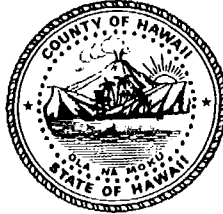


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**OFFICE OF THE PROSECUTING ATTORNEY**

TESTIMONY IN OPPOSITION TO SENATE BILL 2304

A BILL FOR AN ACT RELATING TO RIGHTS OF THE  
ACCUSED

COMMITTEE ON WAYS AND MEANS

Senator David Y. Ige, Chair  
Senator Michelle N. Kidani, Vice Chair

Tuesday, February 28, 2012, 9:00 AM  
State Capitol, Conference Room 211

Senators Ige, Kidani 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".

Currently there is a Hawaii Supreme Court case that will resolve this issue and the court heard oral arguments on the lineup process and jury instructions last week. 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.

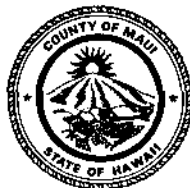
Insofar as S.B. 2304, S.D. 1 proposes to codify a "checklist" of procedures for eyewitness identifications, it seems to create an implied presumption that if any of the checklist items are missing, then the relevant eyewitness identification is somehow substandard or unreliable. Current caselaw on this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



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TESTIMONY

ON

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

February 28, 2012

The Honorable David Y. Ige  
Chair  
The Honorable Michelle N. Kidani  
Vice Chair  
and Members  
Senate Committee on Ways and Means

Chair Ige, Vice Chair Kidani and Members of the Committee:

While the Department of the Prosecuting Attorney, County of Maui, agrees 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. 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 (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. 1. Thank for you the opportunity to comment on this matter

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**THE HONORABLE DAVID Y. IGE, CHAIR**  
**SENATE COMMITTEE ON WAYS AND MEANS**  
**Twenty-sixth State Legislature**  
**Regular Session of 2012**  
**State of Hawai'i**

February 28, 2012

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

Chair Ige, Vice Chair Kidani and members of the Senate Committee on Ways and Means, the Department of the Prosecuting Attorney, City and County of Honolulu, submits the following testimony in opposition to Senate Bill 2304, Senate Draft 1.

The Department agrees that Hawai'i's law enforcement agencies should maintain high standards and protocol for eyewitness identifications. However, it is our understanding that they already do so. It is also our understanding that their protocol is based on both our local caselaw and evidentiary requirements, as well as on national law enforcement developments and discourse; as such, their protocol is constantly evolving. To codify a specific list of procedures would not only be unnecessary and overly restrictive, but would also discount the flexibility needed for law enforcement to adjust to the unique circumstances of each case.

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 caselaw 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 caselaw 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 caselaw 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 "impermissably 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 caselaw, rules and statutes.

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. 1. Thank for you the opportunity to testify on this matter.



Committee: Committee on Ways and Means  
Hearing Date/Time: Tuesday, February 28, 2012, 9:00 a.m.  
Place: Conference Room 211  
Re: Testimony of the ACLU of Hawaii in Support of S.B. 2304, SD1, Relating to Rights of the Accused

Dear Chair Ige and Members of the Committee on Ways and Means:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in support of S.B. 2304, SD1.

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, SD1, 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.

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  
ACLU of Hawaii

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Benjamin N. Cardozo School of Law, Yeshiva University

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

**INNOCENCE PROJECT**

**BEFORE THE HAWAII SENATE COMMITTEE ON WAYS & MEANS**

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

**FEBRUARY 23, 2012**

On behalf of the Innocence Project, thank you for allowing me to submit today before the Hawaii Senate Committee on Ways & Means.

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.

*Mistaken Eyewitness Identifications Harm Crime Victims*

Jennifer Thompson and Penny Beernstein 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 Beernstein 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, 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

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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.

<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.

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 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

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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.

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 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

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

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 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>

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

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

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

*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 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

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<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).

**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 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>

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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).

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



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 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

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

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

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

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; 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.

# COMMUNITY ALLIANCE ON PRISONS

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## COMMITTEE ON WAYS AND MEANS

Sen. David Ige, Chair

Sen. Michelle Kidani, Vice Chair

Tuesday, February 28, 2012

9:00 a.m.

Room 211

## STRONG SUPPORT FOR SB 2304 SD1 - EYEWITNESS ID

Aloha Chair Ige, Vice Chair Kidani and Members of the Committee!

My name is Kat Brady and I am the Coordinator Community Alliance on Prisons, a community initiative promoting smart justice policies for more than a decade. This testimony is respectfully offered, always being mindful that 6,000 Hawai'i individuals are living behind bars, including 1,800 men who are serving their sentences abroad, thousands of miles from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

SB 2304 SD1 establishes procedures for eyewitness identification of persons in live lineups and photo lineups who are suspected of perpetrating an offense

Community Alliance on Prisons is in strong support of this measure that would improve the quality of justice in Hawai'i.

We have met with and communicated with HPD Chief Louis Kealoha specially to talk about reforming eyewitness identification. I assured him that we were pursuing this justice issue because of the fact that 75% of exonerations involved false eyewitness identification and we were researching ways to improve the system. He told me that the police chiefs association was very interested in this issue and was currently working on it. He referred me to HPD's attorney, who I communicated with and even sent her SCR 149 SD1 from last session. I again asserted our interest in this justice issue and our hope that we could work with HPD to make the system better. We thought that the recent exoneration of a man on Maui who spent 20 years in prison for a crime he did not commit that involved false eyewitness identification would spur collaboration. After a few cordial e-mails, there was no more communication.

Recently, there have been a plethora of stories and cases concerning eyewitness identification that have all shown that the mind is not a video camera. Here is a small sampling that you can check out.

### **How Accurate Is Visual Memory?**

[http://www.youtube.com/watch?v=xtDt-THaH\\_o](http://www.youtube.com/watch?v=xtDt-THaH_o)

### **False Memories: The Perils of Eyewitness IDs**

By Jordan Smith

<http://www.thecrimereport.org/news/inside-criminal-justice/2011-06-false-memories-the-perils-of-eyewitness-ids>

Monday, June 13, 2011 01:28

### **How Can Courts Trust Eyewitnesses?**

*How can courts use eyewitness testimony and lineup IDs without overemphasizing their reliability?*

<http://www.nytimes.com/roomfordebate/2011/08/31/can-we-trust-eyewitnessidentifications/in-eyewitness-testimony-memory-fails-us>

August 31, 2011

### **What Did They Really See?**

[http://www.nytimes.com/2011/08/27/opinion/what-did-eyewitnesses-really-see.html?\\_r=1](http://www.nytimes.com/2011/08/27/opinion/what-did-eyewitnesses-really-see.html?_r=1)

Published: August 26, 2011

### **More on the fallibility of eyewitness testimony**

<http://gritsforbreakfast.blogspot.com/2009/12/more-on-fallibility-of-eyewitness.html>

Tuesday, December 01, 2009

### **Eyewitness: How Accurate Is Visual Memory?**

*Lesley Stahl Reports On Flaws In Eyewitness Testimony That Lead To Wrong Convictions*

<http://www.cbsnews.com/stories/2009/03/06/60minutes/main4848039.shtml>

July 12, 2009

### **Eyewitnesses in staged test only 8% accurate**

<http://gritsforbreakfast.blogspot.com/2009/03/eyewitnesses-in-staged-test-only-8.html>

Tuesday, March 10, 2009

### **Study: 88% of Texas police and sheriffs have no written policy on eyewitness ID procedures, even fewer follow best practices**

<http://gritsforbreakfast.blogspot.com/2008/11/study-88-of-texas-police-and-sheriffs.html>

Wednesday, November 19, 2008

### **Eyewitnesses and the 'feeling of knowing'**

<http://gritsforbreakfast.blogspot.com/2008/07/eyewitnesses-and-feeling-of-knowing.html>

Friday, July 25, 2008

### **How much do eyewitnesses really see?**

<http://gritsforbreakfast.blogspot.com/2008/07/how-much-do-eyewitnesses-really-see.html>

Wednesday, July 02, 2008

Community Alliance on Prisons speaks in many college and university classes around Hawai'i nei. During a recent class at Hawai'i Pacific University, the professor and I arranged for a student from another class to enter the room while I was speaking and take a red bag that I had entered with. The room was rectangular with the door at the shorter side of the rectangle. As I was speaking, I reached down to get some material I had brought in my red bag. The bag was missing. I asked, "Did anyone see me walk in with a red bag?" Some students said that they had seen me enter with the bag. I proceeded to look around for it. Someone then said that they saw a woman enter the room, take the bag, and leave. I asked the class if others had witnessed this as well.

Our discussion about what the person looked like was very revealing. The one thing everyone got right was that it was a woman. After that, the descriptions of hair, height, ethnicity, and clothing ranged widely.

Hair: Light brown to dark brown hair; some said she had red highlights  
Longhair to shoulder-length hair  
Straight to wavy air

Height: Short - 5' - 5'7"

Ethnicity: Caucasian to Hapa haole to Asian  
Clothing: Striped to Flowered to Solid blue

Here I must mention that the student who took the bag was not a very good actor because as she was leaving the room, she looked at the professor as if to verify that she grabbed the correct item!

This was just a short example of how wrong people can be when witnessing an event. When one adds the trauma of witnessing or being involved in a criminal event, it is easy to see how wrong we can be in 'remembering' the details.

On a personal note, I was once mugged at gunpoint. When the police asked me what the perpetrator looked like, I realized that he looked like lots of people – brown hair, brown eyes, about 5'7" and I could only really remember that a gun was pointing at me. The officer then asked me what type of gun it was. I told him that we really hadn't discussed the gun, I could only remember that it was black, had a round barrel that was pointing at me. No help in solving that crime!

The National Institute of Justice Journal No. 258<sup>1</sup> stated:

"At its most basic level, a police lineup involves placing a suspect among people not suspected of committing the crime (fillers) and asking the eyewitness if he or she can identify the perpetrator. This can be done using a live lineup of people or, as more commonly done in U.S. police departments, a lineup of photographs. Live lineups typically use five or six people (a suspect plus four or five fillers) and photo lineups six or more photographs.<sup>2</sup>

There are two common types of lineups: simultaneous and sequential. In a simultaneous lineup (used most often in police departments around the country)<sup>3</sup>, the eyewitness views all the people or photos at the same time. In a sequential lineup, people or photographs are presented to the witness one at a time.

Typically, the law enforcement official or lineup administrator knows who the suspect is.<sup>4</sup> Experts suggest that lineup administrators might—whether purposefully or inadvertently—give the witness verbal or nonverbal cues as to the identity of the suspect. For instance, if an eyewitness utters the number of a filler, the lineup administrator may say to the witness, "Take your time . . . Make sure you look at all the photos." Such a statement may effectively lead the witness away from the filler.<sup>5</sup> In a "double-blind" lineup, however, neither the administrator nor the witness knows the identity of the suspect, and so the administrator cannot influence the witness in any way.<sup>6</sup> (See following graphic, "Live Police Lineups: How Do They Work?")

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<sup>1</sup> *Police Lineups: Making Eyewitness Identification More Reliable*, NIJ Journal No. 258 • October 2007, by Beth Schuster, Managing editor of the *NIJ Journal*.

<http://www.ojp.usdoj.gov/nij/journals/258/police-lineups.htm>

<sup>2</sup> Wells, G.L., A. Memon, and S.D. Penrod, "Eyewitness Evidence: Improving Its Probative Value," *Psychological Science in the Public Interest* 7 (2) (November 2006): 45-75.

<sup>3</sup> Wells, G.L., and E. Olson, "Eyewitness Testimony," *Annual Review of Psychology* 54 (2003): 277-295.

<sup>4</sup> Wells, Memon, and Penrod, "Eyewitness Evidence: Improving Its Probative Value," 63.

<sup>5</sup> Gary L. Wells' comments on the Mecklenburg Report (see note 8), available at [www.psychology.iastate.edu/faculty/gwells/Illinois\\_Project\\_Wells\\_comments.pdf](http://www.psychology.iastate.edu/faculty/gwells/Illinois_Project_Wells_comments.pdf) (accessed June 19, 2007).

<sup>6</sup> Mecklenburg, S.H., *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures*, submitted March 17, 2006, available at [www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness%20ID.pdf](http://www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness%20ID.pdf)

In the recent US Supreme Court decision *Perry v. New Hampshire*, dissenting Associate Justice Sotomayor writes:

“...Our due process concern, however, arises not from the act of suggestion, but rather from the corrosive effects of suggestion on the reliability of the resulting identification. By rendering protection contingent on improper police arrangement of the suggestive circumstances, the Court effectively grafts a *mens rea* inquiry onto our rule. The Court’s holding enshrines a murky distinction—between suggestive confrontations intentionally orchestrated by the police and, as here, those inadvertently caused by police actions—that will sow confusion. It ignores our precedents’ acute sensitivity to the hazards of intentional and unintentional suggestion alike and unmoors our rule from the very interest it protects, inviting arbitrary results. And it recasts the driving force of our decisions as an interest in police deterrence, rather than reliability. ...”

...The “driving force” behind *United States v. Wade*, 388 U. S. 218 (1967), *Gilbert v. California*, 388 U. S. 263 (1967), and *Stovall v. Denno*, 388 U. S. 293 (1967), was “the Court’s concern with the problems of eyewitness identification”—specifically, “the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability.” *Manson v. Brathwaite*, 432 U. S. 98, 111–112 (1977). ...”

Using the **Descriptions of Eyewitness Identification Methods** developed by the Law Enforcement Management Institute of Texas (LEMIT)<sup>7</sup>, we can improve the quality of justice in Hawai‘i nei and more adequately protect the safety of the community:

1. **Sequential, Blind Photo Array** – photo arrays where the photographs are presented one at a time to the witness or victim by a person who does not know who the suspect is. This method requires a preparer who may be familiar with the case and an administrator who does not know the identity of the suspect.
2. **Sequential, Blinded Photo Array** – photo arrays where the photographs are presented one at a time to the witness or victim by a person who knows who the suspect is, but who takes steps (putting the photographs in folders and shuffling them) to avoid knowledge of which person the witness or victim is looking at. This method typically involves an administrator who is familiar with the case and knows who the suspect is.
3. **Sequential Live Lineup** – live lineups where the persons in the live lineup are presented one at a time to the witness or victim. This method requires a preparer who may be familiar with the case and an administrator who does not know the identity of the suspect.
4. **Show-up** – procedure where the witness or victim is presented with a single suspect and asked to identify whether that suspect is the perpetrator. This procedure can be carried out by any officer.

A New York Times story published on August 24, 2011 entitled *In New Jersey, Rules Are Changed on Witness IDs* - [http://www.nytimes.com/2011/08/25/nyregion/in-new-jersey-rules-changed-on-witness-ids.html?\\_r=2&hp](http://www.nytimes.com/2011/08/25/nyregion/in-new-jersey-rules-changed-on-witness-ids.html?_r=2&hp)

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<sup>7</sup> Texas Model Policy on Eyewitness Identification, Sam Houston University, 33 pages.  
<http://www.lemitonline.org/publications/ewid.html>



“Study after study revealed a troubling lack of reliability in eyewitness identifications,” Chief Justice Rabner wrote. “From social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real. “Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country.”

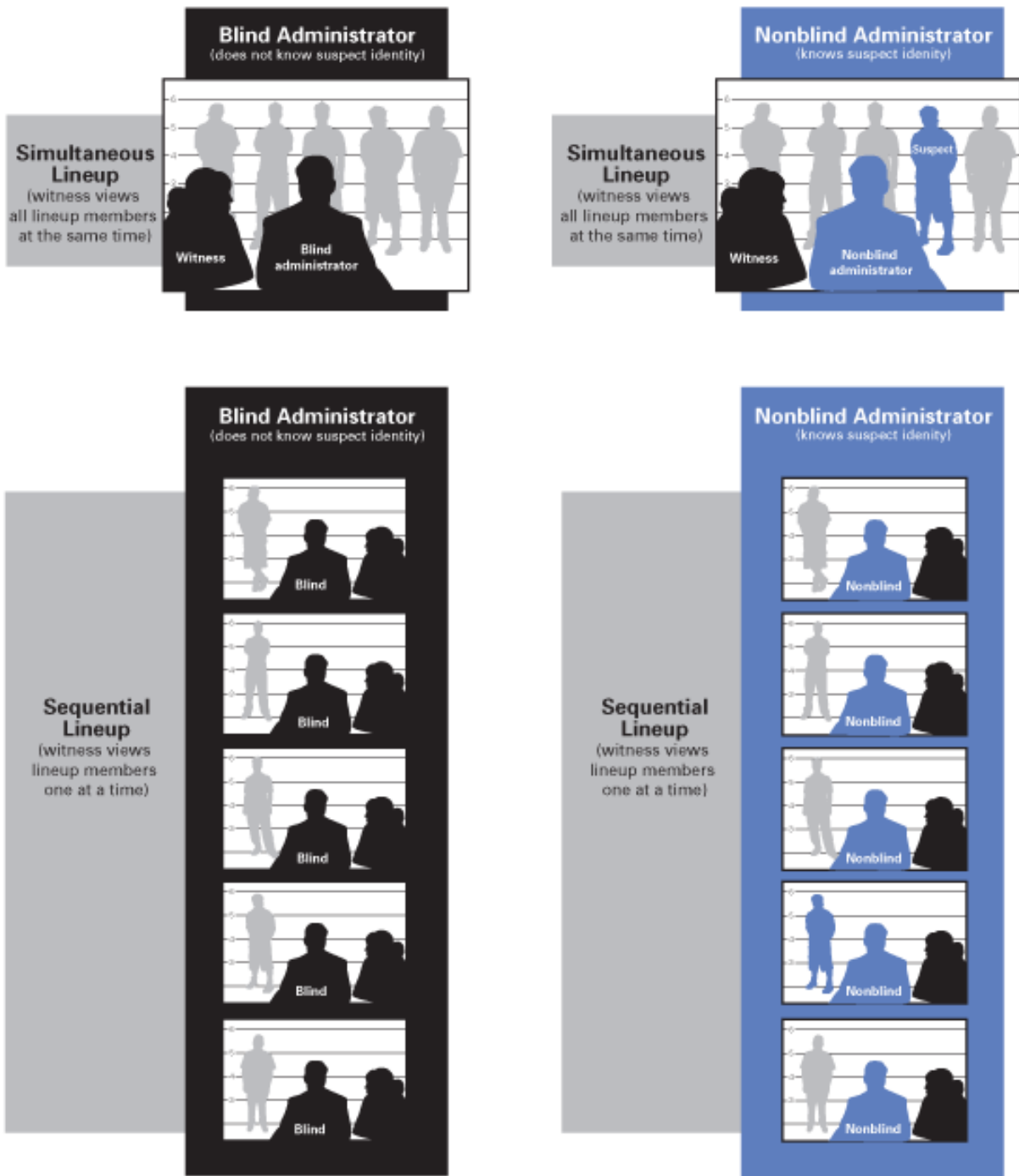
...In its ruling, the court cited findings by Brandon L. Garrett, a law professor at the University of Virginia, who documented in a recent book, “Convicting the Innocent,” **eyewitness misidentifications in 190 of the first 250 cases of DNA exoneration in the country**. Professor Garrett said the decision would provide a model for legislatures and courts around the country that “have been at a loss for what to do” and needed “a structure for how judges should handle identifications in the courtroom.”

After 289 exonerations, 75% were the results of false eyewitness identifications.

Community Alliance on Prisons respectfully asks the committee to pass this important measure to ensure the quality of justice and that the right person is convicted of the crime.

Mahalo for this opportunity to share our research on this important justice issue.

## Live Police Lineups: How Do They Work?\*



\* Most U.S. police departments use photo lineups. The same concepts depicted in this graphic—simultaneous and sequential, blind and nonblind—apply in photo lineups.

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [WAM Testimony](#)  
**Cc:** [pboyle001@hawaii.rr.com](mailto:pboyle001@hawaii.rr.com)  
**Subject:** Testimony for SB2304 on 2/28/2012 9:00:00 AM  
**Date:** Friday, February 24, 2012 8:03:59 AM

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Testimony for WAM 2/28/2012 9:00:00 AM SB2304

Conference room: 211  
Testifier position: Oppose  
Testifier will be present: No  
Submitted by: Peter Boyle  
Organization: Individual  
E-mail: [pboyle001@hawaii.rr.com](mailto:pboyle001@hawaii.rr.com)  
Submitted on: 2/24/2012

Comments:

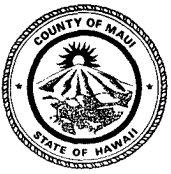
**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [WAM Testimony](#)  
**Cc:** [evernw@aol.com](mailto:evernw@aol.com)  
**Subject:** Testimony for SB2304 on 2/28/2012 9:00:00 AM  
**Date:** Monday, February 27, 2012 2:23:07 AM

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Testimony for WAM 2/28/2012 9:00:00 AM SB2304

Conference room: 211  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Evern Williams  
Organization: Individual  
E-mail: [evernw@aol.com](mailto:evernw@aol.com)  
Submitted on: 2/27/2012

Comments:  
I support SB 2304 SD 1



**ALAN M. ARAKAWA**  
MAYOR

OUR REFERENCE  
YOUR REFERENCE

# **POLICE DEPARTMENT**

## **COUNTY OF MAUI**

**55 MAHALANI STREET**  
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**(808) 244-6400**  
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**GARY A. YABUTA**  
CHIEF OF POLICE

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

February 27, 2012

The Honorable David Y. Ige, Chair  
and Members of the Committee on Ways and Means  
The Senate  
State Capitol  
Honolulu, HI 96813

**RE: SB No. 2304, SD1, RELATING TO RIGHTS OF THE ACCUSED**

Dear Chair Ige and Members of the Committee:

The Maui Police Department reiterates its opposition of SB No. 2304, SD1. This bill is attempting to establish additional procedures for eyewitness identification of persons suspected of perpetrating an offense in line 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 also will 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.

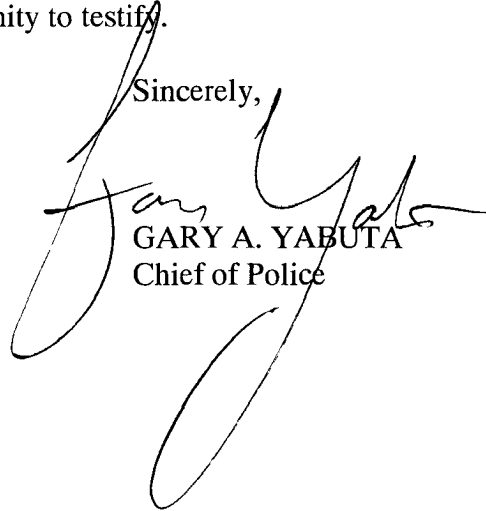
This bill again is not needed as the Maui Police Department is already in compliance with the applicable laws and case laws established for this very situation. We ask that your Committee weigh the issues brought forth through all the testimony you have received and commit to the continued support of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

The Honorable David Y. Ige, Chair  
Committee on Ways and Means  
February 27, 2012  
Page 2

The Maui Police Department asks for your opposition for SB No. 2304, SD1.

Thank you for the opportunity to testify.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Yabuta", is written over the typed name and title. The signature is fluid and cursive, with a large loop at the end of the last name.

GARY A. YABUTA  
Chief of Police