinous crime may have the salutary

effect of freeing a person wrongfully imprisoned for the same offense. "[P]rompt [DNA] testing . . . would speed up apprehension of criminals before they commit additional crimes, and prevent the grotesque detention of . . . innocent people." J. Dwyer, P. Neufeld, & B. Scheck, Actual Innocence 245 (2000).

Forensic DNA testing is a vastly more precise and reliable means of human identification than other methods, including fingerprinting. By collecting DNA samples from those arrested for serious sexual assault offenses, law enforcement can definitively identify the person arrested and, in some instances, identify the perpetrator of an unsolved crime, thus assisting law enforcement investigative efforts.

The Department respectfully requests that this measure be passed.

Testimony of the Office of the Public Defender, State of Hawaii to the House Committee on Judiciary

February 11, 2019

H.B. No. 508 RELATING TO DNA COLLECTION FOR CERTAIN FELONY OFFENSES

Chair Lee and Members of the Committee:

We oppose passage of H.B. No. 508 which would allow for the collection of DNA from persons who are merely arrested for a felony sexual criminal offense. Currently Hawaii law mandates such DNA collection only following a conviction for a felony offense. In addition to buccal samples, H.B. No. 508 would allow for the collection of blood samples from arrestees if required by the collecting agency's rules.

This measure seriously encroaches upon the public's civil liberties and privacy rights. We are aware that 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). However, the Hawai`i Supreme Court has consistently interpreted the Hawai`i Constitution to afford our citizens greater protection of rights than the U.S. Constitution. It is certain that H.B. No. 508 would trigger an immediate constitutional challenge to its enforcement.

While it is understandable that a convicted person would be subject to the collection of a DNA specimen, an arrestee carries with him/her the presumption of innocence. Indeed, it is not uncommon for a person to be wrongfully arrested and accused of a sexual criminal offense. That person would be required to provide a DNA sample under this bill.

Moreover, subsection (g) on page 5 of the bill reads:

> **Nothing in this section shall be construed as precluding other arrested persons from being required to provide buccal swab samples, print impressions, or blood specimens required for law enforcement identification analysis.**

This provision appears to extend the ability to collection DNA from those accused of sexual offenses to any arrestee. Thus, the bill unjustifiably goes far beyond its stated purpose of collecting DNA from those arrested for sexual offenses.

Although the bill provides for expungement of DNA samples where the arrest does not result in a conviction, there is a requirement that the arrestee must apply for expungement with the Attorney General. In the case of an innocent arrestee, we believe that this is an unfair burden to be placed on the citizen. Many arrestees will not realize that they are able to request expungement and do not possess the education or sophistication to follow through on the required procedures to do so. Expungement

should be automatic and should be accomplished by the government at no expense to or effort by the innocent arrestee.

In fact, this bill anticipates that citizens will not exercise their rights to expungement as evidenced by subsection (e) on page 9:

> **Any identification, warrant, probable cause to arrest, 18 or arrest based upon a data bank match shall not be invalidated 19 due to a failure to expunge or a delay in expunging records.**

The government should not be encouraged to capitalize on a citizen's failure to understand or exercise his/her constitutional or statutory right.

Thank you for the opportunity to provide testimony in this matter.

DEPARTMENT OF THE PROSECUTING ATTORNEY

CITY AND COUNTY OF HONOLULU

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THE HONORABLE CHRIS LEE, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Thirtieth State Legislature
Regular Session of 2019
State of Hawai`i

February 11, 2019

RE: H.B. 508; RELATING TO DNA COLLECTION FOR CERTAIN FELONY OFFENSES.

Chair Lee, Vice-Chair San Buenaventura, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney, City and County of Honolulu, submits the following testimony in strong support of H.B. 508. This bill is part of the Department's 2019 legislative package.

The purpose of H.B. 508 is to require persons arrested for felony sex offenses to provide DNA samples at the time of booking, as part of their standard booking/identification procedures. Buccal swabs could only be tested (and eligible for upload to CODIS) upon indictment, written information charging, judicial determination of probable cause, or waiver of indictment. The bill also provides for expungement procedures, if the arrestee is ultimately not convicted.

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. See Maryland v. King, 569 U.S. 439, 133 S.Ct. 1958, 1980, 186 L.Ed.2d 1 (2013). Since that time, numerous states have upheld similar laws, including—most recently—California's Supreme Court in April 2018 (People v. Buza, 413 P.3d 1132 (Cal. 2018); that decision considered not only the defendant's constitutional rights under the U.S. Constitution, but also the more expansive privacy rights afforded by California's State Constitution.

As emphasized by the Court in Maryland v. King (133 S.Ct. at 1972), an arrestee's "identification" is not merely the name on his or her drivers license, but "his or her public persona, as reflected in records of his or her actions that are available to the police." Id, at 1972.

Thus, the information obtained through DNA analysis helps to illustrate an arrestee's "true identity," including an accurate assessment of potential dangerousness, which helps to increase the safety of staff, the safety of the detainee population, and the safety of the new detainee. Id. 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. Id, at 1973-1974.

Indeed, DNA is truly the most accurate form of identification currently available, impervious to any measures that a suspect could possibly take to hide or cloud their complete "identity." While some opponents to this bill may argue that fingerprinting should be sufficient to confirm a person's identity, DNA is essentially a more modern version of fingerprinting. When new fingerprints are uploaded to the FBI's national fingerprint identification system, they may match to an unsolved case(s), in much the same way that unidentified DNA profiles in CODIS may find a match when new DNA profiles are uploaded. Given the state of our modern technology, the Department strongly believes that DNA-based identification should be required of arrestees—starting with felony sex offense arrestees—because it does not make sense to rely solely on fingerprinting identification if we don't have to, in much the same way that it would not make sense to rely solely on an arresting officer identifying an arrestee by face-recognition, when fingerprinting technology is readily available.

If someone is being held in custody for one felony sex offense, but may be responsible for other (unsolved) offenses, it benefits everyone around them for the court, law enforcement and/or corrections staff to know about those other offenses. In addition, early DNA identification can be of critical importance to preventing other offenses from being committed by serial sex offenders. Saving additional potential victims from the agony of the long-term effects of sexual victimization provi

With regards to the particular type of DNA analysis used for identification purposes, our U.S. Supreme Court has emphasized—in reviewing Maryland's DNA Collection Act ("Act")—that scientific and statutory safeguards are sufficient if the DNA loci analyzed by law enforcement "do not reveal the genetic traits of the arrestee." Moreover, the Act—much like H.B. 508—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. Id, at 1979. In comparing the language of H.B. 508 to Maryland's DNA Collection Act, we are confident that Hawai'i's provisions include appropriate safeguards, and establish a reasonably workable and enforceable system for the collection and analysis of DNA from felony sex offense arrestees.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports the passage of H.B. 508. Thank for you the opportunity to testify on this matter.

DEPARTMENT OF THE PROSECUTING ATTORNEY

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For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu supports S.B. 2615, with a request that the Committee work with the appropriate agencies on the aforementioned issues. Thank for you the opportunity to testify on this matter.

POLICE DEPARTMENT

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OUR REFERENCE WK-WK

February 11, 2019

The Honorable Chris Lee, Chair
and Members
Committee on Judiciary
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Lee and Members:

Subject: House Bill No. 508, Relating to DNA Collection for Certain Felony Offenses

I am Wayne Kimoto, Forensic Laboratory Director of the Scientific Investigation Section, Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports the intent of House Bill No. 508, Relating to DNA Collection for Certain Felony Offenses. However, the HPD is concerned that this bill may be too narrow in scope and should be inclusive of arrestees of violent crimes and burglary. Also, we recommend that the qualifying arrestee's sample be tested to align with the Federal Bureau of Investigation's Rapid DNA Initiative to search unsolved crimes of special concern while the arrestee is in police custody during the booking process.

Nationally, the majority of arrestee sample collection laws covers all felony arrestees (17 states) with another 12 states covering various categories of serious violent felony offenses, which generally include murder, manslaughter, kidnapping, robbery, and in some instances burglary. Further, California authorizes collection from all felony arrestees at the point of arrest, with no additional probable cause requirement for analysis. Based on estimates provided by the Hawaii Criminal Justice Data Center, the department estimates receiving approximately 300 samples from arrestees of felony sex offenses per year.

The HPD recognizes DNA information as a valuable tool for investigating criminal cases and supports expansion of the current convicted offender statutes to include

arrestees of violent felony offenses and burglary, with no additional probable cause requirements for analysis.

Thank you for the opportunity to testify.

Sincerely,

Wayne Kimoto
Forensic Laboratory Director
Scientific Investigation Section

APPROVED:

Susan Ballard
Chief of Police

ACLU Hawai'i

Committees:	House Committee on Judiciary
Hearing Date/Time:	Monday, February 11, 2019, 2:00 p.m.
Place:	Conference Room 325
Re:	*Testimony of the ACLU of Hawai'i in **Opposition to H.B. 508**, Relating to DNA Collection for Certain Felony Offenses*

Dear Chair Lee, Vice Chair San Buenaventura, and members of the Committee on Judiciary,

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") writes **in opposition to H.B. 508, which would force people to submit to DNA collection before they are ever convicted of — or even charged with — an applicable criminal offense.** This bill raises serious privacy concerns and, if passed, would undermine the explicit protections guaranteed by the Constitution of the State of Hawai'i.

Forcing arrestees to submit to DNA collection violates the privacy of innocent people.

This bill requires the collection, analysis, and permanent storage of deoxyribonucleic acid (DNA) from anyone arrested upon suspicion of a felony sexual offense. Arrestees, by definition, have not been found guilty of the offense for which they are arrested and are therefore innocent in the eyes of the law. Under Hawai'i law,[1] anyone convicted of a felony offense—which presumably already includes the felony offenses covered by this bill—will already be subject to DNA collection. The only people who this will affect, then, are the innocent, who will be forced to supply samples of their DNA even though they are not guilty of a covered offense.

We acknowledge that the U.S. Supreme Court upheld a similar law in Maryland.[2] However, we also note that the United States Constitution provides a floor on the protection of civil rights, not a ceiling. State constitutions can and do provide greater civil liberties protections for their residents. The Hawai'i Constitution, for example, explicitly provides that "the right of the people to privacy is recognized and shall not be infringed without the showing of a *compelling* state interest." And the portion of the Hawai'i Constitution that specifically protects against unreasonable searches speaks to "unreasonable searches, seizures, and invasions of privacy[.]" It is doubtful the framers of our state constitution would have seen taking genetic material from someone who is innocent in the eyes of the law as anything but an invasion of privacy.

Additionally, a significant portion of the U.S. Supreme Court felt this ruling constituted a dangerous blow to privacy rights. In his dissenting opinion, joined by Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor, and Justice Elena Kagan, Justice Antonin Scalia addressed the issue of impact on the innocent:

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[1] Haw. Rev. Stat. §844D-34.
[2] Maryland v. King, 569 U.S. 435, (2013).

> All parties concede that it would have been entirely permissible, as far as the Fourth Amendment is concerned, for Maryland to take a sample of King's DNA as a consequence of his ***conviction*** for second-degree assault. So the ironic result of the Court's error is this: The only arrestees to whom the outcome here will ever make a difference are those who have been acquitted of the crime of arrest (so that their DNA could not have been taken upon conviction). In other words, this Act manages to burden uniquely the sole group for whom the Fourth Amendment's protections ought to be most jealously guarded: people who are innocent of the State's accusations.[3]

Requiring DNA collection from arrestees turns the presumption of innocence on its head by making innocent people into permanent suspects, and will almost certainly have a disparate impact on people of color, who are wrongfully arrested at a much higher rate than white people.

Expungement of DNA database profile information and destruction of DNA samples taken from innocent people should be automatic.

Under current construction of the bill, innocent people who are forced to submit to DNA testing after being wrongfully arrested for a crime would need to then petition the court for the destruction of their DNA sample and the expungement of their profile in the state DNA database. **Expungement can months or even years**, and this is an onerous requirement to impose on a victim of a wrongful arrest. Should the Committee move forward with this bill, we respectfully request that the bill provide for the *automatic* destruction of DNA samples and expungement of DNA database profiles immediately after the person from whom samples have been taken is released without charges for an applicable offense being filed, or immediately after the person is dismissed of charges for an applicable offense, acquitted, or otherwise found not guilty of an applicable offense.

DNA is not a fingerprint.

Your DNA contains your genetic code—the most intimate, private information about a person and their family. This is different from a fingerprint and the state should approach expanding circumstances under which the state may collect and retain DNA with strong skepticism. The government does not have a strong track record of protecting personal privacy, and a single breach could reveal information about an individual to employers, insurance companies, and identity thieves.

[3] Id, at 480 (*Scalia, J., dissenting*) (emphasis added).

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The Legislature should take this opportunity to reaffirm its commitment to protecting privacy rights.

Hawai‘i is one of eleven states that explicitly protects the right to privacy in its state constitution.[4] As noted above, in its decision in Maryland v. King, the U.S. Supreme Court merely established the floor for our constitutional rights and the Legislature is under no obligation to follow suit by enacting laws diminishing privacy protections to meet that floor.

> Today's judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the "identity" of the flying public), applies for a driver's license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.[5]

For the above reasons, we urge the Committee to defer this measure. Thank you for the opportunity to testify.

Sincerely,

Mandy Fernandes
Policy Director
ACLU of Hawai‘i

The mission of the ACLU of Hawai‘i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai‘i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai‘i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai‘i has been serving Hawai‘i for 50 years.

[4] Haw. Const. art. I, § 6, "Right to Privacy. The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."
[5] Id.

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HB-508
Submitted on: 2/10/2019 1:48:52 PM
Testimony for JUD on 2/11/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Melodie Aduja	O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i	Support	No

Comments:

HB-508
Submitted on: 2/9/2019 1:41:42 PM
Testimony for JUD on 2/11/2019 2:00:00 PM

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

Comments: