

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

Testimony of the Office of the Public Defender,
State of Hawai‘i to the House Committee on Finance

February 6, 2022

H. B. 1866: RELATING TO INTOXICATION

Chair Rep. Mark M. Nakashima
Vice Chair Rep. Scot Z. Matayoshi
Honorable Committee Members:

The Office of the Public Defender **opposes** H.B. 1866 because empowering the police to compel a breath test without consent and without a warrant still violates the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Hawai‘i Constitution. It needlessly invites constitutional challenges, wastes resources, and can undermine future convictions.

The distinction between blood draws and breath tests comes from the Supreme Court of the United States. In *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), the Court held that the warrantless breath test of an arrestee did not violate the Fourth Amendment because it was a search incident to the arrest. *Id.* at 2178, 2184. The search-incident-to arrest exception in *Birchfield* still requires an arrest. *Smith v. Ohio*, 494 U.S. 541, 543 (1990) (“it is axiomatic that an incident search may not precede an arrest and serve as part of its justification.”).

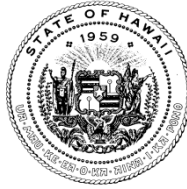
This bill goes beyond *Birchfield* and empowers the police to compel *any* vehicle operator and “any other person” to take a breath test without making an arrest. Without the arrest, there can be no exception to the warrant requirement—even under the Fourth Amendment.

Moreover, even if there is an arrest, the Hawai‘i Supreme Court has never distinguished the breath test from the blood draw under Article I, Section 7 of the Hawai‘i Constitution. *See State v. Wilson*, 141 Hawai‘i 459, 465-466, 413 P.3d 363, 369-370 (App. 2018). Our State constitution’s search-incident-to arrest exception is very different and affords more protection than its federal counterpart. *State v. Won*, 137 Hawai‘i 330, 339 n. 23, 372 P.3d 1065, 1074 n. 23 (2015).

This bill will only cause more confusion for the police and prosecutors, invite needless litigation in our courtrooms, and will waste time and resources. If passed, the coming years will feature constitutional challenges and cast a cloud over any conviction based on warrantless and nonconsensual breath tests. The better approach is to eliminate the distinction and require warrants for blood and breath tests.

Mahalo for allowing our office to provide testimony and our position on this bill.

DAVID Y. IGE
GOVERNOR



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
ROSS M. HIGASHI
EDUARDO P. MANGLALLAN
PATRICK H. MCCAIN
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STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

February 8, 2022
2:00 P.M.
State Capitol, Teleconference

H.B. 1866
RELATING TO INTOXICATION

House Committee on Judiciary and Hawaiian Affairs

The Department of Transportation (DOT) **supports with recommendations**, H.B. 1866 relating to intoxication. This bill amends the procedures under which a blood test, urine test, or breath test is administered in the event of certain vehicular collisions. It prohibits state courts from vacating any conviction for a crime that was committed before December 5, 2016, if the primary basis for doing so would be a warrantless blood test for an intoxicant, unless otherwise required by constitutional law.

This measure, if enacted, would validate and clarify procedures involving police obtaining alcohol and drug test administered by the medical facility in which a driver involved in vehicle collision resulting in serious injury or death is being treated.

The bill would also improve providing evidentiary drug and alcohol test results among drivers who are treated for injuries.

We recommend that the sections 707-702.5, 707-703, 707-704, 707-705, and 707-706 be reinserted, as they clarify procedures to police, prosecution, and medical providers, when alcohol and or drugs are involved in the crash.

Thank you for the opportunity to provide testimony.



Mothers Against Drunk Driving HAWAII
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February 8, 2022

To: Representative Mark M. Nakashima, Chair, Committee on Judiciary & Hawaiian Affairs, Representative Scot Z. Matayoshi, Vice Chair; and members of the Committee

From: Kurt Kendro, Chair, Public Policy Committee; Mothers Against Drunk Driving (MADD) Hawaii

Re: House Bill 1866- RELATING TO INTOXICATION

I am Kurt Kendro, Chair of MADD Hawaii's Public Policy Committee and retired Major from the Honolulu Police Department speaking on behalf of the members of MADD Hawaii Advisory Board in STRONG SUPPORT of House Bill 1866- Relating to Intoxication.

This bill prohibits State Courts from vacating convictions prior to April 24, 2016, if the only basis for doing so was based on a warrantless blood test for an intoxicant when probable cause was present.

For many years, law enforcement was allowed to obtain a warrantless blood, breath, or urine sample from the operator of any vehicle involved in a collision that resulted in injury or death of another person. This standard was accepted by the Hawaii Courts after many countless tragedies involving impaired driving deaths. Law enforcement based their actions based on probable cause in accordance with both statutory and common law. The passage of this bill would allow these convictions to remain in place based upon the accepted laws and practices at the time of the convictions. These convictions should remain in place.

MADD Hawaii is in STRONG SUPPORT of House Bill 1866- Relating to Intoxication.

Thank you for the opportunity to testify.

Erik K. Abe
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TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
TUESDAY, MARCH 2, 2021; 2:00 P.M.
STATE CAPITOL, CONFERENCE ROOM 325

RE: HOUSE BILL NO. 1866, RELATING TO INTOXICATION.

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

My name is Erik Abe, and I am the Public Affairs and Policy Director for the Hawaii Primary Care Association (HPCA). I am testifying today solely in my capacity as a concerned citizen, and my views expressed do not necessarily nor officially reflect those of the HPCA.

I am testifying in **SUPPORT** of House Bill No. 1866, RELATING TO INTOXICATION.

As received by your Committee, this bill would harmonize Hawaii's Implied Consent Law (Part II of Chapter 291E, Hawaii Revised Statutes (HRS)), with the common law by clarifying that a warrant is necessary for a blood or drug test, but not for a breath test, when there is probable cause that someone died or experienced serious bodily injury because of a person operating a vehicle under the influence of an intoxicant.

Four years, I was requested by a friend, Mr. Ron Shimabuku, to assist his family draft legislation before the Hawaii State Legislature to strengthen Hawaii's laws applicable to driving under the influence of an intoxicant. At that time, Mr. Shimabuku informed me that his hanai brother, Kaulana Werner, was killed by an intoxicated driver in Nanakuli, Island of Oahu, and that his family wanted to change the laws to prevent similar situations from occurring in the future to ease the suffering of families of victims.

On November 1, 2019, Myisha Lee Armitage was convicted of Accidents Involving Death or Serious Bodily Injury, in violation of Section 291C-12, HRS, and Negligent Homicide in the First Degree, in violation of Sections 707-702.5(1)(a) and 707-702.5(1)(b), HRS, for the death of Kaulana Werner. On appeal, the Intermediate Court of Appeals vacated this conviction and remanded the case back to the Circuit Court of the First Circuit for a new trial.

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The Intermediate Court of Appeals held that based on the Hawaii Supreme Court's ruling in *State v. Niceloti-Velazquez*, 139 Hawaii 203, 386 P.3d 487 (2016), the police in the *Armitage* case (*State of Hawaii v. Myisha Lee Armitage*, (CASE NO. 1CPC-17-0000342)), failed to adequately develop the record to demonstrate the existence of exigent circumstances that would have justified the arresting officer's requesting a warrantless blood draw from the defendant.

The accident that resulted in the death of Kaulana Werner which led to the conviction of Myisha Armitage, occurred on April 24, 2016. The *Niceloti-Velazquez* decision was issued on December 6, 2016, or more than seven months AFTER Kaulana's accident. In other words, the Intermediate Court of Appeals applied a drastic change in enforcement policy on a crime that was committed BEFORE that change in policy had taken effect.

At the time of Kaulana's accident, both the Honolulu Police Department and the City Prosecutor's Office followed both the statutory and common law applicable to the collection of evidence in accidents involving death or serious injury in Hawaii, despite the fact that the common law in the United States was evolving around that time.

In two separate cases before the United States Supreme Court (*Missouri v. McNeely*, 569 U.S. 141 (2013), and *Birchfield v. North Dakota*, 579 U.S. ____ (2016)), the Supreme Court held that:

- (1) "Exigent circumstances" must be determined on a case-by-case basis and not on a categorical basis;
- (2) A blood test requires a warrant; and
- (3) A breath test does not.

These principles would not become a part of Hawaii law until the Intermediate Court of Appeals issued its *Niceloti-Velazquez* decision.

Shortly after the *Armitage* decision was rendered, there was much discussion between the Werner family, the Prosecutor's Office, and the police regarding who was to blame for this. Based on this research, I don't believe anyone is at fault. Everyone was trying to do the best job they could under extreme circumstances.

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The real problem is that the statutory law does not conform to the common law as stated in the *Niceloti-Velasquez* decision. This creates confusion for the police and prosecutors and ultimately hinders the court's ability to render just decisions.

This much is clear. "Exigent circumstances" must be determined on a case-by-case basis, a blood test requires a warrant, and a breath test does not. This is the public policy as stated by the United States Supreme Court.

This bill seeks to make this clear in Hawaii's statutes.

The ramifications of the *Armitage* decision are unknown. Because this change in evidentiary procedure is being enforced on cases occurring BEFORE that policy was established, countless convictions could be vacated on appeal despite the fact that at the time these crimes were committed, both the police and the prosecutors were following the statutory and common law applicable to the State of Hawaii. Should the *Armitage* decision lead to a rash of appeals, one can only speculate. But I can attest that the *Armitage* decision has added to the grief and suffering of the entire Werner Ohana. They will have to relive the anguish they felt in a new trial.

How many other families will have to suffer likewise?

For these reasons, I urge your favorable consideration of this bill.

Thank you for the opportunity to testify. Should you have any questions, please do not hesitate to contact me.

HB-1866

Submitted on: 2/5/2022 9:47:21 PM

Testimony for JHA on 2/8/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Ke'ala Ragsdale	Individual	Support	No

Comments:

I am in support of this bill. Intoxicated drivers should be held accountable for their actions and should not be released on technicalities such as warrantless blood tests.

HB-1866

Submitted on: 2/7/2022 4:34:09 AM

Testimony for JHA on 2/8/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Kehau Kaalouahi	Individual	Support	No

Comments:

My name is Kehau Kaalouahi and I fully support this bill. Blood drawn from intoxicated individuals should be legal and allowed to be used as evidence for conviction. This state gives too much freedom to the individuals who freely choose to drink and drive and they continue to receive no consequences for their actions - even when their actions include killing innocent people.

**Cynthia Au
1073 Kinau St
Honolulu, Hawaii 96814**

**TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN
AFFAIRS TUESDAY, MARCH 2, 2021; 2:00 P.M.
STATE CAPITOL, CONFERENCE ROOM 325**

RE: HOUSE BILL NO. 1866, RELATING TO INTOXICATION.

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

My name is Cynthia Au, and I am testifying as a concerned citizen in **SUPPORT** of House Bill No. 1866, RELATING TO INTOXICATION.

This bill would harmonize Hawaii's Implied Consent Law (Part II of Chapter 291E, Hawaii Revised Statutes (HRS)), with the common law by clarifying that a warrant is necessary for a blood or drug test, but not for a breath test, when there is probable cause that someone died or experienced serious bodily injury because of a person operating a vehicle under the influence of an intoxicant.

This bill will clarify Hawaii's statutes, which would affect judgments before any new policies that had taken place. We really do not want to continue to see injustices for families who have suffered the loss of loved ones based on unclear laws.

For these reasons, I urge your favorable consideration of this bill.

Thank you for the opportunity to testify in support of HB 1866.