DEPARTMENT OF THE PROSECUTING ATTORNEY

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## THE HONORABLE WILL ESPERO, CHAIR SENATE COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL AND MILITARY AFFAIRS Twenty-Eighth State Legislature Regular Session of 2015 State of Hawai`i

February 12, 2015

## **RE: S.B. 161; RELATING TO CRIMINAL PROCEDURE.**

KEITH M. KANESHIRO

PROSECUTING ATTORNEY

Chair Espero, Vice Chair Baker and members of the Senate Committee on Public Safety, Intergovernmental and Military Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu, submits the following testimony in <u>opposition</u> to S.B. 161.

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 S.B. 161. To codify these standards would be both overly restrictive and unnecessary; the very fact that there is a checklist enumerated in statute creates an implied presumption that, if anything on the checklist is missing or problematic, the eyewitness identification was somehow substandard or unreliable.

Creating this statute would generally disrupt the wealth of case law that already exists on this subject; there are also numerous legal procedures and safeguards now in place, to ensure that a defendant's rights are protected, and to ensure that juries are aware eyewitness identifications are not determinative. Under current law, eyewitness identifications are reviewed under a "totality of the circumstances," which is the most appropriate standard, as there are so many <u>case-specific</u> 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 if it is "unnecessarily suggestive"; this

determination also requires the judge's careful consideration of the <u>totality of the circumstances</u>, rather than considering a set list of requirements.

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, in a totality of circumstances, it is imperative that the Legislature not codify a list of procedures as contemplated by S.B. 161.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu <u>opposes</u> S.B. 161. Thank for you the opportunity to testify on this matter.