

**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-SIXTH LEGISLATURE, 2012**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 2304, S.D. 2, H.D. 1, RELATING TO RIGHTS OF THE ACCUSED.

**BEFORE THE:**

HOUSE COMMITTEE ON FINANCE

**DATE:** Tuesday, April 3, 2012

**TIME:** 5:00 p.m.

**LOCATION:** State Capitol, Room 308

**TESTIFIER(S):** David M. Louie, Attorney General, or  
Lance Goto, Deputy Attorney General

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Chair Oshiro 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 has significant concerns about this bill.

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

The Department strives to always conduct its investigations fairly and thoroughly, and the Investigations Division of the Department has already adopted almost all of the eyewitness identification procedures proposed in this bill.

The Department is concerned, however, with this bill's placement of the law enforcement eyewitness identification procedures under chapter 801, Hawaii Revised Statutes, Rights of Accused. The proposed law enforcement identification procedures should not be established as rights of defendants. The eyewitness identification procedures of this bill are just procedures intended to maximize the reliability of identifications. The bill provides that noncompliance with these procedures may be considered by a jury in determining the reliability of eyewitness identification. Experts may differ on what procedures are best. Time, specific circumstances, and further studies may cause them to change their opinions.

We are also concerned about the provisions on page 8 of the bill regarding "Remedies for noncompliance":

- (a) Any evidence of a failure to comply with this part shall be:
  - (1) Considered by the trial court in adjudicating motions to suppress eyewitness identification; and
  - (2) Admissible at trial or hearings in support of claims of eyewitness misidentification as long as the evidence is otherwise admissible.
- (b) When any evidence of a failure to comply with the provisions of this part has been presented at trial, the jury shall be instructed that it may consider credible evidence of noncompliance in determining the reliability of eyewitness identifications.

These provisions are ambiguous, confusing and likely to create serious issues at trial. It appears that these provisions require the court to make pretrial findings with respect to compliance. Noncompliance with the provisions may not result in 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. But how can evidence of noncompliance be put before the jury? And who is the fact finder on the issue of compliance at trial? The jury will not likely be informed of the court's pretrial findings with respect to compliance. That would be imposing the court's factual findings upon the jury. So would the jury then 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? That would mean that the jury's attention to the issue at hand, the innocence or guilt of the defendant, would be interrupted and distracted by the collateral issues of compliance with these provisions. The following are just a few examples of the types of collateral issues a jury may have to contend with:

- (1) If the investigator who conducted the lineup was aware of which person in the lineup was the suspected perpetrator, then was it "practicable" for the investigative agency to use an investigator who was not aware of the suspected perpetrators identity;
- (2) Did the fillers in the live or photo lineup generally fit the description of the person suspected of being the perpetrator; and
- (3) Did the photograph of the suspected perpetrator resemble the suspect's appearance at the time of the offense, and did it "unduly stand out."

There are sixteen numbered procedural requirements in this bill. Some of the numbered requirements contain several additional procedural requirements that a jury would have to

consider in determining compliance or noncompliance with the procedures. In the end, however, compliance or noncompliance would not be determinative of the reliability of the identification.

It is highly unlikely that the jury will be instructed that compliance with the provisions would mean that the identification was reliable. The implication would be there, however, especially if the jury, as required by this bill, were instructed that "it may consider credible evidence of noncompliance in determining the reliability of eyewitness identifications."

The fact remains that, depending on the circumstances, eyewitness identification may still be highly reliable, even though some provision of this bill may not have been complied with. The provisions of this bill, however, regardless of the specific circumstances of the case, will require that it be suggested to the jury that noncompliance is indicative of unreliability.

This bill also provides that the Attorney General create, administer, and conduct training programs for law enforcement officers and recruits on the eyewitness identification procedures required by this bill. It also provides that the Attorney General fund the training programs from appropriations specifically designated for the training programs. We do not support this provision. Law enforcement agencies have their own training programs for their recruits and officers. If the procedures in this bill were adopted, the law enforcement agencies could and should be able to incorporate them into their existing programs. Eyewitness identification procedures should already be a part of their training programs. The provisions of this bill would only require the agencies to modify their existing programs. We are not in a position to say whether or not the various agencies would require any additional funds to modify their training programs or conduct special training sessions to update their law enforcement officers.



**SB2304 SD2 HD1**  
**RELATING TO CRIME**  
House Committee on Finance

April 3, 2012

5:00 p.m.

Room 308

The Office of Hawaiian Affairs (OHA) **SUPPORTS** SB2304 SD2 HD1, which would implement changes to eyewitness identification procedures.

While drafting OHA's 2010 report, "The Disparate Treatment of Native Hawaiians in the Criminal Justice System," OHA also partially funded the Hawai'i Innocence Project. This project is part of a national effort to free innocent persons who have been wrongly convicted. Alvin Jardine, the first success story from the Hawai'i Innocence Project, is an OHA beneficiary. Unfortunately, Mr. Jardine was imprisoned in part based on evidence from a faulty eyewitness.

To prevent wrongfully convicted innocents like Mr. Jardine from having to suffer, it is imperative to implement this improved eyewitness procedure. Simply put, this bill is about justice. This bill will help prevent the conviction and imprisonment of innocent persons.

Therefore, the OHA Administration will recommend that the OHA Board of Trustees urge the committee to PASS SB2304 SD2 HD1. Mahalo for the opportunity to testify on this important measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY  
**CITY AND COUNTY OF HONOLULU**

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KEITH M. KANESHIRO  
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ARMINA A. CHING  
FIRST DEPUTY PROSECUTING ATTORNEY



**THE HONORABLE MARCUS R. OSHIRO, CHAIR**  
**HOUSE COMMITTEE ON FINANCE**  
Twenty-sixth State Legislature  
Regular Session of 2012  
State of Hawai'i

April 3, 2012

**RE: S.B. 2304, S.D. 2, H.D. 1; RELATING TO RIGHTS OF THE ACCUSED.**

Chair Oshiro, Vice Chair Lee and members of the House Committee on Finance, the Department of the Prosecuting Attorney, City and County of Honolulu, submits the following testimony in opposition to Senate Bill 2304, Senate Draft 2, House Draft 1.

Although the Department agrees that Hawai'i's law enforcement agencies must maintain high standards and protocol for eyewitness identifications, there is currently no conclusive proof that double-blind sequential lineups are more reliable than simultaneous lineups. To force local law enforcement to use one or the other method would be unwarranted and overly restrictive. Moreover, it would discount the value of assessing a "totality of circumstances," and detract from the flexibility needed for law enforcement to adjust to unique circumstances in each case.

In 2011, the American Judicature Society released a research report regarding simultaneous vs. sequential eyewitness identification procedures. Between these two approaches, the report concluded that the "difference in rates of identifying the suspect was not statistically significant," meaning that both methods produced the same amount of 'correct' identifications (i.e. the witness selected the crime suspect). See Gary L. Wells, PhD, Nancy K. Steblay, PhD, Jennifer E. Dysart, PhD, American Judicature Society, A Test of the Simultaneous vs. Sequential Lineup Methods: An Initial Report of the AJS National Eyewitness Identification Field Studies (2011). The same research report indicated that the "simultaneous procedure yielded 18.1% identifications of fillers and the sequential procedure yielded 12.2% identification of fillers," meaning that the witness selected someone other than the crime suspect. Id.<sup>1</sup>

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<sup>1</sup> The American Judicature Society's 2011 report was only an initial report, and indicated that the study is not yet complete. The report called for further study of specific variables, and noted that each case in the study would be examined to determine how likely it is that the suspects identified actually committed the crime.

Even if a witness were to select someone other than the crime suspect (i.e. selected a 'filler'), there is no reason why law enforcement would then switch their investigation to the filler. Indeed, there would be no reason to do that, because law enforcement already knows who their suspect is within that lineup, and no two suspects are ever included in the same lineup. Fillers are simply meant to test a witness' ability to identify the suspected offender, such that picking a filler simply indicates a witness is not able to identify the suspect sufficiently to pick them out of a lineup.

Methods currently used by local law enforcement are based on local caselaw and evidentiary requirements, as well as on national law enforcement developments and discourse. Officers are regularly trained to conduct eyewitness identifications in accordance with the latest developments, and are thus aware of what our courts and juries deem (in)appropriate or (un)reliable methods. This provides law enforcement with the guidance to adjust their procedures and act appropriately under the broad spectrum of circumstances they encounter from day to day.

As to the sufficiency of our law enforcement's methods, these methods are literally put on trial practically every day in Hawai'i, and are subject to rigorous examination, cross-examination and arguments from both defense and prosecution attorneys, who will argue every minute detail of an eyewitness' circumstances and (if relevant) suspect identification.

Once a case goes to trial, there are numerous legal safeguards and procedures to protect a defendant's rights, and juries are made well-aware that eyewitness identifications are not determinative. Both prosecution and defense will encourage jurors to consider all of the facts and circumstances of the case—including the potential biases, and room for human error. Their review should not be sidetracked by a simple checklist of "do's and don'ts," but must encompass a careful examination of all evidence put forth, as a "totality of circumstances."

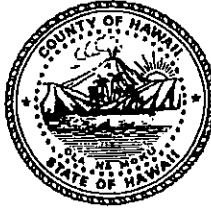
As an additional safeguard, judges may suppress an eyewitness identification that is "impermissibly or unnecessarily suggestive"; this also requires a judge to carefully consider the totality of the circumstances, as clearly illustrated in a recent decision from the Intermediate Court of Appeals. See State v. Mason (App., Feb 24, 2012). In addition, there are at least three major Hawai'i Supreme Court cases--with one more currently pending--to indicate when it is appropriate to issue specific jury instructions regarding an eyewitness identification.

Insofar as S.B. 2304, S.D. 2, H.D. 1, proposes to codify a specific list of procedures for eyewitness identifications, it creates an implication that if any of the listed items is missing, then the eyewitness identification is somehow substandard or unreliable. The natural tendency for the public--and for juries--would be to consider the "checklist" rather than a true consideration of the totality of circumstances. To keep the focus correctly on a totality of circumstances, the defense and prosecution should be permitted to argue every detail of an eyewitness' identification, not in comparison to a list prepared by the legislature, but based on a clean slate and true assessment of the totality of circumstances. And eyewitness identification procedures should be allowed to continue to evolve naturally, based on well-established and still-evolving caselaw developed by our courts and juries.

For all of the reasons noted above, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes S.B. 2304, S.D. 2, H.D. 1. Thank for you the opportunity to testify on this matter.

CHARLENE Y. IBOSHI  
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OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN OPPOSITION TO SENATE BILL 2304  
A BILL FOR AN ACT RELATING TO RIGHTS OF THE  
ACCUSED

COMMITTEE ON FINANCE

Rep. Marcus R. Oshiro, Chair  
Rep. Marilyn B. Lee, Vice Chair

Tuesday, April 3, 2012, 5:00 PM  
State Capitol, Conference Room 308

Representatives Oshiro, Lee, and Members of the Committees:

The Hawaii County Office of the Prosecuting Attorney opposes Senate Bill 2304 with Amendments.

Senate Bill 2340 would attempt to establish procedures for eyewitness identification of persons in live lineups and photo lineups who are suspected of perpetrating an offense. However our courts should govern in this area. The bill would force courts to suppress the identification of a defendant if "unnecessarily suggestive", but it would also have the effect of telling the courts what the jury instruction should be as well if the line-up was considered "suggestive".

Although the current Amendment from the Standing Committee Report is helpful in that it clarifies that participants in a live lineup, "shall be out of view of the eyewitness prior to, as well as at the beginning of, the identification procedure", this checklist approach has inherent problems as it takes the discretion away from the judge to determine "suggestiveness" of the process from the "totality of the circumstances". The Judiciary's Jury Instructions Committee considered this type of procedure and rejected it, reasoning the Judge had safeguards already in place to remedy any "suggestive" eyewitness identification. It is our firm position that the courts should govern in the area of jury instruction.

Our state law does not allow Judges to comment on the evidence and this law would require them to do just that. The jury instructions already address any suggestiveness of the eyewitness identification procedure and the court has the ability to address any issues of tainted evidence.

Insofar as S.B. 2304, S.D. 1 proposes to codify a "checklist" of procedures for eyewitness identifications, it seems to create an implied presumption that if any of the checklist items are missing, then the relevant eyewitness identification is somehow substandard or unreliable.

Current case law on this subject does not endorse a checklist-approach, but rather looks to a "totality of the circumstances," considering all evidence and arguments presented by both parties.

In addition to the wealth of case law that provides guidelines on what would constitute (in)appropriate or (un)reliable eyewitness identification--under a wide variety of circumstances--there is also well-established and evolving case law regarding legal safeguards and procedures to protect a defendant's rights in the courtroom, and to ensure juries are aware that eyewitness identifications are not determinative. During trial, juries are repeatedly told to consider all of the facts and circumstances of the case, as well as the potential biases and human error. Moreover, there are at least three Hawai'i Supreme Court cases--with one more currently pending--regarding specific jury instructions to be considered by the jury during deliberation. Finally, our courts have ample discretion to suppress an eyewitness identification if it is "impermissibly or unnecessarily suggestive"; as clearly illustrated in last week's decision by the Intermediate Court of Appeals, in State v. Mason (App., Feb 24, 2012), this decision also requires a judge to carefully consider the totality of the circumstances.

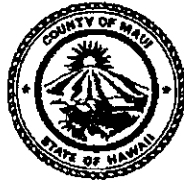
If the Legislature were to codify and impose a specific list of procedures directing law enforcement how to conduct eyewitness identifications, the natural tendency for the public--and for juries--would be to consider the "checklist" more so than the totality of circumstances. As such, we respectfully request that this Committee avoid sending the wrong message; allow law enforcement the discretion and flexibility to adjust to each situation as it arises; and allow Hawai'i's courts and juries to continue focusing on the totality of circumstances for each individual case, under the guidance of existing case law, rules and statutes.

For these reasons the Hawaii County Office of the Prosecuting Attorney opposes SB 2304.

Thank you for the opportunity to testify on this matter.



ALAN M. ARAKAWA  
Mayor



JOHN D. KIM  
Prosecuting Attorney  
ROBERT D. RIVERA  
First Deputy Prosecuting Attorney

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Supervisor, Appellate, Asset Forfeiture and Administrative Services Division

TESTIMONY

ON

S.B. 2304, S.D. 2, H.D. 1 RELATING TO RIGHTS OF THE ACCUSED

April 3, 2012

The Honorable Marcus R. Oshiro  
Chair  
The Honorable Marilyn B. Lee  
Vice Chair  
and Members  
House Committee on Finance

Chair Oshiro, Vice Chair Lee and Members of the Committee:

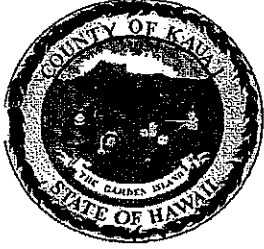
The Department of the Prosecuting Attorney, County of Maui, OPPOSES this bill. While we agree that law enforcement agencies should maintain high standards and protocol for eyewitness identifications, that they already do so. Their protocol is based on both our local case law and evidentiary requirements, as well as on national law enforcement developments and discourse. Further, their protocol is constantly evolving with new information and technology and new case law. Codifying a specific list of procedures is not only unnecessary and restrictive, but would also discount the flexibility needed for law enforcement to adjust to the unique circumstances of each case.

S.B. 2304, S.D. 2, H.D. 1, proposes to codify a "checklist" of procedures for eyewitness identifications, and appears to create an implied presumption that if any of the checklist items are missing, then the relevant eyewitness identification is unreliable. Current case law on this subject does not endorse a checklist-approach, but rather looks to a "totality of the circumstances," considering all evidence and arguments presented by both parties.

In addition to the wealth of case law that provides guidelines on what would constitute “appropriate” or “reliable” eyewitness identification--under a wide variety of circumstances--there is also well-established and evolving case law regarding legal safeguards and procedures to protect a defendant's rights in the courtroom, and to ensure juries are aware that eyewitness identifications are not determinative. During trial, juries are repeatedly instructed to consider all of the facts and circumstances of the case, as well as the potential biases and human error. Moreover, there are at least three Hawai'i Supreme Court cases--with one more currently pending--regarding specific jury instructions to be considered by the jury during deliberation. Finally, the courts have ample discretion to suppress an eyewitness identification if it is “impermissibly or unnecessarily suggestive”; as clearly illustrated in last week's decision by the Intermediate Court of Appeals, in State v. Mason (Hawai'i App., Feb 24, 2012), this decision also requires a judge to carefully consider the totality of the circumstances.

If the Legislature was to codify and impose a specific list of procedures directing law enforcement how to conduct eyewitness identifications, the natural tendency for the public--and for juries--would be to consider the “checklist” more important than the totality of circumstances. As such, we respectfully request that this Committee avoid sending the wrong message; allow law enforcement the discretion and flexibility to adjust to each situation as it arises; and allow the courts and juries to continue focusing on the totality of circumstances for each individual case, under the guidance of existing case law, rules and statutes.

For all of the reasons noted above, the Department of the Prosecuting Attorney, County of Maui, OPPOSES S.B. 2304, S.D. 2, H.D. 1. Thank for you the opportunity to comment on this matter.



# OFFICE OF THE PROSECUTING ATTORNEY

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April 2, 2012

TO: MARCUS R. OSHIRO, CHAIR, MARILYN B. LEE, VICE CHAIR, AND MEMBERS  
OF THE HOUSE COMMITTEE ON FINANCE  
FR: SHAYLENE ISERI-CARVALHO, COUNTY OF KAUAI PROSECUTING  
ATTORNEY  
RE: S.B. 2304, S.D. 2, H.D. 1 RELATING TO THE RIGHTS OF THE ACCUSED

Aloha,

The County of Kaua'i Office of the Prosecuting Attorney strongly OPPOSES SB 2304, which establishes procedures for eyewitness identification in live lineups and photo lineups of persons who are suspected of committing an offense. We agree generally with the opposition testimony put forward on this issue by the Department of the Prosecuting Attorney, County of Maui, and the Department of the Prosecuting Attorney, City and County of Honolulu.

Specifically, we agree that law enforcement agencies should and do maintain high standards for protocols and procedures relating to eyewitness identification. We agree with the Maui and Honolulu Prosecuting Attorneys, however, that codifying a specific list of procedures relating to identifications will be counterproductive as it will overly restrict law enforcement by creating an implication that if any of the procedures are missed, then the identification is defective. We further agree with Maui and Honolulu, that the current "totality of the circumstances" approach is more effective than a checklist approach, but that it still safeguards the fairness and integrity of the identification.

In conclusion, this bill supports a noble cause, the clarifying of practices and procedures used by police in identifications. The bill may have unintended, yet detrimental, consequences however, as it may place a great and unnecessary burden on law enforcement in procuring identifications. We therefore cannot support this bill and we ask that you vote against it. By doing so you will continue to help prosecutors and law enforcement as we seek to enforce and uphold the law.

Mahalo,

SHAYLENE ISERI-CARVALHO  
PROSECUTING ATTORNEY, COUNTY OF KAUAI

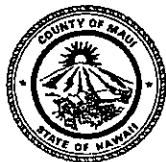
**Deputy Prosecuting Attorneys:**

Lisa R. Arin  
Jared Auna  
Lance Kobashigawa

Melinda K. Mendes  
Tracy Murakami  
Gary Nelson

John H. Murphy  
Ramsey Ross  
Rebecca A. Vogt

"An Equal Opportunity Employer"



ALAN M. ARAKAWA  
MAYOR

OUR REFERENCE  
YOUR REFERENCE

# POLICE DEPARTMENT

## COUNTY OF MAUI

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GARY A. YABUTA  
CHIEF OF POLICE

CLAYTON N.Y.W. TOM  
DEPUTY CHIEF OF POLICE

April 3, 2012

The Honorable Marcus R. Oshiro, Chair  
And Members of the Committee on Finance  
House of Representatives  
Hawaii State Capitol  
Honolulu, HI 96813

RE: SB No. 2304, SD2, HD1 - RELATING TO RIGHTS OF THE ACCUSED

Dear Chair Oshiro and Members of the Committee:

The Maui Police Department reiterates its strong opposition of SB No. 2304, SD2, HD1. This bill is attempting to establish additional procedures for eyewitness identification of persons suspected of perpetrating an offense in live lineups and photo lineups goes beyond the needed procedures to ensure the fairness of this process. Currently the Maui Police Department adheres to all necessary standards regarding lineups and show-ups established by C.A.L.E.A. (The Commission on Accreditation for Law Enforcement Agencies), State and Federal law, and under the Constitution of the United States of America.

Additional procedures outlined in this bill are unnecessary and will also create additional burdens for police manpower and already limited resources. For example, with the addition of lines 6 through 12 on page 3 of this bill, in summary, will call for an additional investigator to compile a photo lineup before passing it on to another investigator who would then present it to the witness for viewing. Instead of one investigator being subpoenaed to court you will now need two.

Another issue with this bill is the overreaching proposal to codify a "checklist" of procedures for eyewitness identifications, and appears to create an implied presumption that if any of the checklist items are missing, then the relevant eyewitness identification is unreliable. Citing current case law on this subject the Maui Police Department does not endorse a checklist approach, but rather the weighing of the "totality of the circumstances," in order to consider all the evidence and arguments presented by both parties. These already established set of steps brings to the table a large wealth of evidence that could conceivably be set aside in a court case because a jury member

The Honorable Marcus R. Oshiro, Chair  
Committee on Finance  
April 2, 2012  
Page 2

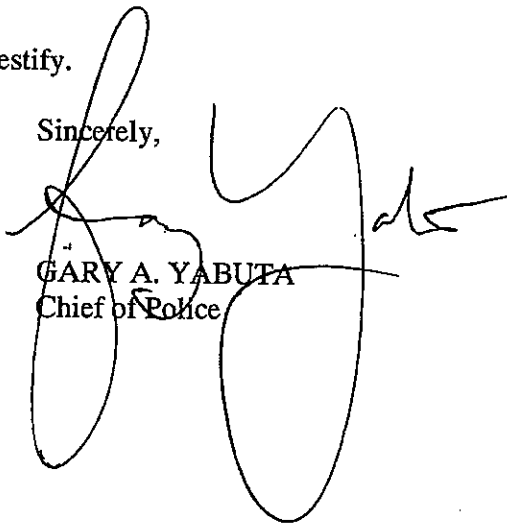
decides that because an investigator, for whatever reason, may not have satisfactorily completed a section of the "checklist" proposed.

This bill again is not needed as the Maui Police Department is already in compliance with the applicable laws and case laws established for this very situation. We ask that your committee weigh the issues brought forth through all the testimony you have received and commit to the continued support of the police departments across the state to have the ability to respond to the ever changing dynamics of investigations.

The Maui Police Department asks for your opposition for SB No. 2304, SD2, HD1.

Thank you for the opportunity to testify.

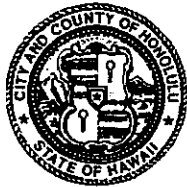
Sincerely,



GARY A. YABUTA  
Chief of Police

POLICE DEPARTMENT  
CITY AND COUNTY OF HONOLULU

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MAYOR

LOUIS M. KEALOHA  
CHIEF

DAVE M. KAJIHIRO  
MARIE A. McCAULEY  
DEPUTY CHIEFS

OUR REFERENCE RC-NTK

April 3, 2012

The Honorable Marcus R. Oshiro, Chair  
and Members  
Committee on Finance  
House of Representatives  
State Capitol  
Honolulu, Hawaii 96813

Dear Chair Oshiro and Members:

Subject: Senate Bill No. 2304, S.D. 2, H.D. 1, Relating to Rights of the Accused

I am Richard C. Robinson, Major of the Criminal Investigation Division of the Honolulu Police Department, City and County of Honolulu.

The Honolulu Police Department opposes the passage of Senate Bill No. 2304, S.D. 2, H.D. 1, Relating to Rights of the Accused. The Honolulu Police Department adheres to nearly all of the recommendations of the National Institute of Justice for eyewitness evidence. Currently, the Honolulu Police Department is working with the Department of the Prosecuting Attorney to thoroughly evaluate the feasibility of implementing blind sequential lineups in this jurisdiction.

We believe that the determination of the validity of any evidence is best handled by the Judiciary. Further, the Judiciary is able to more quickly adapt to changes in court procedures and/or rules of evidence that may result from the judicial findings of higher courts.


The Honolulu Police Department urges you to oppose Senate Bill No. 2304, S.D. 2, H.D. 1, Relating to Rights of the Accused.

Thank you for the opportunity to testify.

Sincerely,

  
RICHARD C. ROBINSON, Major  
Criminal Investigation Division

APPROVED:

  
LOUIS M. KEALOHA  
Chief of Police

*Serving and Protecting With Aloha*



Committee: Committee on Finance  
Hearing Date/Time: Tuesday, April 3, 2012, 5:00 p.m.  
Place: Conference Room 308  
Re: Testimony of the ACLU of Hawaii in Support of S.B. 2304, SD2, H.D. 1, Relating to Rights of the Accused

Dear Chair Oshiro and Members of the Committee on Finance:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in support of S.B. 2304, SD2, H.D. 1.

The two most common causes of wrongful conviction are mistaken eyewitness identification and false confessions. Modern DNA evidence has proven that innocent people are sent to prison for crimes they did not commit far more often than we think.

S.B. 2304 would improve Hawaii's eyewitness identification procedures using scientific standards. Improving these procedures will simultaneously decrease the rate of wrongful conviction and increase our ability to convict those who are truly guilty of the crimes of which they are accused.

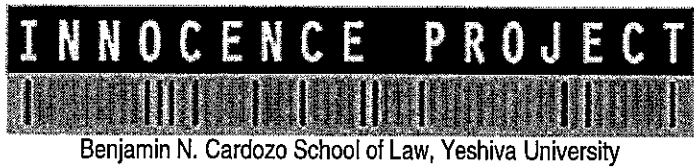
The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 45 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie Temple  
Staff Attorney

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**TESTIMONY OF REBECCA BROWN, SENIOR POLICY ADVOCATE FOR STATE AFFAIRS,**

**INNOCENCE PROJECT**

**BEFORE THE HAWAII HOUSE COMMITTEE ON FINANCE**

**RE: IN SUPPORT OF SB 2304 RELATING TO EYEWITNESS IDENTIFICATION**

**APRIL 2, 2012**

On behalf of the Innocence Project, thank you for allowing me to submit today before the Hawaii House Committee on Judiciary.

Since its U.S. introduction, forensic DNA testing has proven the innocence of 289 people who had been wrongly convicted of serious crimes. With the certainty of innocence that DNA provides, we can also be certain that something(s) went wrong in the process which led fact finders to believe beyond a reasonable doubt that the exonerated person was, in fact, guilty of the crime.

The Innocence Project was founded in 1992 at the Benjamin N. Cardozo School of Law to exonerate the innocent through post-conviction DNA testing. We regard each DNA exoneration as an opportunity to review where the system fell short and identify factually-supported policies and procedures to minimize the possibility that such errors will impair justice again in the future. The recommendations that we make are grounded in robust social science findings and practitioner experience, all aimed at improving the reliability of the criminal justice system.

At least one mistaken eyewitness identification contributed to the wrongful conviction in a full 75% of cases of wrongful conviction proven through DNA testing. But it is not just the wrongfully convicted

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who suffer when an eyewitness misidentifies an innocent person as the perpetrator of a crime. When an eyewitness misidentifies someone, police are also led away from the real perpetrator, and instead focus their investigation on an innocent person. What's more, if the police do again focus their case on the real perpetrator, the eyewitness who had previously identified an innocent person is "burned," and thus not of use in the criminal prosecution. Simply put, nobody – not the police, prosecutors, judge, jury, or indeed, the public at large – benefits from a misidentification. The only person who benefits is the real perpetrator of a crime.

Of particular interest to this committee are the fiscal implications such legislation could engender and I wish to offer the national perspective. To date, more than a dozen states have implemented some form of statewide reform in this area, understanding that a failure to do so will make them more vulnerable to wrongful conviction and the civil litigation that will stem from it. As well, those states recognize the public safety risks inherent in maintaining the status quo.

At the national Innocence Project, we consult with law enforcement around the country to address any concerns they have with those wrongful conviction reforms we recommend. Changes to police practice in the eyewitness identification realm typically elicits concerns about the cost of implementation in two major areas: the requirement that a lineup be conducted by a blind administrator and training costs.

As to the first issue of blind administration, there are concerns that getting a second law enforcement officer to conduct the lineup will be costly. Understandably, small police departments with limited officer manpower – or larger departments with officers conducting identifications in the field - may believe that the requirement of 'blind administration' of eyewitness procedures is unfeasible or costly. Yet this is not the case at all and workable solutions have emerged to address this concern.



Law enforcement agencies that have implemented this reform report that they are able to ‘blind’ the administrator without expending additional manpower resources. This is done through the time-tested ‘folder system.’ Indeed, here is a link to a free training video on the use of the folder shuffle method, which was produced, in part, by the Wellesley (Massachusetts) Police Department for use in their department: <http://tinyurl.com/8y3mybu> As demonstrated in this video, this legislation could be implemented at the cost of 10 manila folders. Indeed, this same video can be circulated to all Hawaii law enforcement agencies for training purposes, eliminating any concerns about training costs.

To be clear, a second law enforcement officer is not required by this legislation; the same investigator who knows the identity of the suspect may conduct the lineup, but take precautions – through the folder shuffle system – to “blind” himself.

Of course fiscal impacts of *not* passing such legislation must also be considered. The cost of opting to maintain the status quo in this area will yield a greater fiscal burden over time than any minimal cost associated with the implementation of enhanced identification procedures. Multi-million dollar settlements have been awarded to several misidentified men around the country, including: Alejandro Dominguez (IL), awarded \$9,000,000; Arvin McGee (OK), awarded \$12,250,000; Eric Sarsfield (MA), awarded \$15,600,000.

#### *Mistaken Eyewitness Identifications Harm Crime Victims*

Jennifer Thompson and Penny Beerstein are two victims who have demanded eyewitness identification reform after having each, in their own separate cases, identified an innocent person as the person who had in fact raped them. Their experiences are a testament to the fallibility of human memory, and how susceptible to influence our memories are. For even after - in these two separate cases in different states - DNA proved the innocence of those men, these women continued to believe that these innocents were the real perpetrators – until, finally, DNA also identified the real perpetrators.

For these victims of rape, it was difficult to accept and horrifying to learn that their memories of the actual perpetrator were wrong and that because of their misidentifications, innocent people were sent to prison. Yet they turned that horror into a demand for reform. As a result of their experiences, Thompson and Beerstein are now strong advocates for the eyewitness identification reform referred to as “blind-sequential,” a procedure being rapidly adopted in jurisdictions around the country.

Victims are not the only witnesses proven to – despite their best efforts – misidentify perpetrators. Every time a witness makes a misidentification, the entire system suffers. And this is certainly an outcome that no one – except for the real perpetrator – desires. As noted earlier, erroneous eyewitness identifications unintentionally distract police and prosecutors’ attention from the true culprit, mislead witnesses, undercut their credibility, and force innocent people to defend their innocence and possibly go to prison for crimes they did not commit. It is, therefore, imperative that eyewitness identification procedures be improved.

*Eyewitness Protocols Should be Grounded in Best Practices & Social Science Research*

From DNA exonerations we’ve learned that the standard lineup procedures provide many opportunities to inadvertently cause a witness to pick a person he or she is not sure is the person they recall from the crime scene. Traditional eyewitness ID protocol, by virtue of its failure to heed the lessons of eyewitness ID research, also creates a situation ripe for a misidentification. What’s more, confirmatory feedback from the officer administering the lineup often reinforces a witness’s wrong choice in a manner that ultimately increases their confidence in that pick, despite their initial hesitance. The good news is that the same social science research over the past three decades that has consistently confirmed the fallibility of eyewitness identifications as well as the unwitting contamination of witness recall through many standard eyewitness identification procedures, can also provide remedies for this urgent problem.

In 1999, the Department of Justice undertook the problem of misidentification, forming the “Technical Working Group for Eyewitness Evidence,” composed of membership from the scientific, legal and criminal justice communities, which sought to identify best practices supported by rigorous social science research. The group recommended a number of areas for study and examination, including:

- The use of a ‘blind administrator,’ namely an individual who does not know the identity of the suspect, to prevent intentional or inadvertent cues to the witness;
- showing line-up members one at a time (sequentially) versus showing members all at the same time (simultaneously);
- the proper composition of fillers (i.e. lineup members other than the suspect);
- providing instructions to the eyewitness, including the directive that the suspect may or may not be in the lineup;
- obtaining a confidence statement at the close of the procedure; and
- recording the entire procedure from start to finish.

*Since Their Publication, Department of Justice Guidelines Bolstered by Scientific Support*

The guidelines devised by the working group nearly a decade ago were groundbreaking. What’s more, the large body of scientific research that supported these reforms at the time has only been bolstered by a significant amount of further peer-reviewed study on every aspect of these reforms. Simply put, today there is solid research and experiential support for all of these reforms, nearly all of which are included in SB 2304. The testimony that follows describes the research findings that prove the value of these reforms.

*Blind Administration*

The idea that test administrators’ expectations are communicated either openly or indirectly to test subjects, who then modify their behavior in response, has been corroborated by over forty years of general social science research.<sup>1</sup> A prominent meta-analysis conducted at Harvard University, which combined the findings of 345 previous studies, concluded that *in the absence of a blind administrator,*

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<sup>1</sup> e.g. Adair, J. G., & Epstein, J. S. (1968). Verbal cues in the mediation of experimenter bias. *Psychological Reports*, 22, 1045–1053; Aronson, E., Ellsworth, P. C., Carlsmith, J. M., & Gonzales, M. H. (1990). On the avoidance of bias. *Methods of Research in Social Psychology* (2nd ed., pp. 292–314). New York: McGraw-Hill.

*individuals typically tailor their responses to meet the expectations of the administrator.*<sup>2</sup>

The eyewitnesses themselves may seek clues from an identification procedure administrator. A recent experiment that sought to examine the decision-making processes of eyewitness test subjects concluded that, “witnesses were more likely to make decisions consistent with lineup administrator expectations when the level of contact between the administrator and the witness was high than when it was low.”<sup>3</sup>

Advocating for the use of a blind administrator does not call into question the integrity of law enforcement; rather it acknowledges a fundamental principle of properly conducted experiments and applies it to the eyewitness procedure. In short, that fundamental principle is that a person administering an experiment – or eyewitness identification – should not have any predisposition about what the subject’s response should be. This eliminates the possibility – proven to exist in the eyewitness identification process – that a witness could seek, and an administrator might inadvertently provide, cues as to the expected response.

#### *Proper Composition of the Lineup*

Suspect photographs should be selected that do not bring unreasonable attention to him. Non-suspect photographs and/or live lineup members (fillers) should be selected based on their *resemblance to the description provided by the witness* – as opposed to their resemblance to the police suspect. Note, however, that within this requirement, the suspect should not unduly stand out from among the other fillers.

When the innocent person is the only person to fit the description provided by the eyewitness, the

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<sup>2</sup> Rosenthal, R., & Rubin, D. B. (1978). Interpersonal expectancy effects: The first 345 studies. *Behavioral and Brain Sciences*, 3, 377-386.

<sup>3</sup> Haw, R. M. & Fisher, R. P. (2004). Effects of administrator-witness contact on eyewitness Identification accuracy. *Journal of Applied Psychology*, 89, 1106-1112.

confidence level of the eyewitness in his selection of the innocent person is greater than when other photo array or lineup members also fit the eyewitness's description. Therefore, when photo array or live lineup members are selected that match the eyewitness's description, high rates of accurate identifications can be maintained while reducing false identifications characterized by an inflated sense of confidence.<sup>4</sup>

### *Instructing the Eyewitness*

"Instructions" are a series of statements issued by the lineup administrator to the eyewitness that deter the eyewitness from feeling compelled to make a selection. They also prevent the eyewitness from looking to the lineup administrator for feedback during the identification procedure. The Department of Justice's "Guide for Law Enforcement" recommended the following recommendations regarding instructions to the eyewitness:

1. Instruct each witness without other persons present.
2. Describe the mug book to the witness only as a "collection of photographs."
3. Instruct the witness that the person who committed the crime may or may not be present in the mug book.
4. Consider suggesting to the witness to think back to the event and his/her frame of mind at the time.
5. Instruct the witness to select a photograph if he/she can and to state how he/she knows the person if he/she can.
6. Assure the witness that regardless of whether he/she makes an identification, the police will continue to investigate the case.
7. Instruct the witness that the procedure requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification.

### *Obtaining a Confidence Statement*

Immediately following the lineup procedure, the eyewitness should provide a statement, in his own words, that articulates the level of confidence he has in the identification made. Research has consistently shown that the eyewitness's *degree of confidence* in his identification at trial is the single largest factor affecting whether observers believe that the identification is accurate.<sup>5</sup> In other words, the more

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<sup>4</sup> Wells, G. L., Seelau, E. P., & Rydell, S. (1993) On the selection of distractors for eyewitness lineups. *Journal of Applied Psychology*, 78, 835-844.

<sup>5</sup> Bradfield, A. L. & Wells, G. L. (2000). The perceived validity of eyewitness identification testimony: A test of the

confidence the eyewitness exudes, the more likely a juror will believe that the identification he made is an accurate one.

Yet research has also shown that a witness's confidence in his identification is malleable, and susceptible to influences and suggestion, which can be unintended and unrecognized.<sup>6</sup> Typically, these changes to witness memory occur after the administrator provides some form of feedback, either confirming or disconfirming, to the eyewitness after the identification has been made.

When confirming feedback is provided to an eyewitness who has incorrectly identified an innocent person, the feedback can be dangerous. A study that examined the effects of feedback found that post-identification feedback produced "strong effects" on the witnesses' reports of a range of factors, from overall certainty to clarity of memory.<sup>7</sup>

#### *Sequential Presentation of Lineup Members*

When combined with a blind administrator<sup>8</sup>, the sequential presentation of photographs or live lineup members has been shown to significantly increase the overall accuracy of eyewitness identifications. In order to reduce the prevalence of false identifications, academic research has pointed to the importance of a sequential presentation.

Presenting photographs or lineup members sequentially, as opposed to simultaneously, deters the

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five Biggers criteria, *Law and Human Behavior*, 24, 581-594. and Wells, G.L., Small, M., Penrod, S., Malpass, R.S., Fulero, S.M., & Brimacombe, C.A.E. (1998). Eyewitness identification procedures: Recommendations for lineups and photospreads, *Law and Human Behavior*, 22, 603-647. (Surveys and studies show that people believe strong relation exists between eyewitness confidence and accuracy).

<sup>6</sup> See, e.g., Bradfield, A. L., Wells, G. L., & Olson, E. A. (2002). The damaging effect of confirming feedback on the relation between eyewitness certainty and identification accuracy. *Journal of Applied Psychology*, 87, 112-120. and Wright, D. B., & Skagerberg, E. M. (in press, due Feb/Mar 2007). Post-identification feedback affects real eyewitnesses. *Psychological Science*.

<sup>7</sup> Wells & Bradfield (1998).

<sup>8</sup> When blind administration is impracticable, the traditional simultaneous presentation of photographs should be used.

eyewitness from making a “relative judgment,” i.e. selecting from among the photographs or lineup members the person who most resembles her memory of the perpetrator. When photo array or live lineup members are presented sequentially, the eyewitness is more likely to assess the resemblance of each person against her memory of the perpetrator, and is less likely to simply make a relative judgment across all members of the identification procedure.<sup>9</sup>

*Testing Best Practices Under Real Life Conditions: Status of National Field Studies*

The empirical evidence supporting these reforms is uncontested,<sup>10</sup> but since opponents of reform often cited a lack of support for the value of these modifications under real life conditions, our office partnered with the American Judicature Society to demonstrate their superiority in the field. These field experiments, which were undertaken in Austin, San Diego, Charlotte & Tucson, utilized laptop computers which – in order to compose lineups – accessed either arrest or DMV photo repositories. The preliminary results support what we have always stated was true: the sequential presentation of

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<sup>9</sup> Wells et al. (1998). Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads. *Law and Human Behavior*, 22, 605–08.

<sup>10</sup> The Illinois Report, aka the Mecklenberg Study and the Chicago Report, is frequently cited by opponents of reform in this area. However, upon closer examination, it does acknowledge that mistaken eyewitness identification is a serious problem that needs to be studied and addressed and further and ongoing study of the problem must take place as our understanding of the problem evolves. The Report also acknowledges the benefits of blind administration, appropriate fillers, instructions to witnesses viewing the line-up and the taking of a confidence statement. The Report’s sole discrepancy between itself and consensus in the scientific and law enforcement community has been concerning the benefits of sequential viewing. It should be noted that the Report has been the subject to significant and sustained criticism from the research community about its fundamentally flawed protocols, most notably in a blue ribbon report by the nation’s top field scholars (Schacter, D., et. al. (2007). Policy Reform: Studying Eyewitness Investigations in the Field. *Law and Human Behavior*). Indeed, the Attorney General of Wisconsin and the Vermont Task Force created by statute have both acknowledged the superiority of sequential viewing. The Wisconsin Attorney General concluded in response to the publication of the Illinois Report: “Scientific research demonstrates that sequential procedures reduce misidentifications, and the results of the Chicago program do not suggest otherwise. Response to Chicago Report on Eyewitness Identification Procedures, State of Wisconsin, Office of Attorney General, Wisconsin Department of Justice Bureau of Training and Standards For Criminal Justice (7/21/06) at p. 3.(emphasis added).The Vermont Task Force Report concluded: “...the Committee recommends that where at all possible, law enforcement agencies should employ sequential photo lineups with a blind administrator”. Report of the Vermont Eyewitness Identification and Custodial Interrogation Study Committee (12/14/07) at p. 8 (emphasis added).





line-ups is superior to the traditional, simultaneous display in reducing incorrect identifications without any reduction in suspect identifications.

*Lineup Protocols Should be Grounded in Best Practices & Social Science Research*

From DNA exonerations we've learned that the traditional lineup procedures provide many opportunities to inadvertently cause a witness to misidentify an innocent person as the perpetrator of crime. Traditional eyewitness identification methods also often reinforce a witness's wrong choice, resulting in even stronger witness confidence in an identification that was incorrect. **Social science research over the past three decades has consistently confirmed the fallibility of eyewitness identifications as well as the unwitting contamination of witness recall through many standard eyewitness identification procedures. This same research has also identified simple changes in eyewitness identification procedures that can greatly reduce the possibility of misidentification.**

Responding to the proliferation of research in this area, police and prosecutors from across the country have begun to rethink traditional eyewitness identification procedures and promulgated updated policies for use by their law enforcement officials. In April 2001, New Jersey became the first state in the nation to officially adopt best practices related to eyewitness identification protocols when the Attorney General issued Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures, mandating the requirement that lineups be administered by blind administrators – by all law enforcement agencies statewide. Attorneys General in New Jersey and Wisconsin have gone so far as to promulgate best practices for use in their respective states. The states of Virginia and Texas recently issued statewide model policies that also embrace best practices.

A nine-member task force in Rhode Island, which included membership from all corners of the criminal

justice community, recently called for every law-enforcement agency in the state to establish a written policy for conducting eyewitness identifications consistent with the report's recommended best practices and that all law-enforcement officers be trained in these "best practices" by June of this year. The best practices recommended by the Rhode Island task force include blind administration of live and photo lineups, proper filler selection, the issuance of specific instructions, and that a confidence statement be taken immediately upon identification. According to Task Force Co-Chair Deputy Attorney Gerald Coyne, "We all have an interest in making sure the right person is convicted."<sup>11</sup>

#### *Reforms Embraced by Other Jurisdictions*

These changes have proven to be successful across the country. The states of New Jersey, North Carolina, Connecticut, Ohio, large cities such as Minneapolis, MN, Winston-Salem NC, and Boston, MA (to name just a few) and small towns such as Northampton, MA have implemented these practices and have found that they have improved their quality of their eyewitness identifications, thus strengthening prosecutions and reducing the likelihood of convicting the innocent.

#### *Courts Take Notice of Emerging Research*

Taking note of the misidentification phenomenon, American courts are for the first time reconsidering their application of the traditional framework, known as the "Manson test," that is used to determine the reliability of eyewitness identifications. Most recently – and perhaps most dramatically – is the case of *State v. Henderson*,<sup>12</sup> presently pending before the New Jersey Supreme Court. In *Henderson*, upon its 2009 review of an appeal of a conviction based on eyewitness evidence, the New Jersey Supreme Court declared that the trial record was

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<sup>11</sup> Mulvaney, Katie. "R.I. General Assembly to take up report on guidelines for eyewitness evidence." Providence Journal, January 26, 2011.

<sup>12</sup> *State v. Henderson*, 937 A.2d 988 (N.J. Super. Ct. App. Div. 2008), cert. granted and denied, 195 N.J. 521 (N.J. 2008), remanded by No. A-8-08, 2009 WL 510409 (N.J. Feb. 26, 2009).

inadequate to “test the current validity of [New Jersey] state law standards on the admissibility of eyewitness identification” and directed that a plenary hearing be held

To consider and decide whether the assumptions and other factors reflected in the two-part *Manson/Madison* test, as well as the five factors outlined in those cases to determine reliability, remain valid and appropriate in light of recent scientific and other evidence.<sup>13</sup>

As the Court ordered, the State of New Jersey, the defendant, along with the Innocence Project and Association of Criminal Defense Lawyers of New Jersey participated in the proceedings, which were presided over by Special Master Geoffrey Gaulkin, a retired New Jersey state appellate judge appointed by the New Jersey Supreme Court to handle the matter. Judge Gaulkin conducted the proceedings “more as a seminar than an adversarial litigation.”<sup>14</sup> The parties submitted, and Judge Gaulkin considered, extensive scientific materials including more than 200 published scientific studies, articles and books. Judge Gaulkin presided over ten days of evidentiary hearings, at which seven expert witnesses –leading scientists in the field of eyewitness identification study – testified, and he received detailed proposed findings of fact and conclusions of law, and heard oral argument.<sup>15</sup> On June 18, 2010, based on his consideration of all of the information presented by the parties, Judge Gaulkin issued his report (the “Special Master’s Report”).

The Special Master’s Report endorsed the remedy set forth by the Innocence Project in its proposed legal findings, “The Renovation of *Manson*: A Dynamic New Legal Architecture For Assessing and Regulating Eyewitness Evidence,” as “wide-ranging, multifaced and highly

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<sup>13</sup> *Henderson*, No. A-8-08, 2009 WL 510409, at \*1-2.

<sup>14</sup> Special Master’s Report, Ex. A.

<sup>15</sup> *Id.* at 3-4.

detailed,”<sup>16</sup> and proposed that the current legal framework be modernized to reflect our current understanding of social science research.

Basing its reasoning on the Special Master’s Report, the New Jersey Supreme Court issued a landmark decision in August, 2011 requiring major changes in the way courts are required to evaluate identification evidence at trial and how they should instruct juries. The new changes, designed to reduce the likelihood of wrongful convictions by taking into account more than 30 years of scientific research on eyewitness identification and memory, require courts to greatly expand the factors that courts and juries should consider in assessing the risk of misidentification.

The court’s decision requires judges to more thoroughly scrutinize the police identification procedures and many other variables that affect an eyewitness identification. The court noted that this more extensive scrutiny will require enhanced jury instructions on factors that increase the risk of misidentification. Hawaii would do well to prepare itself for enhanced judicial scrutiny in this area by implementing best practices in the eyewitness identification realm.

Over the course of thirty years of studying the issue, social scientists have determined that misidentifications are, in many instances, the result of suggestive identification procedures and have developed a set of ‘best practices’ that have been shown to enhance the accuracy of eyewitness identifications. These ‘best practices’ include: the use of a ‘blind’ administrator;

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<sup>16</sup> *Id.* at 84.



providing a set of instructions to the eyewitness that have been shown to reduce guessing; properly composing the line-up so that filler, or non-suspect, line-up members match the description provided by the eyewitness; sequentially presenting line-up members (as opposed to showing them all at once); and obtaining a statement of relative confidence once an identification has been made, all of which are contained in the bill before you.

**Across the country, jurisdictions that have implemented these reforms at first experienced resistance, but after police were provided the opportunity to learn more about them, receive training about how to properly implement them, and to participate in the formation of the specific adaptations of the reforms in their jurisdictions, there is widespread agreement that these improved eyewitness identification procedures increase the accuracy of their criminal investigations, and the effectiveness of their criminal prosecutions.**

For all of the above reasons, the Legislature will be providing an important service to the people of Hawaii by passing this eyewitness identification reform legislation. In doing so, you will help enhance both justice and safety in Hawaii by ensuring that police are not misled by eyewitness misidentification into missing the real perpetrators of crime by instead focusing their investigations on innocent persons, which – as we know all too well – can lead to wrongful convictions. Simply put, Hawaii can wait no longer, and this legislation represents a reasonable, agreed-to way for the state to uniformly advance in this critically important area of wrongful conviction reform.

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COMMITTEE ON FINANCE  
Rep. Marcus Oshiro, Chair  
Rep. Marilyn Lee, Vice Chair  
Hearing Date: Tuesday, April 3, 2012  
5:00 p.m., Room 308

### **STRONG SUPPORT FOR SB 2304 SD2, HD1 WITH AMENDMENTS**

Honorable Chair Oshiro, Honorable Vice Chair Lee, and Honorable Members of the House Finance Committee:

SB2304 SD2 , HD1 establishes procedures for eyewitness identification of persons in live lineups and photo lineups who are suspected of perpetrating an offense.

SB 2304 SD2, HD1 requiring the blind administration of line-ups in Hawai`i, has been referred to your committee for consideration. The Hawai`i Innocence Project strongly supports this measure, with amendments, and strongly requests that this committee PASS this measure, with amendments.

#### ***AMENDMENTS REQUESTED:***

1. Page 3, lines 15 and 16 reads: "*(A) The lineup shall be presented simultaneously, not sequentially.*" The Hawai`i Innocence Project respectfully requests that this line be corrected by amendment to require that the lineup be presented SEQUENTIALLY, not simultaneously. (The simultaneous presentation is the outdated approach that these reforms seek to rectify.)

2. The effective date should be changed to January 1, 2014 to give our law enforcement agencies time for implementation.

The experience of other jurisdictions shows that the costs of these reforms are minimal, if not nonexistent. Conversely, if Hawai`i chooses *not* to implement updated, blind sequential procedures, the choice to continue using outdated simultaneous, non-blinded procedures will

likely make the state vulnerable to civil judgments, in addition to the costs of incarcerating innocent people, and costs to victims and the rest of the community when the actual perpetrator goes free to commit more crimes.

**Cost Concerns Articulated by Law Enforcement:**

SB 2304 requires that the lineup procedures be conducted by a ‘blind administrator,’ *i.e.*, someone who does not know the identity of the suspect. When a blind administrator is employed, intentional or inadvertent cueing by the administrator of the eyewitness is impossible.

Understandably, small police departments with limited officer manpower – or larger departments with officers conducting identifications in the field – may believe that the requirement of ‘blind administration’ of eyewitness procedures is unfeasible or costly. This is actually not the case. In fact, workable solutions have emerged to address this concern.

Law enforcement agencies that have implemented this reform report that they are able to ‘blind’ the administrator without expending additional manpower resources. This is done through the time-tested ‘folder system.’ Here is a link to a free training video on the use of the folder shuffle method, produced, in part, by the Wellesley (Massachusetts) Police Department for use in their department: <http://tinyurl.com/8v3mvbu>

*As demonstrated in this video, this legislation could be implemented at the cost of 10 manila folders.*

This same video is available free of charge to all Hawai`i law enforcement agencies for training purposes, eliminating any concerns about training costs.

The ‘blind administrator’ technique does *not* require a second law enforcement officer to be involved. The folder shuffle method allows the investigator who knows the identity of the suspect to conduct the photo lineup without contamination, taking precautions – through the

folder shuffle system – to “blind” himself or herself.

**Law Enforcement Accounts Regarding Cost of Reforming Eyewitness Identification Procedures:**

The three most recent states to pass comprehensive legislation to update old-fashioned eyewitness identification procedures so that they are predicated upon robust social science and best practices are Connecticut, North Carolina and Ohio. A task force dedicated to this issue in Connecticut has just recommended to use of the folder shuffle method to remove any concerns about cost.

North Carolina passed its law in 2007 (N.C.G.S.A. § 15A-284.52), mandating the blind administration of lineups and the sequential presentation of lineup members/photos. According to the North Carolina General Assembly’s website, no fiscal note was provided, apparently because no appreciable costs were anticipated:

<http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2007&BillID=hb+1625&submitButton=Go>

Ohio’s recently passed omnibus legislation included provisions relating to eyewitness identification reform. Below is an excerpt from the fiscal note attached to SB 77, the bill which ultimately passed.

**Eyewitness identification procedures**

The bill contains provisions that will govern the conduct of lineups for purposes of the identification by an eyewitness of persons suspected of committing an offense.

It specifies that, prior to conducting any live lineup or photo lineup, any law enforcement agency or criminal justice entity in Ohio that conducts live lineups or photo lineups must adopt specific procedures for conducting the lineups.

The bill also provides that the Office of the Attorney General may adopt rules prescribing specific procedures to be followed for the administration by law enforcement agencies and criminal justice entities of photo lineups, live lineups, and showups (an identification procedure in which an eyewitness is presented with a single suspect). The bill requests the Supreme Court of Ohio review existing jury



instructions as they pertain to eyewitness identification.

State and local fiscal effects

**Law enforcement agencies.** Law enforcement agencies may experience one-time costs associated with training and implementing the new eyewitness identification standards, the magnitude of which for any given jurisdiction is uncertain. **It also seems likely that the new standards would require additional ongoing administrative costs related to the documentation requirements, but these associated costs are not expected to exceed minimal. Once in place, these procedures would likely create no more than a negligible ongoing administrative expense.**

**Attorney General.** To the degree that such costs could be quantified, the one-time cost for the Attorney General to adopt rules prescribing specific procedures to be followed by law enforcement agencies and criminal justice entities **would likely be minimal at most.**

**Supreme Court of Ohio.** To the degree that such costs could be quantified, the one-time cost for the Supreme Court to review existing jury instructions **would likely be minimal at most.**

I also enclose two anecdotal accounts of the costs of implementing modern eyewitness identification procedures in other jurisdictions:

We changed our guidelines in 2001. **I don't have any calculations on cost to share, but it mainly involved time (mainly my time).** Xeroxing and making DVDs of training materials were probably the most costly, but we produced all of those items in-house. We created a CD-Rom Power point presentation and training materials and had them duplicated for all of our state's law enforcement trainers. We had a one day "train the trainer" session, which was mandatory, and gave everyone the materials then with a few extras. We let the county prosecutors & local police departments make additional copies of the handouts and CD-ROMs for use when they went back to their academies to train their own people. **Costs were pretty minimal and we did not attempt to do any type of calculation."**

Deputy Attorney General Lori Linskey  
Prosecutors Supervision & Coordination Bureau Division of Criminal Justice State of New Jersey Office of the Attorney General

We've been using the sequential, double-blind method for a few years now, and there have not been any additional costs. We don't use lap tops. The police officers just do a photo line-up in the same manner that they've always done, except now it is sequential. Initially, we were worried that the double blind requirement would be expensive, and we had all sorts of protocols about how smaller agencies

could manage. However, as a practical matter, law enforcement have always been able to find another officer to run the line-up without that much difficulty. And while it is true that the “blind” officer who is running the line-up is taken away from his or her work during the time it takes to do the line-up (which is, of course, not very long), the investigating officer who is not doing the line-up is freed up to do other work on the case. Consequently, there is no net loss in time. **Bottom line, there haven't been any new costs.** Furthermore, since our county includes both large cities, like San Jose with over a million inhabitants, and small rural areas, like Gilroy and Morgan Hill, my guess is that our experience will accurately predict the experience of most other areas.

David Angel  
Deputy District Attorney, Santa Clara, California

**The Potential Cost of Failing to Improve Eyewitness Identification Procedures:**

When considering SB2304, we must be mindful that there is a direct dollars and cents cost involved in relying on outdated and faulty eyewitness identification evidence. In addition to the direct fiscal costs of imprisoning factually innocent persons, especially in for-profit Mainland prisons, it is worth noting that many millions of dollars have been paid out by states across the nation for wrongful convictions stemming from misidentifications. Hawai`i would do well to shield itself from future settlements by implementing modern eyewitness identification procedures. Please see the attached law-enforcement generated materials for additional information.

I hope that this information puts to rest any cost concerns that might be raised regarding legislation. I strongly urge passage of this bill, which will prevent future wrongful convictions and assure the identification of true perpetrators of crime – and therefore prevent future crimes.

Respectfully submitted,

Virginia E. Hench  
Director, Hawai`i Innocence Project

## **SB 2304 – Relating to the Rights of the Accused**

### COMMITTEE ON FINANCE

Rep. Marcus R. Oshiro, Chair

Rep. Marylyn B. Lee, Vice Chair

Tuesday, April 3, 2012, 5:00 PM  
State Capitol, Conference Room 308

Chair Oshiro, Vice Chair Lee and members of the Committee,

My name is Stephanie Keifer and I am a Masters of Social Work student at the University of Hawaii at Manoa. I strongly support SB 2304, which aims to establish procedures for the eyewitness identification process of suspected perpetrators in both live lineups and photo lineups.

Research findings show that eyewitness misidentification plays a role in over 75% of all wrongful convictions. Innocent people are taken away from their significant others, children, jobs, and cut off from society for crimes they did not commit. The negative social stigma faced as a result of the wrongful conviction is nearly impossible for a person to escape. There are countless negative ramifications associated with a conviction; the effects are not limited to social strains. A study conducted by Adrian Grounds in 2004 found that wrongfully convicted individuals suffer from similar psychological difficulties as war veterans. The vast majority of the subjects suffered from Post Traumatic Stress Disorder and most reported depression, anxiety, and other mood disorders. The wrongfully convicted fall victim to the very process that is meant to keep them safe.

If 75% of exonerations are due at least in part to eyewitness misidentification, it is our responsibility as citizens to take the necessary steps to prevent wrongful convictions. The first step is to figure out why eyewitnesses misidentify perpetrators. Environmental factors, anxiety, fear, visual accuracy, and precision of memory all play a part in how well a person is able to recall what a perpetrator looks like. On top of those variable conditions, when the mind has a partial pictorial representation, it fills in the blanks to create a whole picture or memory, whether it accurately represents reality or not. There are a multitude of factors that contribute to the mind's ability to recall a precise memory of what a person looks like for identification purposes. It is imperative that procedures are in place to prevent an investigator from knowingly or unknowingly influencing a person's already fragile memory.

SB 2304 seeks to alleviate eyewitness misidentification of perpetrators by setting a double blind procedure. Doing so will prevent the investigator from showing bias toward any person in the line-up. A meta-analysis conducted by Nancy Steblay found that a significantly higher rate of choosing perpetrators followed biased instructions. Biased instructions include conscious and unconscious indication of the perpetrator's presence in the lineup, which person it may be, and influencing the eyewitness' certainty on their choice. This bill aims to alleviate this serious issue by setting procedures that will prevent investigators' knowledge and partiality from affecting eyewitness' identification of perpetrators and thus decreasing the rate of wrongful convictions. That is why I strongly support this bill.

Thank you for the opportunity to share my testimony.

Criminal Procedure; Eyewitness Identification of Suspects  
SB 2304, SD2, HD1  
Relating to the Rights of the Accused  
Committee on Finance  
Hearing- April 3, 2012  
5:00 pm., State Capitol, Conference Room 308

By  
Rep. Marcus R. Oshiro, Chair  
Rep. Marilyn B. Lee, Vice Chair

Dear Chair Marcus Oshiro and Members of the Committee on Finance:

I am writing in support of S.B. 2304, SD2, HD 1. We have an obligation to continue to improve our procedures related to the rights of the accused. We hold the power in our hands to either continue to place innocent lives in jail or focus on adapting our methods to produce lower rates of wrongly accused individuals.

According to the Innocence Project, "Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing." Unfortunately, eyewitness testimony is often the only link available to identify, charge, and convict a suspect. Research has shown that it is important to keep note of multiple variables that can affect lineup outcomes. Prior research has suggested implementing the following recommendations: informing the eyewitness that the perpetrator might not be present in the lineup; making sure the suspect does not stand out in the lineup; the lineup process should be overseen by someone who does not know who the suspect is; and the witness should be asked their confidence level at the time of identification before other information is released to avoid contamination of judgment (Wells & Seelau, 1995). As mentioned in the bill, pre lineup instructions are crucial to try and avoid miscues in identification. An instruction such as "perpetrator might be in the lineup" can cause eyewitnesses to merely choose the individual in the lineup who they feel comparatively looks most like the perpetrator.

S.B. 2304, SD2, HD 1 will help provide consistent procedures to both county police departments and state investigation agencies. Law enforcement agencies should focus on the system variables that the criminal justice system can control. It is imperative for law enforcement agencies to receive proficient training on both the practices and procedures of eyewitness identification but also on the consequences of noncompliance. In regards to the cost, implementing rigorous training procedures will have the potential to save the state money because it should minimize the number of wrongly accused persons in jail.

I support the passage of this bill.

Sincerely,

Danielle Robinson

**COMMITTEE ON FINANCE**

Rep. Marcus Oshiro, Chair  
Rep. Marilyn Lee, Vice Chair  
Tuesday, April 3, 2012  
5:00 p.m.  
Room 308

**STRONG SUPPORT SB 2304 HD1 - EYEWITNESS ID**

Aloha Chair Oshiro, Vice Chair Lee and Members of the Committee,

I am a concerned citizen who believes that our criminal justice system must be fair and just.

SB 2304 HD1 establishes procedures for eyewitness identification in live lineups and photo lineups of persons who are suspected of committing an offense.

Eyewitnesses are notoriously inaccurate at identifying perpetrators. In fact, studies have shown that eyewitness ID is accurate in only 8% of test cases. False eyewitness identifications are responsible for convicting many innocent people.

In the interests of making our criminal justice system more just, we must correct the extremely flawed process of eyewitness identification. By implementing a more objective process for eyewitness identification, we are enabling the police to become more effective in finding the real criminals. This will also reduce the inexcusable tragedies of wrongful convictions.

Please support SB 2304 HD1.

Mahalo,

Diana Bethel

## FINTestimony

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, April 02, 2012 3:14 PM  
**To:** FINTestimony  
**Cc:** maukalani78@hotmail.com  
**Subject:** Testimony for SB2304 on 4/3/2012 5:00:00 PM

Testimony for FIN 4/3/2012 5:00:00 PM SB2304

Conference room: 308  
Testifier position: Support  
Testifier will be present: No  
Submitted by: elaine funakoshi  
Organization:  
E-mail: [maukalani78@hotmail.com](mailto:maukalani78@hotmail.com)  
Submitted on: 4/2/2012

**Comments:**

Dear Chair Oshiro, Vice Chair Lee, and Members of the Finance Committee:

Support SB2304 SD2 HD1

This bill might have some minor intrinsic problems but the need to make identification of a suspect more definitive is greatly needed, so I commend the committee in hearing this bill and improve our identification process.

I humbly ask you to keep in mind that convicting someone wrongly wastes the lifetime of that person while the dangerous perpetrator can still be roaming the streets looking for another victim.

Thank you for allowing me to submit my testimony.

Mahalo and Aloha,  
elaine funakoshi