

STATE OF HAWAI‘I  
OFFICE OF THE PUBLIC DEFENDER

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

March 18, 2021

H.B. 172, H.D. 1: RELATING TO OFFENSES AGAINST PROPERTY RIGHTS

Chair Sen. Karl Rhoads, Vice Chair Sen. Jarrett Keohokalole, and Members of the Committee:

The Office of the Public Defender respectfully opposes H.B. 172, H.D. 1.

The proponents of this measure assert,

Current statutory provisions have been rendered ineffective by state court rulings that require the State to prove that a defendant operating or occupying a stolen vehicle knew that the vehicle was stolen. In the great majority of cases, this requires a confession from the defendant, which may be difficult to obtain because defendants have the right to remain silent. Thus, law enforcement is often hindered in meeting the burden of proof needed to prosecute these cases.

First, the basic premise of criminal law is that most crimes consist of two broad elements: *mens rea* and *actus reus*. *Mens rea* means to have “a guilty mind.” The rationale behind the rule is that ***it is wrong for society to punish those who innocently cause harm.*** *Actus reus* literally means “guilty act,” and generally refers to an overt act in furtherance of a crime. In regards to *mens rea*, Hawai‘i established four kinds of *mens rea* or states of mind: intentionally, knowingly, recklessly, and negligently.

For the offense of Unauthorized Control of a Propelled Vehicle (“UCPV”), the prosecution must prove the following relevant elements:

1. The Defendant exerted unauthorized control over another’s propelled vehicle by operating the vehicle without the owner’s consent; or

2. The Defendant did so by changing the identity of the vehicle without the owner's consent; and
3. That the Defendant did so *intentionally or knowingly*.

Therefore, the *mens rea*/state of mind currently for UCPV is intentionally or knowingly. Using these states of mind insures that only those who purposefully, or with full knowledge of the unauthorized use of the vehicle are punished. The legislature astutely recognized that it is proper to only punish those who *intentionally or knowingly* exert unauthorized control over another's vehicle.

Moreover, the legislature also enacted HRS § 702-218 to further ensure that individuals who did not have a "guilty mind" will be punished. HRS. § 702-218 provides the following:

In any prosecution for an offense, it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of fact if:

- (1) The ignorance or mistake negatives the state of mind required to establish an element of the offense; or
- (2) The law defining the offense or a law related thereto provides that the state of mind established by such ignorance or mistake constitutes a defense.

H.B. 172, H.D. 1, however, seeks to punish, albeit as a misdemeanor, those who innocently caused the harm; that is, H.B. 172, H.D. 1 seeks to punish those who did *not intend* or did *not know* that he/she was exerting unauthorized control over someone else's vehicle, by reducing the state of mind requirement to recklessness or negligence. A reduction of the state of mind to recklessness or negligence would mean that a person who *consciously disregarded* the substantial and unjustifiable risk that the car was stolen, or simply where the person *should be aware* of a substantial and unjustifiable risk that the car was stolen could be convicted. This is wrong, and would allow for those who were simply mistaken in their belief that they had proper authorization to use a vehicle to be arrested, charged and possibly convicted.

Second, the proponents assert that obtaining convictions for the offense of UCPV is too difficult without providing any statistical data in the number of cases that resulted in acquittal or cases that were dismissed or cases that were not charged. Moreover, we dispute that it is difficult for the prosecution to meet its burden in

these cases. Many UCPV cases involve vehicles with broken door locks and being driven without keys; certainly, the prosecution should be able to establish without a defendant's confession that the defendant knowingly (i.e., was aware) that he/she was exerting control of a propelled vehicle. Other cases involve defendants who informed the police that they purchased a vehicle at a very reduced rate, which is too good to be true, from an individual, who they only know by a first name or a nickname. Again, under these circumstances, the prosecution should be able to obtain a conviction for UCPV.

Finally, there are other serious concerns regarding the proposed offense of UCPV in the 2nd Degree. By setting the state of mind to recklessly and/or negligently, the measure will unintentionally, but essentially require any person borrowing a vehicle to make "a reasonable inquiry" as to whether the person who is loaning the vehicle actually had the legal right to do so. What is a reasonable inquiry? The phrase "reasonable inquiry" is subject to *ad hoc*, inconsistent, and arbitrary enforcement by the police, prosecutors, juries, and the courts. Is simply asking the other person, "Is this vehicle stolen" considered a reasonable inquiry? Or will the person need the other person to produce registration papers or contact the Department of Motor Vehicles to ensure ownership to satisfy the "reasonable inquiry" requirement. Does a person who borrows a vehicle from "uncle" have to conduct a "reasonable inquiry" to avoid arrest, prosecution and possible conviction. Lowering the bar for arrest and conviction, simply insures that more mistakes can be made, and that more of the resources of the criminal justice system are used.

Thank you for the opportunity to comment on H.B. 172 H.D.1.

POLICE DEPARTMENT  
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OUR REFERENCE **MK-KK**

March 18, 2021

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

Dear Chair Rhoads and Members:

SUBJECT: House Bill No. 172, H.D. 1, Relating to Offenses Against Property Rights

I am Mikel Kunishima, Captain of the Criminal Investigation Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports House Bill No. 172, H.D. 1, Relating to Offenses Against Property Rights.

On the island of Oahu, there are approximately 3,000 auto thefts per year. On average, approximately 500 to 600 suspects are arrested for Unauthorized Control of a Propelled Vehicle (UCPV) a year. However, less than half of these suspects are charged for the Class C felony.

This bill would establish a new offense of UCPV in the Second Degree if a person recklessly or negligently drives a stolen vehicle. This would provide the HPD with an investigative tool in charging suspects and holding them accountable for operating or occupying a stolen vehicle.

The HPD urges you to support House Bill No. 172, H.D. 1, Relating to Offenses Against Property Rights, and thanks you for the opportunity to testify.

APPROVED:

Sincerely,

A handwritten signature in black ink that reads "Susan Ballard".

Susan Ballard  
Chief of Police

A handwritten signature in black ink that reads "Mikel Kunishima".

Mikel Kunishima, Captain  
Criminal Investigation Division