

JAN 17 2013

A BILL FOR AN ACT

RELATING TO CRIMINAL PROCEDURE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the goal of a police
2 investigation is to apprehend the person or persons responsible
3 for the commission of a crime. Mistaken eyewitness
4 identification has been shown to have contributed to the
5 wrongful conviction in approximately seventy-five per cent of
6 the nation's two hundred eighty-nine exonerations. Over the
7 past thirty years, a large body of peer-reviewed, scientific
8 research and practice has emerged showing that simple systemic
9 changes in administering eyewitness identification procedures
10 can greatly improve the accuracy of eyewitness identifications.
11 Policies and procedures to improve the accuracy of eyewitness
12 identifications, such as those recommended by the United States
13 National Institute of Justice, the American Bar Association, the
14 New Jersey Office of the Attorney General, the Wisconsin Office
15 of the Attorney General, the California Commission on the Fair
16 Administration of Justice, and the North Carolina Actual
17 Innocence Commission, are readily available for review.



1 "Contamination" occurs when an eyewitness' memory of a
2 person or event becomes altered, replaced, or otherwise impaired
3 as a result of exposure to extrinsic information related to that
4 person or event.

5 "Eyewitness" means a person who observes another person at
6 or near the scene of an offense.

7 "Filler" means either a person or a photograph of a person
8 who is not suspected of an offense and is included in an
9 identification procedure.

10 "Identification" means the eyewitness has identified a
11 specific person as the perpetrator.

12 "Identification procedure" means a live lineup, a photo
13 lineup, or a showup.

14 "Law enforcement" means any law enforcement entity
15 conducting an investigation.

16 "Live lineup" means an identification procedure in which a
17 group of persons, including the suspect and other persons not
18 suspected of the offense, is displayed to an eyewitness for the
19 purpose of determining whether the eyewitness identifies the
20 suspect as the perpetrator.

21 "Photo lineup" means an identification procedure in which
22 an array of photographs, including a photograph of the suspect



1 and additional photographs of other persons not suspected of the
2 offense, is displayed to an eyewitness either in hard copy form
3 or via computer or other electronic means for the purpose of
4 determining whether the eyewitness identifies the suspect as the
5 perpetrator.

6 "Showup" means an identification procedure in which an
7 eyewitness is presented in-person with a single suspect for the
8 purpose of determining whether the eyewitness identifies this
9 individual as the perpetrator.

10 "Suspect" means the person believed by law enforcement to
11 be the possible perpetrator of the crime.

12 **§ -2 Eyewitness identification procedures for live and**
13 **photo lineups.** (a) Any law enforcement entity conducting
14 eyewitness identification procedures shall adopt specific
15 procedures for conducting photo and live lineups that comply
16 with the following requirements:

- 17 (1) Prior to a photo or live lineup, law enforcement shall
18 record in writing as complete a description as
19 possible of the perpetrator provided by the eyewitness
20 in the eyewitness' own words. This statement shall
21 also include information regarding the conditions
22 under which the eyewitness observed the perpetrator



1 including location, time, distance, obstructions,
2 lighting, weather conditions, and other impairments,
3 including but not limited to alcohol, drugs, stress,
4 and visual or auditory disabilities;

5 (2) The eyewitness shall also be asked if the eyewitness'
6 vision needs correction by glasses or contact lenses
7 and whether the eyewitness was wearing them at the
8 time of the offense. The administrator shall note
9 whether the eyewitness was wearing glasses or contact
10 lenses at the time of the identification procedure;

11 (3) All live and photo lineups shall be conducted blind
12 unless to do so would place an undue burden on law
13 enforcement or the investigation; and

14 (4) The eyewitness shall be instructed, without other
15 eyewitnesses present, prior to any live or photo
16 lineup, that:

17 (A) The perpetrator may or may not be among the
18 persons in the identification procedure;

19 (B) The administrator does not know the identity of
20 the perpetrator, if applicable;

21 (C) The eyewitness should not feel compelled to make
22 an identification;



1 (D) The investigation will continue whether or not an
2 identification is made;

3 (E) The procedure requires the administrator to ask
4 the eyewitness to state, in the eyewitness' own
5 words, how certain the eyewitness is of any
6 identification; and

7 (F) The eyewitness is not to discuss the
8 identification procedure or its results with
9 other eyewitnesses involved in the case and
10 should not speak with the media.

11 (b) The administrator shall comply with the following:

12 (1) In a photo lineup, any photograph of the suspect shall
13 be contemporary and shall resemble the suspect's
14 appearance at the time of the offense;

15 (2) In a photo lineup, there shall be no characteristics
16 of the photographs themselves or the background
17 context in which they are placed that makes any of the
18 photographs unduly stand out;

19 (3) A photo or live lineup shall be composed so that the
20 fillers generally resemble the eyewitness' description
21 of the perpetrator, while ensuring that the suspect
22 does not unduly stand out from the fillers;



- 1 (4) In a photo or live lineup, the administrator shall
- 2 comply with the following:
- 3 (A) All fillers selected shall resemble the
- 4 eyewitness' description of the perpetrator in
- 5 significant features including but not limited to
- 6 face, weight, build, and skin tone, including any
- 7 unique or unusual features such as a scar,
- 8 tattoo, or other unique identifying mark;
- 9 (B) At least five fillers shall be included in a
- 10 photo lineup in addition to the suspect;
- 11 (C) At least four fillers shall be included in a live
- 12 lineup in addition to the suspect; and
- 13 (D) If the eyewitness has previously viewed a photo
- 14 lineup or live lineup in connection with the
- 15 identification of another person suspected of
- 16 involvement in the offense, the fillers in the
- 17 lineup in which the instant suspect participates
- 18 shall be different from the fillers used in any
- 19 prior lineups;
- 20 (5) In a live lineup, no identifying actions, such as
- 21 speech, gestures, or other movements, shall be
- 22 performed by lineup participants;

- 1 (6) In a live lineup, all lineup participants must be out
2 of view of the eyewitness prior to the identification
3 procedure;
- 4 (7) In a photo or live lineup, nothing shall be said to
5 the eyewitness regarding the suspect's position in the
6 lineup; and
- 7 (8) In a photo or live lineup, nothing shall be said to
8 the eyewitness that might influence the eyewitness'
9 identification of any particular lineup member.
- 10 (c) If there are multiple eyewitnesses, the administrator
11 shall comply with the following:
- 12 (1) Each eyewitness shall view photo or live lineups
13 separately;
- 14 (2) The suspect shall be placed in a different position in
15 the live lineup or photo lineup for each eyewitness;
16 and
- 17 (3) The eyewitnesses shall not be permitted to communicate
18 with each other until all identification procedures
19 have been completed.
- 20 (d) In any identification procedure, no writings or
21 information concerning the current investigation or any previous



1 arrest, indictment, or conviction of the suspect shall be
2 visible or made known to an eyewitness.

3 (e) When there are multiple suspects, each identification
4 procedure shall include only one suspect.

5 (f) In any identification procedure where an eyewitness
6 makes an identification, the administrator shall seek and
7 document a clear statement from the eyewitness at the time of
8 the identification in the eyewitness' own words, including a
9 statement describing the eyewitness' confidence level that the
10 person identified is the perpetrator.

11 (g) In any identification procedure where an eyewitness
12 makes an identification, the eyewitness shall not be provided
13 any information concerning the person identified before the
14 administrator obtains the eyewitness' statement about the
15 selection.

16 (h) Law enforcement shall make record of the
17 identification procedure that includes all identification and
18 non-identification results obtained during all identification
19 procedures during an investigation, which record shall be signed
20 by the eyewitness.



1 (i) When it is impracticable for a blind administrator to
2 conduct a lineup, the investigator shall state in writing the
3 reason therefore.

4 **§ -3 Eyewitness identification procedures for showups.**

5 (a) The administrator shall comply with the following in
6 conducting a showup:

7 (1) Where possible, the administrator shall perform a live
8 or photo lineup instead of a showup;

9 (2) A showup shall only be performed using a live suspect
10 and only in exigent circumstances that require the
11 immediate display of a suspect to an eyewitness;

12 (3) An administrator shall not conduct a showup with a
13 photograph. If investigators wish to determine if an
14 eyewitness can make an identification using a
15 photograph, a photo lineup must be used;

16 (4) Prior to any showup, law enforcement shall record in
17 writing as complete a description as possible of the
18 perpetrator provided by the eyewitness in the
19 eyewitness' own words. This statement shall also
20 include information regarding the conditions under
21 which the eyewitness observed the perpetrator
22 including location, time, distance, obstructions,



- 1 lighting, weather conditions, and other impairments
2 including but not limited to alcohol, drugs, stress,
3 and visual or auditory disabilities;
- 4 (5) The eyewitness shall also be asked if the eyewitness'
5 vision needs correction by glasses or contact lenses
6 and whether the eyewitness was wearing them at the
7 time of the offense. The administrator shall note
8 whether the eyewitness was wearing glasses or contact
9 lenses at the time of the identification procedure;
- 10 (6) The eyewitness shall be transported to a neutral, non-
11 law enforcement location where the suspect is being
12 detained for the purposes of a showup procedure;
- 13 (7) The eyewitness shall be instructed, without other
14 eyewitnesses present, prior to any showup that:
- 15 (A) The perpetrator may or may not be the person that
16 is presented to the eyewitness;
- 17 (B) The administrator does not know the identity of
18 the perpetrator;
- 19 (C) The eyewitness should not feel compelled to make
20 an identification;
- 21 (D) The investigation will continue whether or not an
22 identification is made;



1 (E) The procedure requires the administrator to ask
2 the eyewitness to state, in the eyewitness' own
3 words, how certain the eyewitness is of any
4 identification; and

5 (F) The eyewitness is not to discuss the
6 identification procedure or its results with
7 other eyewitnesses involved in the case and
8 should not speak with the media.

9 (b) At any showup, in order to reduce potentially damaging
10 or prejudicial inferences that may be drawn by the eyewitness,
11 the administrator shall comply with the following:

12 (1) Refraining from suggesting, through statements or non-
13 verbal conduct, that the suspect is or may be the
14 perpetrator of the crime;

15 (2) Refraining from removing the suspect from a squad car
16 in front of the eyewitness; and

17 (3) When practicable, the administrator shall present the
18 suspect to the eyewitness without handcuffs.

19 (c) When there are multiple eyewitnesses, the
20 administrator shall comply with the following:



- 1 (1) Only one eyewitness at a time shall be present at the
2 location of the showup to participate in the showup
3 procedure; and
- 4 (2) If a positive identification is made, and an arrest is
5 justified, additional eyewitnesses shall be shown live
6 or photo lineups.
- 7 (d) If there are multiple suspects, the suspects shall be
8 separated and subjected to separate showup procedures.
- 9 (e) If the eyewitness makes an identification, the
10 administrator shall seek and document a clear statement from the
11 eyewitness, at the time of the identification and in the
12 eyewitness' own words, as to the eyewitness' confidence level
13 that the person identified in a given identification procedure
14 is the perpetrator.
- 15 (f) The administrator shall photograph a suspect or cause
16 the suspect to be photographed at the time and place of the
17 showup to preserve a record of the appearance of the suspect at
18 the time of the showup procedure.
- 19 (g) When it is impracticable for a blind administrator to
20 conduct a showup, the investigator shall state in writing the
21 reason therefore.



1 **§ -4 Video record of identification procedures;**
2 **impracticability; alternative record.** (a) Unless
3 impracticable, a video record of the identification procedure
4 shall be made that includes the following information:
5 (1) All identification and non-identification results
6 obtained during the identification procedures, signed
7 by any eyewitness, including any eyewitness'
8 confidence statements;
9 (2) The names of all persons present at the identification
10 procedure, including the name of the lineup
11 administrator and whether the administrator was blind,
12 blinded or non-blind;
13 (3) If an administrator other than a blind administrator
14 was used, the reason therefore;
15 (4) The date and time of the identification procedure;
16 (5) In a photo or live lineup, any eyewitness
17 identification of filler; and
18 (6) In a photo or live lineup, the names of the lineup
19 members and other relevant identifying information,
20 and the sources of all photographs or persons used in
21 the lineup.



1 (b) If a video record of the lineup is impracticable, the
2 administrator of the lineup shall document the reason therefore
3 and an audio record of the identification procedure shall be
4 made. The audio record shall be supplemented by the following:

- 5 (1) All of the photographs used in a photo lineup; and
- 6 (2) Photographs of all of the individuals used in a live
7 lineup or showup.

8 (c) If both a video and audio record of the lineup are
9 impracticable, the administrator of the lineup shall document in
10 writing the reason therefore and a written record of the lineup
11 shall be made. The written record shall be supplemented by all
12 of the following:

- 13 (1) All of the photographs used in a photo lineup; and
- 14 (2) Photographs of all of the individuals used in a live
15 lineup.

16 **§ -5 Remedies for noncompliance or contamination.** (a)

17 When the prosecution intends to offer eyewitness identification
18 evidence at trial, the defendant is entitled to a pretrial
19 evidentiary hearing as to the reliability of the evidence
20 offered.

21 (b) At the hearing, the court shall examine whether law
22 enforcement or any administrator failed to substantially comply



1 with any requirement contained in this chapter, resulting in the
2 contamination of the eyewitness. In making its determination,
3 the court shall consider the following:

4 (1) Whether any suggestive identification procedures were
5 employed;

6 (2) Whether the eyewitness identification evidence may
7 have been otherwise contaminated by state or non-state
8 actors; and

9 (3) Any other factors bearing upon the reliability of the
10 identification evidence, including but not limited to
11 characteristics of the witness, perpetrator, or event.

12 (c) If the trial court finds evidence of a failure of law
13 enforcement, an administrator, or prosecuting agencies to comply
14 with any of the provisions of this chapter, of the use of any
15 other suggestive identification procedures, or of any other
16 contamination of identification evidence by state or non-state
17 actors, it shall:

18 (1) Consider this evidence in determining the
19 admissibility of the eyewitness identification; and

20 (2) Suppress the evidence of eyewitness identification
21 when there is a substantial probability of eyewitness
22 misidentification.



1 (d) When a court rules an eyewitness identification
2 admissible after a pretrial evidentiary hearing, the court shall
3 instruct the jury when admitting such evidence and prior to the
4 jury's deliberation, where applicable:

5 (1) That this chapter is designed to reduce the risk of
6 eyewitness misidentification; and

7 (2) That it may consider credible evidence of
8 noncompliance with this chapter when assessing the
9 reliability of the eyewitness identification evidence.

10 **§ -6 Training of law enforcement officers.** The county
11 police departments shall create, administer, and conduct
12 training programs for law enforcement officers and recruits
13 regarding the methods, technical aspects, and scientific
14 findings regarding the basis of the eyewitness identification
15 practices and procedures referenced in this chapter."

16 SECTION 3. This Act does not affect rights and duties that
17 matured, penalties that were incurred, and proceedings that were
18 begun before its effective date.

19



S.B. NO. 67

1 SECTION 4. This Act shall take effect on January 1, 2014.

2

INTRODUCED BY: _____

A handwritten signature in black ink, appearing to be "M. Smith", written over a horizontal line.

S.B. NO. 67

Report Title:

Criminal Procedure; Eyewitness Identification; Remedies

Description:

Creates procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations. Grants a defendant the right to challenge any eyewitness identification to be used at trial in a pretrial evidentiary hearing. Takes effect 1/1/2014.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

