



## Office of the Public Defender State of Hawai'i



### Testimony of the Office of the Public Defender, State of Hawai'i to the Senate Committee on Judiciary

February 12, 2019

S.B. No. 179: RELATING TO SEARCH WARRANTS

Chair Rhoads, Vice Chair Wakai and Members of the Committee:

The Office of the Public Defender opposes S.B. No. 179.

This measure would allow a judge or a magistrate to grant the issuance of a search warrant based upon a sworn oral statement communicated in person or by telephone.

Before a search warrant is issued, the judge must be satisfied that the search is reasonable and that there is probable cause. The judge determines whether probable cause exists based on the contents of the application for the warrant submitted by the law enforcement officer. Therefore, it is critical that the contents/information included in the application must be complete and accurate. Moreover, the contents/information must be properly and accurately communicated to the judge.

To ensure that the information in the application is complete and accurate and to also ensure that the judge accurately received and understood the information, the application must be in written form. The judge, with document in hand, will only then be able to properly review, study, and analyze the application, which are often lengthy and detailed. The judge will not be able to do so if the application is communicated orally. Moreover, an oral statement by the law enforcement officer is also subject to be misheard or misunderstood by the judge.

Finally, it is unlikely that a law enforcement officer would be able to provide the necessary information to a judge "off the top of his/her head." More likely, the officer will have prepared a statement (written or typed) prior to contacting the judge, so that the officer is able to read the information to the judge.

Therefore, the issuance of a search warrant should continue to only be based upon a sworn written statement.

Thank you for the opportunity to comment on S.B. No. 179.

**Justin F. Kollar**  
Prosecuting Attorney

**Jennifer S. Winn**  
First Deputy



**Rebecca A. Vogt Like**  
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**THE HONORABLE KARL RHOADS, CHAIR  
SENATE COMMITTEE ON JUDICIARY  
The Thirtieth Legislature  
Regular Session of 2019  
State of Hawai'i**

February 12, 2019

**RE: S.B. 179: RELATING TO SEARCH WARRANTS.**

Chair Rhoads, Vice-Chair Wakai, and members of the Senate Committee on Judiciary, the Office of the Prosecuting Attorney of the County of Kaua'i is in strong support of this measure.

This bill clarifies and expressly authorizes that search warrants may be issued based upon oral statements or electronic communications.

Allowing for the use of electronic communications will bring Hawai'i's law regarding search warrants into the 21<sup>st</sup> century and align Hawai'i law with many other jurisdictions nationwide that allow law enforcement officers to obtain search warrants via electronic means.

Current procedure allows for only written or telephonic warrants, which can be time-consuming and inconvenient for Judges, who spend much of their time on the bench processing cases, as well as investigators, who must take time to visit the courthouse, wait for a Judge to become available, and then meet face-to-face.

We note that in HB 1773 HD 1 SD 1 from the 2018 session, there were additional requirements imposed, including a finding by the judge that an exigency exists to issue an electronic warrant, as well as a requirement that each electronic warrant be reviewed and e-signed by a Prosecutor. There is no basis under the law or any precedent for either of those requirements. There is nothing about an electronically-issued warrant that is special enough to

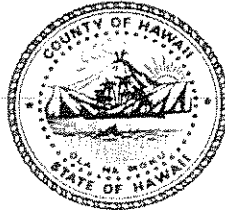
warrant a finding of exigency. Warrants should issue based on probable cause alone. It should be noted that ANY warrant being served between 10 p.m. and 6 a.m. already requires a special finding by the Judge that time is of the essence. Adding a new requirement would be duplicative and cumulative. Moreover, although Prosecutors often review search warrants prior to their presentation to a Judge, there is no requirement that such a review take place. Adding a mandatory review for electronically-issued warrants is a distinction that again, lacks any reasonable basis.

We strongly support S.B. 179 in its CURRENT form and urge you to PASS the Bill.

Thank you for this opportunity to testify on this bill.

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## OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN SUPPORT OF SENATE BILL 179

A BILL FOR AN ACT RELATING TO SEARCH WARRANTS

COMMITTEE ON JUDICIARY

Senator Karl Rhoads, Chair  
Senator Glenn Wakai, Vice Chair

Tuesday, February 12, 2019, 9:00 a.m.  
State Capitol, Conference Room 016

Honorable Chair Rhoads, Honorable Vice Chair Wakai, and Members of the Committee on Judiciary, the Office of the Prosecuting Attorney, County of Hawai'i submits the following testimony in **STRONG SUPPORT** of Senate Bill No. 179

This bill clarifies and expressly authorizes that search warrants may be issued based upon oral statements or electronic communications.

Current procedure allows for only written or telephonic warrants, which can be time-consuming and inconvenient for Judges, who spend much of their time on the bench processing cases, as well as investigators, who must take time to visit the courthouse, wait for a Judge to become available, and then meet face-to-face. This bill authorizes that search warrant may be issued based upon oral statements or electronic communications.

The Office of the Prosecuting Attorney, County of Hawai'i, strongly supports the passage of Senate Bill No. 179 in its CURRENT form and urge you to **PASS** the Bill. Thank you for the opportunity to testify on this matter.

DEPARTMENT OF THE PROSECUTING ATTORNEY  
**CITY AND COUNTY OF HONOLULU**

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**THE HONORABLE KARL RHOADS, CHAIR**  
**SENATE COMMITTEE ON JUDICIARY**  
**Thirtieth State Legislature**  
**Regular Session of 2019**  
**State of Hawai`i**

February 12, 2019

**RE: S.B. 179; RELATING TO SEARCH WARRANTS.**

Chair Rhoads, Vice-Chair Wakai and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu (“Department”) submits the following testimony in strong support of S.B. 179. This bill is part of the Department's 2019 legislative package.

The purpose of S.B. 179 is to expressly authorize judges to issue search warrants based on sworn oral statements and sworn statements communicated electronically.

While Rule 41(h) of the Hawaii Rules of Penal Procedure authorizes a judge to issue a search warrant based on a sworn oral statement, corresponding sections of the Hawaii Revised Statutes (HRS) are currently unclear on this authorization. For example, HRS Section 803-34 mandates that a “warrant shall be *in writing*”; HRS Section 803-31 states that a “search warrant is an order *in writing*”; and HRS Section 803-33 requires that a search warrant be supported by an affidavit. An “affidavit” is a written statement made or taken under oath before an officer of the court or a notary public. Because of this discrepancy, the Department strongly believes that the statutes need to be updated and amended to expressly provide for warrants based on sworn oral statements.

Because Rule 41(h) already provides for sworn oral statements, H.B. 507 would be consistent with the clear desire of the bench and bar that judges *should have* the authority to issue a search warrant based on sworn oral statements. Typically, before a new proposal is incorporated into the Hawaii Rules of Penal Procedure, the proposal is considered by the Permanent Committee on the Hawaii Rules of Penal Procedure, which is comprised of judges from around the State, as well as prosecutors, defense attorneys, and public defenders. Before the Supreme Court decides whether to adopt a proposal and incorporate it into the rules of penal procedure, the public is typically also invited to provide input. The fact that Rule 41(h) has

already been promulgated reflects a determination by learned judges and attorneys that such a procedure is appropriate, lawful, and consistent with the Hawaii State Constitution.

The reason why Rule 41(h)—and thus S.B. 179—is needed, is that law enforcement occasionally encounters scenarios when it is not possible to obtain a written warrant supported by a written affidavit before relevant evidence becomes unavailable. For example, in a vehicular homicide case involving alcohol, it is not possible to generate a written warrant and affidavit, locate a judge for approval, and serve the same written warrant, all before the suspect’s level of alcohol dissipates and that evidence is gone forever. There simply isn’t enough time to prepare a traditional written warrant and affidavit. S.B. 179 addresses that scenario (and others) by allowing warrants to be based on *sworn* oral statements, requiring that the statement be made “under penalty of perjury”. In addition, both Rule 41(h) and S.B. 179 require that all communications between the applicant and the judge be recorded, and that a transcript of the recording be prepared and filed with the court, to ensure a permanent record. These procedures provide for transparency and subsequent review by counsel and appellate courts.

Regarding warrants based on sworn statements communicated electronically, the procedure set forth in H.B. 507 is consistent with the procedure described in Rule 41(h), as well as the court’s new e-filing and e-signature procedures, and provides for the same degree of transparency and accountability as Rule 41(h). This would enable law enforcement and our courts to make use of currently available technology—streamlining this particular procedure while maintaining safeguards—and essentially make the process more efficient.

If the Committee is inclined to move this measure forward by inserting language from H.B. 1733, H.D. 1, S.D. 1 (2018), we respectfully ask that the Committee delete page 1, lines 13-16; page 2, lines 1-2; and page 4, lines 11-17 of that language. Because search warrants are only issued upon a finding of probable cause—as determined by the reviewing judge—and nothing about obtaining a search warrant via telephone or electronically decreases this standard or the reliability thereof, we believe that there should be no additional “time and place” requirements, nor any requirement for a prosecutor to review beforehand. While it is very common for a prosecutor to review a search warrant before police or sheriffs appear before the judge, that should not be a prerequisite for obtaining a search warrant. The decision of whether probable cause exists for a search warrant to issue lies solely with the judge.

Based on the foregoing, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports the passage of S.B. 179. Thank you for the opportunity to testify on this matter.

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JONATHAN GREMS  
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OUR REFERENCE

BM-GR

February 12, 2019

**LATE**

The Honorable Karl Rhoads, Chair  
and Members  
Committee on Judiciary  
State Senate  
Hawaii State Capitol  
415 South Beretania Street, Room 016  
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

SUBJECT: Senate Bill No. 179, Relating to Search Warrants

I am Benjamin Moszkowicz, Acting Major of the Traffic Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports the passage of Senate Bill No. 179, Relating to Search Warrants.

Recent court rulings have established certain situations in which search warrants are an absolute requirement in order to obtain evidence in criminal cases. Given the increased necessity and the limited time constraints to obtain search warrants, it is essential that we utilize the technology available to make the process as efficient as possible while continuing to ensure that everyone's civil rights are protected. In most major jurisdictions, search warrants obtained utilizing oral or electronic means are well established as an option available to law enforcement. The passage of this bill would provide Hawaii law enforcement with a necessary tool to meet the requirements placed upon law enforcement.

The HPD urges you to pass Senate Bill No. 179, Relating to Search Warrants.

Thank you for the opportunity to testify.

APPROVED:

Handwritten signature of Susan Ballard in black ink.

Susan Ballard  
Chief of Police

Sincerely,

Handwritten signature of Benjamin Moszkowicz in black ink.

Benjamin Moszkowicz, Acting Major  
Traffic Division



Mothers Against Drunk Driving HAWAII  
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February 12, 2019

To: Senator Karl Rhoads, Chair; Senator Glenn Wakai, Vice Chair; and members of the Committee

From: Carol McNamee and Arkie Koehl, Public Policy Committee - MADD Hawaii

Re: Senate Bill 179 – Relating to Search Warrants

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I am Carol McNamee, offering testimony on behalf of the Hawaii Chapter of Mothers Against Drunk Driving in support of Senate Bill 179, relating to Search Warrants.

MADD is in support of the section on electronic warrants because of its importance to law enforcement in the realm of impaired driving. It is now common practice in communities across the country to use electronic warrants for the purpose of obtaining blood samples from drivers who have been stopped on suspicion of driving under the influence of alcohol or other drugs and who have refused to be tested.

Hawaii has seen a substantial increase in refusals over recent years in part because of the Supreme Court opinion which resulted in the decriminalization of refusal. Evidently the word has gotten around that now refusal is the “smart” choice in trying to circumvent the sanctions of the administrative drivers’ license revocation system and the judicial system as well. This is very troubling to MADD because studies have shown that drivers who refuse to be tested are in a high risk category meaning they are more likely to become repeat offenders and to cause traffic crashes.

MADD’s 2018 Report to the Nation on the status of the “Campaign to Eliminate Drunk Driving” states that “34 states allow law enforcement the ability to expedite the warrant process for suspected drunk drivers who refuse.” One of the three recommendations in the state report for Hawaii was to expedite our warrant process to help reduce the number of alcohol re- lated crashes and fatalities.

This bill will be a significant help to law enforcement officers who are trying to keep our roads safe from impaired drivers. We encourage this committee to pass SB 179

Thank you for this opportunity to testify.



