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TESTIMONY OF PHYLLIS SHIMABUKURO-GEISER
CHAIRPERSON, BOARD OF AGRICULTURE

BEFORE THE HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

MARCH 23, 2021

2:00 P.M.

VIA VIDEOCONFERENCE

SENATE BILL NO. 219 SD2 HD1
RELATING TO CRIMES ON AGRICULTURAL LANDS

Chairperson Nakashima and Members of the Committee:

Thank you for the opportunity to testify on Senate Bill 219 SD2 HD1. This measure imposes extended terms of imprisonment for certain offenses against property rights committed when on agricultural land in certain situations. The Department supports this measure.

The Hawaii Department of Agriculture recognizes that crimes committed on agricultural land causes significant hardship to the farmer, potentially leading to bankruptcy. Any measure that provides a stronger deterrent to criminal activity on agricultural lands would be beneficial to farmers, ranchers, producers, and landowners, including the State of Hawai`i.

Thank you for the opportunity to testify on this measure.



STATE OF HAWAII
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai'i to the House Committee on the Judiciary & Hawaiian Affairs**

March 23, 2021

S.B. No. 219, SD2 HD 1: RELATING TO CRIMES TO AGRICULTURE
LANDS

Chair NAKASHIMA, Vice Chair MATAYOSHI and Members of the Committee:

The Office of the Public Defender (“OPD”) strongly opposes S.B. No. 219, SD2 HD1.

The Bill is not necessary. Prosecutors and Judges already have a full complement of punitive tools that penalizes individuals for their crimes. Among these are maximum terms of imprisonment, repeat offender sentencing, extended term sentencing, minimum term sentencing, consecutive offenses, enhanced fines for theft offenses. These tools are available regardless of where a crime occurs. An extended term can already be sought for offenses that occur on agriculture lands. Given the full complement of serious punishments in the toolbox, the problem highlighted by the request for this legislation establishes that the issue does not appear to be a legislative problem but an enforcement issue.

There has been no demonstrated need for any type of drastic special protection. The harshest prison terms, mandatory minimums and extended terms are reserved for the most dangerous of individuals in our prison systems, and there is no evidence that those committing property crimes on agriculture land need this type of treatment. Passing these types of bills is a slippery slope, as it will cause other businesses or entities to request or even expect them to deserve this special treatment.

The Courts should maintain their sentencing discretion. With national trends and movement toward criminal justice reform, SB219 SD2 HD1 is regressive by adding yet another law that removes the discretion of the courts. Courts already have the discretion to impose the proper sentence. They are in a much better position to review a person’s history, character, remorse, rehabilitative efforts, or lack thereof, family support etc. The bill would remove the possibility of probation or deferral to deserving individuals. Person would otherwise not be able to get a deferral, just because of the location of the offense. In addition, with this Bill,

offenders would be subject to minimum terms of imprisonment and doubling of their standard penalties, even if the prosecutor, courts, paroling authority or even victim believes it would be unjust.

The proposal is unduly harsh and severe. Given the current language in the Bill, there is no discretion to impose the standard indeterminate term of imprisonment or even a chance for probation for a non-violent offense. The Bill would remove the possibility of a deferral even in cases where it would be deemed appropriate. This would be the case even if the agriculture company has received restitution and does not wish jail to be imposed. This type of mandatory enhanced sentencing disposition is not even available for some of the more egregious or serious offenses, e.g., an aggravated assault case.

The law will have **unintended consequences** that will ensnare unintended individuals for mandatory and enhanced penalties. Here are a few examples:

1. A trespassing tourist who wanders onto agriculture property will face a mandatory jail term and will not be able to receive probation or a deferral of his/her the sentence.
2. An 18-year-old who is found guilty of committing his/her first felony offense is precluded from receiving probation; instead, the young adult offender will receive a prison term simply because it occurred on agriculture lands.
3. A Native Hawaiian expressing cultural rights may trespass mistakenly onto agriculture land, and thereby will be subject to not only a mandatory minimum jail term but also an extend jail term.
4. Teenagers hiking off the trail (which is not uncommon), unaware that they had walked onto agricultural land, innocently picked a fruit off a tree thereby committed theft. Because they unknowingly were on agricultural land, they will now be subject to the harsh penalty of mandatory jail.
5. The homeless, the mentally ill and/or the substance abuser would commit a non-violent offense but would now be subject to imprisonment rather than receiving treatment, housing, or other assistance.

Unfortunately, the proposed statute does not include language that would need to comply with the criteria set forth under HRS § 706-622 (Criteria for extended terms of imprisonment). In general, extended terms may only be imposed if there is a

finding that an extended term is “necessary for the protection of the public.” However, as written, a defendant will be subject to an extended term automatically even if it was not necessary for the protection of the public.

Given the draconian nature of the legislation, a person charged with an offense on agricultural land will likely assert his/her right to trial, thus adding to the ever-increasing backlog of cases awaiting trial.

The proposed SB219 SD2 HD1 version is even more unfair as it does not require a state of mind to impose the extended term as it no longer requires that the person “knew or reasonably should have known that the crime was committed on agricultural land.” Neither does it include the language that the offense was committed “while negligently on agricultural land” under the SB219 SD2 version. Removing the original requirement that the “person knew or reasonably should have known that the crime was committed on agricultural land” or at least the element that it be “committed while negligently on agricultural land” contradicts its very purpose and will likely result in unintended individuals being drawn into the criminal justice system.

Finally, it seems incongruous that a person who commits a property crime on agricultural land receives a punishment twice as severe as a person who commits a property crime in a small store. The damage and cost suffered by the farmer is no greater than the damage and cost suffered by a shopkeeper. In fact, even if the total damages are greater for the shopkeeper, the same would apply. For example, a perpetrator who stole \$750 worth of goods from a farm would be punished twice as harshly than the offender who stole \$1500 of goods from a small shopkeeper.

Hawai‘i does not need more people in jail. Increasing penalties (by automatically imposing extended terms of imprisonment) will only continue to exacerbate the Hawai‘i prison overcrowding problem. Our jails and prisons are filled above not only design capacity but also operational capacity.¹ A significant portion of the State’s prison population are incarcerated in a contracted private, for-profit prison in Arizona; they are exiled thousands of miles away from their families, friends, and crucial support networks.

¹ Hawai‘i Correctional System Oversight Commission Annual Report December 2020, <https://ag.hawaii.gov/wp-content/uploads/2021/01/HCSOC-Final-Report.pdf>

More incarceration does not mean less recidivism or less crime. No conclusive research has indicated that increased jail incarceration has a meaningful impact on crime reduction.² In Hawai'i, our prison population has increased 670% in the last 40 years and our incarceration rate has risen to the point that if we were a nation instead of a state, we would rank in the top 20 incarcerators in the world. But this has not made us one of the safest places in the world.³

Incarceration does not come cheap. In 2017, Hawai'i spent \$255 million on corrections, accounting for 3 percent of the state's total general fund spending that year. Corrections general fund spending increased by 263 percent between 1985 and 2017.⁴ Feeding and caring for an incarcerated person costs \$198 a day in Hawai'i.⁵ This is a burden the taxpayers in Hawai'i cannot afford, including people in the agriculture industry.

Introducing additional mandatory incarceration will only worsen a criminal justice system already disparately treats Native Hawaiians and people of color.⁶ Mandatory sentencing provisions and drug offenses are severely unfair to people living in

² VERA, *The Prison Paradox: More Incarceration Will Not Make Us Safer* (2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf

³ VERA, *Incarceration Trends in Hawaii*, <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-hawaii.pdf>

⁴ National Association of State Budget Officers, State Expenditure Report series, <https://www.nasbo.org/reports-data/state-expenditure-report/state-expenditure-archives>.

⁵ State of Hawaii Department of Public Safety Annual Report FY 2019, <https://dps.hawaii.gov/wp-content/uploads/2019/11/PSD-ANNUAL-REPORT-2019.pdf> at 16.

⁶ Hawaii Profile, Prison Policy Initiative, <https://www.prisonpolicy.org/profiles/HI.html>
The Disparate Treatment of Native Hawaiians in the Criminal Justice System, Office of Hawaiian Affairs (2010), <https://www.oha.org/criminaljustice#:~:text=Report%3A%20The%20Disparate%20Treatment%20of,system%20accumulates%20at%20every%20stage>
 ACLU Hawai'i, Special Report: Bias Against Native Hawaiians in Hawaii Criminal Justice System, ACLU Hawai'i (2012), https://acluhi.org/en/news/special-report-bias-against-native-hawaiians-hawaii-criminal-justice-system#_ftn4.
 Ashely Nellis, The Color of Justice: Racial and Ethnic Disparity in State Prisons, The Sentencing Project (2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

poverty, with mental health and substance use disorders, women, and Native Hawaiians, Pacific Islanders, and Black communities and fail to make us safer.⁷

The jails are already full and overcrowded. Currently, the jail and prison populations have not been reduced. Carving out an exception for agriculture sentencing is not necessary and will only add to the growing problem. Now is certainly not the time to add another mechanism to keep people longer than they should be. Given the growing national movement and studies against mandatory sentences, it is troubling that the trend in the State of Hawai'i is to increase penalties.

For the foregoing reasons, the OPD strongly opposes this proposed measure. We thank you for the opportunity to comment on S.B. No. 219, SD 2 HD1.

⁷ ACLU Hawai'i, "Blueprint for Smart Justice Hawai'i" (2019), <https://50stateblueprint.aclu.org/states/hawaii/>.

SB219 SD2 HD1
RELATING TO CRIMES ON AGRICULTURAL LANDS
Ke Kōmike Hale o ka Ho‘okolokolo a me ke Kuleana Hawai‘i
House Committee on Judiciary & Hawaiian Affairs

Malaki 23, 2021

2:00 p.m.

Lumi 325

The Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on SB219 SD2 HD1, which creates extended terms of imprisonment for a range of property offenses committed on agricultural lands. OHA is concerned that this bill may replicate sentencing policies that have exacerbated the impacts of the criminal justice system on Native Hawaiians and the larger community, including impacts relating to the overcrowded conditions of our correctional facilities, and may also result in a chilling effect on Native Hawaiian traditional and customary practitioners without deterring the commission of the most concerning agricultural crimes.

While OHA appreciates this bill’s intent to deter agricultural crimes such as theft and vandalism, mandating extended terms of imprisonment may have significant deleterious impacts on the administration of justice, and may only exacerbate the costs of our mass incarceration crisis. **Mandatory extended sentences have been found to be ineffective solutions for crime deterrence and have instead been a significant factor in the disproportionate incarceration of communities of color, including Native Hawaiians.**¹ Moreover, mandatory extended sentences effectively provide prosecutors with much greater leverage in negotiating reduced charges and terms of imprisonment in exchange for a guilty plea, regardless of the circumstances of the offense. Judges are in a much better position to objectively review extenuating circumstances, including a person’s history, character, remorse, and rehabilitative potential, that should be considered in the sentencing of defendants, and already have the ability to apply extended sentences if any of the many aggravating factors of HRS §706-662 are met. **Notably, mandatory enhanced sentencing provisions may also further exacerbate the rampant overcrowding in our correctional facilities, and only reduce our ability to properly rehabilitate and prepare pa‘ahao for a successful reentry into the community – thereby contributing to increased recidivism and crime rates over the long term.**

In addition, OHA notes that the most concerning crimes of vandalism and agricultural theft are unlikely to be prosecuted or even deterred, due to serious issues of reporting and law enforcement follow-up that are not addressed by this bill. In 2019, Act 217 established the Agricultural Theft and Vandalism Pilot Project, which found that a key issue with prosecuting agricultural crimes is that producers are not reporting crimes within a reasonable amount of time for law enforcement interdiction, likely stemming from their perception of a historical lack

¹ THE OFFICE OF HAWAIIAN AFFAIRS, THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM 46-47 (2010), available at http://www.oha.org/wp-content/uploads/2014/12/ir_final_web_rev.pdf.

of follow-through by law enforcement.² Without addressing these reporting issues, this measure is unlikely to even be applied against those committing agricultural crimes like theft and vandalism. Moreover, deterring agricultural-related crime seems to be based on the certainty of punishment, rather than the severity: as Dr. Valerie Wright of the Sentencing Project explained, “enhancing the severity of punishment will have little impact on people who do not believe they will be apprehended for their actions.”³ **The temporal nature of vandalism and theft crimes – where offenders are highly unlikely to remain at the scene of the crime – makes it much less likely that those responsible for such crimes will be caught, much less punished, reducing any deterrent impact of the contemplated mandatory extended sentences.** Accordingly, the mandatory extended sentencing provisions of this measure are unlikely to deter or be applied against those committing the crimes of most significant concern.

In contrast, and significantly, OHA notes that those most likely to remain on agricultural lands while committing perceived “criminal” activity– and thereby risk being caught and subject to the mandatory enhanced sentencing provisions of this measure – are Native Hawaiian traditional and customary practitioners, seeking to perpetuate their constitutionally-protected practices on less-than-fully-developed agricultural lands. **The higher likelihood of such practitioners being interdicted and accused of “trespassing” on agricultural lands – combined with the mandatory extended sentences that could potentially be applied to their convictions, if they are not able to meet the significant burden of vindicating their rights in court – may have a substantial chilling effect on the perpetuation of Native Hawaiian traditional and customary practices.**

By only focusing on the *severity* of punishment, this bill may only burden individuals like Native Hawaiian practitioners and those who may not even know that they are on private agricultural property, without deterring or addressing the most serious criminal activities of concern.

Mahalo nui for the opportunity to testify on this measure.

² THE STATE OF HAWAII DEPARTMENT OF AGRICULTURE, REPORT TO THE THIRTY-FIRST LEGISLATURE 2021 REGULAR SESSION STATE OF HAWAII, REPORT ON THE AGRICULTURAL THEFT AND VANDALISM PILOT PROGRAM IN RESPONSE TO ACT 217, SESSION LAWS OF HAWAII 2019 1 (2019), available at <https://hdoa.hawaii.gov/wp-content/uploads/2020/12/Ag-Theft-Vandalism-Report-final.pdf>.

³WRIGHT, VALERIE, PH.D., THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT (2010), available at <https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>.



Email: communications@ulupono.com

HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
Tuesday, March 23, 2021 — 2:00 p.m.

Ulupono Initiative supports SB 219 SD 2 HD 1, Relating to Crimes on Agricultural Lands.

Dear Chair Nakashima and Members of the Committee:

My name is Micah Munekata, and I am the Director of Government Affairs at Ulupono Initiative. We are a Hawai'i-focused impact investment firm that strives to improve quality of life throughout the islands by helping our communities become more resilient and self-sufficient through locally produced food; renewable energy and clean transportation; and better management of freshwater and waste.

Ulupono supports SB 219 SD 2 HD 1, which imposes extended terms of imprisonment for certain offenses against property rights committed on agricultural lands and creates a rebuttable presumption.

In our conversations with farmers and ranchers, one issue that keeps coming up is agricultural theft and how there is little enforcement or punishment for offenders. Agricultural lots are a prime target for thieves as there are many open entry points, farms are often located in rural and isolated areas, and punishments are minor relative to other crimes. For farmers who can afford to, precious money has to be spent on security infrastructure, monitoring, and labor to defend their agricultural operations instead of producing food. Profit margins for agricultural operations are already tight. Losing revenue and investing in repairs and security could push more local farmers and ranchers out of the agricultural sector. Ultimately, this underrated issue is one that hurts our ability to increase locally grown food in our state. By increasing the penalty of agricultural crimes on our agricultural lands, the State is making a commitment to support local producers and get control of this longstanding agriculture issue.

As Hawai'i's local food issues become increasingly complex and challenging, we appreciate this committee's efforts to look at policies that support local food production.

Thank you for this opportunity to testify.

Respectfully,

Micah Munekata
Director of Government Affairs

Investing in a Sustainable Hawai'i



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March 23, 2021

HEARING BEFORE THE
HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

TESTIMONY ON SB 219 SD2, HD1
RELATING TO CRIMES ON AGRICULTURAL LANDS

Via Videoconference
Conference Room 325
2:00 PM

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

I am Brian Miyamoto, Executive Director of the Hawaii Farm Bureau (HFB). Organized since 1948, the HFB is comprised of 1,800 farm family members statewide and serves as Hawaii's voice of agriculture to protect, advocate and advance the social, economic, and educational interests of our diverse agricultural community.

The Hawaii Farm Bureau supports SB 219 SD2, HD1, and any other measure which would help to deter agricultural crime in Hawaii.

Hawaii farmers are begging for help against theft, vandalism, and trespass. Something must be done to stop criminals from taking advantage of the hard work of agricultural producers, especially during this pandemic when many are on the verge of going out of business. Ag crime must be taken more seriously by the county police departments, prosecutors, and judges. If we want agriculture to be successful in Hawaii, we need to do more to catch criminals and to penalize them enough to deter repetition.

The latest USDA agricultural crime statistics show a grim picture for Hawaii farmers and ranchers trying to stay in business. Ag theft and other crimes cost Hawaii farm producers **\$14.4 million, or 10% of the 2018 Hawaii net farm income of \$142 million.**

https://www.nass.usda.gov/Statistics_by_State/Hawaii/Publications/Miscellaneous/AgTheft_2019.pdf

This includes theft of farm commodities, materials, equipment, and other property. Statewide vandalism costs were over half a million dollars. Security costs to prevent theft and/or vandalism were over \$11 million. According to the report, nearly 4,000 incidents of theft, 1,112 incidents of vandalism, and 14,262 trespassing incidents occurred during

2019. In some counties, 25% of all farms report being vandalized or stolen from. And many farmers give up on calling law enforcement because there is no follow-up.

Farmers are spending millions of dollars to install expensive security measures that haven't been effective in stopping crime, and ironically, in some cases are themselves stolen. Ag crime is increasing and farmers cannot solve this problem on their own.

Thank you for your efforts to protect and support Hawaii's farmers and ranchers.