

JAN 22 2015

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 75 per cent of the nation's
6 two hundred eighty-nine exonerations. Over the past thirty
7 years, a large body of peer-reviewed, scientific research and
8 practice has emerged showing that simple systemic changes in
9 administering eyewitness identification procedures can greatly
10 improve the accuracy of eyewitness identifications. Policies
11 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 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 whether or not an
6 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) At least five fillers shall be included in a
16 photo lineup in addition to the suspect;

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

19 (D) If the eyewitness has previously viewed a photo
20 lineup or live lineup in connection with the
21 identification of another person suspected of



1 involvement in the offense, the fillers in the
2 lineup in which the instant suspect participates
3 shall be different from the fillers used in any
4 prior lineups;

5 (5) In a live lineup, no identifying actions, such as
6 speech, gestures, or other movements, shall be
7 performed by lineup participants;

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

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

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

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

19 (1) Each eyewitness shall view photo or live lineups
20 separately;



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

4 (3) The eyewitnesses shall not be permitted to communicate
5 with each other until all identification procedures
6 have been completed.

7 (d) In any identification procedure, no writings or
8 information concerning the current investigation or any previous
9 arrest, indictment, or conviction of the suspect shall be
10 visible or made known to an eyewitness.

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

13 (f) In any identification procedure where an eyewitness
14 makes an identification, the administrator shall seek and
15 document a clear statement from the eyewitness at the time of
16 the identification in the eyewitness' own words, including a
17 statement describing the eyewitness' confidence level that the
18 person identified is the perpetrator.

19 (g) In any identification procedure where an eyewitness
20 makes an identification, the eyewitness shall not be provided
21 any information concerning the person identified before the



1 administrator obtains the eyewitness' statement about the
2 selection.

3 (h) Law enforcement shall make record of the
4 identification procedure that includes all identification and
5 non-identification results obtained during all identification
6 procedures during an investigation, which record shall be signed
7 by the eyewitness.

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

11 **§ -3 Eyewitness identification procedures for showups.**

12 (a) The administrator shall comply with the following in
13 conducting a showup:

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

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

19 (3) An administrator shall not conduct a showup with a
20 photograph. If investigators wish to determine if an



1 eyewitness can make an identification using a
2 photograph, a photo lineup must be used;

3 (4) Prior to any showup, law enforcement shall record in
4 writing as complete a description as possible of the
5 perpetrator provided by the eyewitness in the
6 eyewitness' own words. This statement shall also
7 include information regarding the conditions under
8 which the eyewitness observed the perpetrator
9 including location, time, distance, obstructions,
10 lighting, weather conditions, and other impairments
11 including but not limited to alcohol, drugs, stress,
12 and visual or auditory disabilities;

13 (5) The eyewitness shall also be asked if the eyewitness'
14 vision needs correction by glasses or contact lenses
15 and whether the eyewitness was wearing them at the
16 time of the offense. The administrator shall note
17 whether the eyewitness was wearing glasses or contact
18 lenses at the time of the identification procedure;

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



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

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

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

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

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

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

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

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



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

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

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

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

10 (1) Only one eyewitness at a time shall be present at the
11 location of the showup to participate in the showup
12 procedure; and

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

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

18 (e) If the eyewitness makes an identification, the
19 administrator shall seek and document a clear statement from the
20 eyewitness, at the time of the identification and in the
21 eyewitness' own words, as to the eyewitness' confidence level



1 that the person identified in a given identification procedure
2 is the perpetrator.

3 (f) The administrator shall photograph a suspect or cause
4 the suspect to be photographed at the time and place of the
5 showup to preserve a record of the appearance of the suspect at
6 the time of the showup procedure.

7 (g) When it is impracticable for a blind administrator to
8 conduct a showup, the investigator shall state in writing the
9 reason therefore.

10 **§ -4 Video record of identification procedures;**

11 **impracticability; alternative record.** (a) Unless
12 impracticable, a video record of the identification procedure
13 shall be made that includes the following information:

14 (1) All identification and non-identification results
15 obtained during the identification procedures, signed
16 by any eyewitness, including any eyewitness'
17 confidence statements;

18 (2) The names of all persons present at the identification
19 procedure, including the name of the lineup
20 administrator and whether the administrator was blind,
21 blinded or non-blind;



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

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

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

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

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



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

4 **§ -5 Remedies for noncompliance or contamination. (a)**

5 When the prosecution intends to offer eyewitness identification
6 evidence at trial, the defendant is entitled to a pretrial
7 evidentiary hearing as to the reliability of the evidence
8 offered.

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

- 14 (1) Whether any suggestive identification procedures were
- 15 employed;
- 16 (2) Whether the eyewitness identification evidence may
- 17 have been otherwise contaminated by state or non-state
- 18 actors; and
- 19 (3) Any other factors bearing upon the reliability of the
- 20 identification evidence, including but not limited to
- 21 characteristics of the witness, perpetrator, or event.



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

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

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

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

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

18 (2) That it may consider credible evidence of
19 noncompliance with this chapter when assessing the
20 reliability of the eyewitness identification evidence.



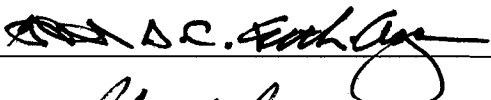

1 § -6 **Training of law enforcement officers.** The county
2 police departments shall create, administer, and conduct
3 training programs for law enforcement officers and recruits
4 regarding the methods, technical aspects, and scientific
5 findings regarding the basis of the eyewitness identification
6 practices and procedures referenced in this chapter."

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

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

11

INTRODUCED BY:



S.B. NO. 147

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. Takes effect 01/01/2016.

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

