

SB 771

RELATING TO LAW ENFORCEMENT

Requires law enforcement officers and officers of justice to request and obtain a person's voluntary and informed consent prior to conducting a search of the person, the person's belongings, the person's residence, or the person's vehicle when conducting the search without a search warrant. Provides an exception for law enforcement officers or officers of justice who have probable cause to believe that a person is armed and presents a danger to the officer's safety.

PSM, JDL

DAVID Y. IGE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
919 Ala Moana Boulevard, 4th Floor
Honolulu, Hawaii 96814

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DEPUTY DIRECTOR
LAW ENFORCEMENT

No. _____

TESTIMONY ON SENATE BILL 771
RELATING TO LAW ENFORCEMENT

Nolan P. Espinda, Director
Department of Public Safety

Senate Committee on Public Safety, Intergovernmental and Military Affairs
Senator Will Espero, Chair
Senator Rosalyn H. Baker, Vice Chair

Tuesday, February 10, 2015, 01:15 PM
State Capitol, Conference Room 229

Chair Espero, Vice Chair Baker, and Members of the Committee:

Department of Public Safety (PSD) **strongly opposes** Senate Bill (SB) 771 which proposes to require law enforcement officers and officers of justice to request and obtain a person's voluntary and informed consent prior to conducting a search of the person, the person's belongings, the person's residence, or the person's vehicle when conducting the search without a search warrant.

Current laws and the constitution provide protections more than adequate to preserve an individual's rights against illegal searches and seizures by law enforcement officers. SB 771 would place an undue burden on the responding law enforcement officer(s) and would not afford any more legal protection to members of the public than already exist. Law enforcement officers, and investigators are specifically trained to recognize those issues which may arise during warrantless searches and are already guided by the Search Incident to Arrest (SITA) rules as articulated in three U.S. Supreme Court decisions regarding the conduct of warrantless searches.

Thank you for the opportunity to present this testimony.

I am in support of SB 109. I feel the police commission should have the right to suspend or terminate the chief of police, etc. if necessary.

In addition, I strongly feel that each county in their appointment of commissioners should choose potential candidates in the community that are of backgrounds that would be in line with the day-to-day challenges of the police officers who serve the public. For example, the community commissioners should consist of: mental health workers, social workers, domestic violence and other anti-abuse educators, nurses and/or other medical health specialists, IT and home-land security specialists, homeless specialists, etc.

We live in a not so innocent world. And we live in the middle of the ocean! We need to be better prepared--our first responders need to be better assisted by having commissioners on board who truly understand what the average policeman or woman is up against on a daily basis.

Testimony by:

Nancy Manali-Leonardo

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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CHIEF

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MARIE A. McCAULEY
DEPUTY CHIEFS

OUR REFERENCE RC-NTK

February 10, 2015

The Honorable Will Espero, Chair
and Members
Committee on Public Safety,
Intergovernmental and Military Affairs
State Senate
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Espero and Members:

SUBJECT: Senate Bill No. 771, Relating to Law Enforcement

I am Richard Schaab, Captain of the Criminal Investigation Division of the Honolulu Police Department, City and County of Honolulu.

The Honolulu Police Department opposes Senate Bill No. 771, Relating to Law Enforcement.

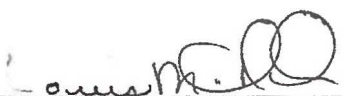
The Honolulu Police Department provides excellent training to its officers regarding constitutional law and court decisions relating to search and seizure. The Honolulu Police Department is confident that its officers conduct criminal investigations to solve crimes while protecting the rights of all persons. Officers seek search warrants whenever possible or a written consent to search when a warrant is impractical. However, there are exceptions to the warrant requirement that this bill seeks to override. We believe that search and seizure issues should be addressed by the Judiciary. The Judiciary is able to more quickly adapt to changes in court procedures and/or rules of evidence that may result from judicial findings of higher courts.

The Honolulu Police Department urges you to oppose Senate Bill No. 771, Relating to Law Enforcement.


Thank you for the opportunity to testify.

APPROVED:

Sincerely,



LOUIS M. KEALOHA
Chief of Police



RICHARD C. SCHAAB, Captain
Criminal Investigation Division

William P. Kenoi
Mayor



Harry S. Kubojiri
Police Chief

Paul K. Ferreira
Deputy Police Chief

County of Hawai'i

POLICE DEPARTMENT

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February 6, 2015

Senator Will Espero
Chair and Committee Members
Committee on Public Safety, Intergovernmental and Military Affairs
415 South Beretania Street, Room 229
Honolulu, Hawai'i 96813

Re: SENATE BILL 771, RELATING TO LAW ENFORCEMENT

Dear Senator Espero:

The Hawai'i Police Department opposes Senate Bill 771, with its purpose being to require law enforcement officers and officers of justice to request and obtain a person's voluntary and informed consent prior to conducting a search of the person, the person's belongings, the person's residence, or the person's vehicle when conducting the search without a search warrant. Provides an exception for law enforcement officers or officers of justice who have probable cause to believe that a person is armed and presents a danger to the officer's safety.

Our concern is geared toward the total absence of "reasonable suspicion" with respect to the searching of an individual. The basic definition of "reasonable suspicion" is articulable facts or circumstances which would lead a reasonable person to suspect that a crime has been, is being or will be committed. This is in contrast to the standard this bill proposes, which is Probable Cause. The basic definition of "probable cause" is articulable facts or circumstances which would lead a reasonable person to believe a crime has been, is being, or will be committed and the person under investigation is the one responsible for the crime.

At the stage of "reasonable suspicion," the courts have repeatedly ruled that for an officer's safety the officer may detain someone for a brief period and perform a frisk of that person for weapons. This action is commonly referred to as a "Terry Stop and Frisk".

At the stage of Probable Cause police may perform a search, and often an arrest. Probable cause generally means police know what crime they suspect you of and have discovered evidence to support that belief. Common examples include smelling or seeing evidence in plain view, or receiving an admission of guilt for a specific crime. In the case of plain view, the Courts have repeatedly upheld the right of law enforcement to seize the object without a warrant and without consent. This is commonly referred to as "plain view".

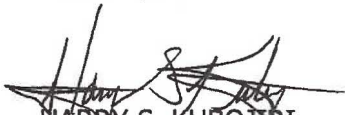
Senator Will Espero
Re: Senate Bill 771, Relating to Law Enforcement
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This bill seemingly fails to take into account the expectations of a Police Officer and the job to be performed under the most extenuating of circumstances. The requirements to have signed consents or an audio; to be forced to present a copy to the person searched at the conclusion of the search; to have to capture additional information to include race, ethnicity, gender, and age, will only serve to further frustrate the officers in the performance of their duties. It also fails to take into account the fact that some of the smaller counties may have only one or two officers working over large stretches of territory without the benefit of additional nearby "backup" officers. Policing is for the most part a "field" occupation. Attempting to put additional constraints and requirements more akin to office work is simply impractical, and in the case of this particular legislative draft, it is downright dangerous.

It is for these reasons, we urge this committee to not approve this legislation.

Thank you for allowing the Hawai`i Police Department to provide comments relating to Senate Bill 771.

Sincerely,



HARRY S. KUBOJIRI
POLICE CHIEF

COMMUNITY ALLIANCE ON PRISONS

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COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL & MILITARY AFFAIRS

Sen. Will Espero, Chair

Sen. Rosalyn Baker, Vice Chair

Tuesday, February 10, 2015

1:15 p.m.

Room 229

SUPPORT for SB 771 - CONSENT TO SEARCH

Aloha Chair Espero, Vice Chair Baker and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies for almost two decades. This testimony is respectfully offered on behalf of the 5,600 Hawai'i individuals living behind bars, always mindful that more than 1,600, and soon to be rising number of Hawai'i individuals who are serving their sentences abroad, thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

SB 771 requires law enforcement officers and officers of justice to request and obtain a person's voluntary and informed consent prior to conducting a search of the person, the person's belongings, the person's residence, or the person's vehicle when conducting the search without a search warrant and provides an exception for law enforcement officers or officers of justice who have probable cause to believe that a person is armed and presents a danger to the officer's safety.

Community Alliance on Prisons supports this measure. We are committed to the principle that justice is blind. Persons involved in any interaction with law enforcement should understand their rights before being asked to surrender them. This would be in compliance with Hawai'i's language access law, HRS 321.

[§321C-3] Oral and written language services. (a) Each state agency and all covered entities shall take reasonable steps to ensure meaningful access to services, programs, and activities by limited English proficient persons, which will be determined by a totality of circumstances, including the following factors:

(1) The number or proportion of limited English proficient persons served or encountered in the eligible service population;

(2) The frequency with which limited English proficient persons come in contact with the services, programs, or activities;

(3) The nature and importance of the services, programs, or activities; and

(4) The resources available to the State or covered entity and the costs.

(b) Subject to subsection (a), each state agency and covered entity shall provide competent, timely oral language services to limited English proficient persons who seek to access services, programs, or activities.

(c) Subject to subsection (a), each state agency and covered entity shall provide written translations of vital documents to limited English proficient persons who seek to access services, programs, or activities, as follows:

(1) Written translations of vital documents for each eligible limited English proficient group that constitutes five per cent or one thousand, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered; or

(2) If there are fewer than fifty persons in a limited English proficient group that reaches the five per cent threshold in paragraph (1), written notice in the primary language to the limited English proficient language group of the right to receive competent oral interpretation of those written materials, free of cost. (Emphasis added)

(d) To the extent that the State requires additional personnel to provide language services based on the determination set forth in this section, the State shall hire qualified personnel who are bilingual to fill existing, budgeted vacant public contact positions. [L 2012, c 201, pt of §2]

Community Alliance on Prisons respectfully asks the Chair to request the Law Enforcement Coalition to furnish a list of languages to which their consent forms are translated.

Mahalo for this opportunity to testify.

SB771

Submitted on: 2/9/2015

Testimony for PSM on Feb 10, 2015 13:15PM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Myles S. Breiner	Hawaii Association of Criminal Defense Lawyers	Support	Yes

Comments: Dear PSM Chair Senator Espero and Vice-Chair Senator Baker: I am the President of the Hawaii Association of Criminal Defense Lawyers (HACDL) and submit this testimony in support of Senate Bill Number 771. We support S.B. 771 because the search of a person or property without notice is deeply offensive to our State and Federal Constitutions. Voluntary and informed consent is at the heart of our constitutional and political system -- without consent there is only tyranny! Myles S. Breiner President Hawaii Association of Criminal Defense Lawyers (HACDL)

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HAND DELIVERED TO ROOM 206 OF THE STATE CAPITOL

February 9, 2015

Senator Will Espero
Chairman, Committee on Public Safety,
Intergovernmental and Military Affairs
Hawaii Senate
State Capitol, Room 206
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Senate Bill No. 771,
"Law Enforcement Search Powers;
Voluntary and Informed Consent"

Dear Chairman Espero and Committee Members:

I am a private practice attorney based in Honolulu and concentrating in criminal defense law. I have been a member of the Hawaii bar since 1968. Additionally, I have served as a Lecturer in Law at the William S. Richardson School of Law since 2005, co-teaching (as a founding member) the Hawaii Innocence Project courses, along with William Harrison, Esq., Susan Arnett, Esq., and Professor Virginia Hench.

This letter constitutes my written testimony (also submitted on behalf of the Hawaii Innocence Project) in ardent support of Senate Bill No. 771, which was introduced by Senators Maile Shimabukuro (Vice Chair of the Senate Judiciary Committee), Brickwood Galuteria, Russell Ruderman and Will Espero. That bill is scheduled to receive a hearing by the Senate Public Safety Committee in conference room 229 at 1:15 p.m. on Tuesday, February 10, 2015.

Article I, section 7 of our Hawaii Constitution emphasizes: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches, seizures and invasions of privacy shall not be

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violated; and no warrants shall issue but upon probable cause, and particularly describing the place to be searched and the persons or things to be seized" Hawaii courts wisely "presume that a warrantless search or seizure is invalid unless and until the prosecution proves that the search or seizure falls within a well-recognized and narrowly defined exception to the warrant requirement. If the prosecution fails to meet this burden, the evidence obtained from the illegal search will be suppressed as 'fruit of the poisonous tree.'" State v. Prendergast, 103 Hawaii 451, 454, 83 P.3d 714, 717 (2004) (citations omitted).

One of the exceptions to the constitutional search warrant requirement is the "consent" of an individual to the search. However, in order to be valid, a person's consent to a search must be "freely and voluntarily given." State v. Russo, 67 Haw. 126, 137, 681 P.2d 553, 562 (1984) (underlining added). Consent cannot "be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion" State v. Trainor, 83 Hawaii 250, 261, 925 P.2d 818, 829 (1996) (citation omitted). The "question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion [or trickery or misunderstanding], express or implied, is a question of fact to be determined from the totality of all the circumstances." Id.

Senate Bill No. 771 will greatly help to ensure that a "consent" is a valid and genuine consent, by requiring (inter alia) that (1) a law enforcement officer's request to search is communicated in "a language and manner understood by the person"; (2) the officer informs "the person that the person has the right to refuse consent or withdraw consent at any time before or during the search"; and (3) the officer creates "an audio or written and signed record of the person's voluntary and informed consent, including a statement that the person is voluntarily providing informed consent to the officer and that the person understands that the person may refuse consent or withdraw consent at any time before or

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during the search." The legal validity of purported consents to search is often a litigated issue in criminal cases. Instituting the fair and reasonable procedures contained in Senate Bill No. 771 will in fact conserve the time and resources of the judiciary, prosecutors and defendants/defense counsel, because it will reduce trial court and appellate litigation over consent-to-search issues.

Although I enthusiastically support Senate Bill No. 771, in my professional opinion it would be highly advisable for the Public Safety Committee to consider one important revision to the current wording of the bill. That revision could substantially improve the prospects for approval of the bill by the Senate, the House of Representatives and the Governor of Hawaii.

Presently, Senate Bill No. 771 is broadly worded in such a manner that it could conflict with judicially recognized exceptions to the search warrant requirement other than (1) an individual's consent, and (2) probable cause to believe that a person is armed and presents a danger to an officer's safety. Section 3 of the bill now states: "A law enforcement officer or officer of justice shall request and obtain a person's voluntary and informed consent prior to conducting a search of the person, the person's belongings, the person's residence, or the person's vehicle if the search is not pursuant to a search warrant." [Underlining added.] The bill then provides only one exception to that broad mandate: "This section shall not apply to a search of a person by a law enforcement officer or officer of justice who has probable cause to believe that the person is armed and presents a danger to the officer's safety in the course of the officer's investigation."

However, the Hawaii Supreme Court and the Hawaii Intermediate Court of Appeals have long recognized that some additional exceptions to the search warrant requirement exist. "[W]e have also recognized that the warrant requirement is 'subject ... to a few specifically established and well-delineated exceptions,'" which apply to "cases where the

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societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate." State v. Meyer, 78 Hawaii 308, 312, 893 P.2d 159, 163 (1995) (ellipsis in original; citations omitted). For example, non-consensual exceptions to the search warrant requirement include the "search incident to arrest" exception (see State v. Naeole, 80 Hawaii 419, 423, 910 P.2d 732, 736 (1996) ("We have long held that a search incident to a lawful arrest is an 'exception to the usual requirement that the officer have a warrant prior to conducting the search'")); an "automobile exception" (see State v. Faulkner, 64 Haw. 101, 106-07, 637 P.2d 770, 775 (1981) ("a warrantless search of an automobile would be proper where the police had probable cause to search at the time of the warrantless search and seizure, and they had reason to believe that because of the car's mobility or exposure, there was a foreseeable risk that it might be moved or that the evidence which it contained might be removed or destroyed before a warrant could be obtained")); and a probation exception (see State v. Fields, 67 Haw. 268, 282, 686 P.2d 1379, 1390 (1984) ("there is reason here for permitting searches for illicit drugs without a warrant issued upon probable cause," if the "particular intrusion" is "justified by a reasonable suspicion supportable by specific and articulable facts that dangerous drugs and substances are being secreted by the probationer"))).

Therefore, I would respectfully suggest that the Public Safety Committee discuss revising the bill's overly narrow "shall not apply" portion to state: "This section shall not apply to a search of a person by a law enforcement officer or officer of justice who has probable cause to believe that the person is armed and presents a danger to the officer's safety in the course of the officer's investigation, and/or to a search that is constitutionally justified by another precise, well-established and judicially approved exception to the search warrant requirement."

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In conclusion, I and the Hawaii Innocence Project urge the Hawaii Senate's Public Safety Committee to approve Senate Bill No. 771, after addressing the one suggested revision set forth above.

Very truly yours,

LAW OFFICES OF BROOK HART
A Law Corporation

Brook Hart

BROOK HART
Hawaii Innocence Project,
William S. Richardson School of Law

From: mailinglist@capitol.hawaii.gov [mailto:mailinglist@capitol.hawaii.gov]
Sent: Friday, February 06, 2015 10:01 AM
To: PSMTestimony
Cc: wusstig@gmail.com
Subject: *Submitted testimony for SB771 on Feb 10, 2015 13:15PM*

SB771

Submitted on: 2/6/2015
Testimony for PSM on Feb 10, 2015 13:15PM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Kenny Wusstig	Individual	Support	No