SB 161

RELATING TO CRIMINAL PROCEDURE

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.

PSM, JDL

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015

ON THE FOLLOWING MEASURE:
S.B. NO. 161, RELATING TO CRIMINAL PROCEDURE.

BEFORE THE:

SENATE COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL AND MILITARY AFFAIRS

DATE: Thursday, February 12, 2015 **TIME:** 1:15 p.m.

LOCATION: State Capitol, Room 229

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

Chair Espero 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 11-15, 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 16-20, and continuing on page 17, at lines 1-20, 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 18, lines 1-9, 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 12-18, 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 10-12 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 10-12 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.

The Judiciary, State of Hawai'i

Testimony to the Senate Committee on Public Safety, Intergovernmental & Military Affairs
Senator Will Espero, Chair
Senator Rosalyn H. Baker, Vice Chair

Thursday, February 12, 2015 1:15 PM
State Capitol, Conference Room 229

WRITTEN TESTIMONY ONLY

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

Bill No. and Title: Senate Bill No. 161, 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 Senate Bill 161. 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 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 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 11 through page 18, line 9), 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.

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
SB161 – RELATING TO CRIMINAL PROCEDURE

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

Senate Committee on Public Safety, Intergovernmental and Military Affairs
February 12, 2015, 1:15 p.m., Conference Room 229

Chair Espero, Vice Chair Baker, and Members of the Committee:

The County of Kauai, Office of the Prosecuting Attorney, OPPOSES SB161 – 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.

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, OPPOSES this Bill. We ask that the Committee HOLD SB161.

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

William P. Kenoi
Mayor

Harry S. Kubojiri
Police Chief

Paul K. Ferreira
Deputy Police Chief

County of Hawai'i

POLICE DEPARTMENT
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February 10, 2015

Senator Will Espero
Chairperson and Committee Members
Committee on Public Safety, Intergovernmental and Military Affairs
415 South Beretania Street, Room 229
Honolulu, Hawai`i 96813

Re: Senate Bill 161 Relating to Criminal Procedure

Dear Senator Espero:

The Hawai`i Police Department opposes passage of House Bill 161, 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 Senate Bill 161.

Sincerely,

HARRY S. KUBOJIRI
POLICE CHIEF

COMMUNITY ALLIANCE ON PRISONS

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COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL & MILITARY AFFAIRS
Chair: Sen. Will Espero
Vice Chair: Sen. Rosalyn Baker
Wednesday, February 12, 2015
1:15 p.m.
Room 229

SUPPORT for SB 161 – EYEWITNESS ID

Aloha Chair Espero, Vice Chair Baker 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 161 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 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.

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[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

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 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.

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[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

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 <u>uniform eyewitness identification procedures statewide</u>.

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.

AMERICAN CIVIL LIBERTIES UNION of HAWAI'I

Committee:	Committee on Public Safety, Intergovernmental and Military Affairs
Hearing Date/Time:	Thursday, February 12, 2015, 1:15 p.m.
Place:	Conference Room 229
Re:	Testimony of the ACLU of Hawaii **in Support of S.B. 161**, Relating to Criminal Procedure

Dear Chair Espero and Committee Members,

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in **support of S.B. 161**, 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.

S.B 161 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.

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