

# LATE TESTIMONY



## TESTIMONY OF THE DEPARTMENT OF THE ATTORNEY GENERAL TWENTY-SEVENTH LEGISLATURE, 2014

ON THE FOLLOWING MEASURE:

S.B. NO. 2615, RELATING TO DNA COLLECTION FOR VIOLENT CRIMES.

BEFORE THE:

SENATE COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL AND MILITARY  
AFFAIRS

DATE: Tuesday, January 28, 2014 TIME: 3:00 p.m.

LOCATION: State Capitol, Room 224

TESTIFIER(S): David M. Louie, Attorney General, or  
Lance M. Goto, Deputy Attorney General.

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Chair Espero and Members of the Committee:

The Department of the Attorney General supports the intent of this bill, but has several concerns.

The purpose of this bill is to require persons arrested for a felony offense involving a violent crime to provide DNA samples. This bill also provides for expungement of the DNA samples and DNA database profile when appropriate.

The Department has several concerns. First, the bill amends sections 844D-31 and 844D-34, Hawaii Revised Statutes (HRS), to include the requirement that persons arrested for felony crimes of violence provide DNA samples. But sections 844D-31 and 844D-34 address the requirements for collection of DNA samples from convicted offenders, not those who have been arrested for a crime. Section 844D-34 is intended to provide a means to collect DNA samples from those who were convicted and in confinement when chapter 844D became law. It specifically refers to the collection of DNA by custodial or prison institutions. It does not cover arresting law enforcement agencies. Section 844D-41 reinforces the legislative intent that sections 844D-31 and 844D-34 apply to convicted offenders by requiring retroactive application of the collection requirement. This retroactive application should not apply to prior arrestees, since the collection requirement must be placed upon the arresting agencies, which will no longer have custody of the prior arrestees. The requirement that persons arrested for crimes provide DNA samples should be placed in a new and separate section under chapter 844D and specifically address the collection responsibilities of the arresting agencies.

Secondly, the bill inserts expungement provisions for the DNA arrest records under sections 831-3.2 and 844D-72, HRS. Section 831-3.2 does provide for the expungement of arrest records, but the proposed amendments on page 4 of the bill appear to be inconsistent with the other expungement provisions in that section. Under that section, the Attorney General receives applications for expungement of arrest records from arrestees and issues expungement orders as required by law. The proposed amendments on page 4, however, provide that the application be forwarded to the police for expungement and destruction of DNA samples "in accordance with sections 844D-71 and 844D-72". The amendments to sections 831-3.2 and 844D-72 appear to require the police to make a determination of the expungement application that is independent of the determination made by the Attorney General. This is confusing and could lead to inconsistent determinations of the expungement applications. Furthermore, sections 844D-71 and 844D-72 address the expungement of DNA records collected from convicted offenders, not arrestees. The expungement of arrestee DNA should be placed under section 831-3.2.

Finally, the new DNA collection, processing, storage, and expungement responsibilities created by this bill will primarily fall upon the Honolulu Police Department (HPD). To meet those responsibilities, HPD has expressed concern that it will need additional resources and funding. Appropriation provisions may be necessary.

Attached hereto is a copy of the proposed amendment for the Committee's consideration.

The Department is willing to work with the Committee on addressing these concerns.

THE SENATE  
TWENTY-SEVENTH LEGISLATURE 2014  
STATE OF HAWAII

**S.B. NO.** 2615  
Proposed SD 1

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## A BILL FOR AN ACT

RELATING TO DNA COLLECTION FOR VIOLENT CRIMES.

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

1           SECTION 1. The legislature finds that there is a growing  
2 trend to collect DNA samples from persons arrested for felony  
3 offenses. While every state now requires a DNA sample from  
4 persons convicted of a felony offense, many states have also  
5 considered and enacted legislation to expand the scope of their  
6 DNA database by requiring DNA sample collection from persons  
7 arrested for a felony offense. Currently, almost thirty states,  
8 the federal government and the Department of Defense are now  
9 authorized to collect DNA samples from arrestees.

10           The United States Supreme Court supports the collection of  
11 DNA samples from arrestees. In its decision in *Maryland v.*  
12 *King*, 569 U.S. \_\_\_\_ (2013), decided June 3, 2013, the Supreme  
13 Court held: "Upon these considerations the Court concludes that  
14 DNA identification of arrestees is a reasonable search that can  
15 be considered part of a routine booking procedure. When  
16 officers make an arrest supported by probable cause to hold for  
17 a serious offense and they bring the suspect to the station to

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1 be detained in custody, taking and analyzing a cheek swab of the  
2 arrestee's DNA is, like fingerprinting and photographing, a  
3 legitimate police booking procedure that is reasonable under the  
4 Fourth Amendment."

5 Forensic DNA testing is a vastly more precise and reliable  
6 means of human identification than other methods, including  
7 fingerprinting. By collecting DNA samples from arrestees, law  
8 enforcement can definitively identify the person arrested and,  
9 in some instances, identify the perpetrator of an unsolved crime  
10 thus assisting law enforcement investigative efforts.

11 The legislature further finds that all the arguments in  
12 support of the enactment of chapter 844D, Hawaii Revised  
13 Statutes, are the same arguments for the enactment of  
14 legislation calling for the collection of DNA upon arrest for  
15 violent felonies; to assure accurate identification of the  
16 arrested person; to help solve cold cases; to provide early and  
17 accurate identification of serial offenders and thereby prevent  
18 the commission of further violent crimes and protect potential  
19 victims; to exonerate the innocent and minimize wrongful  
20 incarceration; to minimize racial bias; and to reduce law  
21 enforcement investigative costs.

22 Accordingly, the purposes of this Act are to:

23 (1) Mandate DNA collection from all persons arrested for

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1 the commission of a violent felony offense; and

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3 (2) Provide for the expungement of DNA records, in certain  
4 circumstances, when an individual is not convicted of  
5 the offense.

6 SECTION 2. Chapter 844D, Hawaii Revised Statutes, is  
7 amended by adding a new section to be appropriately designated  
8 and to read as follows:

9 "§844D- Arrestees subject to collection. (a) Any  
10 person, except for any juvenile, who is arrested for the  
11 commission or attempted commission of any felony offense  
12 involving a violent crime as defined in section 351-32 shall  
13 provide buccal swab samples and print impressions of each hand,  
14 and, if required by the collecting agency's rules or internal  
15 regulations, blood specimens, required for law enforcement  
16 identification analysis.

17 (b) The person shall provide the buccal swab samples,  
18 print impressions, and blood specimens, as required by  
19 subsection (a), to the arresting authority at the time of  
20 booking or processing for the arrest, or as soon as  
21 administratively practicable by the arresting authority.

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1       (c) The arresting authority shall be responsible for  
2 obtaining the buccal swab samples, print impressions, and blood  
3 specimens, as required by subsection (a), from the arrestee.

4       (d) The buccal swab samples, print impressions, and blood  
5 specimens may not be required if the arresting authority  
6 determines that the required samples, impressions, and specimens  
7 have previously been taken and provide an adequate record, and  
8 the arrestee's DNA profile has already been included in the  
9 state DNA database and data bank identification program."

10       SECTION 3. Section 831-3.2, Hawaii Revised Statutes, is  
11 amended to read as follows:

12       "§831-3.2 Expungement orders. (a) The attorney general,  
13 or the attorney general's duly authorized representative within  
14 the department of the attorney general, upon written application  
15 from a person arrested for, or charged with but not convicted of  
16 a crime, shall issue an expungement order annulling, canceling,  
17 and rescinding the record of arrest; provided that an  
18 expungement order shall not be issued:

19       (1) In the case of an arrest for a felony or misdemeanor  
20           where conviction has not been obtained because of bail  
21           forfeiture;

22       (2) For a period of five years after arrest or citation in

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1 the case of a petty misdemeanor or violation where  
2 conviction has not been obtained because of a bail  
3 forfeiture;

4 (3) In the case of an arrest of any person for any offense  
5 where conviction has not been obtained because the  
6 person has rendered prosecution impossible by  
7 absenting oneself from the jurisdiction;

8 (4) In the case of a person acquitted by reason of a  
9 mental or physical defect under chapter 704; and

10 (5) For a period of one year upon discharge of the  
11 defendant and dismissal of the charge against the  
12 defendant in the case of a deferred acceptance of  
13 guilty plea or nolo contendere plea, in accordance  
14 with chapter 853.

15 Any person entitled to an expungement order hereunder may  
16 by written application also request return of all fingerprints  
17 or photographs taken in connection with the person's arrest.  
18 The attorney general or the attorney general's duly authorized  
19 representative within the department of the attorney general,  
20 within 120 days after receipt of the written application, shall,  
21 when so requested, deliver, or cause to be delivered, all  
22 fingerprints or photographs of the person, unless the person has  
23 a record of conviction or is a fugitive from justice, in which

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1 case the photographs or fingerprints may be retained by the  
2 agencies holding such records.

3 (b) Upon the issuance of the expungement certificate,  
4 ~~all~~ the person applying for the order shall be treated as not  
5 having been arrested in all respects not otherwise provided for  
6 in this section.

7 (c) Upon the issuance of the expungement order, the  
8 attorney general or the attorney general's duly authorized  
9 representative within the department of the attorney general,  
10 shall deliver a copy of the order to the law enforcement  
11 authority retaining the arrest records sought to be expunged,  
12 and if the arrest records include DNA samples, specimens and  
13 profiles obtained pursuant to section 844D- , shall also  
14 deliver a copy of the order to the police department of the city  
15 and county of Honolulu. All arrest records pertaining to the  
16 arrest, other than DNA samples and specimens, which are in the  
17 custody or control of any law enforcement agency of the state or  
18 any county government, and which are capable of being forwarded  
19 to the attorney general without affecting other records not  
20 pertaining to the arrest, shall be so forwarded for placement of  
21 the arrest records in a confidential file. The police  
22 department of the city and county of Honolulu shall destroy the  
23 DNA samples and specimens pertaining to the arrest, which were



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1 obtained pursuant to section 844D- , shall expunge the DNA  
2 information from the state DNA database and databank  
3 identification program, shall ensure that the DNA information is  
4 also expunged from any other database to which the information  
5 was uploaded, and shall send written confirmation to the  
6 department of the attorney general that these expungement  
7 requirements have been complied with.

8 (d) The police department is not required to destroy the  
9 DNA samples and specimens, nor expunge the DNA profiles from the  
10 databases, if the person has a record of conviction or is a  
11 fugitive from justice, or has a pending court case that could  
12 result in a felony conviction.

13 (e) Any identification, warrant, probable cause to arrest,  
14 or arrest based upon a data bank match shall not be invalidated  
15 due to a failure to expunge or a delay in expunging records.

16 ~~(d)~~ (f) Records filed under subsection (c) shall not be  
17 divulged except upon inquiry by:

18 (1) A court of law or an agency thereof which is preparing  
19 a presentence investigation for the court;

20 (2) An agency of the federal or state government which is  
21 considering the subject person for a position  
22 immediately and directly affecting the national or  
23 state security; or

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1 (3) A law enforcement agency acting within the scope of  
2 their duties.

3 Response to any other inquiry shall not be different from  
4 responses made about persons who have no arrest records.

5 ~~[(e)]~~ (g) The attorney general or the attorney general's  
6 duly authorized representative within the department of the  
7 attorney general shall issue to the person for whom an  
8 expungement order has been entered, a certificate stating that  
9 the order has been issued and that its effect is to annul the  
10 record of a specific arrest. The certificate shall authorize  
11 the person to state, in response to any question or inquiry,  
12 whether or not under oath, that the person has no record  
13 regarding the specific arrest. Such a statement shall not make  
14 the person subject to any action for perjury, civil suit,  
15 discharge from employment, or any other adverse action.

16 ~~[(f)]~~ (h) The meaning of the following terms as used in  
17 this section shall be as indicated:

18 (1) "Conviction" means a final determination of guilt  
19 whether by plea of the accused in open court, by  
20 verdict of the jury or by decision of the court.

21 (2) "Arrest record" means any existing ~~[photographic]~~  
22 photographs, DNA specimens or samples, DNA profiles,  
23 and fingerprint cards relating to the arrest.

1       (3) "DNA" means deoxyribonucleic acid.

2       ~~[(g)]~~ (i) The attorney general shall adopt rules pursuant  
3 to chapter 91 necessary for the purpose of this section.

4       ~~[(h)]~~ (j) Nothing in this section shall affect the  
5 compilation of crime statistics or information stored or  
6 disseminated as provided in chapter 846."

7       SECTION 4. Section 844D-71, Hawaii Revised Statutes, is  
8 amended to read as follows:

9       " ~~[(f)]~~ §844D-71 ~~[(j)]~~ Expungement of DNA information from state  
10 DNA database and data bank identification program. (a) A  
11 person whose DNA profile has been included in the state DNA  
12 database and data bank identification program pursuant to ~~[this~~  
13 ~~chapter]~~ section 844D-31 shall have the person's DNA specimen  
14 and sample destroyed and searchable database profile expunged  
15 from the program pursuant to section 844D-72 if:

16       (1) The person has no past or present offense which  
17               qualifies that person for inclusion within the state  
18               DNA database and data bank identification program; and

19       (2) There otherwise is no legal basis for retaining the  
20               specimen or sample or searchable profile.

21       (b) A person requesting expungement of their DNA specimen,  
22 sample, and profile:

23       (1) May make a written request to have the person's

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1 specimen and sample destroyed and searchable database  
2 profile expunged from the state DNA database and data  
3 bank identification program if the underlying  
4 conviction or disposition serving as the basis for  
5 including the DNA profile has been reversed and the  
6 case dismissed; and

7 (2) Shall send a copy of the person's request to the trial  
8 court of the circuit that entered the conviction or  
9 rendered disposition in the case, to the department,  
10 and to the prosecuting attorney of the county in which  
11 the person was convicted or adjudicated, with proof of  
12 service on all parties.

13 (c) A court considering a request for expungement made  
14 pursuant to this section, shall grant the request by order  
15 pursuant to section 844D-72(a) if the criteria for expungement  
16 under subsection (a) are met.

17 (d) This section shall not apply to the expungement of DNA  
18 samples, specimens, and profiles provided by arrestees pursuant  
19 to section 844D- . A person whose DNA profile has been  
20 included in the state DNA database and data bank identification  
21 program pursuant to section 844D- may request an expungement  
22 of the person's DNA sample, specimen and profile pursuant to  
23 section 831-3.2."

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1 SECTION 5. Section 844D-83, Hawaii Revised Statutes, is  
2 amended by amending subsection (a) to read as follows:

3 "(a) If any employee of the department knowingly uses an  
4 arrestee or offender specimen, sample, or DNA profile collected  
5 pursuant to this chapter for other than criminal identification  
6 or exclusion purposes, or knowingly discloses DNA or other  
7 forensic identification information developed pursuant to this  
8 section to an unauthorized individual or agency for other than  
9 criminal identification or exclusion purposes or for other than  
10 the identification of missing persons, in violation of this  
11 chapter, the department shall be liable in civil damages to the  
12 donor of the DNA identification information in the amount of  
13 \$5,000 for each violation, plus attorney's fees and costs. In  
14 the event of multiple violations, total damages shall not exceed  
15 \$50,000 plus attorney's fees and costs."

16 SECTION 6. Section 844D-113, Hawaii Revised Statutes, is  
17 amended by amending subsection (a) to read as follows:

18 "(a) A person commits the offense of unauthorized  
19 disclosure of DNA sample or profile if the person intentionally  
20 or knowingly, in violation of this chapter:

- 21 (1) Uses an arrestee or offender sample or DNA profile for  
22 other than criminal identification or exclusion  
23 purposes; or

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(2) Discloses DNA or other forensic identification information developed pursuant to this section to an unauthorized individual or agency, for other than criminal identification or exclusion."

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SECTION 7. Section §44D-114, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

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"(a) A person commits the offense of use of DNA sample or profile for financial gain if the person, for the purpose of financial gain, intentionally or knowingly, in violation of this chapter:

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(1) Uses an arrestee or offender sample or DNA profile for other than criminal identification or exclusion purposes; or

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(2) Discloses DNA or other forensic identification information developed pursuant to this chapter to an unauthorized individual or entity, for other than criminal identification or exclusion purposes."

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SECTION 8. There is appropriated out of the general revenues of the State of Hawaii the sum of \$ \_\_\_\_\_ or so much thereof as may be necessary for fiscal year 2014-2015 to be deposited into the DNA registry special fund.

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1 SECTION 9. There is appropriated out of the DNA registry  
2 special fund the sum of \$ \_\_\_\_\_ or so much thereof as may be  
3 necessary for fiscal year 2014-2015 to carry out the purposes of  
4 the special fund, including for reimbursements to county police  
5 departments for expenses related to collection and processing of  
6 DNA buccal swab samples and specimens made pursuant to this Act.

7 The sum appropriated shall be expended by the department of  
8 the attorney general for the purposes of this Act.

9 SECTION 10. This Act does not affect rights and duties  
10 that matured, penalties that were incurred, and proceedings that  
11 were begun, before the effective date of this Act.

12 SECTION 11. Statutory material to be repealed is bracketed  
13 and stricken. New statutory material is underscored.

14 SECTION 12. This Act, upon its approval, shall take effect  
15 January 1, 2015.

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**Report Title:**

DNA Collection for Violent Crimes

**Description:**

Requires persons arrested for a felony offense involving a violent crime to provide DNA samples. Allows for the destruction of a DNA sample and expungement of a DNA database profile when appropriate.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*