Rod Underhill, District Attorney

1021 SW Fourth Avenue, Room 600
Portland, OR 97204-1193
Phone: 503-988-3162 Fax: 503-988-3643
www.mcda.us

M E M O R A N D U M

To: House Rules Committee

From: **Ryan Lufkin**

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Subject: HB 4161 background materials

HB 4161 represents an effort to abrogate the decisions of State v Shipe, 264 Or App 391 (2014) and State v Korth, 269 Or App 238 (2015) and similar decisions that have evaluated the necessary proof to establish that a possession/user of stolen property (in this case a stolen vehicle) "knew" the property was stolen. The result of these decisions has proven to create a near impossible standard of proof that is not workable and far from the common practice prior to these decisions.

A review was conducted of common law and sister states to determine how other jurisdictions handle the sufficiency of proof to establish the *mens rea* when an actor is in actual possession/use of stolen property. That review determined that Oregon was far out of step from these other jurisdictions and HB 4161 was designed with an eye towards moving Oregon closer to these other jurisdictions with a *mens rea* that would provide sufficient proof of the guilty conscience of the actor without becoming overly burdensome. It also appears that other jurisdictions tacitly acknowledged the somewhat unique nature of a property crime where proof of the victim's consent (or lack thereof) was necessary yet the defendant and victim may never have met and a defendant's claim of good faith receipt from a unknown and typically fictitious third party is not a defense to be reasonably countered by the State in every prosecution. The following provisions were considered persuasive in the drafting:

- "We need not catalogue the large number of cases holding that the unexplained possession of recently stolen goods raises a presumption or warrants an inference of guilty possession." US v Mitchell, 427 F.2 1280 (3rd Cir 1970)
- "Once it is established that a person rode in a vehicle that was taken without the owner's permission, 'slight corroborative evidence' is all that is necessary to establish guilty knowledge. Absence of a plausible explanation is a corroborating circumstance. Flight is also a corroborative factor." State v Womble, 93 Wn. App. 599 (1999)
- "Merely being in possession of the stolen property is insufficient to support a conviction for the offense, but possession of the stolen property coupled with 'slight corroborative evidence' is sufficient to prove guilty knowledge." State v Torres, 2015 Wash App Lexis 753 (2015)
- "Mere possession of a stolen car under suspicious circumstances is sufficient to sustain a conviction of unlawful taking. Possession of recently stolen property is so incriminating

that to warrant a conviction for unlawful taking there need only be, in addition to possession, 'slight corroboration' in the form of statements or conduct of the defendant tending to show guilt" People v Clifton 171 Cal App 3d (1985)

- "Where recently stolen property is found in the conscious possession of a defendant who, upon being questioned by the police, gives a false explanation regarding his possession or remains silent under circumstances indicating consciousness of guilt, an inference of guilt is permissible." People v Green, 34 Cal App 4th 165 (1995)
- "Any person who…shall have in his possession any vehicle which he knows or has reason to believe has been stolen…shall be guilty of a felony." Idaho Code, 49-228.

Therefore, and after careful negotiations with OCDLA, a compromise was reached to permit prosecution and conviction upon a showing that the person either knew (current law) or was aware of and disregarded a substantial and unjustified risk that, the owner did not consent. As part of this compromise, agreement was reached to carve out passenger offenses (whereby the passenger is merely "riding in" a stolen vehicle) from this fix and preserve those offenses at current law.

Finally, compromise was reached to clarify that the vehicle - as a fact without any attendant mental state for the defendant – was actually operated without consent of the owner to avoid any scenario whereby the defendant would have criminal liability for having disregarded a substantial risk the vehicle was stolen (eg. Damaged ignition, no paperwork) but actually did have permission from the owner.

Much like the case law cited above, HB 4161 should be able to reach criminal liability (that is – to submit for a jury's consideration) any of the following facts, either exclusively or in combination, to permit the inference that the defendant disregarded a substantial and unjustified risk that the owner did not consent. A jury could then properly deliberate on whether the State had proved its case beyond a reasonable doubt. This list is not exhaustive:

- Absence of plausible explanation for possession of another's vehicle
- Flight from police
- Damage to the vehicle consistent with theft
- Operation of the vehicle without proper keys to the vehicle
- Lying to police about the possession of the vehicle
- Inability to produce any form of documentation establishing ownership of the vehicle
- Inability to reach or contact the authorized user/owner of the vehicle
- Possession of stolen property
- Possession of burglary tools
- Possession of keys that are "shaved" or "filed" to operate in numerous vehicles
- Possession of the stolen vehicle in close time to the theft of the stolen vehicle
- Defendant's prior criminal record of using/possessing stolen vehicles (when ruled admissible by a court)