

SB2045

Late

Testimony on behalf of the
Office of the Public Defender, State of Hawai`i
to the Senate Committee on Judiciary and Government Operations

February 8, 2010

RE: S.B. 2045: Relating To Crime.

Senator Taniguchi and Members of the Committee:

S.B. 2045 seeks to create two new offenses, "Sexual Human Trafficking" and "Labor Trafficking". We question the need for the proposed "Sexual Human Trafficking" statutes as it is unclear what specific conduct this legislation is designed to address that is not already covered by offenses in the Hawaii Penal Code. While we understand the desire to have a "Labor Trafficking" offense, we have serious concerns about the proposed legislation.

As drafted, the "Sexual Human Trafficking" legislation appears to address conduct already covered by current statutes. Additionally, it is at odds with the structure of the Hawaii Penal Code.

The proposed new Human Trafficking statute would create a class "A" offense, punishable by a mandatory indeterminate 20 year prison term (i.e. not probationable), which would provide, in pertinent part,

if a person "with the intent to advance prostitution or sexually-explicit activity transports, **or aids, assists** or causes to be transported any person **into, through, within, across, or out** of the State ...

The terms **aid** and **assist** are not defined. The Random House Webster's Dictionary defines "aid" as "to help; assist". It defines "assist" as "to aid; help". It is poor legislative drafting to use words that mean the same thing in a statute and to use words that are defined so broadly.

Likewise, the words **through, within** and **across** are equally similar and, therefore, confusing. Can you cause someone to be transported **through** a state without being **within** or **across** the state? No. Including all of these words in the statute does not afford greater protection. It invites litigation challenging the normal meaning of the words, because the use of each of them implies that each means something different from the other.

This proposed legislation is full of questionable drafting. For example, the proposed Second Degree offense at §707-B does not include a state of mind. That is troubling because any statute that does not specifically cite a state of mind comes under HRS § 702-204 which provides that when the state of mind is not specified, the states of mind of "intentionally, knowingly, or recklessly" will

apply. This means that a person may be subjected to mandatory prison for only a “reckless” state of mind.

Another example is the sentencing provision for the Second Degree offense which provides that it is a class B offense unless the trafficked person is under 18 in which case the crime is a class A offense. This is poor writing, and again, at odds with the structure of the Hawaii Penal Code.

Additionally, while certain provisions in the bill do specify a state of mind such as intentional or knowing, there is a catchall provision in §707-G which essentially tries to create “strict liability” (i.e. that if the trafficked person was under 18, no state of mind need be proven) but immediately contradicts itself by stating that proof of recklessness or negligence will suffice.

There is another odd provision in proposed §707-G which states that it shall be a complete defense to a charge under this statute if a trafficked person is “required” to perform labor or services in a correctional facility or as “punishment for a crime”. The laws in Hawaii do not provide for involuntary servitude by incarcerated persons. If the reference to “punishment for a crime” is meant to apply to community service, it should so state.

Regarding the proposed statute for “Human Labor Trafficking”, we have a number of concerns about the form of the legislation. As currently drafting, it would punish the exact same conduct as the “sexual trafficking” statute. In order to avoid that result, the new law should refer to “non-sexual” labor or services.

Just as the sexual trafficking statute does, this proposal lists items that are included in other items. For example, the language at §707-D (1) (j) would punish

“Using any scheme, plan, or pattern intended to cause the trafficked person to believe that if the trafficked person did not perform the labor or services, then the trafficked person or another person would suffer serious harm or physical restraint”.

That behavior is already included in §707-D (1) (d) which would punish “force, threat or intimidation”.

We believe that the mandatory restitution amounts are unreasonably great and, in fact, are not true restitution but are fines under the guise of restitution. It is unrealistic to expect any significant payment when the mandatory prison terms are so severe at any rate.

Also, it seeks to add these newly created offenses to the list of “violent offenses” under section 351-32. While taking no issue with the seriousness of the conduct sought to be addressed in this bill, the offenses created are not

“violent” offenses, under the standard definition of violence. We open a Pandora’s box when we start adding offenses that are not violent, per se, to such a list.

Finally, we note that it is essentially insulting to our judiciary, not to mention the Hawai’i Paroling Authority, to mandate these prison sentences and minimum terms. It shows no faith on the part of judges and the parole board to fashion appropriate sentences that match the circumstances of each offense.

For these reasons, we cannot support this legislation in its current form.

Thank you for the opportunity to comment on this bill.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

LATE

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PETER B. CARLISLE
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DOUGLAS S. CHIN
FIRST DEPUTY PROSECUTING ATTORNEY

**THE HONORABLE BRIAN T. TANIGUCHI, CHAIR
SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS**

**TWENTY-FIFTH STATE LEGISLATURE
REGULAR SESSION OF 2010**

February 8, 2010

RE: SENATE BILL 2045, RELATING TO RELATING TO CRIME

Good morning Chair Taniguchi and members of the Judiciary and Government Operations Committee, the Department of Prosecuting Attorney provides the following testimony **regarding S.B. 2045**, which proposes to amend Hawaii Revised Statutes to establish new offenses of Sexual Human Trafficking and Labor Human Trafficking with three degrees of each offense, which are classified as Class A, B, and C felonies respectively. The bill further provides for amendments for amendments to existing statutes covering Crime Victim Compensation, Forfeiture, Wiretapping, Organized Crime, Sex Offender Registration, and Deferred Acceptance of Pleas.

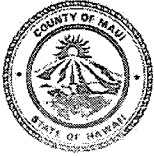
While we have little argument with the justification laid out in the purpose clause of S.B. 2045 for addressing human trafficking as a serious criminal offense. However, the proposed legislation put forward in this bill is where we begin to part company with the approach taken by this measure. While stating in the purpose clause suggests that the bill is designed to address human trafficking “holistically, directly and completely” in a way that existing statutes do not, its core approach is one that focuses on a very narrow piece of the human trafficking process and exalts or emphasizes it statutorily in a manner which creates excessive complexity, confusion, and overlap with existing offenses in the Penal Code. While it is not our purpose here to provide a detailed, point by point analysis of S.B. 2045, as provided by the Department of the Attorney General, we will focus instead on the problematic nature of the general construct of the new offenses proposed in this bill.

The primary premise of this bill appears to be that human trafficking including both labor and sex trafficking cannot and are not being effectively prosecuted in the state of Hawaii under existing statutes. While failing to cite specific examples, the impression is left by the purpose clause that human trafficking in our state is being ignored or ineffectively prosecuted due to the lack of adequate statutory authority in our existing laws. Although Sexual Assault, Kidnapping, Promoting Prostitution, and Extortion statutes (class A and B felonies carrying 10 to 20 year sentences) are routinely being used to charge and convict individuals of forcing into or maintaining women in prostitution, the perception provided in this measure is that it is not adequate. So instead of proposing improvements to our existing statutes to address whatever

shortcomings that may exist, this bill would have you adopt a complex and poorly integrated proposal that would most likely make human trafficking cases more difficult to prosecute than easier. One is reminded of a "Rube Goldberg" device in which an extremely complex machine is designed to accomplish a relatively simple task. While improvements to existing criminal statutes are always welcomed by our office we prefer to do so by simplest and most direct means. In this case we have attached a copy of H.B. 1938 which contains the incremental improvements we believe to be desirable in responding to human trafficking cases. The measure which includes upgrades to the Promoting Prostitution and Kidnap statutes and amends the State Witness protection statute to insure that Promoting Prostitution is among the offenses given greatest priority when determining which cases will be provided the funding to house, relocate, and provide living expenses for witnesses. We believe these to be practical proposals built on the foundation of existing statutory and case law.

In evaluating the concepts and details of S.B. 2045 virtually all of those deputy prosecutors consulted felt that the proposed offenses would be difficult to prove and provide a variety of conflicts and overlaps with current statutes. Indeed the ten page purpose clause of the bill itself recites numerous state appellate decisions that might be used to challenge the details of the proposed bill. This recitation could serve as a virtual road map for defense counsel seeking to appeal a conviction obtained under the proposed statute. Similarly the high risk of successful challenges to the proffered laws in this bill creates a significant disincentive for prosecutors to use this law if enacted. This, in fact, mirrors the experience in many other jurisdictions where complex human trafficking laws have been passed and state and local prosecutors have seldom used them. The deputy prosecutors in our Department have been very clear; the greatest problems in prosecuting human trafficking cases are evidentiary and witness problems, not statutory ones.

Although we commend the extensive effort put into S.B. 2045, it simply doesn't accomplish what it sets out to do. Like someone who has designed an elaborate addition onto a modest dwelling that overwhelms the original dwelling this proposal is legislative overkill. As an alternative we urge you to substitute the contents of H.B. 1938 (attached to our testimony) for the bill's current provisions. Our laws in this area are in need of a scalpel, not a sledge hammer. Thank you for your time and consideration.



CHARMAINE TAVARES
MAYOR

OUR REFERENCE
YOUR REFERENCE

POLICE DEPARTMENT
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LATE



GARY A. YABUTA
CHIEF OF POLICE

CLAYTON N.Y.W. TOM
DEPUTY CHIEF OF POLICE

February 5, 2010

The Honorable Brian T. Taniguchi, Chair
And Members of the Committee on Judiciary and Government Operations
The Senate
State Capitol
Honolulu, Hi 96813

Re: S.B. No. 2045, Relating to Crime

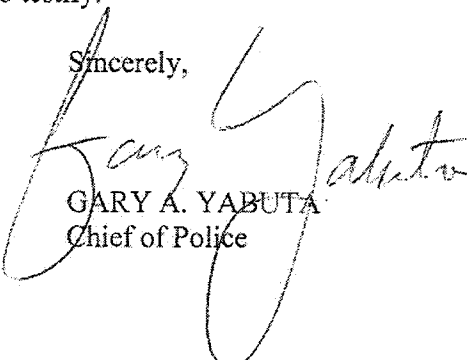
Dear Chair Taniguchi and Members:

The Maui Police Department opposes S.B. No. 2045, Relating to Crime. These criminal offenses are adequately covered by the current statutes. Under the current statutes, we can successfully investigate and prosecute said offense that will result in lengthy jail terms.

The Maui County Police Department asks for your support in opposing S.B. No. 2045.

Thank you for the opportunity to testify.

Sincerely,


GARY A. YABUTA
Chief of Police

THE SENATE
TWENTY-FIFTH LEGISLATURE, 2010
STATE OF HAWAII

Sen. Brian T. Taniguchi, Chair
Sen. Dwight Y. Takamine, Vice Chair

Hearing: Monday, February 8, 2010
Time: 9:30 a.m.
Place: State Capitol, Room 016

**TESTIMONY OF PACIFIC SURVIVOR CENTER RE:
SB 2045 RELATING TO CRIME**

Chair Taniguchi, Vice Chair Takamine, and Members of the Committee:

Thank you very much for the opportunity to present testimony regarding SB2045. We support the intent and the majority of the provisions of the bill.

Pacific Survivor Center is a small and young organization of persons trained in medicine, international relations, anthropology, and law, among other disciplines, that strives to assist the victims of human trafficking and torture. We believe there is now an emerging awareness of the grave and widespread international and national problems associated with human trafficking. SB2045 is a constructive response to this awareness that creates a separate criminal offense of human trafficking.

Human trafficking is a limited but very real phenomena in the State of Hawaii. It is manifested in recent guilty plea entered in federal court by two corporate officers of Aloun Farms, who trafficked some 44 Thai workers through debt bondage; the corruption case brought in the U.S. District Court against the Samoan Immigration and Customs Enforcement Office against some officials conspired to further actual trafficking; the Daewoosa sex trafficking victims who were taken from the People's Republic of China, then trafficked to American Samoa, released, and brought to Hawaii for resettlement and rehabilitation; and Francis Maka, a Tongan male illegally transported to Hawaii and enslaved in Waianae, beaten, deprived of food and water, and compelled to build a rock wall. In addition, there are also young women from the mainland and Hawaii forced into massage parlors in Waikiki, as well as immigrant woman brought here and coerced into working in hostess bars, strip clubs, and various other forms of sexual servitude.

In past legislative sessions other interested organizations have expressed concerns that anti-trafficking legislation misconceived persons involuntarily forced into the sex industry as "prostitutes" when in fact they were the victims of physical, emotional, and economic coercion and trauma. We also appreciate that prosecutors, police, and public defenders have had practical and theoretical concerns about the proposed anti-trafficking statute, its conformity with due process, equal protection, and the overlapping definitions of specific offenses.

As persons vitally concerned about eradicating the menace of human trafficking, we fully support the passage of an anti-trafficking law in Hawaii. Indeed, it is ironic that our legislature had the foresight to pass the first anti-sex tourism statute in the nation, Hawaii is now one of only eight states that does not have a specific anti-trafficking statute.

We do, however, also suggest that several additional aspects of S.B. 2045 bear further consideration:

1. Section 707-H(c)(2) of the bill requires law enforcement agencies to issue a Declaration of Law Enforcement Officer for Victim of Trafficking in Persons (LEA declarations) within fifteen days after the agency becomes aware of an alleged victim. (S.B. 2045, p. 27) A swift agency declaration is of course desirable in principle, but in practice it may often be insufficient time for law enforcement to conduct a thorough investigation of the victim's circumstances. The LEA declarations made by law enforcement are often of critical importance in the subsequent legal adjudication of victims' immigration status. An incomplete or erroneous declaration may complicate, delay, and sometimes even lead to denial of legal relief to victims. We therefore urge that a longer time period be afforded for this critical phase of law enforcement agencies' investigation.

2. Section 707-H(1)(a) and (b) provide that victims may not be detained in a facility that is inappropriate, or jailed given a trafficking victims status as a crime victim. This admirable concern for victims' welfare, however, must also be addressed in the context that there may be federal determinations of where victims should be detained or held. Legislating trafficking victims rights through the State of Hawaii must give due regard for the federal government's right to act to secure the safety of victims and with care to avoid problems with federal preemption in areas our national government attempts to regulate in a uniform and comprehensive manner.

3. The chronological age classifications stated in S.B. 2045 to establish mandatory minimum sentences for sex and labor trafficking also could benefit from greater flexibility. Often, victims may suffer from learning disabilities or other mental impairments so that their chronological age is not reflective of their mental competence and are misleading indicators of the severity of penalty that is warranted. We therefore urge that the bill make allowance for victims whose learning disabilities or provable mental impairments make age an inaccurate indication of their mental competence, as these classes of persons are especially vulnerable and warrant special protection.

4. Finally, we recommend that a final section be added to the proposal requiring law enforcement officials to certify in writing to federal authorities that an investigation or prosecution involving human trafficking under Hawai'i laws has begun and that the individual who is a likely victim of the crime is willing to cooperate or is cooperating in the investigation. Such language might state:

Certification. The Attorney General, state or local law enforcement agencies, or other state or county agencies having criminal investigative jurisdiction in their respective areas of expertise shall forthwith certify in writing to the United States Department of Justice or other federal agency, such as the United States Department of Homeland Security, that an investigation or prosecution has begun and the individual who is a likely victim of human trafficking as described under Hawai'i law and is willing to cooperate or is cooperating with the investigation to enable the individual, if eligible under federal law, to qualify for an appropriate special immigrant visa and to access available federal benefits. Cooperation with law enforcement shall not be required of victims of human trafficking who are under 18 years of age. This certification shall be made available to the victim and his or her designated legal representative.

Language such as this will facilitate receipt of benefits under federal law to trafficking victims and promote the kind of federal and state cooperation which will maximize use of joint resources.

Finally, we are mindful that there is a diversity of opinion on specific intricate issues surrounding constitutional law dimensions of the bill. However, we hope it will be possible for different parties to resolve such technical and substantive disagreements in the interest of eradicating the horrors of this immense social problem. We therefore urge that Senate Committee on Judiciary and Governmental Operations to pass this bill out of the committee. In that fashion, SB 2045 can be meaningfully debated in subsequent Senate committees, the full Senate, and the House, and refined into a lasting instrument of social change that will truly protect those victims of trafficking that our community unanimously wishes to support.

LATE

Date: February 7, 2010

ATTN: Committee on Judiciary and Government Operations

Sen. Brian Taniguchi, Chair
Sen. Dwight Y. Takamine, Vice Chair
Sen. Robert Bunda
Sen. Mike Gabbard
Sen. Clarence K. Nishihara
Sen. Sam Slom

HEARING DATE: February 8, 2010
HEARING TIME: 9:30am
PLACE: Conference Room 016, State Capitol

SB2045 - RELATING TO CRIME – Human Trafficking Offenses; Crime
Establishes class A, B, and C felony sexual human trafficking offenses and class A, B, and C felony labor trafficking offenses, and provisions related to prosecution of the offenses.

Dear COMMITTEE ON JUDICIARY and Government Operations:

I am submitting my testimony in favor of SB 2045, which criminalizes human trafficking in the State of Hawaii. I would specifically like to address the problem of sexual human trafficking.

The Republic of Hawaii first criminalized prostitution in 1869. Unfortunately, the State of Hawaii has not made significant progress on eradicating what our current criminal statutes define as an offense against public health and morals – prostitution. I believe this is so because historically Hawaii has *misunderstood* a key difference between a consenting adult selling his/her body for sexual services and a non-consenting adult or minor *being sold* for sexual services. My testimony focuses on the later experience.

According to a 2001 study by the University of Pennsylvania, the average age of entry into prostitution for girls is 12-14 years of age and for boys is 11-13 years of age in the United States. That's horrendous! Frequently, traffickers, who are often incorrectly referred to as pimps, lure these children into prostitution by capitalizing on their vulnerabilities. A runaway youth fleeing domestic violence at home is an easy victim for a trafficker offering to be the youth's father figure or sexual partner. Other times traffickers use violence. Our Honolulu newspapers have covered several stories over the years of teenage girls telling police they were kidnapped, raped, and forced into prostitution.

Yet, the problem is older than Hawaii's statehood. In *Territory of Hawaii v. Alford*, the Hawaii Supreme Court while upholding a conviction of promoting prostitution reveals the story of Alford's wife, who testified that Alford called her names, threatened her, and told that if she didn't continue prostituting herself he "had ways of handling women like her" and would "bust my face." 30 Haw. 460, 461 (1952). In *Hawaii v. Alexander*, again while upholding the conviction of promoting prostitution, the Hawaii Supreme Court reveals through the lower court's record that Alexander was accused of sexually exploiting minor girls, physically beating them for failure to make their earnings quota, and personally injecting the girls with drugs, probably cocaine. 612 P.2d 110, 118, 119 (1980).

What amazes me is that Hawaii law considers these and similar stories “promoting prostitution.” The word “prostitution” has a legal definition, which arose from tremendous societal prejudice and stereotypes. SB2045 is not addressing the “Pretty Woman” phenomenon where a consenting adult woman enters prostitution to pay the rent. It’s addressing the crime of sexually exploiting children and adults who didn’t voluntarily choose to sell their body for a fee. For Hawaii law to include kidnapping, raping, and repeated forced sexual exploitation under the umbrella of “Prostitution and Promoting Prostitution” is an offense to the public moral. The difference between the two crimes is as stark as the legislature’s indifference in failing to pass a human trafficking law since first introduced in 2006.

SB2045 isolates the crime of sexual human trafficking from prostitution. SB2045 recognizes that a person engaging in sexual conduct with another person for a fee is sometimes a child or sometimes an adult forced into sexual exploitation. SB2045 calls these persons victims while Haw. Rev. Stat. §712-1200 (2009) calls these persons “prostitutes” in spite of the circumstances. SB2045 goes after the bad guys, not the victims. SB2045 acknowledges that the first step in solving a problem is naming it – human trafficking – as a separate offense. SB2045 will help everyone from law enforcement to the judiciary *see* the invisible chains traffickers bind to their victims. SB2045 will punish traffickers not as pimps glorified by mass media but as slave-owners abhorrent to Hawaii’s Constitutional promise that all people are free by nature and entitled to control their destinies.

Aloha,
Tatjana Johnson

* *Am changes made by Gina M. Sa. GMS*

Date: 7 Feb 10

LATE

ATTN: **Committee on Judiciary** *and Government Operations*

- ~~Rep. Jon Riki Karamatsu, Chair~~
- ~~Rep. Ken Ito, Vice Chair~~
- ~~Rep. Della Au Bellati~~ *SEN BRIAN T. TANIGUCHI (Chair)*
- ~~Rep. Rida Cababilla~~ *SEN CLARENCE K. NISHIHARA*
- ~~Rep. Mele Carroll~~ *SEN SAM SLOW*
- ~~Rep. Robert N. Herkes~~ *SEN MIKE GABBARD*
- ~~Rep. Sylvia Luke~~ *SEN DWIGHT Y. TAKAMINE (V-Chair)*
- ~~Rep. Angus L.K. McKelvey~~
- ~~Rep. John M. Mizuno~~
- ~~Rep. Hermina Morita~~
- ~~Rep. Blake K. Oshiro~~
- ~~Rep. Joseph M. Souki~~
- ~~Rep. Clift Tsuji~~
- ~~Rep. Glenn Wakai~~
- ~~Rep. Barbara C. Marumoto~~
- ~~Rep. Cynthia Thielen~~

HEARING DATE: 8 Feb 10

HEARING TIME: 9:30 AM

PLACE: Hawaii State Capitol, *Conference Room 016*

SB2045

Subject: **HB1940 - RELATING TO CRIME - Human Trafficking Offenses; Crime**

Establishes class A, B, and C felony sexual human trafficking offenses and class A, B, and C felony labor trafficking offenses, and provisions related to prosecution of the offenses.

Dear Judiciary Committee,

I would like to begin my testimony with a short recitation.

**I pledge allegiance to the flag, of the United States of America
 And to the Republic for which it stands
 One nation, under God, indivisible
 With Liberty and Justice for all**

Today I appear before this distinguished body and citizenry to relate my testimony regarding Human Trafficking and the need to protect the innocent from this abominable crime. I have worn many hats in my life; daughter, sister, airman, mother, veteran. Now I proudly add one more hat to my mantle...citizen. If titles or labels are important you can pick anyone of the aforementioned hats to label me, or make up one of your own based upon my appearance, but the outcome is the same. I'm a human being.

Human trafficking; enforced prostitution; indentured servitude; forced labor, sweatshop...many different labels that have the same outcome...slavery...no matter how it appears.

It was as a daughter and a sister I first saw images of indentured servitude in my little town of Rosamond California where many school friends came and went seasonally or were; "here today, gone tomorrow." Many were children of legal migrant farm workers, but as I later learned many were part of families that were treated as little more than slaves, indebted to those who treated them like chattel. Farm worker conditions in California were atrocious in those days, but the "support system" for some of the farming camps may have been worse in some cases. In high school I learned about prostitution from two school friends from well-to-do families and only a year or two older than I. They ran away from home and ended up being taken from farm camp to farm camp by pimps. The pimps made \$10 a trick. They got drugs.

During my first few years in the Air Force I would learn more about prostitution while stationed in Germany. I would even come to believe these women were doing what they wanted by choice and that prostitution was a victimless crime. Over a decade later I would learn more about the Eastern European girls who were forced into prostitution in Western Europe even before the demise of the Iron Curtain and Berlin Wall. My thoughts about prostitution and the sex worker industry began to undergo a change as I saw the sad little caravans parked along the European roadsides and heard stories of the teenaged girls in the Czech Republic who sold baked good during the day and their bodies at night.

Once I became a mother, horrific tales of child stealing and so-called "white slavery" seemed to hit the media with regularity I'd not before known. Perhaps it was because I was a new mother, or perhaps because the media was getting larger as the world became smaller. One way or the other my eyes became more open to the fact slavery was not over just because America thought so and slavery is not just about the past holocaust against Black America. I woke up to an on-going crime against humanity. Slavery had never stopped or even taken a break just because I wasn't looking.

Later, as a senior noncommissioned officer (SNCO) stationed at Camp Smith, Hawaii I was a member of Joint Task Force-Full Accounting. We were tasked with locating and returning the missing from the Vietnam War. I spent a total of six-months in Southeast Asia during my three-year tour. It was an honorable mission, but what I witnessed off-duty made this SNCO weep more than once. To see middle-aged men of European descent walking down the street, hand-in-hand with a young boy or girl was commonplace in some countries. I cringed to see an older man with a child for fear that the true nature of the relationship was something more sinister than a proud papa strolling with his young child seated upon his shoulders. I was so proud when the Department of Defense took steps to educate military personnel and prevent us from frequenting establishments that could be facilitating human trafficking. I gratefully took my annual training on Human Trafficking, proud that America was doing something about this heinous crime. Then I retired and got another wake up call to the reality of the current state of affairs in Hawaii.

As a veteran of the United States Air Force, I spent 28 years of my life helping to protect our freedoms and our way of life. I was appalled to discover slavery was not only happening in this state, but that there was no law to curtail human trafficking or to punish the slavers. Slavery. It is an ugly word isn't it? I know it tastes foul leaving my mouth, but I cannot allow our common discomfort to quell the necessity of putting these atrocities in perspective. We all need to be "uncomfortable" if we are to really understand why this law needs to be passed. We need to walk a block in the spike heels of a young prostitute. We need to dig in the hard soil with the callused hands of an indentured farm worker. We need to rub away our silent tears with the chubby little fists of a child afraid of what sunrise may bring. If we have to force ourselves to taste the bile as it rises in our throats to picture what is done to a small body by a much larger one when no one cares to look, than that is what we must do. It is imperative that we take this discussion out of the political arena and place it precisely where it belongs, in the human realm. Humans feel, we care, we can empathize, and we have compassion. We are not inherently bound to a political party. We are however, inherently bound to each other through our humanity.

So now, as a citizen, I've decided to become part of the solution and to stop ignoring the problem. I can no longer stand by and watch as innocent people are brutally, even savagely abducted and placed into a life of slavery, prostitution, and hard labor. I am here on behalf of disenfranchised persons caught up in a heinous crime that has yet to be formalized. Your support of this resolution will show criminals, potential criminals, victims, potential victims, and the world the strength of Hawaii's commitment against human trafficking and slavery.

At the end of the day I am a human being who chooses to work to end the suffering of those unable to help themselves and to help prevent future suffering of others. Judiciary committee you have a choice.

You can continue in the spirit of Lady Liberty with the words inscribed at her base:

**Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tossed to me,
I lift my lamp beside the golden door**

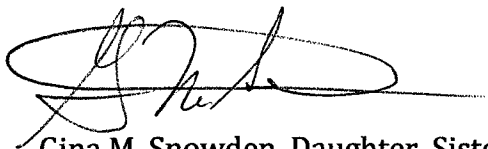
Or you can place new words outside this building for all to know:

**Force here your abducted, abandoned poor
Your hollowed hearts have given up being free
The worthless refuge of these wealthy shores
Ignore them, the helpless victims of man's greed
I hide my lamp inside these prestigious doors**

I would very much like to see an end to a system that robs generations of their culture, history, and ancestry. I am proud to be an American created from the roots of two great continents. I have little curiosity about from what part of Africa or from what tribe of Native Americans I can claim my DNA. But the fundamental nature of how I came to be here is no different than the fundamental nature that brings many more to this country in chains of one form or another. Passing this law moves us farther along in combating this awful illustration of man's inhumanity to man. Esteemed judiciary, in passing this law you make a commitment that you want to prevent repeating our awful history of slavery in America.

Thank you for your time and attention to my testimony. May we all continue to be blessed...living free and content.

Sincerely,



Gina M. Snowden, Daughter, Sister, Mother
Chief Master Sergeant (retired), United States Air Force
Citizen, Hawaii, America, the World

LATE

I am here to support SB 2045.

my name is Eliana Haglund and I am 2045.

This is a tug of war of who needs protection in human trafficking. I am from Panama in central america and I have seen in my own family Not having enough food to prostitute or sell their children for money. This is internationaly but it is effecting us locally as well.

I know we have economic times but when do we say enough is enough.

I worked w/ families to protect abuse, children program, but funds are out.

We are stuck in the corner now of protecting the innocent human beings. This is

rediculous to let this happen now where we use to be open and friendly growing

up. Now, I am here to say Hawaii is going down. We need to uprise and protect the innocent, here in Hawaii. Aloha.

Thank you.

LATE

Conf. Rm, 016 State
Capitol

Julie P. McFarland

2/08/10

In Support of SB 2045

Attn: ^{Gov.} Committee on Judiciary + Operations

These are our local children
being trafficked - placed into
slavery.

Local run aways are at
high risk of being trafficked.

Trafficking is routinely considered
to be people brought to Hawaii
from other countries or states.

Our local people are at high
risk of being trafficked.

Respectfully,

Ju P

LATE

Attachments
to JGO Testimony by
Kathryn Xian

SB2045

Hearing Date 02/08/10

9:30 am

Room 016

DAVIS POLK & WARDWELL LLP

Date: September 1, 2009

To: Equality Now

From: William J. Fenrich, Zachary D. Shankman, Joanna C. Weiss,
Ashley Gorski (Law Clerk), Kevin Satter (Law Clerk) *

Re: Analysis of Proposed Hawaii Human Trafficking Legislation in
Light of Modica

The purpose of this memorandum is to address potential conflicts between proposed Hawaii human trafficking legislation, H.B. No. ****, and the Hawaii Supreme Court's decision in State v. Modica, 567 P.2d 420 (Haw. 1977). You have asked us to provide an assessment as to whether Modica prohibits the passage of H.B. No. ****. In the past, attempts to enact human trafficking legislation in Hawaii have met with opposition due to a perceived conflict with the Modica decision. This memo discusses Modica and explains why it is not contravened by H.B. No. ****. Modica forbids differently-graded crimes from requiring the exact same elements of proof. The proposed crime of human trafficking incorporates other crimes, such as prostitution, and adds a transportation element. Because the proposed legislation adds an additional element (the transportation element) to existing crimes, it will not have the exact same elements of proof as any other crime. While there will be overlap between elements of the proposed legislation and existing crimes, Modica does not prohibit statutory overlap; rather, the decision supports prosecutorial discretion where crimes have overlapping elements. Moreover, statutory overlap and lesser-included crimes are common in both state and federal law.

I. Overview of H.B. No. ****

H.B. No. **** would codify a new crime of human trafficking that includes two main aspects: sex trafficking, and trafficking persons for labor or services. The bill also creates the new crimes of managing persons who have been trafficked, and paying trafficked persons for sex or labor. See H.B. No. ****, 27th Leg., Reg. Sess. (Haw. 2010).

* As you know, the lawyers who worked on this memorandum are not licensed to practice law in the State of Hawaii. Any final determinations you make with respect to the Hawaii law issues under consideration should, accordingly, have the benefit of input from a Hawaii lawyer; we therefore would recommend that you also consult Hawaii counsel.

A. Prior Attempts to Pass a Human Trafficking Bill

In 2007, Equality Now sponsored H.B. No. 1784, a precursor to H.B. No. ****. Some state legislators opposed H.B. No. 1784 on the basis of a perceived conflict with the Hawaii Supreme Court's decision in State v. Modica, 567 P.2d 420 (Haw. 1977). Two subsequent versions of H.B. No. 1784 also met legislative resistance. Furthermore, in March 2007, the Hawaii Department of the Attorney General raised Modica-related concerns about the proposed legislation in a senate committee hearing.¹

B. Current Version of the Trafficking Bill

In response to these concerns, unlike previous iterations of this bill, H.B. No. **** defines human trafficking so that transporting a person or assisting in transport is an essential element of the crime. The transportation element acts as a "plus factor" and distinguishes human trafficking in the first, second, and third degrees from all other crimes in the Hawaii Revised Statutes.

H.B. No. **** defines the crime of human trafficking in the first degree as:

[T]ransport[ing], aid[ing], assist[ing], or caus[ing] to be transported any person into, through, within, across, or out of the State knowing that:

(a) The person will engage in prostitution, labor, or services that will be obtained, maintained, or advanced by any of the following methods: (i) Extortion as defined in section 707-764; (ii) Kidnapping as defined in section 707-720; (iii) Unlawful imprisonment as defined in sections 707-721 and 707-722; (iv) Force, threat, or intimidation; (v) Deception, as defined in section 708-800, or fraud . . . [or other prohibited methods]; or

(b) The person will engage in prostitution or activity as an erotic or nude massager or exotic or nude dancer, as defined by section 712-1210, or in the production of child pornography, as defined in section 707-750; provided that

¹ The Department of the Attorney General stated that it believed that "the proposed offense of Human Trafficking [was] problematic because it attempt[ed] to create trafficking crimes that have already been established under our current penal code." It was concerned that "most of the new proposed crimes are the same or very similar to existing extortion, kidnapping, child abuse and promoting prostitution offenses. The significant overlap with existing offenses raises concerns that the proposed, higher grade offenses will violate the 'Modica Rule.'" Amendments to Facilitate the Prosecution of Offenses Relating to "Human Trafficking": Hearing on H.B. 2212, S.D. 1 Before the State H. Comm. on Human Services and Housing, 2008 Leg., 24th Sess. (Haw. 2008) (statement of the Department of the Prosecuting Attorney of the City and County of Honolulu), available at http://www.capitol.hawaii.gov/session2008/Testimony/SB2212_SD1_HSH_LATE_03-11-08_.pdf (quoting testimony submitted by the Department of the Attorney General at a Senate Committee on Judiciary and Labor hearing on H.B. No. 1784, H.D. 2, on March 16, 2007).

this paragraph shall apply only where the person transported is under the age of eighteen.

H.B. No. ****, 27th Leg., Reg. Sess. (Haw. 2010).²

Under the proposed legislation, human trafficking in the second degree prohibits managing trafficked persons, and human trafficking in the third degree prohibits paying for trafficked sex or labor. Further, human trafficking is added to existing statutory provisions that define crimes for which property is subject to forfeiture, crimes for which a prosecutor may seek an application for a court order to intercept communications, “violent crimes,” “organized crime,” and “racketeering activity.” H.B. No. ****, 27th Leg., Reg. Sess. (Haw. 2010) (modifying HAW. REV. STAT. §§ 351-32, 712A-4, 803-44, and 842-1).

II. H.B. No. **** Does Not Run Afoul of Modica

The “Modica rule,” as set forth by the Hawaii Supreme Court, provides that two differently-graded crimes cannot require precisely the same elements of proof. State v. Modica, 567 P.2d 420, 422 (Haw. 1977). Modica does not bar the passage of H.B. No. **** for two reasons: (1) the proposed legislation contains a transportation element that distinguishes it from existing crimes; (2) Modica specifically supports prosecutorial discretion in the context of overlapping statutes and lesser-included offenses. Overlapping statutes and lesser-included crimes are commonplace in Hawaii and federal law.³ Thus, overlap between H.B. No. **** and other crimes does not present a Modica problem.

A. Background on Modica

In Modica, police found the defendant in possession of a loaded revolver without a permit. 567 P.2d at 421. The defendant could have been charged with carrying a loaded firearm on a public highway, a misdemeanor offense. Id. Instead, the prosecutor charged him with the felony crime of carrying a revolver on his person, and a jury found the defendant guilty of the felony. Id. On appeal, the defendant argued that because the two statutes prescribed different punishments for the same act, his conviction under the felony statute deprived him of due process and equal protection of the law. Id. The Hawaii

² Statutory language quoted in this memorandum is from the Legislative Reference Bureau draft dated July 2009, attached as Exhibit A.

³ A “lesser included offense” is “an offense that is (1) ‘included’ in a charged offense, within the meaning of HAW. REV. STAT. § 701-109(4), and (2) ‘of a class and grade lower than the greater [charged] offense’” Hawaii v. Wallace, 910 P.2d 695, 728 (Haw. 1996). HAW. REV. STAT. § 701-109(4) provides that an offense is included when:

- (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
- (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
- (c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

Supreme Court found no violation of the defendant's rights, because, although the elements of the crimes overlapped, they were not exactly the same. *Id.* at 421-22. The elements differed in that the felony crime required proof that the defendant carried an unlicensed pistol on the person, whereas the misdemeanor crime only required proof that a person possessed an unlicensed firearm on a public highway. *Id.* Thus, the court noted, the carrying of a pistol within a vehicle, but not on the person, would violate the misdemeanor statute but not the felony one. *Id.* at 422. The *Modica* Court also explicitly stated that an accused's act may be punishable under more than one statute. *Id.*

Modica does prohibit a statutory scheme in which "the same act committed under the same circumstances is punishable either as a felony or a misdemeanor, under either of two statutory provisions, and the elements of proof essential to either conviction are *exactly the same.*" *Id.* at 422 (emphasis added). Even assuming that this holding applies to all differently-graded offenses, and not simply felonies and misdemeanors,⁴ a defendant's rights are denied "only if a violation of [the lesser grade offense] would *invariably and necessarily* constitute a violation of [the greater grade offense]." *Id.* at 421 (emphasis added).

Since *Modica*, only a handful of cases have opined on the possible conflict between the so-called "*Modica* rule" and a particular statutory scheme. See *Hawaii v. Apao*, 24 P.3d 32, 39 (Haw. 2001) (finding that an action can either represent separate culpable acts or a continuous course of conduct, but not both); *Hawaii v. Hau Van Hoang*, 947 P.2d 360, 370-71 (Haw. 1997) (finding that interrelationship between two drug statutes violates the *Modica* rule when it is undisputed that "distribution" takes place by way of a "sale"; however, because defendant was charged with the lesser crime, there was no *Modica* violation); *Hawaii v. Arceo*, 928 P.2d 843 (Haw. 1996) (determining that if sexual assaults were both continuous and distinct, it would violate the *Modica* rule); *Hawaii v. Aluli*, 893 P.2d 168, 175-76 (Haw. 1995) (Levinson, J., concurring) (noting that prosecutor's argument about the fungibility of "possesses" and "distributes" would lead to a *Modica* problem). These conflicts are distinguishable from the relationship between H.B. No. **** and existing statutes in the Hawaii Revised Code.

B. The Transport Element Distinguishes Human Trafficking from All Other Crimes, as *Modica* Requires

Consistent with *Modica*, H.B. No. **** does not create a statutory scheme in which a violation of a lesser-grade offense would "invariably and necessarily" constitute a violation of the greater-grade offense. *Modica*, 567 P.2d at 421. Rather, this bill includes some potentially overlapping or lesser-included crimes. Because none of these other crimes has a transportation element, it is always possible for one to commit the lesser-grade crime without committing the higher-grade offense of human trafficking. For example, a person who commits kidnapping under Hawaii law could only be charged with human trafficking in the first degree if, *in addition to kidnapping another person*, the

⁴ See *Hawaii v. Friedman*, 996 P.2d 268, 279-80 (Haw. 2000) ("[a]ssuming, arguendo, that *Modica* applies analogously where the punishment under different statutory provisions involves a misdemeanor and petty misdemeanor").

offender “transports, aids, assists, or causes to be transported” the kidnapped individual, with knowledge that the individual will engage in prostitution, child pornography production, or activity as an erotic massager or dancer, and where the transported individual is under eighteen; or with knowledge that the individual will engage in prostitution, labor, or services advanced by one of nine enumerated methods of force, coercion, or deception. H.B. No. **** 27th Leg., Reg. Sess. (Haw. 2010). (Kidnapping, as defined in HAW. REV. STAT. § 707-720, is one of these enumerated methods.) Similarly, one promotes prostitution in the first degree by compelling a person “by force, threat, or intimidation to engage in prostitution,” see HAW. REV. STAT. § 712-1202, but because this crime does not necessarily involve transportation, the perpetrator will not “invariably and necessarily” violate any of the proposed human trafficking offenses. Modica, 567 P.2d at 421.

The existence of a transportation element in the definition of “human trafficking” makes the proposed crimes unique. This additional, discrete element absolves the legislation of any problems under Modica. This resolves Modica-related concerns raised about this legislation in 2007 by the Department of the Attorney General, which was considering a version of the bill that did not make “transport” an essential element of the crime of human trafficking.⁵ The current version remedies this alleged infirmity.

C. Modica Specifically Endorses Prosecutorial Discretion Where Statutes Overlap

Modica states that a prosecutor has discretion to charge an individual under either of two overlapping statutes, and Hawaii courts have repeatedly reiterated this principle. “Statutes may on occasion overlap, [and] . . . it is generally no defense to an indictment under one statute that the accused might have been charged under another. . . . Under those circumstances, the matter is necessarily and traditionally subject to the prosecuting attorney’s discretion.” Modica, 567 P.2d at 422. The existence of prosecutorial discretion in the face of overlapping statutes and lesser-included offenses is an established principle of Hawaii law. State v. Lagat, 40 P.3d 894, 901 (Haw. 2002); see also, e.g., State v. Mendonca, 711 P.2d 731, 734 (Haw. 1985); State v. Rabago, 686 P.2d 824, 826 (Haw. 1984); State v. Kuuku, 595 P.2d 291, 294 (Haw. 1979) (“[I]t is settled criminal law that where a single act violates more than one statute, the State may elect to proceed against the accused under either statute.”).

Hawaii statutory law similarly affirms the existence of prosecutorial discretion: “When the same conduct of a defendant may establish an element of more than one

⁵ To the extent the Department of the Attorney General was concerned with statutory “overlap,” as opposed to whether the elements were “exactly the same,” its concern may have been misguided. See supra note 1. Statutory overlap is common, and Hawaii and federal statutory schemes provide for prosecutorial discretion in such cases. See infra Part II.C and Part III.

offense, the defendant may be prosecuted for each offense of which such conduct is an element.”⁶ HAW. REV. STAT. § 701-109(1).

III. Lesser-Included Offenses Are Common in Hawaii and in Other Jurisdictions

Complex crimes, such as human trafficking, are often composed of numerous criminal elements – each of which might be criminalized separately under various statutes (e.g., prostitution and extortion) – but when committed together constitute a unique offense. Criminalizing this unique offense does not violate Modica. Indeed, there are numerous examples of lesser-included offenses under Hawaii and federal law. Moreover, a super-majority of states have passed human trafficking statutes. Their statutes, like H.B. No. ****, criminalize conduct that, in certain instances, can also be prosecuted under other statutes.

A. Lesser-Included Offenses Are Common Under Hawaii Law

Lesser-included offenses are prevalent in all areas of Hawaii criminal law, ranging from sexual assault to drug dealing to criminal trespass to attempted murder. See State v. Kinnane, 897 P.2d 973 (Haw. 1995) (sexual assault in the fourth degree is an included offense of attempted sexual assault in the second degree); State v. Rumbawa, 17 P.3d 862 (Haw. Ct. App. 2001) (reckless endangering in the first degree is an included offense of attempted murder in the second degree); State v. Rullman, 896 P.2d 944 (Haw. Ct. App. 1995) (distribution of marijuana in any amount is a lesser-included offense of the statute that prohibits distribution of one ounce or more of a substance containing marijuana); State v. Williams, 708 P.2d 834 (Haw. Ct. App. 1985) (criminal trespass in the first degree is a lesser-included offense of burglary in the first degree).

B. Statutory Overlap Is Common Under Federal Law

Similarly, federal criminal law contains numerous examples of complex crimes that ostensibly overlap with other federal crimes. One simple example is 18 U.S.C. § 111(b), which criminalizes the assault of a federal officer with use of a deadly weapon or inflicting bodily injury. Many federal crimes satisfy some (but not all) of the elements of 18 U.S.C. § 111(b). For example, an assault on a process server under 18 U.S.C. § 1501 would overlap with 18 U.S.C. § 111(b) in that both crimes involve assaulting a federal officer, but the perpetrator could not be charged under 18 U.S.C. § 111(b) unless the crime involved a deadly weapon or the infliction of bodily injury. See United States v. Gonzalez, 122 F.3d 1383 (11th Cir. 1997). Similarly, simple assault and simple battery would overlap with – but would not invariably result in a violation of – 18 U.S.C. § 111(b). See United States v. Bey, 667 F.2d 7 (5th Cir. 1982); United States v. Knife, 592 F.2d 472 (8th Cir. 1979).

⁶ This discretion is not unlimited, however. In certain instances, a defendant may not be convicted of two offenses, such as when one offense consists only of a conspiracy or solicitation to commit the other. See HAW. REV. STAT. § 701-109(1)(a)-(e) (outlining circumstances in which a person cannot be convicted of two offenses). These limits do not constrain H.B. No. ****.

C. Other States Have Passed Similar Human Trafficking Laws

Forty-two states have criminalized human and/or sex trafficking as a felony.⁷ Indeed, the U.S. Department of Justice has encouraged states to adopt comprehensive anti-trafficking legislation to expand the pool of prosecutors and investigators combating human trafficking, and to provide for seamless cooperation with federal authorities and federal law.⁸

Each of the forty-two states' laws involves lesser-graded crimes or overlapping statutes. For example, Florida had a preexisting statute deeming it unlawful to "force, compel, or coerce another to become a prostitute." FLA. STAT. ANN. § 796.04(1). Florida's 2004 trafficking legislation overlaps with § 796.04(1) by defining as a trafficker anyone who "knowingly recruits, entices, harbors, transports, provides, or obtains by any means a person, knowing that force, fraud, or coercion will be used to cause that person to engage in prostitution." *Id.* § 796.045.

Similarly, in California, the Legislative Counsel's Digest prefaces the state's trafficking legislation, CAL. PENAL CODE § 236.1, with the following:

Existing law establishes the offenses of slavery and involuntary servitude. Existing law also makes it an offense to entice an unmarried female minor for purposes of prostitution, as specified, or to aid or assist with the same, or to procure by fraudulent means, any female to have illicit carnal relations with any man. Existing law also makes it a crime to take away any minor as specified, for purposes of prostitution.

This bill would establish the crime of trafficking of a person for forced labor or services or for effecting or maintaining other specified felonies

2005 Cal. Legis. Serv. Ch. 240 (A.B. 22).

Like the proposed Hawaii legislation, the California statute not only created a new felony crime, but it also added human trafficking to other relevant sections of the penal code (e.g., as an act that constitutes "criminal profiteering activity"). CAL. PENAL CODE § 186.2.

⁷ This data is current as of April 2009. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2009 57 (2009), [available at](http://www.state.gov/documents/organization/123357.pdf) <http://www.state.gov/documents/organization/123357.pdf>.

⁸ CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING, FISCAL YEARS 2001-2005 61 (2006), [available at](http://www.usdoj.gov/crt/crim/trafficking_report_2006.pdf) http://www.usdoj.gov/crt/crim/trafficking_report_2006.pdf.

IV. Conclusion

H.B. No. **** does not conflict with Hawaii case law. This proposed legislation requires an element of knowing transportation, which distinguishes the crime of human trafficking from other crimes under Hawaii law and thus eliminates any potential violation of State v. Modica.

Kidwell, J., dissenting

drug distribution is carried on by persons who are licensed to possess and dispense the drug. So far as Appellant is concerned, the statute draws no line between a licit and an illicit distribution, if the authorization to distribute was extended to Appellant by a licensed person.

At the conclusion of this analysis, I find myself wondering whether the permissible inference, from these circumstances, that Appellant's supplier was not within one of the statutory categories was not too weak to support a conviction, regardless of what alternative inferences were also permissible. In any event, it seems clear that the circumstances permitted an inference that Appellant's supplier was a licensed person selling drugs in the more-profitable illicit market. The reasonableness of this inference depends, I believe, in part on the strength of any contrary inference. Where the inference of guilt is nearly matched in weight by the inference of innocence, as it is here, I would conclude that the circumstances do not exclude a reasonable hypothesis of innocence. The motion to acquit should have been granted.

I would reverse the conviction.

Syllabus

STATE OF HAWAII, Plaintiff-Appellee v. TOMMIE MODICA, Defendant-Appellant

NO. 5889

APPEAL FROM CIRCUIT COURT OF THE FIRST CIRCUIT
HONORABLE WALTER M. HEEN, JUDGE

AUGUST 4, 1977

RICHARDSON, C.J., KOBAYASHI, OGATA,
MENOR AND KIDWELL, JJ.

CRIMINAL LAW — constitutional law — construction and operation — misdemeanor/felony — due process — equal protection.

Where the same act committed under the same circumstances is punishable either as a felony or as a misdemeanor, under either of two statutory provisions, and the elements of proof essential to either conviction are exactly the same, a conviction under the felony statute would constitute a violation of defendant's right to due process and the equal protection of the law.

SAME — statutory construction — essential element — carrying "on the person".
Where the carrying of a pistol or revolver on the person is an essential element of the conduct proscribed by the statute, the phrase "on the person" has been construed to mean physical connection with or attaching to the person.

SAME — same — indictment and information — defenses.

Statutes may on occasion overlap, depending on the facts of a particular case, but it is generally no defense to an indictment under one statute that the accused might have been charged under another.

SAME — same — same — prosecutor's discretion.

Where statutes overlap, depending on the facts of a particular case, the matter is necessarily and traditionally subject to the prosecuting attorney's discretion.

OPINION OF THE COURT BY MENOR, J.

The defendant was found guilty by a jury upon an indictment charging him with carrying a revolver without a permit or license to do so, in violation of HRS § 134-9. From the judgment and sentence of the trial court, the defendant appeals.

The operative facts are that the defendant was found with a loaded revolver, for which he had no permit, in the municipal parking lot at the corner of Smith and Pauahi Streets in the City and County of Honolulu. On the basis of these facts, he could have been charged for a misdemeanor under HRS

Opinion of the Court

§ 134-6,¹ for carrying a loaded firearm on a public highway, but he was charged instead with carrying a revolver on his person in violation of HRS § 134-9.²

The defendant does not contend that the two statutes are unconstitutionally vague, but he does assert that "[i]t is the arbitrary and unbridled discretion vested in the prosecutor which allows the prosecutor to charge the same conduct either as a felony, under HRS § 134-9, or as a misdemeanor, under HRS § 134-6, which violates the [defendant's] rights to the equal protection of the laws and due process of law." He argues that inasmuch as HRS § 134-6 and HRS § 134-9 prescribe different degrees of punishment for the same conduct committed under the same circumstances by similarly situated persons, his conviction and the entry of judgment against him pursuant to the terms of HRS § 134-9 violated his rights to due process of law and the equal protection of the laws.

We find no violation of the defendant's constitutional rights. A denial of these rights would be the result, only if a violation of the misdemeanor statute (HRS § 134-6) would invariably and necessarily constitute a violation of the felony provision (HRS § 134-9). *Palmore v. United States*, 290 A.2d 573 (D. C. App. 1972); *United States v. Coppola*, 425 F.2d 660 (2d Cir. 1969); *cf. State v. Canady*, 69 Wash.2d 886, 421 P.2d 347 (1966); *State v. Reid*, 66 Wash.2d 243, 401 P.2d 988

¹ HRS § 134-6, in pertinent part, provides as follows:

"It shall be unlawful for any person to have in his possession or to carry on any public highway any firearm loaded with ammunition; provided that the provisions of this paragraph shall not apply to any person who has in his possession or carries a pistol or revolver and ammunition therefor in accordance with a license or permit issued, as provided in section 134-9.

Any person who violates any provision of this section shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

² HRS § 134-9, in pertinent part, provides as follows:

"... No person shall carry concealed or unconcealed on his person a pistol or revolver without being licensed to do so under this section or in compliance with section 134-6.

Any person violating this section shall be imprisoned for a term of not less than two years nor more than five years, without probation."

Opinion of the Court

(1965); *State v. Reed*, 34 N.J. 554, 170 A.2d 419 (1961). Thus, where the same act committed under the same circumstances is punishable either as a felony or as a misdemeanor, under either of two statutory provisions, and the elements of proof essential to either conviction are exactly the same, a conviction under the felony statute would constitute a violation of the defendant's rights to due process and the equal protection of the laws. *Olsen v. Delmore*, 48 Wash.2d 545, 295 P.2d 324 (1956); *State v. Pirkey*, 203 Or. 697, 281 P.2d 698 (1955). We do not, however, find this to be the case here.

Carrying a pistol or a revolver on the person is an essential element of the conduct proscribed by HRS § 134-9, but it is not a requirement under the provisions of HRS § 134-6.³ The phrase "on the person" in a statute has been construed to mean physical connection with or attaching to the person. *Schraeder v. State*, 28 Ohio App. 248, 162 N.E. 647 (1928); *State v. Breckenridge*, 282 S.W. 149, 219 Mo.App. 587 (1926). Black's Law Dictionary (4th ed. 1976) defines the phrase "on the person" to mean "[i]n common parlance, . . . that [the article] is either in contact with his person or is carried in his clothing." Thus, the carrying of a pistol or revolver within a vehicle, not on the person, would constitute a violation of HRS § 134-6, but it would not be an offense under HRS § 134-9. See *Hampton v. Commonwealth*, 257 Ky. 626, 78 S.W.2d 748 (1934); *Blashfield, Cyc. of Automobile Law and Prac.*, Perm. Ed., § 5528.88.

Statutes may on occasion overlap, depending on the facts of a particular case, but it is generally no defense to an indictment under one statute that the accused might have been charged under another. *Territory v. Awana*, 28 Haw. 546 (1925); *In re Converse*, 137 U.S. 624 (1891); *State v. Swan*, 55 Wash. 97, 104 P. 145 (1909). *Cf. State v. Travis*, 45 Haw. 435, 368 P.2d 883 (1962). Under those circumstances, the matter is necessarily and traditionally subject to the prosecuting

³ HRS § 134-6 also directs itself to all types of firearms, as defined in HRS § 134-1, as well as ammunition therefor, while the weapons covered by HRS § 134-9 are strictly limited to pistols and revolvers.

Syllabus

attorney's discretion. *Newman v. United States*, 382 F.2d 479 (D.C.Cir. 1967); *Hutcherson v. United States*, 345 F.2d 964 (D.C.Cir. 1965), cert. denied 382 U.S. 894.

Affirmed.

Steven J. Levinson (Schutter, Levinson & O'Brien) for defendant-appellant.

Randolph Stator, Deputy Prosecuting Attorney (Michael Gibson, Deputy Prosecuting Attorney on the brief, Maurice Sapienza, Prosecuting Attorney, of counsel) for plaintiff-appellee.

Opinion of the Court

SAME — *same* — *circumstantial evidence*.

Whether the threat of harm was imminent, and whether the defendant was reasonable in his assessment of the situation and in acting as he did are to be determined from the facts and circumstances of the particular case.

SAME — *same* — *constitutional right* — *determination by jury*.

An accused is entitled to a jury determination of his guilt or innocence, and it is his constitutional right to present any and all competent matters in his defense.

SAME — *right to trial by jury* — *due process*.

A right to a trial by jury and the right to adduce evidence in his behalf are two of the fundamentals inherent in the due process guarantee of a fair trial.

SAME — *rejection of evidence* — *reversible error*.

It would be reversible error for the trial court to reject evidence which, if admitted, would present an essential factual issue for the trier of fact.

Per Curiam. The defendants, Horn and Ortiz, were indicted and convicted by a jury of the crime of escape in the second degree (HRS § 710-1021). They appeal from the judgment and sentence of the circuit court.

We are called upon to decide whether and to what extent the "choice of evils" or "necessity" defense (HRS § 703-302) is available to the accused in escape situations. We hold that the defense is available to the escapee provided certain conditions are met, and in this regard we adopt the rationale and the conditions imposed by *People v. Lovercamp*, 43 Cal.App.3d 823, 118 Cal.Rptr. 110 (1974), with one principal modification. In that case, the court held that a limited defense of necessity in escape situations is available to the accused if the following conditions exist:

- (1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
- (2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
- (3) There is no time or opportunity to resort to the courts;
- (4) There is no evidence of force or violence used towards prison personnel or other innocent persons in the escape; and

STATE OF HAWAII, Plaintiff-Appellee, v. GLENN KALANI HORN, LARRY JAMES ORTIZ, Defendant-Appellants, and DELBERT KAAHANUI WAKINEKONA, Defendant

NO. 5901

APPEAL FROM CIRCUIT COURT OF THE FIRST CIRCUIT
HONORABLE MASATO DOI, JUDGE

AUGUST 5, 1977

RICHARDSON, C.J., KOBAYASHI, OCATA,
MENOR AND KIDWELL, JJ.

CRIMINAL LAW — *defense of necessity* — *rights of defendant*.

The defense of necessity in escape situations is available to the accused when specific and articulable conditions within the prison exist which seriously expose the prisoner to severe injury.

SAME — *same* — *sufficiency of evidence*.

There must be some support in the evidence that the danger existed, that the defendant was vulnerably exposed to the danger, and that the threatened harm to him was imminent.

1. 09-326022/Promoting Prostitution 3rd
Suspect: Clarence Moten
Synopsis: Suspect befriended female in Dallas Texas. Bought her a ticket to come to Hawaii under pretense of a birthday gift. Upon arrival on her birthday, placed her on the street as a prostitute. No direct coercion or threat. Only misdemeanor charge of Promoting Prostitution in the 3rd.

2. 09-086789/Promoting Prostitution 1st
Suspect: Joseph Vaimili
Synopsis: Victim was recruited by a suspect in Dallas Texas. Transported over to Honolulu to work as a prostitute. Victim ran away from the suspect and was picked up by another “pimp” (Vaimili) via a prostitute and was forced to work for him as a prostitute. Vaimili was charged. The suspect who transported her over from Dallas was not identified at this time. Only charge on the transporting suspect if identified is Promoting Prostitution in the 3rd, a misdemeanor.

3. Promoting Prostitution 1st (1999) – Currently faces 15 years minimum to life in prison for Federal Offense of Sex Trafficking of minors and adult women.
Suspect: Rodney D. King
Synopsis: Rodney D. King faces fifteen years to life in prison for trafficking women and children for sex. In 1999, Hawaii brought Rodney D. King to trial for the same crime of sex trafficking minors but King received only thirty months in prison and three years supervised release for his guilty plea.

From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 08, 2010 11:39 AM
To: JGO Testimony
Cc: erinann815@aol.com
Subject: Testimony for SB2045 on 2/8/2010 9:30:00 AM

LATE

Testimony for JGO 2/8/2010 9:30:00 AM SB2045

Conference room: 016
Testifier position: support
Testifier will be present: No
Submitted by: erin rutherford
Organization: Individual
Address:
Phone:
E-mail: erinann815@aol.com
Submitted on: 2/8/2010

Comments:
human sex trafficking is a HUGE HUGE HUGE issue that should not be ignored or downplayed. we must have laws enacted that address every aspect of this issue, the punishment for offenders, and how we can prevent this from happening.

TEMPLATE FOR SENATE JUDICIARY HEARING

Date: February 5, 2010

ATTN: **Committee on Judiciary and Government Operations**
Sen. Brian Taniguchi, Chair
Sen. Dwight Y. Takamine, Vice Chair
Sen. Robert Bunda
Sen. Mike Gabbard
Sen. Clarence K. Nishihara
Sen. Sam Slom

HEARING DATE: February 8, 2010
HEARING TIME: 9:30am
PLACE: Conference Room 016, State Capitol

FAX: 586-6659

SB2045 - RELATING TO CRIME – Human Trafficking Offenses; Crime

Establishes class A, B, and C felony sexual human trafficking offenses and class A, B, and C felony labor trafficking offenses, and provisions related to prosecution of the offenses.

Dear COMMITTEE ON JUDICIARY and Government Operations:

Human Trafficking is a grave human rights offense recognized internationally and nationally but unrecognized by Hawaii state law. Hawaii is now one of seven states left in the nation that has not made Human Trafficking a felony offense while protecting the human rights and safety of trafficking victims. The other six states without laws are: South Dakota, Ohio, Alabama, Wyoming, West Virginia, and Massachusetts.

The people of Hawaii feel that there is no valid excuse to ignore the passage of a state law against Human Trafficking. The people urge you to pass SB2045, a bill which carries the highest penalty available to criminals who traffick or patronize trafficked persons, setting mandatory minimums for the traffickers and patrons of trafficked children. This bill effectively addresses the growing problem of Human Trafficking in Hawaii.

Current state laws are not adequate in addressing Human Trafficking, which has been nationally highlighted recently by the ongoing Federal Sex-Trafficking case of Rodney D. King who faces fifteen years to life in prison for trafficking women and children for sex. In 1999, Hawaii brought Rodney D. King to trial for the same crime but because of the inefficacy of our state prostitution laws in addressing Sex-Trafficking, King received only thirty months in prison and three years supervised release for his guilty plea. This penalty was hardly justice for the victims and was hardly a deterrent for King.

If Hawaii had an adequate Human Trafficking Law in 1999, Kings current victims would not have had to suffer the injustices he put them through. In this current case, King allegedly forced several women and two children to take crystal meth and then forced them into commercial sexual exploitation while he reaped all of their earnings. (U.S. Department of Justice Press Release; 09-601; June 18, 2009)

The people of Hawaii find this unacceptable. Please pass SB2045 and do not allow its text to be adulterated by politics.

Sincerely,

Liu Liu

Testimony in SUPPORT of SB2045: Against Human Trafficking

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Thank you for hearing testimony on SB2045 on Monday February 8th.

I stand with the Pacific Alliance to Stop Slavery in supporting SB2045. Current "promoting prostitution" statutes are inadequate. They have been in place for years while Human Trafficking has flourished in Hawaii. They are inadequate, biased, and non-victim centered. We need a HUMAN TRAFFICKING definition that meets the needs of victims and holds pimps, johns and traffickers accountable.

Furthermore, the Human Trafficking Bill SB2045 and the companion HB1940 also cover Labor Trafficking Offenses as well as Sex Trafficking.

Let Hawaii join the other 43 states that have adequate Anti- Human Trafficking laws.

Thank you,

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