**Testimony of the Office of the Public Defender, State of Hawaii,
to the House Committee on Judiciary**

February 20, 2015

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

Chair Rhoads and Members of the Committee:

We support H.B. No. 147 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.

The Judiciary, State of Hawai'i

Testimony to the House Committee on Judiciary
Representative Karl Rhoads, Chair
Representative Joy San Buenaventura, Vice Chair

Friday, February 20, 2015 4:00 PM
State Capitol, Conference Room 325

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, 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 any eyewitness identification to be used at trial in a pretrial evidentiary hearing.

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. 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 does have strong objection to and strenuously opposes Section 5 of the proposed legislation beginning at page 16, line 4, 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 addition, the mandates regarding jury instructions set forth in subsection (d) of the proposed Section 5 are not only unnecessary, but, in the considered judgment of this committee, ill-advised and potentially damaging to the integrity of the trial process. The first required jury instruction provided for in subsection (d)(1) mandates that the court inform the jury that the "chapter is designed to reduce the risk of eyewitness misidentification." However, in order for the jurors to be able to appreciate the chapter's design, the trial court would need to instruct them that the chapter authorizes the court "to [s]uppress the evidence of eyewitness identification when there is a substantial probability of eyewitness misidentification" resulting from the "failure" to comply with any of the provisions of the chapter. Accordingly, the trial court's admission of the evidence during the trial in the first instance would clearly provide basis for a jury inference 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. In the committee's view, the foregoing would essentially constitute a comment on the evidence on the court's part, and such comment is explicitly proscribed in this jurisdiction by Hawaii Rules of Evidence Rule 1102, presumably because of the danger that such comment will illegitimately influence the jury's reception and evaluation of the evidence.

The second required instruction provided for in subsection (d)(2) mandates that the court inform the jury "[t]hat it may consider credible evidence of noncompliance with [the] chapter when assessing the reliability of the eyewitness identification evidence." For the jury to be able rationally to consider whether such supposed evidence of noncompliance is credible would require the trial court to provide the jury with the sections of the chapter applicable to the particular identification procedure to which the eyewitness making the identification was exposed, as well as to Section 6, which sets forth the requirements to which law enforcement authorities must adhere in order to be in compliance with the chapter. However, to provide such a lengthy instruction prior to the elicitation of the eyewitness testimony would be at best very

confusing to the jury, a confusion which would be further compounded by such a written instruction to the jury prior to their deliberations.

Finally, it is the committee's belief that 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 pre-trial 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.

In sum, the committee respectfully recommends that Section 5 of the proposed chapter (page 16, line 4 through page 18, line 20), 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 DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015

ON THE FOLLOWING MEASURE:
H.B. NO. 147, RELATING TO CRIMINAL PROCEDURE.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Friday, February 20, 2015 **TIME:** 4:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Russell Suzuki, Attorney General, or
Lance Goto, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General (the "Department"), appreciates the intent of the bill to provide for more accurate and reliable eyewitness identifications, but opposes this bill due to significant concerns.

The purpose of this bill is to establish procedures for law enforcement to follow when conducting live lineups, photo lineups, and showups for the eyewitness identification of those suspected of committing offenses.

The Department notes that it strives to always conduct its investigations fairly and thoroughly, and the Investigations Division of the Department has already adopted strong eyewitness identification procedures.

The Department has significant concerns about this bill, starting with the provisions on pages 16-17, regarding the section entitled, "Remedies for noncompliance or contamination." On page 16, lines 5-8, the bill provides that a defendant is "entitled to a pretrial evidentiary hearing as to the reliability of the evidence offered." This entitlement means that the court must have a hearing to address this right, whether or not a defendant wants to or has a basis to challenge the eyewitness identification process. Currently, defendants can file motions to suppress identifications to raise the issue before the court.

On page 16, at lines 9-21, and continuing on page 17, at lines 1-11, the bill provides:

> (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.

Although the court is required to "examine whether law enforcement or any administrator failed to substantially comply with any requirement contained in this chapter," it is then directed to consider factors that have nothing to do with law enforcement compliance with the chapter requirements. For example, the court is being directed to consider contamination as a result of acts by non-state actors. This could be referring to acts by anyone. The court is also directed to consider "any other factors bearing upon the reliability of the identification evidence, including but not limited to characteristics of the witness, perpetrator, or event." These factors have no bearing on whether law enforcement complied with the chapter. Currently, these issues may be brought up during trial by both the prosecution and the defense and subsequently used by the jury in evaluating the evidence and determining the facts.

Subsection (c) refers to the court finding evidence of failure by prosecuting agencies to comply with provisions of the chapter. Prosecuting agencies however, are not involved in the eyewitness identification process, and are therefore not required to comply with any provisions in the chapter.

Subsection (d), on page 17, lines 12-20, provides:

(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.

These provisions are ambiguous, confusing and likely to create serious issues at trial. It requires a process in which both the court and then the jury will independently receive and assess evidence of pretrial identification procedures employed during the investigation, make findings regarding the state's compliance with the provisions of this bill, and use the findings of compliance or noncompliance in assessing the reliability of the eyewitness identification. These provisions require the court to make pretrial findings with respect to compliance. Noncompliance with the provisions may not result in the court's suppression of the eyewitness identification evidence. But this bill requires that any evidence of noncompliance shall be admissible at trial to support claims of misidentification; and that the jury shall be instructed that it may consider evidence of noncompliance in determining reliability of the identification. The jury cannot be informed of the court's pretrial findings with respect to compliance with chapter requirements and the reliability of the eyewitness identification evidence. That would be imposing the court's factual findings upon the jury. So the jury would have to be instructed on the statutory requirements of this bill and be required to independently determine whether or not there was compliance with the procedures set out in this bill, even after the court already ruled that the eyewitness identification evidence was admissible.

The collateral issues related to compliance will potentially distract the jury from the issue at hand, the innocence or guilt of the defendant. The following are just a few examples of the types of collateral and distracting issues a jury may have to contend with:

(1) If the lineup investigator/administrator was aware of which person in the lineup was the suspected perpetrator, and was not blind as required by this chapter, then the jury would have to determine if this was allowable as an undue burden on law enforcement or the investigation to use an investigator who was not aware of the suspected perpetrator's identity.

(2) When a live lineup or photo lineup was made up of several individuals, along with the suspect, then the jury would have to determine if the other individuals generally resembled the eyewitness' description of the perpetrator, and whether the suspect did not unduly stand out from the other individuals selected for the lineup.

(3) When a photographic lineup was presented to an eyewitness, the jury would have to determine if the photograph of the suspected perpetrator that was used in the photo lineup was contemporary and resembled the suspect's appearance at the time of the offense.

There are many procedural requirements in this bill that a jury would have to consider in determining compliance or noncompliance with the procedures. In the end, however, compliance or noncompliance is not determinative of the reliability of the identification.

Depending on the circumstances, eyewitness identification may still be highly reliable, even though there may have been some degree of noncompliance. Under the provisions of this bill, regardless of the specific circumstances of the case, the idea that noncompliance is indicative of unreliability will be suggested.

On page 7, lines 9-14, the bill addresses fillers in a photo or live lineup:

> All fillers selected shall resemble the eyewitness' description of the 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[.]

The phrase "resemble the eyewitness' description of the perpetrator in significant features" can be applied very subjectively, especially when dealing with photos and does not account for the situation where the suspect's appearance at the time of the lineup is very different from the eyewitness' description at the time of the offense. The fillers may resemble the description, but the suspect may look very different, and stand out. Also, it may be very difficult to comply with this provision if the suspect has a very "unique or unusual" feature. It may not be possible to find fillers with a similar "unique or unusual" feature.

On page 8, lines 5-7 provide:

> In a live lineup, no identifying actions, such as speech, gestures, or other movements, shall be performed by lineup participants[.]

The phrases, "no identifying actions," and "other movements," are not clear. The administrator may want all of the participants in the lineup to turn several times to give the witness an opportunity to see them from different perspectives. And sometimes, movements or speech may be important to identification. It might be appropriate for all of the lineup participants to be directed to engage in the same movement or speech.

On page 9, lines 4-6 provide:

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

This requirement may be very difficult or impractical to apply because law enforcement officers only have intermittent control over eyewitnesses. When the police arrive at a crime scene where there are multiple eyewitnesses, it may take some time before the police identify who are eyewitnesses. Eyewitnesses who have left the scene may not be identified or reached by the police for many days. Sometimes, the eyewitnesses may all be members of the same family, and include minor children. It may not be possible or reasonable to isolate the children from the parents and prevent them from communicating with each other.

For the foregoing reasons, the Department opposes this bill and respectfully asks that it be held.

DEPARTMENT OF THE PROSECUTING ATTORNEY

CITY AND COUNTY OF HONOLULU

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THE HONORABLE KARL RHOADS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Eighth State Legislature
Regular Session of 2015
State of Hawai`i

February 20, 2015

RE: H.B. 147; RELATING TO CRIMINAL PROCEDURE.

Chair Rhoads, Vice-Chair Buenaventura and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu, submits the following testimony in opposition to H.B. 147.

Although the Department agrees that it is important for law enforcement to maintain best practices and standardized procedures for eyewitness identifications, 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, and train their officers accordingly. To codify these standards would be both overly restrictive and unnecessary; the very existence of such a checklist in statute would create a implied presumption that, if anything on the checklist is missing or problematic, the eyewitness identification must somehow be substandard or unreliable, which is not the applicable standard.

Provisions contained in H.B. 147 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 relevant.

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.

For all of these reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes H.B. 147. 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

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TESTIMONY IN OPPOSITION TO
HB147 – RELATING TO CRIMINAL PROCEDURE

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

House Committee on Judiciary
February 20, 2015, 4:00 p.m., Conference Room 325

Chair Rhoads, Vice Chair San Buenaventura, and Members of the Committee:

The County of Kauai, Office of the Prosecuting Attorney, STRONGLY OPPOSES HB147 – 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.

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

HARRISON & MATSUOKA

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February 18, 2015

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

COMMITTEE: **COMMITTEE ON THE JUDICIARY**
Chair: Rep. Karl Rhoads
Vice Chair: Rep. Joy A. San Buenaventura

DATE: Friday, February 20, 2015
TIME: 4:00 PM
PLACE: Conference Room 325
State Capitol
415 Beretania Street
Honolulu, Hawai'i 96813

BILL NO.: **SUPPORT HB 147**

Honorable Representatives: Karl Rhoads, Joy A. San Buenaventura and members of the Committee on the Judiciary.

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.**

As background to our support of the House Bill 147, 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

Committee:	Committee on Judiciary
Hearing Date/Time:	Friday, February 20, 4:00 p.m.
Place:	Conference Room 325
Re:	Testimony of the ACLU of Hawaii **in Support of H.B. 147**, Relating to Criminal Procedure

Dear Chair Rhoads, Vice Chair San Buenaventura, and Members of the Committee on Judiciary,

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in **support** of H.B. 147, 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 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.

Daniel M. Gluck
Legal Director
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
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STRONG SUPPORT FOR HB147 - PERTAINING TO CRIMINAL PROCEDURE

[EYEWITNESS IDENTIFICATION REFORM]

COMMITTEE ON JUDICIARY

Rep. Karl Rhoads, Chair

Hearing Date: Friday, February 20, 2015
4:00 p.m., House Converence Room 325

Honorable Chair Rhoads and Honorable Members of the House Judiciary Committee:

HB147 establishes procedures for eyewitness identification of persons in live lineups and photo lineups who are suspected of perpetrating an offense. The Hawai`i Innocence Project strongly supports this measure and strongly requests that this committee PASS this measure.

Eyewitness misidentification is the single greatest cause of wrongful convictions nation-wide, playing a role in 75% of the 325 convictions overturned through DNA testing to date.

Advances in research have led numerous police departments to abandon outdated identification procedures that greatly increase the likelihood of a witness identifying the wrong person. The Hawai`i Innocence Project strongly urges that Hawai`i adopt this measure implementing best practices to reduce misidentification and conviction of innocent persons.

Alvin Jardine spent nearly 20 years in prison for a 1990 burglary and rape which he did not commit. Although he always maintained his innocence, Jardine was convicted in 1992 after two previous trials ended in hung juries. His convictions were finally tossed in January, 2011,

after DNA tests revealed that DNA evidence from the crime scene came from an unknown man – and not Jardine. Even though eleven witnesses testified that Alvin Jardine was at another location at the time of the crime, Mr. Jardine was convicted solely on the mistaken eyewitness identification by the traumatized victim, whose actual assailant escaped punishment.

Witness memory is fragile, and easily contaminated. Like any other crime scene evidence; identifications based on witness memory must be collected according to best practices, preserved carefully and retrieved methodically, or the memory can be contaminated. Once contaminated, the true memories are over-written, and can no longer be retrieved..

The problem with traditional police identification procedures is that witnesses are easily influenced - even unintentionally - by the officers conducting the lineup. Witnesses are naturally eager to identify the perpetrator, and the witness will unconsciously pick up on verbal and non-verbal cues from the officer administering the lineup as to which is the suspect, even when the officer consciously tries to avoid influencing the identification.

Adopting the no-cost and low-cost best practices set forth in HB2304, Hawai`i can improve the accuracy of identifications leading to criminal convictions without impairing accurate identifications.

Through decades of social science research by such leading researchers as Dr. Elizabeth Loftis, and Dr. Gary Wells, scientists now have a much better understanding of how memory and identification work. From this knowledge the best practices for identification procedures have evolved, leaving behind some of the misconceptions of the past.

Decades of strong social science research have revealed that the human mind is not like a video recorder; our memories are not recorded exactly as we see them, and the process of recalling them is not like playing back a recording.

It should be noted that while best practices call for a benchmark certainty statement at the time of the identification, a high level of certainty does not correlate with accuracy. Contrary to popular belief, a witness who is absolutely certain is no more likely to be accurate than a witness who is less certain. Rather, the benchmark is there as a guide to the investigating officers.

The reforms set forth in the measure before you are not costly, and many are free of any cost. For example, it is now known that the risk of misidentification is sharply reduced if the police officer administering a photo or live lineup is not aware of who the suspect is.

The witness viewing a lineup should be told that the perpetrator might not be in the lineup, that the officer administering the lineup does not know which person is the suspect, and that the investigation will continue regardless of the lineup result.

No feedback should be given to the witness viewing a lineup. Further, if more than one photo array or physical lineup is done, the person suspected by the police should not be the only one whose likeness is repeated.

There is a wealth of material on implementation, from the smallest to the largest departments, because these procedural improvements have already been implemented in a wide array of large and small police departments. Where implemented, these changes have proven successful. The state of New Jersey, large cities such as Minneapolis, MN and small towns such as Northampton, MA, and others 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.

Numerous other jurisdictions, such as the states of North Carolina and Illinois, as well as Boston, Massachusetts, and other cities, are now beginning to implement these procedures. Law enforcement in these state, though initially skeptical, have come to embrace them after seeing how effective they are. I have attached some of the relevant material for your review.

Wrongful identifications hurt everyone except the actual perpetrator. When the wrong person is convicted of a crime, the victim and public are not protected, the innocent person convicted has their life, and their family's lives, irreparably damaged, the taxpayers pay dearly for the incarceration of the innocent, and the actual perpetrator is free to continue preying on innocent victims.

Thank you for receiving and considering my testimony.

Respectfully submitted,

/s/ Virginia E. Hench, Director
Hawai`i Innocence Project

LATE

TIMONY OF
DEPARTMENT OF THE ATTORNEY GENERAL
NTY-EIGHTH LEGISLATURE, 2015

ON THE FOLLOWING MEASURE:
H.B. NO. 295, RELATING TO EVIDENCE.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Friday, February 20, 2015 **TIME:** 4:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Russell A. Suzuki, Attorney General, or
Deirdre Marie-Iha, Deputy Attorney General

Chair Rhoads and Members of the Committee:

This bill restores the journalists' shield law, which was originally enacted by Act 210 in 2008 and repealed via a sunset provision in 2013. A journalists' shield law allows professional journalists to keep their sources confidential, and thus promotes public access to more information. The existence and scope of a journalists' shield law is a question of policy. To the extent the journalists' shield applies to professional journalists and their sources, the Department of the Attorney General does not object to this bill. Beyond that, however, the Department has some significant concerns about the wording of this bill, including provisions that make the shield law unduly expansive.

We therefore respectfully urge this Committee to amend this bill. We suggest four substantive amendments: (1) omit the provision that extends the protections beyond professional journalists to non-traditional journalists and bloggers, (2) add an exception for defendants in criminal cases who have a constitutional right to the information, (3) omit the provision extending the shield to unpublished information that is not reasonably likely to lead to the identification of the source, and (4) add definitions for some of the critical terms in the statute. These amendments would address potentially problematic aspects of the journalists' shield law, and better tie the provision to the protection of confidential *sources*, which is the primary aim of journalists' shield laws. We also suggest one drafting change.

First, the protection for "bloggers" or non-traditional journalists is far too broad, untested, and well beyond any statutory journalists' shield enacted in any state. Our research indicates that no state-law statutory journalists' shield law has gone this far. The interests in bringing

information to the public eye would be just as well served by offering statutory protection for professional journalists only, because a source desiring anonymity could simply go to a professional journalist. The bloggers' provision should be therefore removed. Making this amendment will not decrease the protection for professional journalists who publish on the digital version of traditional news sources (for example, a newspaper's website), because that is explicitly protected under subsection (a). Because the bloggers' provision is overbroad and not necessary to accomplish the shield law's central goals, all of subsection (b) should be omitted.[1]

As noted above, however, we understand the scope of the journalists' shield to be a question of policy. If this Committee wants to provide bloggers with protection under the shield law, we suggest the provision be made more narrow. There is one amendment that could accomplish this objective. One of the criteria to qualify under subsection (b) is that the individual has "regularly and materially participated in the reporting or publishing of news[.]" Page 3, line 19-20. This could be narrowed, and made more precise, by adding in a frequency-of-circulation requirement, and a requirement that the individual have done so for a year. This could be accomplished by adding in the phrase "and has done so at least once a month for an entire year," at the end of subsection (b)(1). This would ensure that only individuals who regularly participate in the gathering and publishing of news qualify. This would keep the bulk of the bloggers' provision intact, but narrow it in a very precise manner. The Department's preference remains to remove the bloggers' provision in its entirety. But if the Committee wants to include the provision, this narrowing wording offers a method to make the provision less problematic in our view.

Second, the existing wording fails to guarantee the protection of constitutional rights of criminal defendants, who may be entitled to the information as part of their entitlement to a fair trial, or to call or confront witnesses in their defense. In the absence of an exception tailored to address this concern, when this circumstance arises, the statute may be struck down as unconstitutional, or otherwise valid prosecutions may be dismissed because the defendant is unable to present evidence in his or her defense. Neither result is in the public interest. To address this concern, a new paragraph (6) should be added to the exceptions presently found in

[1] The following subsections would have to be re-designated.

subsection (c). Such an exception could read, for example: "a defendant in a criminal case has a constitutional right to the information sought to be disclosed."

Third, the statute's extension to all unpublished information in a journalists' possession (or in the possession of a blogger who stands in a similar position, if the blogger provision is left intact) is unnecessary, because it goes beyond unpublished information that is likely to reveal the identity of the source. Because subsection (a)(1) explicitly protects information that "could reasonably be expected" to lead to the identity of the source, further protection for unpublished information not reasonably likely to lead to the identity of the source is unnecessary to serve the central aim of the journalists' shield law. Furthermore, because there is no requirement that the protected unpublished information be given to the journalist by the source with an express demand for confidentiality, there is no reason to believe that the source would not come forward unless the unpublished information were protected. The protection of all unpublished information is therefore overbroad, and subsection (a)(2) should be omitted.

Fourth, the proposed wording should be made more precise by adding definitions for the critical terms. Adding definitions will give the statute more precision, which will help our courts apply it more consistently. Many of the words used in the operative part of the statute are sufficiently precise with their ordinary English meaning. There are other phrases, however, that would benefit from additional definitions. We specifically suggest that definitions be added for "news agency," "press association," and "wire service." For example, "news agency" could be defined as "a commercial organization that collects and supplies news to subscribing newspapers, magazines, and radio or television broadcasters."[2] "Press association" could be defined as "an association of newspapers or magazines formed to gather and distribute news to its members." "Wire service" could be defined as "a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, or radio or television broadcasters." Additional definitions could be added (for "journalist," "newscaster," "newspaper," and "magazine") if desired.[3]

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[2] Our suggested definitions are based in part on New York's journalist shield law, found at N.Y. Cons. Law § 79-h.

[3] When the Legislature considered this issue in 2013, the S.D. 1 and the C.D. 1 of H.B. No. 622 contained definitions of "journalist," "newscaster," "newspaper" and "magazine." All four of these definitions contained a financial component (i.e., a paid subscription for a magazine, or a

Finally, we make one minor drafting suggestion. Subsection (d), regarding when the protections of the privilege apply, is vague because it implies that a person "claiming" the privilege is protected from fines or imprisonment, even if the privilege plainly did not apply. For this reason we suggest replacing this wording with something more precise, such as: "No fine or imprisonment shall be imposed against a person validly claiming a privilege pursuant to this section." This change is not substantive.

We respectfully ask this Committee to amend the journalists' shield law with the recommend changes listed above.

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requirement that a journalist be acting for the journalist's livelihood or financial gain) in the S.D. 1. Those components were later removed in the C.D. 1. The Department takes no position on whether a financial component should be included in any definitions for these four terms. The Department's concern about a lack of definitions is due to the lack of precision. If the Committee chose to add definitions for these four terms using the prior wording from H.B. No. 622, either set of definitions would be sufficient to address the Department's concern about a lack of precision. The difference between them is a policy choice.

LATE

MONY OF THE HAWAI`I POLICE DEPARTMENT

HOUSE BILL 147

RELATING TO CRIMINAL PROCEDURE

BEFORE THE COMMITTEE ON JUDICIARY

DATE : Friday, February 20, 2015

TIME : 4:00 P.M.

PLACE : Conference Room 325
State Capitol
415 South Beretania Street

PERSON TESTIFYING:

Police Chief Harry S. Kubojiri
Hawai`i Police Department
County of Hawai`i

(Written Testimony Only)

William P. Kenoi
Mayor

Harry S. Kubojiri
Police Chief

Paul K. Ferreira
Deputy Police Chief

County of Hawai'i

POLICE DEPARTMENT
349 Kapi'olani Street • Hilo, Hawai'i 96720-3998
(808) 935-3311 • Fax (808) 961-2389

February 18, 2015

Representative Karl Rhoads
Chairperson and Committee Members
Committee on Judiciary
415 South Beretania Street, Room 325
Honolulu, Hawai`i 96813

Re: House Bill 147 Relating to Criminal Procedure

Dear Representative Rhoads:

The Hawai`i Police Department opposes passage of House Bill 147, relating to Criminal Procedure. The stated intent of the appropriation is to require new eyewitness identification procedures.

Our Department is opposed to this measure as it places certain restrictive burdens on state and county law enforcement agencies with regards to eyewitness identifications.

In essence, this legislation seemingly attempts to detail specific investigative procedures to be followed, which usurp the authority vested in the various Police Chiefs and other State law enforcement directors. We are unaware of any other investigative procedure which is so specific as to dictate the methodology to be used in conducting a criminal investigation aside from those procedures that are constitutional in nature.

Further, the Bill as written seeks to infer that any time one of the procedures is not followed that the identification is somewhat flawed regardless of the individual facts and circumstances connected to each and every particular investigation. Our department fully believes the positive identification process is best left to the "Trier of the Facts" (Judge or Jury) during the judicial adjudication of the case, which is also subject to Defense Counsel Scrutiny and objection.

In that we are a nationally-accredited agency, the Hawai'i Police Department does already have a standard for eyewitness identification that is in keeping with a modern law enforcement agency.

For these reasons, we strongly oppose this legislation. Thank you for allowing the Hawai`i Police Department to provide comments relating to House Bill 147.

Sincerely,

HARRY S. KUBOJIRI
POLICE CHIEF

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

TEL: (80

brookhartlaw@gmail.com

FAX: (808) 531-2677

LATE

HAND DELIVERED TO ROOM 305 OF THE STATE CAPITOL

February 19, 2015

Representative Karl Rhoads
Chairman, Committee on Judiciary
Hawaii House of Representatives
State Capitol, Room 302
415 South Beretania Street
Honolulu, Hawaii 96813

Re: House Bill No. 147, "Criminal Procedure; Eyewitness Identification; Remedies"

Dear Chairman Rhoads 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. That bill was introduced by Representative Joseph Souki, the Speaker of the House. The bill is scheduled to receive a hearing by the House Committee on Judiciary in conference room 325 at 4:00 p.m. on Friday, February 20, 2015. To avoid needless repetition, my written testimony incorporates by reference the written testimony in favor of House Bill No. 147 that was submitted by William Harrison on February 18, 2015, and the written testimonies of the Office of the State Public Defender, the Community Alliance on Prisons, and the American Civil Liberties Union of Hawaii that were submitted last month in support of the original version of Senate Bill No. 147.

House Bill No. 147 would beneficially add a new chapter to Hawaii Revised Statutes named "Eyewitness Identification Procedures." As the legislative description for House Bill No. 147 explains, the bill "[c]reates procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations," and statutorily guarantees "a defendant the right to challenge an eyewitness identification to be used at trial in a pretrial evidentiary hearing." In my professional opinion, the current language of House Bill No. 147 should be revised on one particular point. The second sentence of the bill currently states: "Mistaken eyewitness identification has been shown to have contributed to the wrongful conviction in approximately 75 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 321 wrongful convictions in the United States overturned by post-conviction DNA evidence" (see http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform.php).[1]

All six sections of the proposed new "Eyewitness Identification Procedures" chapter of H.R.S. are vitally necessary.

Section 1 provides concise, standardized and highly useful statutory definitions of thirteen key terms: "administrator," "blind," "blinded," "contamination,"

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[1] Although not involving post-conviction DNA evidence, another case presenting issues of mistaken eyewitness identification is the Shaun Rodrigues case here in Hawaii, in which the defendant was pardoned on December 1, 2014 (for a burglary conviction, two robbery convictions and two kidnapping convictions). That case is listed and discussed on the "National Registry of Exonerations" website of the University of Michigan Law School (http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4588).

"eyewitness," "filler," "identification," "identification procedure," "law enforcement," "live lineup," "photo lineup," "showup" and "suspect."

Section 2 requires that law enforcement entities adopt specific procedures for live lineups and photo lineups. For example, it requires law enforcement officers to "record in writing as complete a description as possible" of the suspect(s) provided by the eyewitness, in the eyewitness' own words, prior to a live lineup or photo lineup. It similarly requires a written record of "information regarding the conditions under which the eyewitness observed" the suspect(s), "including location, time, distance, obstructions, lighting, weather conditions, and other impairments, including but not limited to alcohol, drugs, stress and visual or auditory disabilities."

Section 3 sets forth eyewitness identification procedures for showups, including the salient requirement that when possible, "a live or photo lineup" be performed instead of a less reliable single-person showup.

Section 4 addresses video recording of identification procedures, audio recording when video recording is impracticable, and ensuring at least a written record when both video and audio recording are impracticable. Notably, it requires a documented written basis for not making a video recording and not making an audio recording.

Section 5 grants defendants a statutory right to "a pretrial evidentiary hearing as to the reliability of the [eyewitness identification] evidence offered," in addition to specifying remedies for noncompliance with required procedures and/or for contamination. A court is required to consider evidence of failure "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," and then "[s]uppress the evidence of eyewitness identification when there is a substantial probability of eyewitness misidentification."

Finally, section 6 wisely requires training of law enforcement officers by the county police departments. The police will conduct training programs for recruits and officers "regarding the methods, technical aspects, and scientific findings regarding the basis of the eyewitness identification practices and procedures referenced in [the new] chapter." Having law enforcement officers who are better trained in this field should reduce the occurrence of unreliable identifications and misidentifications.

A "robust body of research in the area of eyewitness identification" has "confirm[ed] that false identifications are more common than was previously believed," and "use of unreliable eyewitness identification testimony" can "violate a defendant's due process rights" under the United States Constitution and Hawaii Constitution. State v. Cabagbag, 127 Hawaii 302, 309-10, 277 P.3d 1027, 1034-35 (2012). In consideration of all of the foregoing, I and the Hawaii Innocence Project urge the House of Representatives Judiciary Committee to approve House Bill No. 147. As the bill itself perceptively points out: "more accurate eyewitness identifications increase the ability of police and prosecutors to convict the guilty and protect the innocent. The integrity of the State's criminal justice process is enhanced by adherence to best practices in evidence gathering. The people of the State of Hawaii will benefit from the improvement of the accuracy of eyewitness identifications." [Underlining added.]

Very truly yours,

LAW OFFICES OF BROOK HART
A Law Corporation

Brook Hart

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

LATE

TO: USE COMMITTEE ON JUDUCIARY
. Karl Rhoads, Chair
Rep. Joy A. San Buenaventura, Vice-Chair

FROM: Ghia Delapena
1711 East West Road #627
Honolulu, HI 96848
Graduate Student, UH Manoa

HEARING: 4:00 pm Friday, February 20, 2015
Conference Room 325, Hawaii State Capitol

SUBJECT: HB 147 Relating to Criminal Procedure

POSITION: I strongly support HB 147, which creates procedural and administrative requirements for law enforcement agencies for eyewitness identification of suspects in criminal investigations and grants a defendant the right to challenge an eyewitness identification used at trial in a pretrial evidentiary hearing.

RATIONAL:

Eyewitness misidentification is the most common element in all wrongful convictions which were subsequently overturned by DNA evidence. This was due to the misleading lineup methods that have been used for decades that have gone without serious scrutiny. Misidentifications do not only threaten the innocent, they also derail investigations. According to the Innocent Project which is a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to prevent future injustice, several easy-to-implement procedures such as blind administration, lineup composition, instructions, confidence statements and recording, all of which have been included in this bill, have been proven to significantly decrease the number of misidentifications. Therefore, specific identification reforms need to be implemented in order to change the status quo to make eyewitness identification more accurate.

Thank you for this opportunity to testify.

LATE

UNITY ALLIANCE ON PRISONS
. Box 37158, Honolulu, HI 96837-0158
Phone/E-Mail: (808) 927-1214 / kat.caphi@gmail.com

COMMITTEE ON JUDICIARY
Chair: Rep. Karl Rhoads
Vice Chair: Rep. Joy Sanbuenaventura
Friday, February 20, 2015
4:00 p.m.
Room 325

SUPPORT for HB 147 with Amendment – EYEWITNESS ID

Aloha Chair Rhoads, Vice Chair Sanbuenaventura 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.

HB 147 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. We respectfully ask that the committee consider amending the language regarding the administrator on page 5 lines 14-16:

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;

The blind administrator should be a requirement with a blinded option when it is not feasible.

We, therefore, respectfully ask the committee to replace lines this section with the following language:

14 (3) All live and photo lineups shall be conducted blind,
15 <u>with a blinded option when it is not feasible</u>;

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.

[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

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.

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

[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

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.

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 234 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.