
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 The legislature further finds that more accurate eyewitness
2 identifications increase the ability of police and prosecutors
3 to convict the guilty and protect the innocent. The integrity
4 of the State's criminal justice process is enhanced by adherence
5 to best practices in evidence gathering. The people of the
6 State of Hawaii will benefit from the improvement of the
7 accuracy of eyewitness identifications.

8 SECTION 2. The Hawaii Revised Statutes is amended by
9 adding a new chapter to be appropriately designated and to read
10 as follows:

11 "CHAPTER

12 EYEWITNESS IDENTIFICATION PROCEDURES

13 § -1 Definitions. As used in this chapter, unless the
14 context clearly requires otherwise:

15 "Administrator" means the person conducting the photo or
16 live lineup or showup for law enforcement.

17 "Blind" means the administrator does not know the identity
18 of the suspect in the lineup.

19 "Blinded" means the administrator may know who the suspect
20 is, but by virtue of the use of procedures or technology, does
21 not know which lineup member is being viewed by the eyewitness.



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.



1 "Photo lineup" means an identification procedure in which
2 an array of photographs, including a photograph of the suspect
3 and additional photographs of other persons not suspected of the
4 offense, is displayed to an eyewitness either in hard copy form
5 or via computer or other electronic means for the purpose of
6 determining whether the eyewitness identifies the suspect as the
7 perpetrator.

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

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

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

19 (1) Prior to a photo or live lineup, law enforcement shall
20 record in writing as complete a description as
21 possible of the perpetrator provided by the eyewitness



1 in the eyewitness' own words. This statement shall
2 also include information regarding the conditions
3 under which the eyewitness observed the perpetrator
4 including location, time, distance, obstructions,
5 lighting, weather conditions, and other impairments,
6 including but not limited to alcohol, drugs, stress,
7 and visual or auditory disabilities;

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

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

17 (4) The eyewitness shall be instructed, without other
18 eyewitnesses present, prior to any live or photo
19 lineup, that:

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



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

3 (C) The eyewitness should not feel compelled to make
4 an identification;

5 (D) The investigation will continue regardless of
6 whether an identification is made;

7 (E) The procedure requires the administrator to ask
8 the eyewitness to state, in the eyewitness' own
9 words, how certain the eyewitness is of any
10 identification; and

11 (F) The eyewitness is not to discuss the
12 identification procedure or its results with
13 other eyewitnesses involved in the case and
14 should not speak with the media.

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

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

19 (2) In a photo lineup, there shall be no characteristics
20 of the photographs themselves or the background



1 context in which they are placed that makes any of the
2 photographs unduly stand out;

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

7 (4) In a photo or live lineup, the administrator shall
8 comply with the following:

9 (A) All fillers selected shall resemble the
10 eyewitness' description of the perpetrator in
11 significant features including but not limited to
12 face, weight, build, and skin tone, including any
13 unique or unusual features such as a scar,
14 tattoo, or other unique identifying mark;

15 (B) Create a consistent appearance between the
16 suspect and fillers with respect to any unique or
17 unusual feature, e.g., scars or tattoos, used to
18 describe the perpetrator by artificially adding
19 or concealing that feature;

20 (C) At least five fillers shall be included in a
21 photo lineup in addition to the suspect;



(D) At least four fillers shall be included in a live lineup in addition to the suspect; and

(E) If the eyewitness has previously viewed a photo lineup or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the instant suspect participates shall be different from the fillers used in any prior lineups;

(5) In a live lineup, ensure that any identification actions, e.g., speaking or moving, are performed by all lineup participants;

(6) In a live lineup, all lineup participants shall be out of view of the eyewitness prior to the identification procedure;

(7) In a photo or live lineup, nothing shall be said to the eyewitness regarding the suspect's position in the lineup; and

(8) In a photo or live lineup, nothing shall be said to the eyewitness that might influence the eyewitness' identification of any particular lineup member.



1 (c) If there are multiple eyewitnesses, the administrator
2 shall comply with the following:

3 (1) Each eyewitness shall view photo or live lineups
4 separately;

5 (2) The suspect shall be placed in a different position in
6 the live lineup or photo lineup for each eyewitness;
7 and

8 (3) The eyewitnesses shall not be permitted to communicate
9 with each other until all identification procedures
10 have been completed.

11 (d) In any identification procedure, no writings or
12 information concerning the current investigation or any previous
13 arrest, indictment, or conviction of the suspect shall be
14 visible or made known to an eyewitness.

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

17 (f) In any identification procedure where an eyewitness
18 makes an identification, the administrator shall seek and
19 document a clear statement from the eyewitness at the time of
20 the identification in the eyewitness' own words, including a



1 statement describing the eyewitness' confidence level that the
2 person identified is the perpetrator.

3 (g) In any identification procedure where an eyewitness
4 makes an identification, the eyewitness shall not be provided
5 any information concerning the person identified before the
6 administrator obtains the eyewitness' statement about the
7 selection.

8 (h) Law enforcement shall make record of the
9 identification procedure that includes all identification and
10 non-identification results obtained during all identification
11 procedures during an investigation, which record shall be signed
12 by the eyewitness.

13 (i) When it is impracticable for a blind administrator to
14 conduct a lineup, the investigator shall state in writing the
15 reason therefor.

16 **§ -3 Eyewitness identification procedures for showups.**

17 (a) The administrator shall comply with the following in
18 conducting a showup:

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



- 1 (2) A showup shall only be performed using a live suspect
2 and only in exigent circumstances that require the
3 immediate display of a suspect to an eyewitness;
- 4 (3) An administrator shall not conduct a showup with a
5 photograph. If investigators wish to determine if an
6 eyewitness can make an identification using a
7 photograph, a photo lineup must be used;
- 8 (4) Prior to any showup, law enforcement shall record in
9 writing as complete a description as possible of the
10 perpetrator provided by the eyewitness in the
11 eyewitness' own words. This statement shall also
12 include information regarding the conditions under
13 which the eyewitness observed the perpetrator
14 including location, time, distance, obstructions,
15 lighting, weather conditions, and other impairments
16 including but not limited to alcohol, drugs, stress,
17 and visual or auditory disabilities;
- 18 (5) The eyewitness shall also be asked if the eyewitness'
19 vision needs correction by glasses or contact lenses
20 and whether the eyewitness was wearing them at the
21 time of the offense. The administrator shall note



1 whether the eyewitness was wearing glasses or contact
2 lenses at the time of the identification procedure;

3 (6) The eyewitness shall be transported to a neutral, non-
4 law enforcement location where the suspect is being
5 detained for the purposes of a showup procedure;

6 (7) The eyewitness shall be instructed, without other
7 eyewitnesses present, prior to any showup that:

8 (A) The perpetrator may or may not be the person that
9 is presented to the eyewitness;

10 (B) The administrator does not know the identity of
11 the perpetrator;

12 (C) The eyewitness should not feel compelled to make
13 an identification;

14 (D) The investigation will continue regardless of
15 whether an identification is made;

16 (E) The procedure requires the administrator to ask
17 the eyewitness to state, in the eyewitness' own
18 words, how certain the eyewitness is of any
19 identification; and

20 (F) The eyewitness is not to discuss the
21 identification procedure or its results with



1 other eyewitnesses involved in the case and
2 should not speak with the media.

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

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

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

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

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

15 (1) Only one eyewitness at a time shall be present at the
16 location of the showup to participate in the showup
17 procedure; and

18 (2) If a positive identification is made, and an arrest is
19 justified, additional eyewitnesses shall be shown live
20 or photo lineups.



1 (d) If there are multiple suspects, the suspects shall be
2 separated and subjected to separate showup procedures.

3 (e) If the eyewitness makes an identification, the
4 administrator shall seek and document a clear statement from the
5 eyewitness, at the time of the identification and in the
6 eyewitness' own words, as to the eyewitness' confidence level
7 that the person identified in a given identification procedure
8 is the perpetrator.

9 (f) The administrator shall photograph a suspect or cause
10 the suspect to be photographed at the time and place of the
11 showup to preserve a record of the appearance of the suspect at
12 the time of the showup procedure.

13 (g) When it is impracticable for a blind administrator to
14 conduct a showup, the investigator shall state in writing the
15 reason therefor.

16 § -4 Video record of identification procedures;
17 impracticability; alternative record. (a) Unless
18 impracticable, a video record of the identification procedure
19 shall be made that includes the following information:

20 (1) All identification and non-identification results
21 obtained during the identification procedures, signed



1 by any eyewitness, including any eyewitness'

2 confidence statements;

3 (2) The names of all persons present at the identification
4 procedure, including the name of the lineup
5 administrator and whether the administrator was blind,
6 blinded, or non-blind;

7 (3) If an administrator other than a blind administrator
8 was used, the reason therefor;

9 (4) The date and time of the identification procedure;

10 (5) In a photo or live lineup, any eyewitness
11 identification of filler; and

12 (6) In a photo or live lineup, the names of the lineup
13 members and other relevant identifying information,
14 and the sources of all photographs or persons used in
15 the lineup.

16 (b) If a video record of the lineup is impracticable, the
17 administrator of the lineup shall document the reason therefor
18 and an audio record of the identification procedure shall be
19 made. The audio record shall be supplemented by the following:

20 (1) All of the photographs used in a photo lineup; and



(2) Photographs of all of the individuals used in a live lineup or showup.

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

(1) All of the photographs used in a photo lineup; and

(2) Photographs of all of the individuals used in a live lineup.

§ -5 Remedies for noncompliance or contamination. (a) When the prosecution intends to offer eyewitness identification evidence at trial, the defendant is entitled to a pretrial evidentiary hearing as to the reliability of the evidence offered.

(b) At the hearing, the court shall examine whether law enforcement or any administrator failed to substantially comply with any requirement contained in this chapter, resulting in the contamination of the eyewitness. In making its determination, the court shall consider the following:



(1) Whether any suggestive identification procedures were employed;

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

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

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

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

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

§ -6 Training of law enforcement officers. The county police departments shall create, administer, and conduct



1 training programs for law enforcement officers and recruits
2 regarding the methods, technical aspects, and scientific
3 findings regarding the basis of the eyewitness identification
4 practices and procedures referenced in this chapter."

5 SECTION 3. This Act does not affect rights and duties that
6 matured, penalties that were incurred, and proceedings that were
7 begun before its effective date.

8 SECTION 4. This Act shall take effect on January 1, 2016.



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 an eyewitness identification to be used at trial in a pretrial evidentiary hearing. (HB147 HD1)

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