



Office of the Public Defender State of Hawaii



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

February 4, 2020

H.B. No. 1744: RELATING TO EYEWITNESS IDENTIFICATION

Chair: Representative Chris Lee, Vice Chair: Representative Joy A. San Buenaventura and Members of the Committee:

The Office of the Public Defender (OPD) supports the intent of H.B. 1744, in its goal to establish procedures for the use of eye witness identification by law enforcement agencies. However, the OPD has some concerns regarding certain parts of the Bill.

The OPD asks that Section -2 (1) which is proposed to be deleted from the final bill, be re-instated, as the procedure outlined therein is necessary for law enforcement to be in compliance with other sections of the Bill. Furthermore, all law enforcement agencies should be required, prior to any form of line up, to record, in writing, as complete a description as possible of the alleged perpetrator of the crime. The recordation of any witness description is necessary, so that evidence regarding the fairness of the lineup is preserved for later review. (It should be noted that the Honolulu Police department currently uses a form that requires eye witnesses to record a written description of the perpetrator, and therefore any statutory requirement would not be overburdensome)

The OPD also opposes the deletion of the same requirements for field show ups as stated in section -3 (5).

Furthermore, the OPD opposes the deletion of any section requiring all lineups and show ups from being recorded by way of video or photography. Recordation of any identification procedure is a safeguard that allows for proper review of said law enforcement procedure. (It should be noted that

the Honolulu Police Department, per their own policy, currently photographs all participants of live lineups and video records all live lineups, and therefore any statutory requirement would not be overburdensome)

Lastly, the OPD objects to the entirety of section -6 dealing with non-compliance. This section will serve only to complicate objections to the fairness of any identification procedure in a particular case. The fairness, or constitutionality of any identification procedure should be judged strictly by its ability to withstand due process scrutiny, and not by statutory compliance.

Thank you for the opportunity to comment on H.B. 1744.

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CITY AND COUNTY OF HONOLULU

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**THE HONORABLE CHRIS LEE, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Thirtieth State Legislature
Regular Session of 2020
State of Hawai`i**

February 5, 2020

RE: H.B. 1744; RELATING TO EYEWITNESS IDENTIFICATION.

Chair Lee, Vice Chair San Buenaventura, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in strong support of H.B. 1744. This bill is part of the Department's 2020 legislative package.

In 2019, Act 281 codified investigation procedures for law enforcement to conduct eyewitness identifications, with a delayed effective date of July 1, 2020. On October 1, 2019, however, the Hawaii Supreme Court issued a pivotal decision in *State v. Kaneaiakala*, 450 P.3d 761 (Haw. 2019), which increased the factors needed to determine the admissibility of an eyewitness identification--from 5 factors to 13 factors (and arguably up to 22 factors)--and significantly raised the legal standards for admitting an eyewitness identification into evidence. While the Department strongly believes that the *Kaneaiakala* decision merits repeal of Act 281 (2019), we also understand that that may not be an option before the Committee today.

H.B. 1744 would make crucial amendments to Act 281, to make it more practicable for real-life application. Specifically:

- details about the circumstances surrounding the eyewitness need not be written before lineup/showup is conducted;
- photo need not be contemporary but must resemble the suspect;
- speech is allowed during live lineup;
- suspect chooses their own position during lineup;
- "exigent circumstances" is defined;
- photograph showup is permitted if the suspect is someone known by the eyewitness;
- eyewitness must be escorted to suspect's location, not necessarily transported;
- when there are multiple eyewitnesses, each of them may participate in a showup, but only one may be present at the showup at a time;

- provision regarding “blind showup” was deleted;
- record of must be made of each identification procedure, but need not be video;
- new section added to clarify that exclusion of evidence is not the mandated remedy, and expressly maintain long-established standards for admissibility (e.g. sufficient reliability, totality of circumstances)

On a larger discussion, the Department does understand the Legislature’s concern that eyewitness identifications can be wrong, and also understands the Legislature wanting to feel assured that the justice system is protecting people’s right to fair collection of evidence, fair presentation of that evidence to a judge or jury, and fair assessment of that evidence by the judge and jury. The people who work for our Department are citizens of the State of Hawaii too, and we also want to rest assured that our rights would be protected if we were ever to find ourselves in a situation where we are accused of committing a crime; but Act 281 does not further those protections. If anything, it only builds-in more ways for criminal cases to get dismissed on technicalities, or for more cases not to be charged in the first place, based on technicalities. This will be at the expense of victims in some cases, and to a certain extent, we feel this will at the expense of overall public safety and welfare.

Indeed, we cannot overemphasize the fact that there are currently legal safeguards in place—and in fact even higher safeguards since October 1, 2019—that do all of those things in a way that is broadly applicable to every situation, every case, by establishing legal standards that everyone has to live up to and abide by, rather than codifying rote instructions for each step in the process. These are rote instructions that—if not followed to a “T”—are likely to lead to constitutionally reliable evidence getting suppressed and constitutionally valid cases getting dismissed.

The proper way to determine if an officer’s actions (on an eyewitness identification) were impermissibly suggestive is not by checking-off that she did steps A and C, and make her explain why she did not do B—because it is exquisitely easy to say in hindsight, “you could’ve done more” or “you could’ve done better”—but rather, the process should be to look at the totality of circumstances, see what was in fact done, and hold that up to the legal standards established by decades of caselaw and fine-tuning.

Keeping all of these things in mind, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports the passage of H.B. 1744. Thank you for the opportunity to testify on this matter.

Justin F. Kollar
Prosecuting Attorney

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First Deputy



Rebecca Vogt Like
Second Deputy

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**THE HONORABLE CHRIS LEE, CHAIR
THE HONORABLE JOY A. SAN BUENAVENTURA, VICE CHAIR
HOUSE COMMITTEE ON JUDICIARY
Thirtieth State Legislature
Regular Session of 2020
State of Hawai'i**

February 5, 2020

RE: H.B. 1744; RELATING TO EYEWITNESS IDENTIFICATION.

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In 2019, Act 281 codified investigation procedures for law enforcement to conduct eyewitness identifications, with a delayed effective date of July 1, 2020. On October 1, 2019, however, the Hawaii Supreme Court issued a pivotal decision in *State v. Kaneaiakala*, 450 P.3d 761 (Haw. 2019), which increased the factors needed to determine the admissibility of an eyewitness identification--from 5 factors to 13 factors (and arguably up to 22 factors)--and significantly raised the legal standards for admitting an eyewitness identification into evidence. While the Office strongly believes that the *Kaneaiakala* decision merits repeal of Act 281 (2019), we also understand that that may not be an option before the Committee today.

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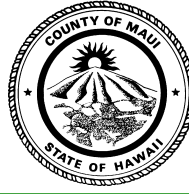
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Keeping all of these things in mind, the Office of the Prosecuting Attorney of the County of Kaua'i strongly supports the passage of H.B. 1744. Thank you for the opportunity to testify on this matter.



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TESTIMONY
ON
H.B. 1744 - RELATING TO
EYEWITNESS IDENTIFICATION

February 4, 2020

The Honorable Chris Lee
Chair
The Honorable Joy A. San Buenaventura
Vice Chair
and Members of the Committee on Judiciary

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

The Department of the Prosecuting Attorney, County of Maui respectfully submits the following comments concerning H.B. 1744, Relating to Eyewitness Identification. Specifically, we would like to express our strong support for H.B. 1744, which would amend the eyewitness identification procedures for live lineups and photo lineups.

Our Department's primary mission is to seek justice. To that end, we have a strong interest in ensuring that the person who commits an offense is held accountable for their actions. We also have a strong interest in ensuring that we are holding the correct person accountable for their actions.

However, our Department's ability to hold a person accountable for their actions is often dependent upon a witness having a full and fair opportunity to identify the person who committed a crime at the investigative and pre-trial/trial stages. In our Department's view, the additional requirements imposed by Act 281 in 2019 create an undue burden for law enforcement, resulting in increased expenses, the need for additional personnel and an increased opportunity for procedural errors to creep in.

H.B. 1744 addresses some of our concerns by modifying or removing requirements that were unduly burdensome, extraneous or contradictory, such as the requirement that a suspect's photograph be both contemporary and resemble their appearance at the time of the offense. It also clarifies the effect of noncompliance with the requirements, language that did not appear to be present in Act 281, and requires a court make a determination that an identification lacks

sufficient reliability, under the totality of the circumstances, to be admissible.

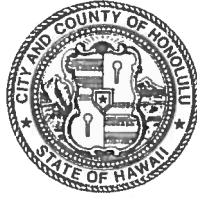
Furthermore, although H.B. 1744 amends the requirements for eyewitness identification procedures, it does not remove them entirely. There are still statutory procedures that need to be followed. Moreover, both the Hawaii pattern jury instructions (3.19 and 3.19A, specifically) and recent Hawaii case law (e.g. State v. Kaneaikala, SCWC-16-0000647 (October 1, 2019)) set forth factors for a jury or judge to consider when looking at an eyewitness' identification of a defendant. In fact, the Kaneaikala case sets forth a variety of factors, including the ones contained within the pattern jury instructions, that must be considered by a fact finder.

For these reasons, the Department of the Prosecuting Attorney, County of Maui strongly supports the passage of H.B. 1744. Please feel free to contact our office at (808) 270-7777 if you have any questions or inquiries.

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

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OUR REFERENCE

February 5, 2020

The Honorable Chris Lee, Chair
and Members
Committee on Judiciary
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Lee and Members:

SUBJECT: House Bill No. 1744, Relating to Eyewitness Identification

I am Walter Ozeki, Major of the Criminal Investigation Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports House Bill No. 1744, Relating to Eyewitness Identification.

While the HPD is in agreement that meaningful policies and procedures can ensure the accuracy of eyewitness identification, it is important to recognize that different jurisdictions deal with different restrictions relating to the introduction of evidence. While accurate identification is an essential factor in the prosecution of cases, identification alone without supporting corroborating evidence is not sufficient to successfully prosecute a case.

Recognizing the importance of eliminating the possibility of misidentification during investigations, the HPD has already voluntarily adopted the majority of procedures as outlined in Act 281, Session Laws of Hawaii 2019. However, it is in the department's opinion that to legislatively mandate the actual procedures that law enforcement must follow in order to conduct an identification process would have a far greater negative effect of reducing the number of violent offenders who would get prosecuted as opposed to the intended purpose of protecting potential suspects from misidentification, an issue that has never been identified as a prevalent problem within this jurisdiction.

With that in mind, there are a few specific areas within Act 281 that we find problematic. The requirement that a written description of the possible perpetrator be obtained from the eyewitnesses prior to a photo lineup or live lineup being conducted fails to take into consideration that in dynamic situations where a possible perpetrator may already be detained

The Honorable Chris Lee, Chair
and Members
February 5, 2020
Page 2

as officers are still in the process of responding, any identification and the subsequent detention of the possible perpetrator would have to be delayed to complete the written description prior to the identification process being conducted. This could potentially result in the extended detention of an uninvolved person who could have been quickly eliminated absent this requirement.

Act 281, also mandates that, "...in a live lineup, no identifying actions to include speech shall be performed by a lineup participant." We increasingly face situations where perpetrators seek to conceal their appearance utilizing some type of face covering. While speech is never used as the sole element in confirming identification, the use of speech as supporting evidence can be a very powerful and impacting aid in contributing to the reliable identification or elimination of an innocent person. Restricting the use of any speech as supporting evidence would serve to further validate the use of masks or face coverings while committing crimes as a way of completely eliminating the possibility of identification.

The HPD's policy currently allows the suspect to choose his/her position in the live lineup as opposed to "randomly" positioning the suspect to eliminate bias in the positioning of the suspects in a live lineup. In our experience of conducting numerous live lineups over the years, random positioning would provide additional grounds to contest the fairness of the lineup. Similarly in conducting a photographic lineup best practices dictate that suspects should not be placed in the number one position to avoid bias.

The utilization of a photograph in a "showup" is limited to circumstances when there is already an established and clear relationship between the victim and the perpetrator. It is particularly useful when the relationship is a familial one such as in domestic violence or sexual assault. In these cases, especially where the victim is a child, the requirement that the victim is forced to view a lineup and have to choose an already known perpetrator will only serve as a further unnecessary stressor to a fragile victim particularly in cases where the perpetrator is a family member.

While we believe that the current process of exclusion of identification evidence, which is based on the evaluation of the relevant factors by a judge, has already proved to be an effective and appropriate safeguard towards protecting the citizens of Hawaii, the aforementioned amendments to Act 281 would help to maintain the balance between the safeguarding of citizen's rights and the prosecution of offenders.

The HPD urges you to support House Bill No. 1750, Relating to Eyewitness Identification.

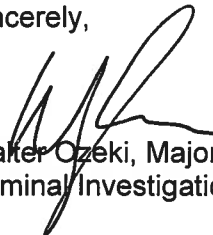
Thank you for the opportunity to testify.

APPROVED:



Susan Ballard
Chief of Police

Sincerely,



Walter Ozeki, Major
Criminal Investigation Division

COMMUNITY ALLIANCE ON PRISONS

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COMMITTEE ON JUDICIARY

Rep. Chris Lee, Chair

Rep. Joy San Buenaventura, Vice Chair

Wednesday, February 5, 2020

3:30 pm – Room 325

OPPOSITION TO HB 1744 – AMENDING EYEWITNESS IDENTIFICATION

Aloha Chair Lee, Vice Chair San Buenaventura 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 in Hawai'i for more than two decades. This testimony is respectfully offered on behalf of the families of **ASHLEY GREY, DAISY KASITATI, JOEY O'MALLEY, JESSICA FORTSON** and all the people who have died under the "care and custody" of the state including the ten people who died in the last 5 months of 2019 and for **JAMES BORLING-SALAS** who was beaten and died on January 16th. We also remember the approximately 5,200 Hawai'i individuals living behind bars or under the "care and custody" of the Department of Public Safety on any given day and we are always mindful that more than 1,200 of Hawai'i's imprisoned people are serving their sentences abroad -- thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Kanaka Maoli, far, far from their ancestral lands.

HB 1744 amends Act 281, Session Laws of Hawaii 2019, to provide clarification and flexibility in eyewitness identification procedures.

Community Alliance on Prisons is in opposition of this measure. Eyewitness misidentification is the leading cause of wrongful conviction, and suggestive police procedures are a key culprit in these cases: they appear in 78% of the misidentification cases proven through DNA testing.

Hawaii's current eyewitness identification law (Act 281, Session Law of Hawaii 2019) encodes proper law enforcement practices that have been endorsed and adopted by the National Academy of Sciences, the US Department of Justice, the International Association of Chiefs of Police, and jurisdictions across the nation. These procedures provide critical protections designed to facilitate effective police investigations and prevent wrongful conviction.

The National Academy of Sciences report¹ on eyewitness identification made the following recommendations:

RECOMMENDATIONS TO ESTABLISH BEST PRACTICES FOR THE LAW ENFORCEMENT COMMUNITY

The committee's review of law enforcement practices and procedures, coupled with its consideration of the scientific literature, has identified a number of areas where eyewitness identification procedures could be strengthened. The practices and procedures considered here

¹ Identifying the Culprit – Assessing Eyewitness ID, National Academy of Sciences, 2014.
<https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification>

involve acquisition of data that reflect a witness' identification and the contextual factors that bear on that identification. A recurrent theme underlying the committee's recommendations is development of and adherence to guidelines that are consistent with scientific standards for data collection and reporting.

Recommendation #1: Train All Law Enforcement Officers in Eyewitness Identification The committee recommends that all law enforcement agencies provide their officers and agents with training on vision and memory and the variables that affect them, on practices for minimizing contamination, and on effective eyewitness identification protocols.

Recommendation #2: Implement Double-Blind Lineup and Photo Array Procedures The committee recommends blind (double-blind or blinded) administration of both photo arrays and live lineups and the adoption of clear, written policies and training on photo array and live lineup administration.

Recommendation #3: Develop and Use Standardized Witness Instructions The committee recommends the development of a standard set of easily understood instructions to use when engaging a witness in an identification procedure.

Recommendation #4: Document Witness Confidence Judgments The committee recommends that law enforcement document the witness' level of confidence verbatim at the time when she or he first identifies a suspect.

Recommendation #5: Videotape the Witness Identification Process The committee recommends that the video recording of eyewitness identification procedures become standard practice.

RECOMMENDATIONS TO STRENGTHEN THE VALUE OF EYEWITNESS IDENTIFICATION EVIDENCE IN COURT

The best guidance for legal regulation of eyewitness identification evidence comes not from constitutional rulings, but from the careful use and understanding of scientific evidence to guide fact-finders and decisionmakers. The *Manson v. Brathwaite* test under the Due Process Clause of the U.S. Constitution for assessing eyewitness identification evidence was established in 1977, before much applied research on eyewitness identification had been conducted. This test evaluates the "reliability" of eyewitness identifications using factors derived from prior rulings and not from empirically validated sources. As critics have pointed out, the *Manson v. Brathwaite* test includes factors that are not diagnostic of reliability. Moreover, the test treats factors such as the confidence of a witness as independent markers of reliability when, in fact, it is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors. While some states have made minor changes to the due process framework, wholesale reconsideration of this framework is only a recent development.

Recommendation #6: Conduct Pretrial Judicial Inquiry The committee recommends that, as appropriate, a judge make basic inquiries when eyewitness identification evidence is offered.

Recommendation #7: Make Juries Aware of Prior Identifications The committee recommends that judges take all necessary steps to make juries aware of prior identifications, the manner and time frame in which they were conducted, and the confidence level expressed by the eyewitness at the time.

Recommendation #8: Use Scientific Framework Expert Testimony The committee recommends that judges have the discretion to allow expert testimony on relevant precepts of eyewitness memory and identifications.

Recommendation #9: Use Jury Instructions as an Alternative Means to Convey Information The committee recommends the use of clear and concise jury instructions as an alternative means of conveying information regarding the factors that the jury should consider.

RECOMMENDATIONS TO IMPROVE THE SCIENTIFIC FOUNDATION UNDERPINNING EYEWITNESS IDENTIFICATION RESEARCH

Basic scientific research on visual perception and memory provides important insight into the factors that can limit the fidelity of eyewitness identification. Research targeting the specific problem of eyewitness identification complements basic scientific research. However, this strong scientific foundation remains insufficient for understanding the strengths and limitations of eyewitness identification procedures in the field. Many of the applied studies on key factors that directly affect eyewitness performance in the laboratory are not readily applicable to actual practice and policy. Applied research falls short because of a lack of reliable or standardized data from the field, a failure to include a range of practitioners in the establishment of research agendas, the use of disparate research methodologies, failure to use transparent and reproducible research procedures, and inadequate reporting of research data. The task of guiding eyewitness identification research toward the goal of evidence-based policy and practice will require collaboration in the setting of research agendas and agreement on methods for acquiring, handling, and sharing data.

Recommendation #10: Establish a National Research Initiative on Eyewitness Identification The committee recommends the establishment of a National Research Initiative on Eyewitness Identification.

Recommendation #11: Conduct Additional Research on System and Estimator Variables The committee recommends broad use of statistical tools that can render a discriminability measure to evaluate eyewitness performance and a rigorous exploration of methods that can lead to more conservative responding. The committee further recommends that caution and care be used when considering changes to any existing lineup procedure, until such time as there is clear evidence for the advantages of doing so.

CONCLUSION

Eyewitness identification can be a powerful tool. As this report indicates, however, the malleable nature of human visual perception, memory, and confidence; the imperfect ability to recognize individuals; and policies governing law enforcement procedures can result in mistaken identifications with significant consequences. New law enforcement training protocols, standardized procedures for administering lineups, improvements in the handling of eyewitness identification in court, and better data collection and research on eyewitness identification can improve the accuracy of eyewitness identifications.

Community Alliance on Prisons respectfully asks the committee to hold this bill. Mahalo for this opportunity to testify



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LATE

H.B. No. 1744
Relating to Eyewitness Identification
House Committee on Judiciary
Public Hearing – Wednesday, February 5, 2020
3:30 PM, State Capital, Conference Room 325
by
Rep. Chris Lee, Chair
Rep. Joy A. San Buenaventura, Vice Chair

February 4, 2020

H.B. No. 1744 amends Act 281, Session Laws of Hawai'i 2019, which procedures and administrative requirements for law enforcement agencies in eyewitness identification procedures statewide. Hawai'i Innocence Project submits this statement in strong opposition of the proposed amendments in H.B. No. 1744, and asks the Committee to consider our concerns, proposed changes, and other considerations.

Hawai'i Innocence Project is a non-profit legal clinic with the goals of exonerating the wrongfully convicted, reforming the criminal justice system which failed the innocent, and ultimately seeking justice for the victim by determining the real perpetrator of the crime. Hawai'i Innocence Project supports the intent of this bill to establish a consistent practice and procedure for conducting eyewitness identifications of criminal suspects, as eyewitness misidentifications are one of the leading causes of wrongful convictions. While we support the intent of the bill, we submit these recommendations so that the bill may comply more fully with social science research, nationwide successful reform policies, and the practical experience of the many attorneys and experts who work to reform the criminal justice system.

Eyewitness misidentification is the leading cause of wrongful convictions and suggestive police procedures are a key culprit in these cases: they appear in 78% of the misidentification cases proven through DNA testing. Hawaii's current eyewitness identification law (Act 281, Session Law of Hawaii 2019) encodes proper law enforcement practices that have been endorsed and adopted by the National Academy of Sciences, the US Department of Justice, the International Association of Chiefs of Police, and jurisdictions across the nation. These procedures provide critical protections designed to facilitate effective police investigations and prevent wrongful conviction. As such, we request that they should not be disturbed.

The collaborations of Innocence Projects around the nation, law enforcement, and social science research have determined the best practices that provide the most credible eyewitness

identification must include: blind administration, proper composition of fillers and instructions, obtaining confidence statements, and recording the procedure. H.B. No. 1744 seeks to eliminate important safeguards that represent best practices as established by the current research and reform efforts, and the Hawai'i Innocence Project asks the Committee to consider our recommendations in opposition of the proposed amendments as they are contrary to known and established best practices, policies, and reform used throughout the country.

Hawai'i Innocence Project requests that the Committee consider our commentary on the proposed amendments outlines in H.B. No. 1744 as follows:

1. H.B. No. 1744 §§ 2(a)(1) and 3(a)(5): eliminates Act 281's requirement that, before conducting a live or photo lineup or a showup, law enforcement should gather a complete description as possible of the perpetrator and the conditions under which the eyewitness observed the perpetrator. This provision should not be struck. As the wrongful conviction cases and extensive scientific research has established, eyewitness memory is highly malleable and can be profoundly influenced by post-event information (e.g. information from co-witnesses, the news media, or law enforcement). Promptly gathering a detailed description from an eyewitness at the earliest possible point and before conducting an identification procedure is proper practice, because the eyewitness's memory will be at its freshest at that point, and there has been the least potential for contamination. Additionally, it is the current policy of the Honolulu Police Department (policy 4.30, 2015) to question the witness fully and document description of the suspect provided by the witness, verbatim.
2. H.B. No. 1744 §§ 2(a)(1) and 3(a)(5): erroneously omits the requirement that a contemporaneous confidence statement be provided by the eyewitness. Act 281 and H.B. No. 1744 appear to share a minor, and inadvertent omission. Best practices include the collection of a contemporaneous confidence statement from the eyewitness as soon as an identification has been made. This is because witness confidence is highly malleable and can be easily inflated by post-event information. Act 281 and H.B. No. 1744 both require that, if an identification is made, that "the administrator shall seek and document a clear statement from the eyewitness at the time of the identification in the eyewitness's own words." We believe that this provision inadvertently fails to specify that it refers to "a clear statement from the eyewitness of their confidence in the identification." Additionally, it is the current policy of the Honolulu Police Department (policy 4.30, 2015) to a confidence statement by the witness at the time the identification is made. We respectfully urge that this be clarified.
3. H.B. No. 1744 §2(d): eliminates the requirement that information about the current investigation should not be made known to an eyewitness before that eyewitness participates in an identification procedure. This would allow law enforcement to share contaminating information with the eyewitness, compromising the reliability of a subsequent identification and raising the risk of misidentification. As a result, this provision should not be struck. Wrongful conviction cases and extensive scientific research have also established that sharing information about an investigation (e.g.

the fact that an arrest has been made, or that proceeds of the crime have been located) with an eyewitness before that eyewitness participates in an identification procedure encourages the eyewitness to assume that the perpetrator is present in the lineup or array. This natural assumption encourages the eyewitness to look for the “best fit” (i.e. the candidate who most resembles the perpetrator) rather than search their memory to see if they actually recognize the perpetrator – leading to an elevated risk of misidentification. This also undermines § 2(a)(3)(A)’s requirement that an eyewitness be instructed that “the suspect may or may not be among the persons in the identification procedure,” which is designed to encourage the eyewitness to see if they actually recognize the perpetrator rather than choose the candidate who looks most like the perpetrator.

4. H.B. No. 1744 §3(a)(2): limits the use of show ups to exigent circumstances, such as circumstances that involve the “temporary detention ... of a suspect at or near the scene of an offense.” Showups are universally understood by courts and scientific experts as inherently suggestive identification procedures that lead to elevated rates of misidentification, contaminate eyewitness memory, and artificially inflate an eyewitness’s confidence in their identification, because they present only a single suspect to the eyewitness. As a result, all authorities including the International Association of Chiefs of Police recommend that “showups should be avoided whenever possible in preference for the use of a photo array or a lineup.” (IACP Model Policy, at IV(A)). Act 281 appropriately requires that where possible, a live or photo lineup should be used instead of a showup. However, in its definition of exigent circumstances, §3(a)(2) also includes circumstances that involve the “arrest of a suspect at or near the scene of an offense.” Once a suspect has been arrested, there are no longer exigencies at play. There is no reason that the arrestee cannot be placed in a properly designed lineup or array that appropriately protects against the risk of misidentification. As a result, the inclusion of “arrest of a suspect” in H.B No. 1744’s definition of exigent circumstances should also be struck.
5. H.B. No. 1744 §3: without justification, eliminates the requirement that in cases with multiple eyewitnesses, that following a positive identification using a showup, that subsequent identifications be made by live or photo lineup. Conducting multiple showups is entirely unnecessary and raises the risk of misidentification by exposing multiple eyewitnesses to an inherently suggestive showup. This provision in Act 281 requirement should not be struck. As explained above, showups are highly suggestive, lead to elevated rates of misidentification, and should be avoided whenever possible in favor of a lineup or array. If a showup that is necessitated by exigent circumstances yields an identification by an eyewitness, that would allow for the arrest of the suspect. At that point, there is no reason that other eyewitnesses should also participate in an inherently suggestive showup procedure. Instead, any further eyewitnesses should participate in a properly conducted lineup or array. Act 281 appropriately requires that if a positive identification is made and an arrest is justified, subsequent eyewitnesses shall be shown live lineups or photo showups.

6. H.B. No. 1744 §4: improperly eliminates the requirement that identification procedures be video recorded. Best practices for eyewitness identifications procedures recommends that all eyewitness procedures be video recorded when possible. This helps to ensure that eyewitness procedures are followed and if not, provides criminal defendants with the information necessary to challenge an improper eyewitness identification process. It is the current policy of the Honolulu Police Department (policy 4.30, 2015) that all physical lineups used in eyewitness identification be video recorded. Therefore, this requirement should not be struck.

Hawai'i Innocence Project believes that rejecting these proposed amendments will ensure that eyewitness identifications in Hawai'i are reliable, promote justice for all victims, and prevent the innocent from being wrongfully convicted. Thank you for your time and the opportunity to provide our testimony in opposition of H.B. No. 1744.

With warm aloha and gratitude,

Kenneth Lawson, Co-Director, Hawai'i Innocence Project
Jennifer Brown, Associate Director, Hawai'i Innocence Project

HB-1744

Submitted on: 2/5/2020 8:16:12 AM

Testimony for JUD on 2/5/2020 3:30:00 PM

LATE

Submitted By	Organization	Testifier Position	Present at Hearing
Michael Kitchens	Stolen Stuff Hawaii	Support	No

Comments:

Dear Committee Chairman & Members,

I support HB1744 which amends Act 281, Session Laws of Hawaii 2019, to provide clarification and flexibility in eyewitness identification procedures.

I believe it provides clarity while also allowing further flexibility for law enforcement, which already has a difficult time in handling eyewitness identification.

Thank, you,

Michael Kitchens
Creator & Administrator
Stolen Stuff Hawaii