

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 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 solve crime, convict the guilty, and protect the innocent.
4 The integrity of the State's criminal justice process is
5 enhanced by adherence to best practices in evidence gathering.
6 The people of the State of Hawaii will benefit from the
7 improvement of the 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
16 lineup or 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" means an eyewitness' memory of a person or
2 event has become altered, replaced, or otherwise impaired as a
3 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 possible 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 possible 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 possible 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 possible 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**
15 **lineups and photo lineups.** (a) Any law enforcement entity
16 conducting eyewitness identification procedures shall adopt
17 specific procedures for conducting photo lineups and live
18 lineups that comply with the following requirements:

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



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

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

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

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



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

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

(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) The administrator shall comply with the following:

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



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

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

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

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

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



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

(D) 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, no identifying actions, such as speech, gestures, or other movements, shall be performed by lineup participants;

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

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

(8) In a photo lineup or live lineup, nothing shall be said to the eyewitness that might influence the



eyewitness' identification of any particular lineup member.

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

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

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

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

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

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

(f) In any identification procedure where an eyewitness makes an identification, the administrator shall seek and document a clear statement from the eyewitness at the time of



1 the identification in the eyewitness' own words, including a
2 statement describing the eyewitness' confidence level that the
3 person identified is the possible perpetrator.

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

9 (h) Law enforcement shall make a record of each
10 identification procedure, including all identification and non-
11 identification results obtained, undertaken during all
12 investigations. Each identification procedure record shall be
13 signed by the relevant eyewitness.

14 (i) When it is impracticable for a blind administrator to
15 conduct a lineup, the investigator shall state in writing, in
16 the identification procedure record, the reason therefore.

17 **§ -3 Eyewitness identification procedures for showups.**

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

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



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



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

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

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

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

(B) The administrator does not know the identity of the possible 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



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:

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

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

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

13 (c) When there are multiple eyewitnesses, the following
14 procedure shall apply:

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

18 (2) If a positive identification is made, and an arrest is
19 justified, subsequent 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 an 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 the showup is the possible
8 perpetrator.

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

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

16 **§ -4 Video record of identification procedures;**
17 **impracticability; alternative record.** (a) Unless

18 impracticable, a video record of each identification procedure
19 shall be made that includes the following information:

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



1 by each 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 administrator and
5 whether the administrator was blind, blinded, or non-
6 blind;

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

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

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

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

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

21 (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 identification procedure are impracticable, the administrator shall document in writing the reason therefore and a written record of the identification procedure shall be made. The written 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.

§ -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 eyewitness identification 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, possible 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.



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

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

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

§ -6 Training of law enforcement officers. Law enforcement entities shall include in their training programs for law enforcement officers and recruits information on the methods, technical aspects, and scientific findings regarding the basis of the eyewitness identification practices and procedures referenced in this chapter."

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

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

INTRODUCED BY: 



S.B. NO. 161

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.

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

