



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

ON THE FOLLOWING MEASURE:

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

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

LATE TESTIMONY

DATE: Tuesday, March 20, 2012

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

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

Chair Keith-Agaran 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 bill's stated purpose is to require eyewitness identification procedures, and that noncompliance may be considered in determining the reliability of eyewitness identification.

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. 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.