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MARCH 10, 2015

TO: Chair Prozanski and Members of the Senate Judiciary Committee

FROM: Bob Hermann, Washington County District Attorney and President of the Oregon District Attorneys Association, and Jason Weiner, Washington County Deputy District Attorney

OREGON DISTRICT ATTORNEYS ASSOCIATION
OPPOSITION TO SENATE BILL 575

The 4th Amendment of the United States Constitution protects us from unlawful searches and seizures. The judiciary, tasked with interpreting the Constitution, has zealously protected those rights since our country's inception. There is a well-established body of search and seizure law that specifically addresses when consent searches are lawful. Consent to search must be freely and voluntarily given by an individual. There must be no coercion of any kind by the police. Police officers, prosecutors and judges understand this constitutional rule and apply it over and over again.

It is widely recognized that a police officer is not required to inform an individual that they have the right to refuse to consent to a search. The United States Supreme Court addressed this issue in a 2002 opinion authored by Justice Kennedy, saying, "The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search . . . Instead, the Court has repeated that the totality of the circumstances must control, *without giving extra weight to the absence of this kind of warning*." United States v. Drayton, 536 US 194, 206 (2002) (emphasis added). Later on in the same opinion, the Court says:

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

A person charged with a crime may challenge the admissibility of any evidence that the state obtains through a search. The state must prove to a judge that the evidence was obtained lawfully. Most searches take place without a search warrant, in which case the state must prove that the search took place pursuant to one of the well-recognized exceptions to the search warrant requirement. Consent is one of these exceptions. To prove that a consent search was lawful, the state must prove that the person *voluntarily* gave consent, that the consent was not the result of coercive police conduct. The courts have recognized a multitude of factors as being relevant in determining whether consent was voluntary or not. Among these factors include the person's age, education level, intelligence, mental and physical condition, custodial status, the length and nature of the encounter, *and whether the person was advised that he or she could refuse consent*. The judiciary has already contemplated this precise issue and chose to make it one of many factors used to determine whether consent was lawfully obtained. The current legal framework for consent searches has evolved over decades from the reasoned opinions of many judges. It is difficult to fathom why the Oregon legislature should change a well-established and well working constitutional rule established by the judiciary

Police officers are sworn to protect the public. Police investigate crime and often suspect that the people they are talking to have contraband (evidence of a crime). The contraband includes potentially lethal drugs such as methamphetamine and heroin, fraud materials used to commit Identity Theft, unlawfully possessed firearms, and evidence related to violent felonies or child abuse. It is routine for police officers in these situations to request consent to search. Frequently, police receive consent and discover dangerous contraband that, but for the consent search, would remain in our community. Requiring the police to proactively tell a citizen they have a right to refuse to consent to a search essentially turns the police officer from a servant and protector of the community to a servant and protector of the criminal, and is wholly unnecessary.

The ODAA opposes this legislation. In the aggregate, local police officers seize enormous quantities of dangerous contraband from consent searches, and there is already a well-settled, comprehensive series of safeguards that protect citizens' rights in this area. We fully expect that the proposed legislation will result in less contraband being seized and make the community less safe. Certainly, the Oregon legislature is entitled to create privacy rights that are stricter than those created by the Oregon and United States Constitutions, but in this particular area, it is difficult to come up with any rationale for such a requirement. Judges are well equipped to analyze every fact pattern and assess whether consent was voluntarily given or the result of coercive police conduct.