

JAN 22 2021

A BILL FOR AN ACT

RELATING TO EYEWITNESS IDENTIFICATIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Chapter 801K, Hawaii Revised Statutes, is
2 amended by adding a new section to be appropriately designated
3 and to read as follows:

4 "§801K- Noncompliance. (a) Noncompliance with the
5 requirements imposed by this chapter does not require the
6 exclusion of eyewitness identification evidence.

7 (b) An impermissibly suggestive eyewitness identification
8 procedure alone does not require the exclusion of identification
9 evidence.

10 (c) No eyewitness identification shall be deemed
11 inadmissible in any trial, hearing, or other proceeding in any
12 court of this State unless a court determines that the
13 identification lacks sufficient reliability, under the totality
14 of the circumstances, to be admissible in evidence."

15 SECTION 2. Section 801K-2, Hawaii Revised Statutes, is
16 amended by amending subsections (a), (b), (c), and (d) to read
17 as follows:



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1 "(a) Any law enforcement entity conducting eyewitness
2 identification procedures shall adopt specific procedures for
3 conducting photo lineups and live lineups that comply with the
4 following requirements:

5 ~~[(1) Prior to a photo lineup or live lineup, law~~
6 ~~enforcement shall record in writing as complete a~~
7 ~~description as possible of the possible perpetrator~~
8 ~~provided by the eyewitness in the eyewitness' own~~
9 ~~words. This statement shall also include information~~
10 ~~regarding the conditions under which the eyewitness~~
11 ~~observed the possible perpetrator including location,~~
12 ~~time, distance, obstructions, lighting, weather~~
13 ~~conditions, and other impairments, including but not~~
14 ~~limited to alcohol, drugs, stress, and visual or~~
15 ~~auditory disabilities,~~

16 ~~(2)]~~ (1) The eyewitness shall also be asked if the
17 eyewitness' vision needs correction by glasses or
18 contact lenses and whether the eyewitness was wearing
19 them at the time of the offense. The administrator
20 shall note whether the eyewitness was wearing glasses



1 or contact lenses at the time of the identification
2 procedure;

3 ~~[(3)]~~ (2) All live lineups and photo lineups shall be
4 conducted blind unless to do so would place an undue
5 burden on law enforcement or the investigation; and

6 ~~[(4)]~~ (3) The eyewitness shall be instructed, without other
7 eyewitnesses present, prior to any live lineup or
8 photo lineup, that:

9 (A) The suspect may or may not be among the persons
10 in the identification procedure;

11 (B) The administrator does not know the identity of
12 the suspect, if applicable;

13 (C) The eyewitness should not feel compelled to make
14 an identification;

15 (D) The investigation will continue whether or not an
16 identification is made;

17 (E) The procedure requires the administrator to ask
18 the eyewitness to make a statement, in the
19 eyewitness' own words, if the eyewitness makes an
20 identification; and



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1 (F) Speaking with other witnesses or the media may
2 hinder prosecution.

3 (b) The administrator shall comply with the following:

4 (1) In a photo lineup, any photograph of the suspect
5 ~~[shall be contemporary and]~~ shall resemble the
6 suspect's appearance at the time of the offense;

7 (2) In a photo lineup, to the extent practicable, there
8 shall be no characteristics of the photographs
9 themselves or the background context in which they are
10 placed that makes any of the photographs unduly stand
11 out;

12 (3) A photo lineup or live lineup shall be composed so
13 that the fillers generally resemble the eyewitness'
14 description of the possible perpetrator, while
15 ensuring that the suspect does not unduly stand out
16 from the fillers;

17 (4) In a photo lineup or live lineup, the administrator
18 shall comply with the following:

19 (A) All fillers selected shall resemble the
20 eyewitness' description of the possible
21 perpetrator in significant features including but



1 not limited to face, weight, build, and skin
2 tone;

3 (B) At least five fillers shall be included in a
4 photo lineup in addition to the suspect;

5 (C) At least four fillers shall be included in a live
6 lineup in addition to the suspect; and

7 (D) If the eyewitness has previously viewed a photo
8 lineup or live lineup in connection with the
9 identification of another person suspected of
10 involvement in the offense, the fillers in the
11 lineup in which the instant suspect participates
12 shall be different from the fillers used in any
13 prior lineups;

14 (5) In a live lineup, no identifying actions, such as
15 [~~speech,~~] gestures [~~,~~] or other movements, shall be
16 performed by lineup participants;

17 (6) In a live lineup, all lineup participants shall be out
18 of view of the eyewitness prior to the identification
19 procedure;



1 (7) In a photo lineup or live lineup, nothing shall be
2 said to the eyewitness regarding the suspect's
3 position in the lineup; and

4 (8) In a photo lineup or live lineup, nothing shall be
5 said to the eyewitness that might influence the
6 eyewitness' identification of any particular lineup
7 member.

8 (c) If there are multiple eyewitnesses, the administrator
9 shall comply with the following:

10 (1) Each eyewitness shall view photo lineups or live
11 lineups separately;

12 (2) The suspect shall be [~~randomly positioned~~] permitted
13 to select their position in the live lineup or photo
14 lineup for each eyewitness; and

15 (3) The eyewitnesses shall not be permitted to communicate
16 with each other until all identification procedures
17 have been completed.

18 (d) In any identification procedure, no writings or
19 information concerning [~~the current investigation or~~] any
20 previous arrest, indictment, or conviction of the suspect shall
21 be visible or made known to an eyewitness."



1 SECTION 3. Section 801K-3, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "[+]§801K-3[+] Eyewitness identification procedures for
4 showups. (a) The administrator shall comply with the following
5 in conducting a showup:

6 (1) [~~Where possible,~~] Except as provided herein, the
7 administrator shall perform a live lineup or photo
8 lineup instead of a showup;

9 (2) A showup shall only be performed using a live suspect
10 and only in exigent circumstances [that require the
11 immediate display of a suspect to an eyewitness;].

12 For purposes of this paragraph, "exigent
13 circumstances" means circumstances that involve the
14 temporary detention or arrest of a suspect at or near
15 the scene of an offense, or during the suspect's
16 flight therefrom, pending procedures that attempt to
17 verify the identity of the suspect;

18 [~~(3) All showups shall be conducted blind unless to do so~~
19 ~~would place an undue burden on law enforcement or the~~
20 ~~investigation;~~



1 ~~(4)~~ (3) An administrator shall not conduct a showup with a
2 photograph~~[. If investigators wish to determine if an~~
3 ~~eyewitness can make an identification using a~~
4 ~~photograph, a photo lineup shall be used,]~~ unless the
5 suspect is someone already familiar to the eyewitness,
6 including but not limited to a spouse, partner, child,
7 relative, co-worker, or neighbor;

8 ~~(5)~~ ~~Prior to any showup, law enforcement shall record in~~
9 ~~writing as complete a description as possible of the~~
10 ~~possible perpetrator provided by the eyewitness in the~~
11 ~~eyewitness' own words. This record shall also include~~
12 ~~information regarding the conditions under which the~~
13 ~~eyewitness observed the possible perpetrator including~~
14 ~~location, time, distance, obstructions, lighting,~~
15 ~~weather conditions, and other impairments including~~
16 ~~but not limited to alcohol, drugs, stress, and visual~~
17 ~~or auditory disabilities;~~

18 ~~(6)~~ (4) The eyewitness shall also be asked if the
19 eyewitness' vision needs correction by glasses or
20 contact lenses and whether the eyewitness was wearing
21 them at the time of witnessing the offense. The



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1 administrator shall note whether the eyewitness was
2 wearing glasses or contact lenses at the time of the
3 identification procedure;

4 ~~[(+7)]~~ (5) The eyewitness shall be ~~[transported]~~ escorted to
5 ~~[a neutral, non-law enforcement]~~ the location where
6 the suspect is being detained for the purposes of a
7 showup;

8 ~~[(+8)]~~ (6) The eyewitness shall be instructed, without other
9 eyewitnesses present, prior to any showup that:

- 10 (A) The suspect may or may not be the person that is
11 presented to the eyewitness;
- 12 (B) The administrator does not know the identity of
13 the suspect, if applicable;
- 14 (C) The eyewitness should not feel compelled to make
15 an identification;
- 16 (D) The investigation will continue whether or not an
17 identification is made;
- 18 (E) The procedure requires the administrator to ask
19 the eyewitness to make a statement, in the
20 eyewitness' own words, if the eyewitness makes an
21 identification; and



1 (F) Speaking with other witnesses or the media may
2 hinder prosecution.

3 (b) At any showup, in order to reduce potentially damaging
4 or prejudicial inferences that may be drawn by the eyewitness,
5 the administrator shall:

6 (1) Refrain from suggesting, through statements or
7 nonverbal conduct, that the suspect is or may be the
8 perpetrator of the crime;

9 (2) Refrain from removing the suspect from a squad car in
10 front of the eyewitness; and

11 (3) When practicable, present the suspect to the
12 eyewitness without handcuffs.

13 (c) When there are multiple eyewitnesses, ~~[the following~~
14 ~~procedure shall apply:~~

15 ~~(1) Only~~ only one eyewitness at a time shall be present
16 at ~~[the location of]~~ the showup ~~[to participate in the~~
17 ~~showup; and~~

18 ~~(2) If a positive identification is made and an arrest is~~
19 ~~justified, subsequent eyewitnesses shall be shown live~~
20 ~~lineups or photo lineups].~~



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1 (d) If there are multiple suspects, the suspects shall be
2 separated and participate in separate showups.

3 (e) If an eyewitness makes an identification, the
4 administrator shall seek and document a clear statement from the
5 eyewitness, at the time of the identification and in the
6 eyewitness' own words.

7 (f) The administrator shall photograph each suspect or
8 cause the suspect to be photographed at the time and place of
9 the showup to preserve a record of the appearance of the suspect
10 at the time of the showup.

11 ~~[(g) When it is impracticable for a blind administrator to
12 conduct a showup, the investigator shall state in writing the
13 reason therefor.] "~~

14 SECTION 4. Section 801K-4, Hawaii Revised Statutes, is
15 amended to read as follows:

16 "[+] §801K-4 [—Video record] Record of identification
17 procedures [~~-, impracticability, alternative record~~]. [-(a)]

18 Unless impracticable, a [video] record of each identification
19 procedure shall be made that includes the following information:



- 1 (1) All identification and non-identification results
- 2 obtained during the identification procedure, signed
- 3 by each eyewitness;
- 4 (2) The names of all persons present at the identification
- 5 procedure, including the name of the administrator and
- 6 whether the administrator was blind, blinded, or non-
- 7 blind;
- 8 (3) If an administrator other than a blind administrator
- 9 was used, the reason therefor;
- 10 (4) The date and time of the identification procedure;
- 11 (5) In a photo lineup or live lineup, any eyewitness
- 12 identifications of fillers; and
- 13 (6) In a photo lineup or live lineup, the names of the
- 14 lineup members and other relevant identifying
- 15 information, and the sources of all photographs or
- 16 persons used in the lineup.

17 ~~[(b) If a video record of the identification procedure is~~

18 ~~impracticable, the administrator shall document the reason~~

19 ~~therefor, and an audio record of the identification procedure~~

20 ~~shall be made. The audio record shall be supplemented by the~~

21 ~~following:~~



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1 ~~(1) All of the photographs used in a photo lineup; and~~
2 ~~(2) Photographs of all of the individuals used in a live~~
3 ~~lineup or showup.~~
4 ~~(e) If both a video and audio record of the identification~~
5 ~~procedure are impracticable, the administrator shall document in~~
6 ~~writing the reason therefor, and a written record of the~~
7 ~~identification procedure shall be made. The written record~~
8 ~~shall be supplemented by the following:~~

9 ~~(1) All of the photographs used in a photo lineup; and~~
10 ~~(2) Photographs of all of the individuals used in a live~~
11 ~~lineup or showup.] "~~

12 SECTION 5. Statutory material to be repealed is bracketed
13 and stricken. New statutory material is underscored.

14 SECTION 6. This Act shall take effect upon its approval.

15

INTRODUCED BY: *M. D. Oll.*
 By Request



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Report Title:

Honolulu Prosecuting Attorney Package; Criminal Procedure;
Eyewitness Identification

Description:

Amends Chapter 801K, Hawaii Revised Statutes, to provide
clarification and flexibility in eyewitness identification
procedures.

*The summary description of legislation appearing on this page is for informational purposes only and is
not legislation or evidence of legislative intent.*

