The Judiciary, State of Hawai'i

Testimony to the Senate Committee on Judiciary and Labor
Senator Gilbert S. C. Keith-Agaran, Chair
Senator Maile S. L. Shimabukuro, Vice Chair

Monday, March 23, 2015 9:35 AM
State Capitol, Conference Room 016

WRITTEN TESTIMONY ONLY

by
Judge Glenn J. Kim, Chair
Supreme Court Committee on the Rules of Evidence

Bill No. and Title: House Bill No. 147, House Draft 1 Relating to Criminal Procedure.

Purpose: 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)

Judiciary's Position:

The Hawaii Supreme Court's Committee on the Rules of Evidence respectfully submits the following comments on the eyewitness identification procedures proposed by House Bill 147, House Draft 1. The committee has no objection to and does not oppose the procedures included in Sections ___-1 through -4 and Section ___-6 of the proposed chapter. However, the committee continues to have strong objection to and strenuously opposes Section ___-5 of the proposed legislation beginning at page 16, line 11, encompassing so-called "remedies for non-compliance or contamination," as these supposed mandates infringe upon and constrain the judgment and discretion of our trial judges, whose proper job it is to decide upon and craft such remedies in the first instance.

To begin with, the judicial procedures mandated by subsections (a) through (c) of proposed Section ___-5 are completely unnecessary, superfluous, and over-constraining of the discretion already properly exercised in this context by our criminal court judges. At present,

criminal defendants are already "entitled to a pre-trial evidentiary hearing as to the reliability of" eyewitness identification evidence sought to be admitted at trial. In fact, defense motions to suppress such evidence are already routinely filed in cases where such evidence is at issue, and once such a motion is filed, the trial court is obligated to hold a full evidentiary hearing on the matter.

In such a hearing, the court routinely considers at least the factors set forth in subsection (b) of the proposed Section ___-5, and almost always additional relevant factors as well. And if the court concludes that the identification evidence is insufficiently reliable for any reason, the court will order such evidence suppressed. To repeat, this is routine and current practice in our criminal courts, such that the mandates proposed in Section ___-5 are unnecessary, and as such, potentially mischievous. Were the remainder of the proposed legislation passed into law, then this would simply broaden the area of eyewitness identification procedures subject to the legitimate purview and oversight of the courts which they already exercise without the need for the superfluous mandates set forth in Section ___-5.

In sum, the committee respectfully recommends that Section ___-5 of the proposed chapter (page 16, line 11 through page 17, line 19), be deleted in its entirety, especially since to do so will not in any way impair the presumed efficacy of the specific eyewitness identification procedures mandated by the remainder of the proposed legislation.

Thank you for the opportunity to testify on this measure.

**Testimony of the Office of the Public Defender, State of Hawaii,
to the Senate Committee on Judiciary and Labor**

March 23, 2015

H.B. No. 147 HD1: RELATING TO CRIMINAL PROCEDURE

Chair Keith-Agaran and Members of the Committee:

We support H.B. No. 147 HD1 which seeks to reform the procedures under which eyewitnesses to crimes are asked to identify the perpetrators. Studies have shown that current procedures used by law enforcement authorities, including those used by the Honolulu Police Department, are in need of reform to reduce the chances of erroneous eyewitness identifications.

In the recent U.S. Supreme Court case of Perry v. New Hampshire, 132 S. Ct. 716 (January 11, 2012), the majority opinion quoted the case of United States v. Wade, 388 U.S. 218 (1967), in setting forth the dangers involved in police-arranged eyewitness identification procedures:

> "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."

388 U.S. at 228.

Moreover, Justice Sotomayor, in her dissenting opinion in Perry, boldly wrote:

> The empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country. Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification. Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy . . . .

132 S. Ct. at 738-39.

Thus, it is clear that the United States Supreme Court recognizes the danger that is inherent in eyewitness identification. Law enforcement officials, however, are resistant to change and cling to long-held, disproved beliefs that the procedures being used to identify criminal suspects remain accurate. Legislation is necessary to reform police department procedures to improve the accuracy and reliability of eyewitness identifications.

Thank for the opportunity to comment on this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY

CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 547-7400 • FAX: (808) 547-7515

KEITH M. KANESHIRO
PROSECUTING ATTORNEY

ARMINA A. CHING
FIRST DEPUTY PROSECUTING ATTORNEY

THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR
Twenty-Eighth State Legislature
Regular Session of 2015
State of Hawai`i

March 23, 2015

RE: H.B. 147, H.D. 1; RELATING TO CRIMINAL PROCEDURE.

Chair Keith-Agaran, Vice-Chair Shimabukuro and members of the Senate Committee on Judiciary and Labor, the Department of the Prosecuting Attorney of the City and County of Honolulu, submits the following testimony in opposition to H.B. 147, H.D. 1.

While the Department agrees that it is crucial for law enforcement to maintain best practices and standardized procedures for eyewitness identifications, codifying a "checklist" of such procedures in statute would be overly restrictive and unduly burdensome, creating the implied presumption that, if anything on the checklist is missing or problematic, the eyewitness identification must somehow be substandard or unreliable. In this way, codification of such procedures would discount the true standard—totality of the circumstances—that has now been established and fleshed-out through years of caselaw. In addition, it is our understanding that Honolulu Police Department and the neighbor island police departments already incorporate most or all of the procedures listed in H.B. 147, H.D. 1, and train their officers accordingly; they need the flexibility to continuously improve and adjust these procedures, as local and national caselaw and best practices continue to evolve.

Provisions contained in H.B. 147, H.D. 1, would generally disrupt the wealth of case law that already exists on the subject of eyewitness identifications. There are also numerous legal procedures and safeguards already in place, to ensure defendants' rights are protected, and to ensure juries are well-aware that eyewitness identifications are not determinative. By law, eyewitness identifications are reviewed under a "totality of the circumstances," which is the most appropriate standard, as there are so many case-specific factors that must be taken into account.

During trial, juries are repeatedly told to consider any potential biases, and the overall level of reliability, when a case involves eyewitness identification. In addition, our courts have ample discretion to suppress an eyewitness identification that is "unnecessarily suggestive"; this determination also requires the judge's careful consideration of the totality of the circumstances, rather than considering a set list of requirements. There are already various types of pretrial hearings and motions available to both parties, to address this or any other evidentiary matters.

Today, there are at least three (3) Hawaii Supreme Court decisions that address when and what type of jury instructions must be given to juries, to ensure that juries are well-aware of the fallibility of eyewitness identifications. Moreover, it is our understanding that the Judiciary's Jury Instructions Committee reviews this matter regularly, and in fact approved new jury instructions regarding eyewitness identifications on December 18, 2014 and October 29, 2014, to properly guide juries in their consideration of eyewitness identifications, as necessary for trial purposes.

In order to ensure that our juries—and our courts—continue to consider the true totality of circumstances pertaining to eyewitness identifications, and continue to consider every aspect of the evidence and arguments presented by defense and prosecution—rather than a checklist—it is imperative that the Legislature not codify a list of police procedures or duplicative court proceedings as contemplated by H.B. 147, H.D. 1. We would note that law enforcement should be permitted to continuously improve and adjust their procedures in accordance with local and national caselaw, and as is in their best interests, to conduct the most reliable investigations.

For all of these reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes H.B. 147, H.D. 1. Thank for you the opportunity to testify on this matter.

Justin F. Kollar
Prosecuting Attorney

Kevin K. Takata
First Deputy

Rebecca A. Vogt
Second Deputy

Diana Gausepohl-White
Victim/Witness Program Director

OFFICE OF THE PROSECUTING ATTORNEY
County of Kaua'i, State of Hawai'i
3990 Ka'ana Street, Suite 210, Līhu'e, Hawai'i 96766
808-241-1888 ~ FAX 808-241-1758
Victim/Witness Program 808-241-1898 or 800-668-5734

TESTIMONY IN OPPOSITION TO
HB147, HD1 – RELATING TO CRIMINAL PROCEDURE

Justin F. Kollar, Prosecuting Attorney
County of Kaua'i

Senate Committee on Judiciary & Labor
March 23, 2015, 9:35 a.m., Conference Room 016

Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee:

The County of Kauai, Office of the Prosecuting Attorney, STRONGLY OPPOSES HB147, HD1 – Relating to Criminal Procedure. As grounds therefore, we note that the Hawaii Supreme Court, in the course of fifty years of jurisprudence, in conjunction with guidance from the United States Supreme Court, has established a thorough and comprehensive set of legal guidelines setting forth the procedures to be followed by law enforcement in conducting eyewitness identification. The same courts have also established strict guidelines to be followed by law enforcement in the interrogation of suspects in criminal investigations.

This office submits that the implementation of new guidelines could not, legally, have the effect of running counter to or relaxing the requirements imposed by the courts. Moreover, the impacts of new, additional requirements, would be unduly burdensome in that current procedures already comply with the requirements of the Hawai'i and United States Supreme Courts. There already exist remedies in cases where said procedures are violated – the right to exclude the identification from use at trial, and of appeal, the same remedies that would follow from any violation of new administrative regulations. This bill is essentially a defense checklist that presupposes that law enforcement did not and does not follow well-established practices of criminal procedure in the streets or in the courts.

In conclusion, any recommendations adopted by the Task Force would duplicate already existing protections and impose new burdens on law enforcement agencies that are already held to very stringent standards in a State that affords criminal defendants protections that extend beyond those offered by the United States Constitution.

Based on the foregoing, the County of Kauai, Office of the Prosecuting Attorney, STRONGLY OPPOSES this Bill. We ask that the Committee HOLD HB147, HD1.

Thank you very much for the opportunity to provide testimony on this bill.

Committee:	Committee on Judiciary and Labor
Hearing Date/Time:	Monday, March 23, 2015, 9:35 a.m.
Place:	Conference Room 016
Re:	Testimony of the ACLU of Hawaii **in Support of H.B. 147, H.D. 1**, Relating to Criminal Procedure

Dear Chair Keith-Agaran and Members of the Committee on Judiciary and Labor,

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in **support** of H.B. 147, H.D. 1, Relating to Criminal Procedure.

The Innocence Project found that eyewitness identifications are "the single greatest cause of wrongful convictions nationwide, playing a role in 72% of convictions overturned through DNA testing."[1] Hawaii law enforcement agencies must implement policies and procedures that will prevent mistaken eyewitness identifications whenever possible, particularly when something as fundamental as a person's freedom and liberty are at stake.

H.B 147, H.D. 1 seeks to propel Hawaii law enforcement in this direction by reducing any intentional or unintentional influence or suggestion to eyewitnesses about a suspect.

If law enforcement agencies are truly interested in justice, they should revise their eyewitness identification policies to conform to the best practices established by the state. Compliance will improve eyewitness accuracy, which means fewer innocent people may be convicted.

Thank you for this opportunity to testify.

Lois K. Perrin
Of Counsel
ACLU of Hawaii

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for 50 years.

[1] *See* http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php.

American Civil Liberties Union of Hawai'i
P.O. Box 3410
Honolulu, Hawai'i 96801
T: 808-522-5900
F: 808-522-5909
E: office@acluhawaii.org
www.acluhawaii.org

COMMUNITY ALLIANCE ON PRISONS

P.O. Box 37158, Honolulu, HI 96837-0158

Phone/E-Mail: (808) 927-1214 / kat.caphi@gmail.com

COMMITTEE ON JUDICIARY and LABOR
Chair: Sen. Gil Keith-Agaran
Vice Chair: Sen. Maile Shimabukuro
Monday, March 23, 2015
9:35 a.m.
Room 016

SUPPORT for HB 147 HD1 – EYEWITNESS ID

Aloha Chair Keith-Agaran, Vice Chair Shimabukuro and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies for almost two decades. This testimony is respectfully offered on behalf of the 5,600 Hawai`i individuals living behind bars, always mindful that more than 1,600, and soon to be rising number of Hawai`i individuals who are serving their sentences abroad, thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

SB 147 HD1 creates procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations and grants a defendant the right to challenge any eyewitness identification to be used at trial in a pretrial evidentiary hearing. Takes effect 1/1/2016.

Community Alliance on Prisons is in strong support of measures that improve the quality of justice in Hawai`i nei. This measure that would do just that.

We are happy that the Honolulu Police Department has revised their eyewitness identification procedures and hope that they furnished copies of new procedures to all sitting legislators, as requested,

The National Research Council of the National Academies released the report **IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION** in the Fall of 2014.

Below is a thumbnail sketch of their recommendations:

IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION

Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts; Committee on Science, Technology, and Law; Policy and Global Affairs; Committee on Law and Justice; Division of Behavioral and Social Sciences and Education; National Research Council
National Research Council of the National Academies

OVERARCHING FINDINGS

The committee is confident that the law enforcement community, while operating under considerable pressure and resource constraints, is working to improve the accuracy of eyewitness identifications. These efforts, however, have not been uniform and often fall short as a result of insufficient training, the absence of standard operating procedures, and the continuing presence of actions and statements at the crime scene and elsewhere that may intentionally or unintentionally influence eyewitness' identifications.

Basic scientific research on human visual perception and memory has provided an increasingly sophisticated understanding of how these systems work and how they place principled limits on the accuracy of eyewitness identification (see Chapter 4).1 Basic research alone is insufficient for understanding conditions in the field, and thus has been augmented by studies applied to the specific practical problem of eyewitness identification (see Chapter 5). Applied research has identified key variables that affect the accuracy and reliability of eyewitness identifications and has been instrumental in informing law enforcement, the bar, and the judiciary of the frailties of eyewitness identification testimony.

A range of best practices has been validated by scientific methods and research and represents a starting place for efforts to improve eyewitness identification procedures. A number of law enforcement agencies have, in fact, adopted research-based best practices. This report makes actionable recommendations on, for example, the importance of adopting "blinded" eyewitness identification procedures.

RECOMMENDATIONS TO ESTABLISH BEST PRACTICES FOR THE LAW ENFORCEMENT COMMUNITY

Recommendation #1: Train All Law Enforcement Officers in Eyewitness Identification
Recommendation #2: Implement Double-Blind Lineup and Photo Array Procedures
Recommendation #3: Develop and Use Standardized Witness Instructions
Recommendation #4: Document Witness Confidence Judgments
Recommendation #5: Videotape the Witness Identification Process

RECOMMENDATIONS FOR BEST PRACTICES FOR COURTS

The report also surveys state and federal court decisions and state statutes that alter the Manson test in light of the scientific research. The cited decisions include those by the New Jersey and Oregon Supreme Courts (Henderson and Lawson, respectively) which rely on the robust research on memory and identification in overhauling the way courts in those states deal with identification evidence. This report should help to accelerate this trend by making the following recommendations for courts:

•***Conduct pre-trial judicial inquiry:*** Judges should inquire about the eyewitness evidence being offered. If there are indicators of unreliable identifications, judges could limit portion of the eyewitness's testimony or instruct the jury on how to properly evaluate the reliability of the identification based on the scientific research.

•***Make juries aware of prior identifications:*** Because in court identifications can unduly influence the jury, juries should hear detailed information about any earlier identification, including the confidence the witness expressed at the time of the identification.

•***Permit expert testimony:*** The report recognizes that expert witness who are capable of explaining the nuances of memory and identification are helpful in assisting juries in how to evaluate eyewitness testimony and should be permitted. The report also encourages local jurisdictions to provide funding to defendants to engage qualified experts. The report acknowledges that experts offer distinct advantages over jury instructions.

•***Better instruct juries:*** Jury instructions can be used to educate jurors on how to properly evaluate the factors affecting eyewitness identifications and should be tailored to the relevant facts in a particular case. The report urges further study of the effects of jury instructions, including the use of videotaped information to educate jurors and the role of the timing of jury instructions (i.e., presented prior to the witness's testimony rather than at the close of the case).[1]

WHY THIS REPORT IS SO IMPORTANT:

Policy reform efforts have long been stalled by claims that the science relating to eyewitness identification continues to evolve and has not been settled. This report has at long last provided definitive answers in some key areas of eyewitness identification police practice.

The findings in this report are based on the first-ever *comprehensive evaluation of the state of the science of eyewitness identification*. Key to this inquiry was an in-depth review of existing research on eyewitness identification and the provision of recommendations about how to improve the administration of lineups and photo arrays to ensure accurate and appropriate use of eyewitness evidence.

WHY THIS IS AN IMPORTANT ISSUE FOR COMMUNITY ALLIANCE ON PRISONS:

Community Alliance is pursuing this justice issue because eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in 72% of convictions overturned through DNA testing. The wrongful conviction and imprisonment of a man on Maui, Alvin Jardine, who spent more than 20 years in prison for a crime he did not commit, involved eyewitness mis-identification. This man lost his prime earning years because of the tremendous injustice perpetrated by the state despite 11 witnesses testifying that he was not near the location of the crime.

While eyewitness testimony can be persuasive evidence before a judge or jury, 30 years of strong social science research has proven that eyewitness identification is often unreliable. Research shows that the human mind is not like a tape recorder; we neither record events exactly as we see them, nor recall them like a tape that has been rewound. Instead, witness memory is like any other evidence at a crime scene; it must be preserved carefully and retrieved methodically, or it can be contaminated.

As far back as the late 1800s, experts have known that eyewitness identification is all-too-susceptible to error, and that scientific study should guide reforms for identification procedures. In 1907, Hugo Munsterberg published "On the Witness Stand," in which he questioned the reliability of eyewitness identification. When Yale law professor Edwin Borchard studied 65 wrongful convictions for his pioneering 1932 book, "Convicting the Innocent," he found that eyewitness misidentification was the leading cause of wrongful convictions.

[1] Report Urges Caution in Handling and Relying Upon Eyewitness Identifications in Criminal Cases, Recommends Best Practices for Law Enforcement and Courts, National Research Council, October 2014, http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=18891

Since then, hundreds of scientific studies (particularly in the last three decades) have affirmed that eyewitness identification is often inaccurate — and that it can be made more accurate by implementing specific identification reforms.[2]

Professional Prosecutors[3]

> … Jeff Rosen, district attorney of Santa Clara County, where the exoneration groups' best practices for eyewitness identifications have been employed for more than a decade, said, "I think that district attorneys should play a role in encouraging police departments to adopt best practices. District attorneys should educate law enforcement about best practices and encourage best practices.
> (…)
> Gil Garcetti, former Los Angeles County district attorney, agrees. "It is the responsibility of district attorneys to ensure that the practices being employed by law enforcement are the fairest practices. District attorneys should be working with each law enforcement agency to ensure that they are employing the most professional practices." …

Community Alliance on Prisons speaks in many college and university classes around Hawai`i nei. During a recent class at Hawai`i Pacific University, the professor and I arranged for a student from another class to enter the room while I was speaking and take a red bag that I had entered with. The room was rectangular with the door at the shorter side of the rectangle. As I was speaking, I reached down to get some material I had brought in my red bag. The bag was missing. I asked, "Did anyone see me walk in with a red bag?" Some students said that they had seen me enter with the bag. I proceeded to look around for it. Someone then said that they saw a woman enter the room, take the bag, and leave. I asked the class if others had witnessed this as well.

Our discussion about what the person looked like was very revealing. The one thing everyone got right was that it was a woman. After that, the descriptions of hair, height, ethnicity, and clothing ranged widely. (Here I must mention that the student who took the bag was not a very good actor because as she was leaving the room, she looked at the professor as if to verify that she grabbed the correct item!) This was just a short example of how wrong people can be when witnessing an event. When one adds the trauma of witnessing or being involved in a criminal event, it is easy to see how wrong we can be in 'remembering' the details.

On a personal note, I was once mugged at gunpoint. When the police asked me what the perpetrator looked like, I realized that he looked like lots of people – brown hair, brown eyes, about 5'7" and I could only really remember that a gun was pointing at me. The officer then asked me what type of gun it was. I told him that we really hadn't discussed the make and model of the gun, I could only remember that it was black, had a round barrel that was pointing at me. I was no help in solving that crime!

72% of the 325 exonerations were the results of false eyewitness identifications. This should not be acceptable.

---

[2] Information from The Innocence Project website: http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php

[3] **Oregon's Eyewitness Decision: Back to Basics,** By James M. Doyle, and December 13, 2012. http://www.thecrimereport.org/viewpoints/2012-12-oregons-eyewitness-decision-back-to-basics

Community Alliance on Prisons respectfully asks that the legislature mandate uniform eyewitness identification procedures statewide.

There are also good training videos available on line for police departments with resource issues.

Imagine if you, or someone you love, were one of the innocent/wrongly convicted people. Would your vote be different?

Mahalo for this opportunity to share our research on this important justice issue and for your commitment to equal justice.

HARRISON & MATSUOKA

Attorneys at Law

William A. Harrison
E-mail: wharrison@hamlaw.net
Keith A. Matsuoka
E-mail: kmatsuoka@hamlaw.net
Gene K. Lau, of Counsel
E-mail: glau@hamlaw.net

Davies Pacific Center
841 Bishop Street, Suite 800
Honolulu, Hawaii 96813
Telephone: (808) 523-7041
Facsimile: (808) 538-7579
Web: www.harrisonmatsuoka.net
www.hamlaw.net

March 20, 2015

Via: Web: www.capitol.hawaii.gov/submittestimony.aspx

COMMITTEE: **ON THE JUDICIARY AND LABOR**
Chair: Senator Gilbert S.C. Keith-Agaran,
Vice Chair: Senator Maile S.L. Shimabukuro

DATE: Monday, March 23, 2015
TIME: 9:35 AM
PLACE: Conference Room 016
State Capitol
415 Beretania Street
Honolulu, Hawai'i 96813

BILL NO.: **SUPPORT HB 147, HD1**

Honorable Senator Gilbert S.C. Keith-Agaran, Senator Maile S.L. Shimabukuro and members of the Committee on the Judiciary and Labor.

Thank you for providing me this opportunity to offer testimony on behalf of the Hawai'i Innocence Project ("HIP") and the "Eyewitness Identification Reform Litigation Network," **who are in strident support of House Bill 147, HD1.**

As background to our support of the House Bill 147, HD1 I am one of the founding attorneys of the "Hawai'i Innocence Project." The Hawai'i Innocence Project is an upper level clinical program at the William S. Richardson School of Law. The project provides individuals who have been wrongfully convicted, the last opportunity to seek exoneration, redress and release. The project is manned by law students who are supervised by Professor Virginia Hench, and practicing criminal defense attorneys,

Brook Hart, Susan Arnett and the undersigned. The supervising attorneys have combined legal experience in excess of 120 years.

I am also Hawai'i's "Point Person" for the national "Eyewitness Identification Reform Litigation Network" which is an organization composed of representatives from the National Association of Criminal Defense Lawyers ("NACDL"), the National Legal Aid and Defender Association ("NLADA"), the Innocence Project ("IP") and the Public Defender Service for the District of Columbia ("PDS").

The Problem

The need for eyewitness identification reform has been borne out in both reality and research. The Innocence Project has found that mistaken eyewitness identification played a role in the vast majority of the 321 mistaken convictions in the United States overturned by DNA evidence. Studies of eyewitness identification over the past three decades have consistently shown the fallibility of eyewitness identifications as well as the unwitting contamination of witness recall through many standard eyewitness identification procedures.

Experts have recently acknowledged the problems with eyewitness identification. According to the Illinois Governor's Commission on Capital Punishment, "The fallibility of eyewitness testimony has become increasingly well-documented in both academic literature and courts of law." (Report of The (Illinois) Governor's Commission on Capital Punishment, April 2002) Mario Gaboury, director of the Crime Victim Study Center at the University of New Haven stated, "Eyewitness testimony is often inaccurate. I don't think anyone understood the magnitude of the problem until the past few years." (New Haven Register, "U.S. Navy Study: Eyewitnesses Unreliable," June 21, 2004).

Erroneous eyewitness identifications unintentionally distract police and prosecutors' attention from the true culprit, mislead and undercut witness credibility, and sometimes result in convicting and imprisoning innocent people. It is imperative that Hawai'i improve its eyewitness identification procedures.

The most common way to conduct police line-ups is to have multiple persons appear or multiple photographs placed before a witness at the same time and the officer

conducting the line-up/photo spread knows who the suspect is. Police officers conducting these line-ups/photo spreads can suggest to the witness either through intonation or attitude who the suspect is. Since defense counsel is usually not present during this procedure, there is little the suspect can do to protect his or her rights and ensure a fair procedure.

This issue was highlighted in a recent United States Supreme Court decision, *Perry v. New Hampshire*, 132 S.Ct. 716 (2012). In that case the United States Supreme Court agreed with such ID problems citing the case of *United States v. Wade*, 388 U.S. 218 (1967). *Wade* noted that the type of similar procedures utilized by our local law enforcement agencies was "[a] major factor contributing to the high incidence of miscarriage of justice…." See, *Wade*, 388 U.S. at 288.

The good news is that procedures proven to improve the accuracy of eyewitness identifications are readily available and easy to implement. For instance, research and experience shows that "blind" administration of the lineup (where the lineup administrator is unaware of who the suspect is within the lineup) prevents subtle, unintentional cues from influencing the witness's identification. Further, providing specific instructions to witnesses, such as information about the procedure and the potential that the culprit may or may not be in the lineup, greatly reduces the potential for a false identification. Additionally, showing the witness one person as a time reduces the likelihood of witness suggestibility. Studies show that using all three of these procedures *together* provides the greatest accuracy in eyewitness identifications

Where implemented, these changes have proven successful. The States of North Carolina, and Connecticut, as well as, large cities such as Dallas, Minneapolis, Boston**,** Philadelphia**,** San Diego**,** San Francisco, Tucson and Denver have implemented these practices and have found that they have improved the quality of their eyewitness identifications, thus strengthening prosecutions and reducing the likelihood of convicting the innocent. It is our hope that with experience and evaluation, Hawai'i's police departments and prosecutors will agree that taking advantage of the emerging research and best practices will further enhance their ability to swiftly and surely convict offenders, and avoid being misled into pursuing others – or convicting the innocent.

In the late 1990s, the National Institute of Justice (NIJ) convened a technical working group of law enforcement and legal practitioners, together with researchers specializing in the issue, to explore the development of improved procedures for the collection and preservation of eyewitness evidence within the criminal justice system. In 1999, the NIJ group issued *Eyewitness Evidence: A Guide for Law Enforcement*, and in 2003 followed up with *Eyewitness Evidence: A Trainer's Manual for Law Enforcement*. These manuals recommend the techniques referred to in the model legislation, and will serve as an excellent resource for any law enforcement agencies interested in improving the accuracy of eyewitness identifications.

In the introduction to that report, former United States Attorney General Janet Reno notes the following:

> Eyewitnesses frequently play a vital role in uncovering the truth about a crime. The evidence they provide can be critical in identifying, charging, and ultimately convicting suspected criminals. That is why it is absolutely essential that eyewitness evidence be accurate and reliable. One way of ensuring we, as investigators, obtain the most accurate and reliable evidence from eyewitnesses is to follow sound protocols in our investigations. Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes in recalling and interpreting a witnessed event; it is the nature of human memory. This issue has been at the heart of a growing body of research in the field of eyewitness identification over the past decade. The National Institute of Justice convened a technical working group of law enforcement and legal practitioners, together with these researchers, to explore the development of improved procedures for the collection and preservation of eyewitness evidence within the criminal justice system.
>
> This Guide was produced with the dedicated and enthusiastic participation of the seasoned professionals who served on the Technical Working Group for Eyewitness Evidence. These 34 individuals brought together knowledge and practical experience from jurisdictions large and

> small across the United States and Canada. I applaud their effort to work together over the course of a year in developing this consensus of recommended practices for law enforcement. In developing its eyewitness evidence procedures, every jurisdiction should give careful consideration to the recommendations in this Guide and to its own unique local conditions and logistical circumstances. Although factors that vary among investigations, including the nature and quality of other evidence and whether a witness is also a victim of the crime, may call for different approaches or even preclude the use of certain procedures described in the Guide, consideration of the Guide's recommendations may be invaluable to a jurisdiction shaping its own protocols. As such, Eyewitness Evidence: A Guide for Law Enforcement is an important tool for refining investigative practices dealing with this evidence as we continue our search for truth.

Former Attorney General Janet Reno*, Eyewitness Evidence A Guide for Law Enforcement*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (October 1999). www.ncjrs.gov/pdffiles1/nij/178240.pdf**.**

The Department of Justice's "Eyewitness Evidence, A Guide for law Enforcement" recommends the adoption of procedures like those set forth in HB 147.

The Solution

Across the country, experience implementing these improvements has shown that these procedures are successful.

Hawai'i must have their police agencies ordered to reevaluate their current line-up procedures to ensure that they are in compliance with the most up-to-date protocols, such as those put forth by the United States Department of Justice. The proposed eyewitness legislation is an important step in that direction.

Improving eyewitness identification procedures is not about the adversarial process or political power; it's about apprehending the guilty and protecting the innocent. In short, it's just good law enforcement.

Sincerely,

William A. Harrison
Hawai'i Innocence Project

Eyewitness Identification Reform Litigation Network
Point Person – Hawai'i

Law Offices of
BROOK HART
A LAW CORPORATION
333 Queen Street, Suite 610
Honolulu, Hawaii 96813

TEL: (808) 526-0811 brookhartlaw@gmail.com FAX: (808) 531-2677

SUBMITTED BY E-MAIL TO: JDLtestimony@capitol.hawaii.gov

March 21, 2015

Senator Gilbert S.C. Keith-Agaran
Chairman, Committee on Judiciary & Labor
Hawaii Senate
State Capitol, Room 221
415 South Beretania Street
Honolulu, Hawaii 96813

Re: House Bill No. 147 (HD 1), "Criminal Procedure; Eyewitness Identification; Remedies"

Dear Chairman Keith-Agaran and Committee Members:

I am a private practice attorney based in Honolulu and concentrating in criminal defense law. I have been a member of the Hawaii bar since 1968. Additionally, I have served as a Lecturer in Law at the William S. Richardson School of Law since 2005, co-teaching (as a founding member) the Hawaii Innocence Project courses, along with William Harrison, Esq., Susan Arnett, Esq., and Professor Virginia Hench.

This letter constitutes my written testimony (also submitted on behalf of the Hawaii Innocence Project) in strong support of House Bill No. 147 (HD 1). The original version of that bill was introduced by Rep. Joseph Souki, the Speaker of the House, and the amended version (HD 1) was approved by both the House Judiciary Committee and the full House of Representatives. House Bill No. 147 (HD 1) is scheduled to be heard by the Senate Committee on Judiciary and Labor in conference room 016 at 9:35 a.m. on Monday, March 23, 2015. To avoid needless repetition, my current written testimony incorporates by reference the written testimony in favor of the original House Bill No. 147 that I submitted to the House Judiciary Committee on February 19, 2015, in addition to the written testimonies in support of that bill submitted to that

committee by William Harrison, Esq., of the Hawaii Innocence Project; Virginia Hench, Esq., Director of the Hawaii Innocence Project; the American Civil Liberties Union of Hawaii; the State Office of the Public Defender; the Community Alliance on Prisons; and University of Hawaii graduate student Ghia Delapena.

As stated by House of Representatives Standing Committee Report No. 609, the three primary differences between the original version of House Bill No. 147 and the current House Bill No. 147 (HD 1) are that the present HD 1 version of the bill: "(1) Clarif[ies] the requirement for consistent appearance with respect to unique or unusual features for participants in the photo or live lineup; (2) Ensure[s] that any identification actions, e.g., speaking or moving, are performed by all lineup participants in a live lineup; [and] (3) Delete[s] the provision for instructions to the jury regarding eyewitness identifications because it duplicates the Hawaii Supreme Court's requirements."

In my professional opinion, the language of House Bill No. 147 (HD 1) should be revised on two particular points.

First, the second sentence (lines 3 to 6) of page 1 of House Bill No. 147 (HD 1) currently states: "Mistaken eyewitness identification has been shown to have contributed to the wrongful conviction in approximately seventy-five per cent of the nation's two[-]hundred eighty-nine exonerations." However, the website of the national Innocence Project updates and clarifies that statistic as follows: "Mistaken eyewitness identifications contributed to approximately 72% of the 318 wrongful convictions in the United States overturned by post-conviction DNA evidence" (see http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/eyewitness-identification-reform). Additionally, the University of Michigan Law School's National Registry of Exonerations website lists 1,567 total exonerations (both DNA and non-DNA), and states that mistaken witness identifications were a contributing factor in 531 (34%) of those exonerations (see https://www.law.umich.edu/special/exoneration/Pages/

ExonerationsContribFactorsByCrime.aspx#).[1]

Second, the now-deleted jury instruction section that was contained in the original version of House Bill No. 147 should be restored. Although it is claimed in House Standing Committee Report No. 609 that the deleted jury instruction requirement merely "duplicate[d] the Hawaii Supreme Court's requirements," in fact that is incorrect. The deleted jury instruction requirement beneficially mandated:

> 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.

House Bill No. 147 (original version) at page 17, lines 12-20 (underlining added).

The Hawaii Supreme Court's jury instruction requirements obviously do not include instructing the jury about the intent of this new H.R.S. chapter that does not yet exist, and clearly do not include instructing the jury about noncompliance with this new H.R.S. chapter that does not yet exist. See State v. Cabinatan, 132 Hawaii 63, 319 P.3d 1071 (2014); State v. Cabagbag, 127 Hawaii 302, 277 P.3d 1027 (2012). Yet, explicitly informing a jury that certain eyewitness identification procedures are so important that

---

[1] Both of those websites were accessed on March 21, 2015.

they are statutorily required in Hawaii, and that noncompliance with the statute may be considered in assessing the reliability of eyewitness identification evidence, are critically essential to providing defendants with fair trials. Furthermore, the Hawaii Supreme Court has ruled that a jury instruction must be given upon a defendant's request "when eyewitness identification is central to the case." State v. Cabinatan, 132 Hawaii at 78 (underlining added). The jury instruction requirement in the original version of House Bill No. 147 was not so restricted. Eyewitness identification evidence can still potentially affect a jury's determination of whether reasonable doubt (requiring an acquittal) exists even if it is not "central to the case." Thus, fundamental fairness merits restoring to the current version of House Bill No. 147 the jury instruction section that was unwisely deleted under a mistaken assumption.

I respectfully disagree with the portion of First Circuit Court Judge Glenn Kim's written testimony to the House Judiciary Committee that requested the deletion of the jury instruction requirement. Judge Kim first asserted that requiring the court to inform the jury that the new statutory "chapter is designed to reduce the risk of eyewitness misidentification" would necessitate that the court also inform the jury that the court was authorized to suppress the eyewitness identification evidence, and that the jury would thus infer "that the court had already found such evidence sufficiently reliable for admission, and that any non-compliance with the policies and procedures of the chapter did not result in a misidentification." However, informing the jury that the new statutory "chapter is designed to reduce the risk of eyewitness misidentification" definitely would not additionally require informing the jury that the court was authorized to suppress the evidence.[2] If the Senate Committee

[2] For example, when a jury is instructed that it can consider the issue of the voluntariness of a defendant's statement, it is not also instructed that the court was authorized to suppress the statement.

on Judiciary and Labor has any concern regarding that matter, the committee can simply add language to the bill clarifying that the court is prohibited from instructing the jury that the court was authorized to suppress the eyewitness identification evidence and did not do so.

Judge Kim's written testimony to the House Judiciary Committee then contended that instructing the jury that "it may consider credible evidence of noncompliance with [the] chapter when assessing the reliability of the eyewitness identification evidence" would confuse the jury by requiring it to review the statutory requirements. Yet, the well-organized requirements of this statute are clear, relatively simple, and not difficult for a lay juror to understand. Indeed, lay jurors are required to apply much more esoteric and complicated concepts in (for example) medical malpractice cases involving scientific evidence and antitrust cases involving advanced economic theories.

Finally, Judge Kim's written testimony to the House Judiciary Committee argued: "mandating such instructions poses an unnecessary burden on a defendant's constitutional right to conduct his or her own defense. A defendant should be able to seek the suppression of arguably tainted eyewitness identification evidence pretrial without fearing that the consequences of not prevailing on such a motion would then include a requirement that the court instruct the jury in that regard." That alleged problem is easily solved, simply by adding a sentence to the bill that prohibits the court from giving the jury instructions in question "when the defendant objects."

The written testimony submitted by the Department of the Prosecuting Attorney for the City and County of Honolulu to the House Judiciary Committee regarding House Bill No. 147 claimed: "it is our understanding that the Honolulu Police Department and the neighbor island police departments already incorporate most or all of the procedures listed in H.B. 147, and train their officers accordingly." Yet, that written testimony provides no specific evidence to support that

purported "understanding." (It is noteworthy that the written testimony refers to an "understanding," which can easily be erroneous, rather than definite knowledge.) Furthermore, that claim uses the ambiguous "most or all of the procedures" rather than the precise "all of the procedures." Moreover, if the county police departments already incorporate the procedures of this proposed legislation, then there should be no objection to codifying those procedures into Hawaii statutory law.

The written testimony submitted by the Department of the Prosecuting Attorney for the City and County of Honolulu to the House Judiciary Committee also alleges: "Provisions contained in H.B. 147 would generally disrupt the wealth of case law that already exists on the subject of eyewitness identifications." However, rather than "disrupting" such case law, House Bill No. 147 (HD 1) would supplement it. The Hawaii Legislature is free to enlarge by statute the minimum standards required by case law.

The written testimony submitted by the Office of the Prosecuting Attorney for the County of Kauai to the House Judiciary Committee lists an "appeal" as a remedy that "already exist[s]" in "cases where [eyewitness identification] procedures are violated." However, appeals are costly, may take one year or more to resolve, and will involve continued incarceration of defendants who are not released on bail. Rather than wasting the time and resources of courts and litigants on appeals, the effects of mistaken eyewitness identification would be much more efficiently and effectively prevented at the source by the statutorily mandated requirements of House Bill No. 147 (HD 1).

In light of all of the foregoing, I and the Hawaii Innocence Project urge the Senate Committee on Judiciary and Labor to approve House Bill No. 147 (HD 1), after making the

revisions to the language of that bill that are recommended above.

Very truly yours,

LAW OFFICES OF BROOK HART
A Law Corporation

Brook Hart

BROOK HART
Hawaii Innocence Project,
William S. Richardson School of Law

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: *Submitted testimony for HB147 on Mar 23, 2015 09:35AM*
Date: Friday, March 20, 2015 3:01:08 PM

HB147
Submitted on: 3/20/2015
Testimony for JDL on Mar 23, 2015 09:35AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
E. Ileina Funakoshi	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: Submitted testimony for HB147 on Mar 23, 2015 09:35AM
Date: Sunday, March 22, 2015 10:51:00 AM

HB147
Submitted on: 3/22/2015
Testimony for JDL on Mar 23, 2015 09:35AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
james crowe	Individual	Support	No

Comments: Eyewitness convictions are more faulty than correct. Seventy five percent of persons exonerated by DNA are from faulty eyewitness convictions. Please support this bill.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov