



SB2193

Measure Title:	RELATING TO LAW ENFORCEMENT.
Report Title:	Public Safety; Law Enforcement Officers; Custody; Sexual Assault in the Second Degree and Third Degree
Description:	Defines "person in custody" as used in the offense of sexual assault in the second degree and third degree to mean a person who is stopped by or under the control of a law enforcement officer for official purposes.
Companion:	
Package:	None
Current Referral:	PSM, JDL
Introducer(s):	ESPERO, BAKER, KEITH-AGARAN, NISHIHARA, SHIMABUKURO, Kahele, Kim, Slom, L. Thielen

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TESTIMONY ON SENATE BILL 2193
RELATING TO LAW ENFORCEMENT

By
Nolan P. Espinda, Director

Senate Committee on Public Safety, Intergovernmental, and Military Affairs
Senator Clarence Nishihara, Chair
Senator Will Espero, Vice Chair

Thursday, February 4, 2016; 1:15 p.m.
State Capitol, Conference Room 229

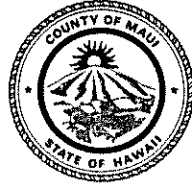
Chair Nishihara, Vice Chair Espero, and Members of the Committee:

The Department of Public Safety (PSD) **supports** Senate Bill (SB) 2193 Relating to Law Enforcement. SB 2193 would broaden the definition of "in custody" as it pertains to sexual assault in the second and third degrees under Hawaii Revised Statutes 707-732.

This proposed amendment expands potential situations in which law enforcement officers would be held accountable for their actions. As this Committee is aware, PSD is in compliance with the Prison Rape Elimination Act (PREA) and welcomes any clarity to current law that would provide further guidance to our State law enforcement officers.

Thank you for the opportunity to testify on this measure.

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TESTIMONY
ON
SB 2193 - RELATING TO LAW ENFORCEMENT

February 4, 2016

The Honorable Clarence K. Nishihara
Chair
The Honorable Will Espero
Vice Chair
and Members
Senate Committee on Public Safety, Intergovernmental and Military Affairs

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

The Department of the Prosecuting Attorney, County of Maui, OPPOSES SB 2193 - Relating To Law Enforcement. The bill seeks to define when a person is "in custody" for purposes of Haw. Rev. Stat. § 707-731 and § 707-732. At the outset, we have concerns regarding the effect the bill will have on determining when a person is "in custody" for other purposes such as Miranda warnings. This bill will essentially create multiple definitions of the term "in custody" which will lead to confusion under the law. For these reasons, the Department of the Prosecuting Attorney, County of Maui, OPPOSES the passage of this bill.

Thank you very much for the opportunity to provide testimony on this bill.

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SENATE COMMITTEE ON PUBLIC SAFETY,
INTERGOVERNMENTAL AND MILITARY AFFAIRS
Twenty-Eighth State Legislature
Regular Session of 2016
State of Hawai'i

February 4, 2016

RE: S.B. 2193; RELATING TO LAW ENFORCEMENT.

Chair Nishihara, Vice-Chair Espero, and members of the Senate Committee on Public Safety, Intergovernmental and Military Affairs, the Department of the Prosecuting Attorney, City and County of Honolulu, submits the following testimony in **support** of Senate Bill 2193.

The purpose of S.B. 2193 is to define “person in custody” as that term is used in the offenses of Sexual assault in the second and third degree. As the Committee is likely aware, our Department has previously argued that the interpretation of this term—even without the bill’s additional language—could include traffic stops, however, at least one court has declined to adopt that interpretation. Thus, we greatly appreciate the Legislature’s agreement with our interpretation, and efforts to clarify it accordingly.

With regards to the exact language used to define this term, we would just urge the Committee to carefully consider each word, to minimize the likelihood of having any negative, unintended consequences. While we do not have specific alternative language to offer at this point, we do have some concerns that the phrase “under the control of” may be overly broad. In the alternative or in conjunction, it may also be that the term itself—“person in custody”—could be improved upon, to help clarify the intent.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu supports the passage S.B. 2193, and asks that the discussions and evolution of this bill be allowed to continue. Thank for you the opportunity to testify on this matter.



THE SEX ABUSE TREATMENT CENTER

A Program of Kapi'olani Medical Center for Women & Children

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DATE: February 4, 2016

TO: The Honorable Clarence Nishihara, Chair
The Honorable Will Espero, Vice Chair
Senate Committee on Public Safety, Intergovernmental, and Military Affairs

FROM: The Sex Abuse Treatment Center
A Program of Kapi'olani Medical Center for Women and Children

RE: Testimony in Support of S.B. 2193
Relating to Law Enforcement

Good afternoon Chair Nishihara, Vice Chair Espero, and members of the Senate Committee on Public Safety, Intergovernmental, and Military Affairs.

The Sex Abuse Treatment Center (SATC) supports S.B. 2193, which defines “person in custody” as used in the offenses of sexual assault in the second and third degrees to mean a person who is stopped by or under the control of a law enforcement officer for official purposes.

Hawaii’s sexual assault laws generally make it illegal for law enforcement officers to subject persons in their custody to sexual penetration or sexual contact. This is based on the principle that a person who is being held in the custody of law enforcement officers is placed at a sharp power imbalance relative to those officers, and therefore meaningful consent is not possible under those circumstances.

However, the current law does not cover situations where a law enforcement officer inarguably has power and control over another person, but has not effected an arrest, and therefore the other person is not technically in their “custody” as that term is currently defined and interpreted in Hawaii.

This was demonstrated by a recent, well-publicized local case where a Honolulu Police Department patrol officer stopped a 17 year old driver for speeding and fondled her breasts, but could not be convicted for committing the crime of sexual assault in the third degree because, although the driver was not free to leave and was within the officer’s control at the time of the sexual contact, she had not been placed under arrest.

S.B. 2193 would prevent the recurrence of this injustice, by broadening the definition of “person in custody” to address the specific situation of one who is subjected to a traffic stop or is in the process of providing documents pursuant to that stop, as well as other

scenarios where a person is stopped by or under the control of law enforcement officers for official purposes but were not placed under arrested.

Therefore, we respectfully urge you to join SATC in supporting S.B. 2193.

**Hawaii State Legislature
Senate Committee on
Public Safety, Intergovernmental and Military Affairs
Testimony**

Aloha Chair Nishihara, Vice Chair Espero, and other distinguished committee members

Thank you for allowing me to testify on behalf of this proposed amendment. My name is Aaron Hunger and I am a doctoral researcher at the University of Hawaii at Manoa, a former police officer in Florida and California, and a criminal justice instructor for a private college in Honolulu. I have been honored to be engaged in doctoral research involving the Honolulu Police Department, and its oversight mechanisms since 2010. Together with my teaching, I have over 24 years of police experience. Currently, I am engaged in research with the University of Hawaii at Manoa that (among other issues) seeks to understand the unique structure of the criminal justice institutions on Oahu. Based on the unique composition of local policing organizations, one of many questions being answered is what effect (if any) does the absence of critical systemic oversight mechanisms (or their dysfunctionality) produce and how often. Based on the work and research that I have been privileged to be a part of, I would support Senate Bill 2193 (Expansion of “in Custody” to include police traffic stops).

While most U.S. police academies and departments teach new police recruits that traffic stops are an extension of physical custody of a driver, the Supreme Court ruling in *Berkemer v McCarty*, 468 US 420, 440 (1984) complicates the clarity of the issue with its ruling that traffic stops were not considered “in custody” for the purposes of Miranda. This has left traffic stops as falling within the grey area between “Terry” and “Miranda” stops.

Most case law has used the degree and duration of restraint as a dividing line between what is considered either “in custody apprehension”, or a form of “temporary investigative detention”. Hawaiian case law has sought to follow the spirit of the Supreme court’s ruling by determined that motorists detained during a traffic stop are legally not “in custody.” While *Berkemer v McCarty* (1984) clarified that in cases involving DUI investigations, Miranda rights waivers need not been introduced until after roadside testing determines impairment levels, the ruling does not address non-DUI traffic situations directly. The ruling fails to clarify at what point a driver becomes “in custody” if the purpose or scope of an investigation is not DUI related but instead, are related to another function of police investigation.

The idea that a driver may not drive away from an officer during the traffic stop is understood when an individual signs for the privilege of operating a motor vehicle, but does not excuse the government from its responsibility from not abusing the power to detain motorists for routine traffic infractions. Hawaiian motorists also have the reasonable expectation that if an officer extends (or requests to extend) their investigation to an area other than the act that led to probable cause for the initial detention, that they (the motorist) may refuse such as request as they are not “in custody.” Should such

as refusal take place, because the motorist is not “in custody” the officer must either arrest them based on probable cause that they violated a criminal statute or release them.

According the facts that led to this bill, the driver charged that during the course of an official police investigation into a traffic infraction, the officer violated her civil rights and forced her into a sexual act. This legislative solution to addressing a legal grey area seems appropriate given the severity of the circumstances that led to the introduction of this remedy, and should clearly guide judicial, police, and correctional elements of governmental justice services in the future.

I support the proposed clarification in Section 707-731 SubSection 2 (1c) of Hawaii Revised Statute with the proposed language contained in the bill. I furthermore support the proposed amending of Section 707-732 Subsection (1) of the Hawaii Revised Statute.