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TESTIMONY IN OPPOSITION TO
H.B. No. 274
A BILL FOR AN ACT RELATING TO CRIMINAL PROCEDURE

Justin F. Kollar, Prosecuting Attorney
County of Kauai

House Committee on Judiciary

Tuesday, February 11 2014
2:00 p.m., Room 325

Honorable Chair Rhoads, Vice-Chair Har, and Members of the House
Committee on Judiciary:

The Office of the Prosecuting Attorney, County of Kauai submits the following
testimony in opposition to H.B. 274, Relating to Criminal Procedure.

The purpose of H.B. 274 is to create criminal procedures as it relates to
eyewitness identification.

On a daily basis, law enforcement officers are faced with various circumstances
and are tasked with being able to act appropriately when faced with such
complex matters. We believe that witness credibility should remain in the
hands of the fact finder and that these new requirements are unnecessary and
unduly burdensome.

For these reasons, the Office of the Prosecuting Attorney, County of Kaua'i,
opposes H.B. 274. Thank you very much for the opportunity to provide
testimony on this bill.

Respectfully,

A handwritten signature in black ink, appearing to read "Justin F. Kollar".

Justin F. Kollar
Prosecuting Attorney
County of Kaua'i

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**THE HONORABLE WILL ESPERO, CHAIR
SENATE COMMITTEE ON PUBLIC SAFETY,
INTERGOVERNMENTAL AND MILITARY AFFAIRS**

**THE HONORABLE GLENN WAKAI, CHAIR
SENATE COMMITTEE ON TECHNOLOGY AND THE ARTS**

**Twenty-Seventh State Legislature
Regular Session of 2013
State of Hawai'i**

January 31, 2013

RE: S.B. 67; RELATING TO CRIMINAL PROCEDURE.

Chair Espero, Chair Wakai, Vice-Chair Baker, Vice-Chair Nishihara, members of the Senate Committee on Public Safety, Intergovernmental and Military Affairs, and members of the Senate Committee on Technology and the Arts, the Department of the Prosecuting Attorney, City and County of Honolulu, submits the following testimony in opposition to Senate Bill 67.

While the Department agrees that Hawai'i's law enforcement agencies must maintain high standards and protocol for eyewitness identifications, it is also our understanding that they already do so. Moreover, it is our understanding that their protocol is based on local caselaw and evidentiary requirements, as well as on national law enforcement developments and discourse; thus, this protocol is constantly evolving. To codify a specific list of procedures would be overly restrictive, 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.

Insofar as S.B. 67, proposes to codify "checklists" of procedures for eyewitness identifications, it also creates an implication that if any of the checklist items are missing, then the eyewitness identification is somehow substandard or unreliable. It is this Department's understanding that Hawai'i's police officers are continuously trained to conduct eyewitness identifications in accordance with the latest developments in local caselaw, and are thus aware of what our courts and juries deem (in)appropriate or (un)reliable evidence. This gives them the

guidance and flexibility to adjust procedures, and act appropriately under the broad spectrum of circumstances that they encounter from day to day.

Once a case proceeds to trial, there are numerous legal safeguards and procedures already built into our trial process, such that juries are made well-aware that eyewitness identifications are not determinative. If the Legislature were to codify and impose a specific list of procedures for conducting eyewitness identifications, 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 on a totality of circumstances, eyewitness identification procedures must be allowed to develop administratively, based on well-established and still-evolving caselaw developed by our courts and juries.

In addition to the foregoing, it is our understanding that the Hawaii Pattern Jury Instructions were updated very recently, to address—via jury instructions—the very issues that S.B. 67 are intended to address. For all of these reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes S.B. 67. Thank for you the opportunity to testify on this matter.

COMMUNITY ALLIANCE ON PRISONS

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COMMITTEE ON JUDICIARY

Rep. Karl Rhoads, Chair

Rep. Sharon Har, Vice Chair

Tuesday, February 11, 2014

2:00 p.m.

Room 325

SUPPORT - HB 274 - Criminal Procedure/Eyewitness Identification

Aloha Chair Rhoads, Vice Chair Har and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies for more than a decade. This testimony is respectfully offered on behalf of the 5,800 Hawai'i individuals living behind bars, always mindful that approximately 1,500 Hawai'i individuals are serving their sentences abroad, thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

In the interest of justice, Community Alliance on Prisons is in support of this measure. We never forget that Alvin Jardine of Maui was wrongfully imprisoned based on false eyewitness id for more than twenty years for a crime he did not commit.

The International Association of Chiefs of Police (IACP) issued a federally-funded report¹, announced that "law enforcement can take a lead role in preventing and reducing wrongful convictions by eliminating the arrest of the wrong person." The report includes 30 recommendations for dealing with the problem.

A "culture of openness to new information from reliable sources" is a key to reducing the problem of wrongful convictions in American criminal justice, the IACP said today.²

The report covers a number of familiar culprits, including biased investigators, witness misidentifications, faulty forensic science, false confessions, and the failure of authorities to consider evidence that could clear suspects of charges.

¹ *National Summit On Wrongful Convictions: Building a Systemic Approach to Prevent Wrongful Convictions*, the International Association of Chiefs of Police/U.S. Department of Justice, Office of Justice Programs Wrongful Convictions Summit, August 2013.

http://www.theiacp.org/portals/0/documents/pdfs/Wrongful_Convictions_Summit_Report_WEB.pdf

² *IACP: Police Can Take Lead Role in Preventing Wrongful Convictions*, By Ted Gest, December 3, 2013

<http://www.thecrimereport.org/news/inside-criminal-justice/2013-11-wrongful-conviction-report>

A leading cause of wrongful convictions, the report said, is "tunnel vision" by investigators under pressure to solve a major case, who may jump to conclusions about the guilty parties and not seek other suspects or view their initial evidence with enough skepticism.

This flaw can be exacerbated by an organizational culture in policing that typically puts one officer or a small group of investigators in charge of a case and discourages colleagues or supervisors from interfering, the IACP said. The report concluded that such "cultural challenges create a climate that is ripe for errors to occur and for a wrongful conviction to take place."

The report concludes:

"Wrongful arrests, prosecutions, and convictions damage everyone. In good faith, the justice system, beginning with law enforcement, sets out to conduct investigations, prosecute and convict suspects, and ensure that the right offender is held accountable for the crime. Most of the time, this desired outcome is achieved. However, getting it wrong, even once, is once too often, given the serious consequences.

One misstep can often lead to a series of cascading missteps, leading to wrongful arrest, prosecution, and conviction. Summit participants resoundingly believe that missteps can be prevented through better communication, training, protocols, supervision, assessment and review, and a culture of openness to new information. Law enforcement must lead that effort and is in the best position to do so at the front-end of the justice process.

Law enforcement and prosecutors should focus on rightful arrests and support enhancing and continually evaluating the investigative process. They should simultaneously avoid external pressure to make quick arrests and referrals for prosecution decisions. Policy changes to promote and reinforce the focus on rightful arrest should be solidified and implemented as soon as possible. All steps in this direction can have a significant and positive impact on all stakeholders when rightful arrests and convictions occur. "

The IACP's role in issuing the report is significant partly because many of the 1,135 exonerations in the U.S. recorded by the National Registry of Exonerations from 1989 to 2012 have been brought to public attention by private organizations such as The Innocence Project, and in large part blamed on prosecutorial ineptness or misconduct.

International Association of Chiefs of Police (IACP) and National Institute of Justice (NIJ) are united in the idea that one wrongful conviction is too many.

2013 was a record-breaking year for exonerations in the United States. The National Registry of Exonerations has recorded 87 exonerations that occurred in 2013. The next highest total was in 2009, with 83 known exonerations, and the difference is bound to grow as we learn about additional exonerations that occurred in 2013.³

³ EXONERATIONS IN 2013, *The National Registry of Exonerations*, February 4, 2014.

http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf

On February 5, 2014, NPR aired an interview with Craig Watkins⁴ who has been a trailblazer in re-examining questionable convictions. And what's surprising is that he's a prosecutor. He's the district attorney of Dallas County. When he took office, he created a **conviction integrity office** in 2007, the first of its kind in the country. His office has had 33 exonerations. Last year Texas led all states in exonerations with 13 from 2013.

When asked what his office has learned since the establishment of the conviction integrity office, he replied that they learned that some of the techniques used in investigating cases and even pursuing prosecutions were flawed.

"We've learned that of the exonerations that we've had here, 90 percent of the individuals were identified incorrectly. So we decided to go to the double-blind system⁵ and convince the different municipalities within Dallas County to take a look at how they present potential assailants to victims and witnesses.

We've also learned that storing biological evidence needs to be done in such a way that at some point it could be tested in the future."

Community Alliance on Prisons believes that there are five things necessary for justice:

1. Double blind procedures: the officer administering the lineup test should not know who the suspect is or whether the suspect is actually in the lineup.
2. Also, nobody who knows who the suspect is or whether the suspect is in the photo lineup should be in the room to avoid inadvertent verbal or body language cues.
3. Sequential presentation as opposed to side-by-side "multiple choice" 6-packs.
4. The "fillers" should be chosen to match the witness' original description or composite, not to match the suspect.
5. Confidence statements provided by the eyewitness immediately upon id and before any feedback is provided.

A 2012 article discussed a roundtable discussion on eyewitness id...

"...It seems that each week brings news of another exoneration or wrongful conviction, a frightening trend TEXAS MONTHLY addressed in its June 2012 issue with a robust roundtable discussion featuring two prosecutors (Craig Watkins and Kelly Siegler), a chief of police (Art Acevedo) a state Senator (Rodney Ellis), a judge on the state's highest criminal court (Barbara Hervey), and a man who spent twelve years on death row for a murder he didn't commit (Anthony Graves).

⁴ *A Surprising Crusader Against Wrongful Convictions*, NPR, February 05, 2014 4:00 PM.
<http://www.npr.org/2014/02/05/272100036/an-surprising-crusader-against-wrongful-convictions>
<http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=272100036&m=272100037>

⁵ The double-blind/sequential protocol is also consistent with IACP's National Policy Center's Eyewitness Identification Model Policy. See Footnote 2, page 14.

Sparks flew, unusual alliances were formed, and panelists talked about why the wrong people get nabbed, prosecuted, and sent away. Acevedo, who has been chief of the Austin Police Department since 2007, even admitted, *"We're fallible. We know there's something called noble cause corruption. Human nature being what it is, if... the investigator knows who the 'bad guy' is and he's doing one of these 'wink-wink-nudge-nudge' things—you want to prevent those situations."*

In other words, **the state wants to prevent situations where police unwittingly prey on the dodgy memories of traumatized witnesses, all in the cause of catching vicious killers.** Acevedo is talking about the police conducting eyewitness lineups, and APD now requires double-blind lineups, where the investigator cannot know the identity of the purported "bad guy" – such as Carlos DeLuna. **Ultimately, the roundtable members conclude, eyewitness IDs are not one hundred percent perfect. "Eyewitness IDs are leads," says Judge Hervey. "They're just leads.""**⁶

Community Alliance on Prisons is happy to see the IACP and police departments across the United States embrace reform in their eyewitness id procedures. We hope that Hawai'i adopts uniform eyewitness id policies and procedures statewide in the interest of justice. Our people deserve no less.

Mahalo for this opportunity to testify.

⁶ *The Problem With Eyewitness Testimony*, by Michael Hall, May 23 2012, 8:25 AM.

VIRGINIA E. HENCH,
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STRONG SUPPORT FOR HB 274 - RELATING TO CRIMINAL PROCEDURE
[EYEWITNESS IDENTIFICATION REFORM]

COMMITTEE ON JUDICIARY

Rep. Karl Rhoads, Chair
Rep. Sharon E. Har, Vice-Chair

Hearing Date: Tuesday, February 11, 2014
2:00 p.m., Room 325

Honorable Chair Rhoads, Honorable Vice-Chair Har, and Honorable Members of the House Judiciary Committee:

HB 274 establishes procedures for eyewitness identification of persons in live lineups and photo lineups who are suspected of perpetrating an offense. The Hawai`i Innocence Project strongly supports this measure and strongly requests that this committee PASS this measure.

Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in 75% of the 289 convictions overturned through DNA testing to date. Advances in research have led numerous police departments to abandon outdated identification procedures that greatly increase the likelihood of a witness identifying the wrong person. The Hawai`i Innocence Project strongly urges that Hawai`i adopt this measure implementing best practices to reduce misidentification and conviction of innocent persons.

Alvin Jardine spent nearly 20 years in prison for a 1990 burglary and rape which he did not commit. Although he always maintained his innocence, Jardine was convicted in 1992 after two previous trials ended in hung juries. His convictions were finally tossed in January, 2011,

after DNA tests revealed that DNA evidence from the crime scene came from an unknown man – and not Jardine.

Witness memory is fragile, and easily contaminated. Like any other crime scene evidence; identifications based on witness memory must be collected according to best practices, preserved carefully and retrieved methodically, or the memory can be contaminated. Once contaminated, the true memories are over-written, and can no longer be retrieved.

The problem with traditional police identification procedures is that witnesses are easily influenced - even unintentionally - by the officers conducting the lineup. Witnesses are naturally eager to identify the perpetrator, and the witness will unconsciously pick up on verbal and non-verbal cues from the officer administering the lineup as to which is the suspect, even when the officer consciously tries to avoid influencing the identification. By adopting the no-cost and low-cost best practices set forth in HB 274, Hawai'i can improve the accuracy of identifications leading to criminal convictions without impairing accurate identifications.

Through decades of social science research by such leading researchers as Dr. Elizabeth Loftis, and Dr. Gary Wells, scientists now have a much better understanding of how memory and identification work. From this knowledge the best practices for identification procedures have evolved, leaving behind some of the misconceptions of the past.

Decades of strong social science research have revealed that the human mind is not like a video recorder; our memories are not recorded exactly as we see them, and the process of recalling them is not like playing back a recording. It should be noted that while best practices call for a benchmark certainty statement at the time of the identification, a high level of certainty does not correlate with accuracy. Contrary to popular belief, a witness who is absolutely certain is no more likely to be accurate than a witness who is less certain. Rather, the benchmark is there as a

guide to the investigating officers.

The reforms set forth in SB2304 - SB2 are not costly, and many are free of any cost. For example, it is now known that the risk of misidentification is sharply reduced if the police officer administering a photo or live lineup is not aware of who the suspect is.

The witness viewing a lineup should be told that the perpetrator might not be in the lineup, that the officer administering the lineup does not know which person is the suspect, and that the investigation will continue regardless of the lineup result.

No feedback should be given to the witness viewing a lineup. Further, if more than one photo array or physical lineup is done, the person suspected by the police should not be the only one whose likeness is repeated.

There is a wealth of material on implementation, from the smallest to the largest departments, because these procedural improvements have already been implemented in a wide array of large and small police departments. Where implemented, these changes have proven successful. The state of New Jersey, large cities such as Minneapolis, MN and small towns such as Northampton, MA, and others have implemented these practices and have found that they have improved the accuracy of their eyewitness identifications, thus strengthening prosecutions and reducing the likelihood of convicting the innocent.

Numerous other jurisdictions, such as the states of North Carolina and Illinois, as well as Boston, Massachusetts, and other cities, are now beginning to implement these procedures. Law enforcement in these state, though initially skeptical, have come to embrace them after seeing how effective they are. I have attached some of the relevant material for your review.

Wrongful identifications hurt everyone except the actual perpetrator. When the wrong person is convicted of a crime, the victim and public are not protected, the innocent person

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PUBLIC LAW, POLICY, AND ETHICS JOURNAL

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POLICE IDENTIFICATION PROCEDURES: A TIME FOR CHANGE

*Lt. Kenneth Patenaude**

In the spring of 2004, I received a phone call from a representative of the New York Innocence Project, a group of lawyers and law students dedicated to helping those unjustly convicted in criminal court. As Detective Bureau Commander for the Northampton Police Department in Massachusetts, this would seem to be an unusual or surprising phone call—considering it was coming from the “dark side,” a.k.a., defense counsel. After brief introductions, I was asked to prepare a short presentation about my experiences with the U.S. Department of Justice, National Institute of Justice (NIJ), Technical Working Group for Eyewitness Evidence (TWG),¹ and how those experiences led to the incorporation of new eyewitness evidence procedures within the Northampton Police Department.

In 1998, I was invited by the Department of Justice to work with a small group of criminal justice professionals to develop improved procedures for the collection and handling of eyewitness evidence. The goal

* Detective/Lieutenant, Northampton Police Department, 29 Center St., Northampton, MA 01060. A twenty-eight year veteran and departmental hostage negotiator with over twenty years of supervisory experience. He has sixteen years of detective bureau experience and has been commander for the past thirteen years. Lt. Patenaude holds a Master's Degree in Criminal Justice Administration.

Lt. Patenaude has been recognized for his outstanding service as a member of the National Institute for Justice, Technical Working Group for Eyewitness Evidence. He also played a key role in developing *Eyewitness Evidence: A Guide for Law Enforcement*, a guide on how to conduct criminal investigation interviews, showups, and lineups. Lt. Patenaude is a published author and co-author of the eyewitness evidence instructional guide and training manual, as well as an eyewitness evidence article, and various departmental policies for the Northampton Police Department.

Lt. Patenaude has lectured for numerous criminal justice agencies and organizations across the country. He has been invited to speak for a number of District Attorney's offices, law enforcement agencies, as well as the Northampton Criminal Public Defense Attorney's office. Lecture topics have included domestic violence, crime scene protection, Massachusetts Firearms Laws and most extensively on eyewitness evidence procedures.

¹ The Technical Working Group (TWG) for Eyewitness Evidence was established in 1998 by the U.S. Department of Justice in Washington, D.C., to develop best practices for handling and collecting eyewitness evidence. TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 3 (1999) [hereinafter NIJ GUIDE].

was to generate more accurate and reliable eyewitness evidence for evaluation by the criminal justice community. The project was inspired by recent cases in which DNA evidence was used to overturn convictions that were based primarily on eyewitness evidence. The project culminated in the NIJ publication, *Eyewitness Evidence: A Guide for Law Enforcement*² (*NIJ Guide*) and its accompanying training manual, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement*³ (*NIJ Trainer's Manual*).

Throughout my career as an investigator, I treated eyewitness accounts with care, knowing that witnesses make mistakes. After my Department of Justice experience, I had a much better understanding of how and why witnesses' details could be distorted or in some cases, wrong. These Department of Justice publications offer the law enforcement community a written set of procedures that give some structure and consistency to the process of collecting and handling eyewitness evidence.⁴ The outcome, a blend of social sciences, courtroom tenets, and investigative practices and experiences, is a workable set of procedures to reduce the possibility that misidentifications will lead to wrongful convictions.

For the past several years, I have been actively involved with training investigators, attorneys and judges in the best practices for collecting and handling eyewitness evidence. Of the police officers I trained, the vast majority said that they had never received formal training in eyewitness identification procedures, and that their departments do not have eyewitness evidence policies. Most investigators indicated that they learned their identification procedures from their predecessors—procedures which were based on longstanding practice. The lawyers attending these training programs were also unaware of any police procedures related to the handling of eyewitness evidence.

I strongly suggest to the law enforcement community that agencies adopt policies and training programs that will provide police with the proper procedures for the collection and handling of eyewitness evidence. The policy and training program should cover topics such as:

² *Id.*

³ TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, NAT'L INST. OF JUSTICE, *EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT* (2003) [hereinafter *NIJ TRAINER'S MANUAL*].

⁴ *See id.* at v; *NIJ GUIDE*, *supra* note 1, at iii (proposing a set of common procedures that, though not universally applicable, may increase the accuracy and reliability of witness identification in many cases).

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understanding human memory, the use of cognitive interviewing techniques, and the best practices for administering photo arrays and live lineups.

Law enforcement officials should know that more than 170 individuals have been exonerated since the inception of DNA technology.⁵ The most important question we need to ask ourselves is: how were over 170 *innocent* individuals wrongfully convicted? There are many factors involved in these wrongful convictions, such as bad science, incompetent defense attorneys, prosecutorial malfeasance, and police misconduct—to name a few. The most common factor is eyewitness error by confident but mistaken eyewitnesses.⁶ Eyewitnesses have a great deal of influence in criminal investigations and even greater influence with juries. The investigators and police administrators who are responsible for conducting criminal investigations, upon looking at these exoneration cases and well-established social science research, must realize that eyewitness testimony is not infallible. The *NIJ Guide* offers practical improvements to current police practices that “can decrease the number of wrongful identifications and should help to ensure that reliable eyewitness evidence is given the weight it deserves in legal proceedings.”⁷

I began the process of educating members of the Northampton Police Department at the ground level, by writing a policy dealing specifically with the handling and collection of eyewitness evidence. Using the newly published *NIJ Guide*, I developed a training program to introduce the new policy. This policy replaced the longstanding practices for collecting eyewitness evidence, which were never put in writing. The training program highlighted the changes in our procedures, and provided explanations and reading materials in support of the mandated changes. As part of this training, officers were given a copy of the *NIJ Guide*,⁸ a published article authored by a number of social science researchers,⁹ as well as the U.S. Department of Justice publication, *Convicted by Juries, Exonerated by Science*, which highlights the first twenty-

⁵ The Innocence Project: Mistaken I.D., <http://www.innocenceproject.com/causes/mistakenid.php> (last visited Feb. 20, 2006).

⁶ *Id.*; see also Gary L. Wells et al., *From the Lab to the Police Station*, 55 AM. PSYCHOLOGIST 581, 586 (2000).

⁷ NIJ GUIDE, *supra* note 1, at 2.

⁸ *Id.*

⁹ Wells, *supra* note 6.

eight exoneration cases.¹⁰ The publications and training emphasized the need for change, and provided officers with information about the numerous factors that contributed to the many mistaken, but confident, eyewitness accounts. In particular, the training program highlighted the fact that eyewitness testimony is not infallible.

As with most new policies, the administration monitored implementation of the new procedures. After a year, I surveyed the investigators who used the new eyewitness procedures on many occasions. They were more comfortable using the new sequential identification procedures, and more confident with the results obtained under these procedures than they had been under the old policy. We concluded that simultaneous procedures, although accepted for decades by the courts, could contribute to misidentifications due to the influence of relative judgment processes—which may occur when a witness compares lineup subjects to one another instead of relying on his or her memory of the perpetrator. As a result of the investigators' comfort and confidence with the sequential identification process, the department changed its policy to mandate that only sequential procedures are used in future identification processes.

Under the new policy, the department strongly preferred that the double-blind administration procedure be applied by our officers. In 2003, we made an additional modification to the policy, by making the blind administration of photo arrays the mandatory, rather than preferred, method of presentation. Although there was a concern that costs and personnel shortages would prevent smaller departments from effectively utilizing the blind administrator, these problems never materialized for the Northampton Police Department. We are very comfortable with our current policy, and feel that we have made every attempt to reduce the chance that misidentification will lead to wrongful convictions in our jurisdiction.

It is essential that law enforcement investigators and administrators change the way that eyewitness evidence is collected and preserved. There are 170 compelling reasons to change the predominant practices for handling eyewitness evidence. There are over 170 people who were fortunate enough to be exonerated by evidence that was collected at the scene of their alleged crime. But how many other innocent people are still in prison or jail without the possibility of exoneration based on

¹⁰ EDWARD CONNORS ET AL., *U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE* (1996).

DNA or other evidence? Police administrators must have the fortitude and commitment to develop the best practices for collecting and preserving eyewitness evidence. These changes begin at the recruit level with proper and consistent training.

To bring structure and consistency to an antiquated system, law enforcement agencies that do not currently have an eyewitness identification policy should institute one. This policy should be based on social science research, the *NIJ Guide*, and sound police practices.

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Cognitive science and the law

Thomas A. Busey¹ and Geoffrey R. Loftus²

¹ Department of Psychology, Indiana University, Bloomington, IN 47405, USA

² Department of Psychology, University of Washington, Seattle, WA 98195, USA

Numerous innocent people have been sent to jail based directly or indirectly on normal, but flawed, human perception, memory and decision making. Current cognitive-science research addresses the issues that are directly relevant to the connection between normal cognitive functioning and such judicial errors, and suggests means by which the false-conviction rate could be reduced. Here, we illustrate how this can be achieved by reviewing recent work in two related areas: eyewitness testimony and fingerprint analysis. We articulate problems in these areas with reference to specific legal cases and demonstrate how recent findings can be used to address them. We also discuss how researchers can translate their conclusions into language and ideas that can influence and improve the legal system.

Introduction

Certain types of forensic evidence are significantly hampered by normal human fallibility. Generally, this occurs when one instance of a physical stimulus (e.g. the remembered face of a criminal or a fingerprint lifted from a crime scene) must be compared with a putative second instance of the same stimulus (e.g. a suspect in a lineup or a suspect's fingerprint). The problem is that one or both instances of the stimulus can be corrupted by perceptual, memorial or judgmental noise. Thus, the process of making an optimal matching decision is a complex perceptual and cognitive skill, and recent court decisions have highlighted the vulnerability of this type of 'comparative judgment'. Courts do not usually exclude testimony based on comparative judgments, but they recognize that it is subject to human fallibility and that cognitive science can improve elements of this comparison process.

Here, we discuss issues that originate in ongoing court challenges but have made their way into the laboratory in the form of forensically relevant scientific questions. We ground our discussion in a consideration of eyewitness testimony and latent-fingerprint evidence, which we address from the perspectives of their forensic relevance and how cognitive scientists can convey their relevance to judges and juries.

Eyewitness testimony

Box 1 describes a legal case in which eyewitness testimony was pivotal. This case illustrates several topics in perception and memory, which are discussed below.

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Viewing conditions, post-event information and witness confidence

The Alaska case parallels laboratory situations in which an initially poor memory is supplemented by suggestive, but potentially false, post-event information [1–5], thereby leading to an eventual memory which, although potentially strong and confidence evoking, is incorrect in important respects. Typically, this kind of case includes two elements:

- (i) A witness views a crime being committed under suboptimal perceptual circumstances (e.g. poor lighting, a lengthy distance or intoxication).
- (ii) The witness is exposed to suggestive post-event information (e.g. seeing and identifying a suspect in a biased identification procedure).

It is reasonable to expect that, when these elements are present, the witness uses post-event information to supplement and reconstruct his or her memory of the crime so that the originally poor (or nonexistent) memory of the perpetrator is replaced with a stronger representation of the suspect. Later, when testifying at the trial, the witness believes that they are basing their confident identification of the defendant on a memory that was formed at the time of the original event, whereas they are actually basing it on their reconstructed memory that was formed at the time of the identification procedure.

Identification procedures as forms of post-event information

There are many forms of suggestive post-event information to which a witness can be exposed, the most common of which is an identification procedure. The nature of identification procedures has been widely discussed in the psychological literature, most extensively by Gary Wells and colleagues [6–10].

The majority of real-life identification procedures are showup procedures and lineup procedures. In a showup procedure, a witness is presented with a single suspect and asked, 'Is this the person you saw commit the crime?'. In a lineup procedure, the suspect and five 'fillers' (i.e. individuals who fit the perpetrator's description but who have no association with the crime) are shown to the witness, who must decide which, if any, of the lineup members is the perpetrator.

A key challenge is to administer an identification procedure that is unbiased (i.e. that does not entail an unreasonably high probability of a witness choosing an innocent suspect). The consequences of such bias are two-fold. Firstly, a high probability of an innocent suspect being identified is inimical to judicial philosophy. Secondly, a more insidious but equally harmful consequence is that the

Box 1. Eyewitness testimony: a murder in Alaska

On 10 October 1997, a group of young men committed several acts of mayhem in Fairbanks, Alaska [37]. Their rampage, which culminated in the murder of a teenage boy, eventually resulted in the arrests of four suspects, two of whom were tried for the crimes. The centerpiece of the case for the prosecution was the testimony of Arlo Olson who, while drunk, had seen the perpetrators at night and from a distance of 450 ft. Despite these perceptual disadvantages, Mr Olson picked the defendants from photographic lineups. At the trial, almost two years later, Mr Olson pointed to the two defendants and testified, with a good deal of confidence and drama, that they were the people he had seen commit the crime.

The defense attorney called Geoffrey Loftus (co-author of this paper) to testify as an expert witness at the trial. His task was to educate the jury about research in cognition that related to three issues: perceptual problems attendant to Mr Olson's original ability to perceive and memorize the perpetrators; why Mr Olson might have selected the defendants from lineups despite these problems; and why Mr Olson might have had a clear and confidence-evoking, yet potentially false, memory of the defendants as the people he had seen commit the crime.

appearance of an innocent suspect who is identified in a biased identification procedure can act as a source of post-event information: an originally hazy memory of the perpetrator is replaced by a stronger memory of the suspect. This reconstructed memory can then form the basis for a subsequent, inappropriately high-confidence identification by the witness during the trial.

Showup procedures. A showup procedure is, in memory-research parlance, an old–new recognition procedure, the results of which can be described using two measures: memory strength (e.g. d') and bias (e.g. β). In a real-life showup procedure, unlike its laboratory analogue, there is only a single 'trial'. Because there is no way of knowing whether an 'old' response (e.g. 'That is the guy!') is a hit or a false alarm, there is no way of distinguishing strength, which is of primary importance, from bias, which matters little. This difficulty can be conveyed by an expert to a jury, as follows.

An unbiased lineup procedure is truly a test of the match between the suspect's appearance and the witness's memory of the perpetrator: an innocent suspect is falsely identified only if he matches the witness's memory of the perpetrator better than do the five fillers. By contrast, in a showup procedure, a positive identification of the suspect probably depends, at least in part, on the match between the suspect's appearance and the witness's memory of the perpetrator, but it almost certainly depends on other irrelevant bias factors too, including the witness's expectations that the suspect is the perpetrator, the pressure on the police to make a positive identification and the witness's desire to have someone arrested. In short, one cannot assess, in a principled manner, how much credence to put on a witness's positive identification in a showup procedure.

Lineup procedures. An unbiased lineup procedure is a bona fide measure of the match between the suspect's appearance and the witness's memory of the perpetrator. The key term here is 'unbiased', which refers to a lineup in which an innocent suspect has no greater chance of being identified by the witness than do the fillers. However, there are many ways in which lineups can be biased:

- (i) *Physical bias (fillers not fitting the witness's description).* The central challenge for a police officer who is constructing a lineup is how to select the fillers. Wells *et al.* [10] point out that the key rule is that the fillers should fit the witness's description of the perpetrator. For example, if the witness has described the perpetrator as 'a white male with a gap in his front teeth', then all the fillers should fit this description. If any do not, then the witness can rule them out immediately and the 'functional size' of the lineup is reduced from 6 to $6 - n$ where 'n' is the number of fillers that fail to fit the witness's description.
- (ii) *Physical bias (oddball).* A lineup, particularly a photo lineup, can also be biased if the suspect's picture is physically different from the fillers' [11]. For example, if the suspect's picture is notably larger or smaller than the fillers' or set against a different background, the witness can infer that the oddball is the suspect. Sometimes the oddball effect is obvious, but it can also be subtle (Box 2).
- (iii) *Lack of double-blind procedures.* The logic of double-blind procedures, which are obligatory in many kinds of scientific research, carries over to lineup procedures. The rule is that the police officer who administers the lineup cannot know who the suspect is. Application of this rule (which, in practice, is almost never followed) would exclude the possibility of the officer providing information to the witness about the suspect. It would be churlish to suggest that police officers would do this obviously and/or deliberately, but it can easily be done subtly and/or inadvertently. Geoffrey Loftus had the rare opportunity to view a videotape of two witnesses being shown a photo lineup. After inspecting the six photos, the first witness began to focus on one of the fillers. The police officer, betraying some exasperation, responded, 'Is there anyone else you think it might be?'. After inspecting the six photos, the second witness began to focus on the suspect. The police officer responded, 'Just sign your name across his picture' (which is the standard means by which a witness indicates identification of a lineup member). Such a discrepancy could not have occurred if the officer had been blind to the suspect's identity.
- (iv) *Unconscious transference.* Unconscious transference [12] refers to a situation in which a witness has had the opportunity to view the suspect at some time other than at the crime (e.g. the witness and the suspect live in the same neighborhood). By virtue of such opportunity, the suspect's appearance could be familiar to the witness. By contrast, other lineup members would not look familiar to the witness. Therefore, an identification of the suspect by the witness might be based on this differential degree of familiarity.

Lineups versus showups. Lindsay and colleagues [13] have attempted to compare showup and lineup procedures with respect to error rates. Although the results are complex, the basic conclusions are (i) when the suspect does not resemble the perpetrator, there is a small overall accuracy edge for showup procedures, but (ii) when an innocent

Box 2. An oddball in the lineup

In most cases, an 'oddball' suspect picture is obvious (e.g. the suspect is wearing street clothes, whereas all fillers are wearing prison garb). The photo lineup in Figure 1 illustrates a subtler bias, perhaps involving expression. One of the lineup members presented here was accused of committing a heinous crime in Tacoma, Washington [38]. The Pierce County Public Defender asked Loftus to assess the fairness of the

lineup. To implement the appropriate double-blind procedures, Loftus sent the lineup to Thomas Busey without telling him who the suspect was. Busey showed the lineup to a sample of people in Indiana, telling them only that one of the lineup members was suspected of a crime and asking them to guess the suspect. The suspect was chosen 26% of the time, which is considerably above the chance rate of 17%*.



Figure 1. Lineup used in Ref. [38], which demonstrates the oddball bias.

suspect resembles the perpetrator, false identifications are more likely to occur in showup procedures. However, in a real-life showup procedure, unlike in a laboratory experiment, one can never separate the degree to which a positive identification is made on the basis of memory strength versus on the basis of bias factors, such as peer pressure and expectations.

Research on perceptual factors

Many factors influence the ability of an eyewitness to perceive and encode the perpetrator's appearance (e.g. viewing time, lighting conditions and degree of focused attention). These factors divide into those from which precise conclusions can be made, at least in principle, and those from which only statistical conclusions can be made. One factor from which only statistical conclusions can be drawn is exemplified by the cross-racial effect. Numerous studies have shown that, on average, people are less able to identify members of other races than members of their own race [14]. However, this statistical finding does not enable one to conclude that, say, an African-American witness who has viewed a crime committed by a Caucasian perpetrator has a precisely identifiable constraint on the information that he or she can encode about the perpetrator's appearance (reviewed in Refs [14,15]).

An example of a factor from which precise conclusions can be made is distance. The relevance of distance in the Alaska murder case (the witness viewed the perpetrator from a distance of 450 ft) triggered a research project [16], which aimed (i) to quantify the effect of distance on limitations of perceptual information, and (ii) to use

the results as a tool for creating demonstrations of such limitations for lawyers and juries.

The logic behind the study relied on a well-known property of a witness's visual system: like every image-processing system, the visual system spatially filters what it sees – that is, it removes details (e.g. of a face). The size of the removed details is directly proportional to the distance of the face from the witness [17–19]. From a legal perspective, an important consequence of this finding is that viewing an object from a distance is equivalent to blurring it by an amount that is determined by that distance. One can represent a face, or any object, viewed from a distance in two ways. The first, most straightforward, way is to resize the image of the face so that it subtends the appropriate visual angle, which decreases with distance. The second way, the validity of which depends on the inferred workings and measured filter parameters of the human visual system, is to blur the image by a specifiable degree, which increases with distance. Figure 1a shows an image of Julia Roberts' face that has been sized and filtered to produce equivalent representations of the effect of two distances.

Based on this research, one can demonstrate to a jury the loss of information about an object that corresponds to witness-object distance by preparing a suitably blurred version of the object in question. The object in question is usually a perpetrator's face that has been viewed by a witness from an identifiable distance, as in the Alaska case. Figure 1b shows the face of a celebrity that has been filtered to represent the information loss that is attendant

* Suspect is in the middle of the top row.

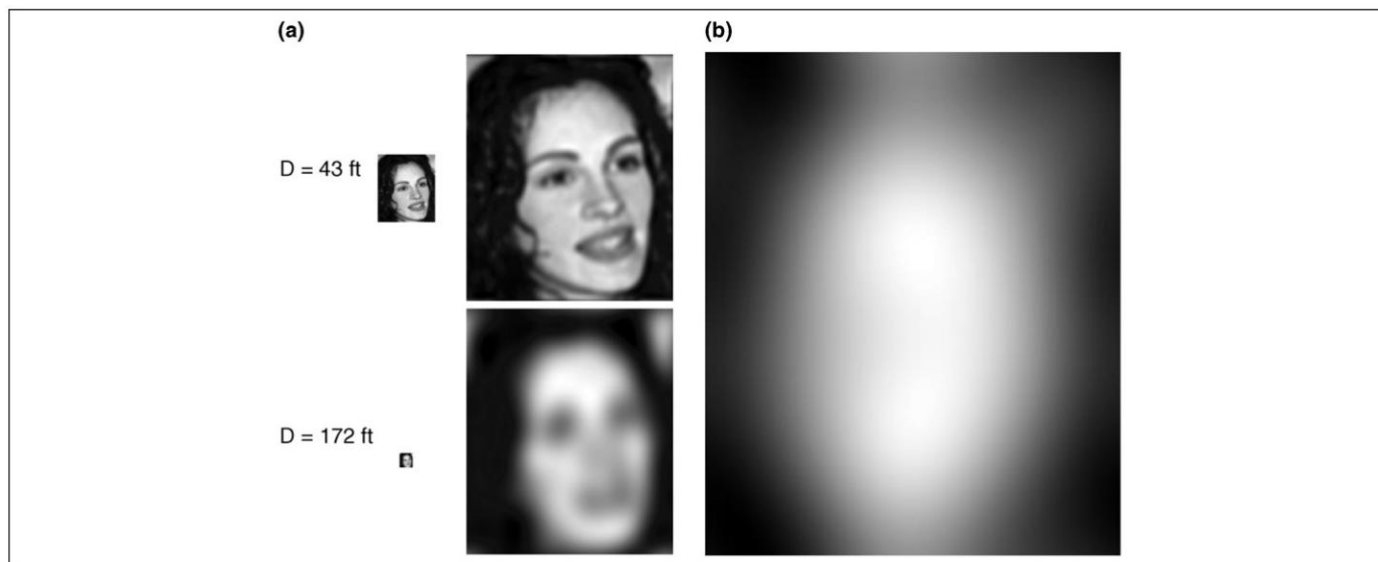


Figure 1. Stimuli used to compare filtering with size changes. (a) Two theoretically equivalent representations of a face viewed from distances (D) of 43 ft and 172 ft: resizing (left panels) and blurring (right panels). Left panels are valid when viewed from a distance of 11 in. (b) Mystery celebrity blurred to simulate a distance of 450 ft[†].

to a 450 ft viewing distance. This procedure has also been applied to a cigarette pack that, from a distance of 250 ft, was perceived to be a bag of marijuana [20], and to a tomato plant that, from an altitude of 1200 ft, was perceived to be a marijuana plant (personal communication to G. Loftus). The answers provided by research, such as that described above, must eventually make their way back into the courtroom, and Box 3 provides some guidelines when presenting research to jurors.

Latent-fingerprint evidence

Recent cases involving the use of fingerprint evidence have raised questions that can be addressed by cognitive scientists (see Box 4 for one high-profile case). As with lineups, the latent-print individualization decision process is particularly troublesome because identification is a criterion-based judgment that is based on the perceived similarity between two images; it is often difficult to balance the perceived similarity against the prior probability of obtaining that similarity. In the Madrid case, the FBI examiners were apparently overly impressed by the similarity of the Madrid print and the one returned by the Integrated Automated Fingerprint Identification System, and several independent examiners were apparently affected by the decision that was made by other examiners; both of these factors might have affected the verification process [21].

The issues of a poorly defined criterion for a match and the potential contextual biases that arise from additional information about the case have left fingerprint evidence open to criticism from the defense. This matter was formalized by the US Supreme Court in *Daubert vs Dow* [22], which defined criteria for admission of expert testimony at trials. For fingerprints, the defense argued that latent-print examiners have no special skills and that the fingerprint evidence should be shown to the jury without rendering a final opinion. Although the judge in the case ultimately rejected this

claim [23], the challenge left open the question of whether latent-print examiners possess abilities beyond those of a novice – an issue that cognitive scientists have begun to examine.

Box 3. The role of a perception and memory expert

A question that often triggers heated legal wrangling is whether and how a perception and memory expert can provide useful information to the jury. The appropriateness of such experts is described by numerous scholars [2,11,39].

The central issue that is discussed by an eyewitness expert is that, contrary to common sense, a confident witness need not be an accurate witness. This issue is gradually coming to the attention of judicial authorities, as exemplified by a recent memo from New Jersey Attorney General James Farmer, which accompanied new guidelines for identification procedures. Farmer noted the importance of guarding against identification procedures that might invest a witness with a false sense of confidence, stating that 'Studies have established that the confidence level that witnesses demonstrate regarding their identifications is the primary determinant of whether jurors accept identifications as accurate and reliable.' This is certainly correct, and an eyewitness expert is in a position to alert jurors to situations that, on the basis of scientific studies, are known to lead to such a false sense of confidence.

First, it is important to establish why a confident witness sways jurors. This is because, in most everyday life, high confidence is predictive of high accuracy. Therefore, it makes sense that an average juror would believe, intuitively, that high confidence is always associated with high accuracy, or at least that the juror should use such predictive power as a default assumption in evaluating the credibility of a witness's identification. However, contrary to intuition, this predictive power can break down. Indeed, scientific research has delineated the circumstances under which such a breakdown occurs: poor viewing circumstances, combined with subsequent post-event information of dubious accuracy.

Although this combination of circumstances is rare in most people's experience, it is common in many crimes, such as the Alaska case (Box 1). It is also clear, based both on common sense and on laboratory studies, that a highly confident eyewitness can be persuasive to a jury [39]. Accordingly, the main purpose of a perception and memory expert is to describe to the jury these counterintuitive, but scientifically understood, circumstances under which confidence should not be taken as a predictor of accuracy. The job of the attorney is to demonstrate to the jury that the facts of the case mirror these circumstances.

[†] Mystery celebrity is a different view of Julia Roberts.

Box 4. Terrorism in Madrid and latent-print evidence

On 11 March 2004, ten simultaneous explosions ripped through commuter trains in and around Madrid, Spain. The US Federal Bureau of Investigation processed a copy of a latent fingerprint found on a bag of detonators into the Integrated Automated Fingerprint Identification System (IAFIS), which uses salient features called 'minutiae' to find candidate matches. The fourth best match belonged to Brandon Mayfield, an Oregon attorney and a Muslim, who had married an Egyptian immigrant. He had represented a convicted terrorist in a child custody dispute in Portland and had known contacts with suspected terrorists. Three FBI examiners and one external expert examiner agreed that the two prints came from the same source. They expressed confidence in their judgments, using language such as 'positive - 100% identification' [40]. Mayfield was arrested on 6 May 2004.

However, latent-print examiners from the Spanish national police did not agree with the FBI identification and, based on a better fingerprint match, identified another suspect, Ouhane Daoud, a known Algerian terrorist who had loose al-Qaeda connections. Mayfield was released, and the FBI apologized for the error. They cited several factors that contributed to the error, including the use of a poor-quality digital image of the initial latent print, lack of access to the original bag of detonators and the unusual similarity of the latent print to Mayfield's print. Mayfield was recently awarded a \$2 million settlement.

Several panels that probed the mishandling of the case by the FBI suggested additional contributing factors and discounted the image-quality explanation. The initial examiner failed to conduct a complete analysis of the latent print, which resulted in the failure to recognize important unexplained differences between the two prints. Overconfidence in the IAFIS results and the pressure of working a high-profile case also contributed to the error. Several panelists also felt that the external verification procedures were tainted by knowledge of the initial examiner's conclusion and supervisory status [40].

Research on perceptual factors

Latent-print examinations can take hours to complete and can involve changes in both perceptual and cognitive processes. To address the question of whether experts differ from novices, Busey and Vanderkolk [24] used a two-alternative forced-choice task to address the role of added noise, partial masking and memory delays on a task that might tap some of the processes that underlie latent-print examinations (Figure 2). The major conclusion was that expert print examiners appeared to rely on a configural-processing mechanism when viewing prints, similar to that used when viewing upright faces, which addresses the question that was raised in the Daubert case [22] of whether experts and novices differ. The introduction of configural processing by experts seems to represent one difference between the groups. We supported this conclusion with an EEG/ERP study that used upright and inverted faces, and fingerprints [24]. Faces and inverted faces show differences in several ERP components, most notably the N170, which is a negative-going component that occurs over the left and right parietal-occipital region of the scalp [25]. We found the same pattern with fingerprints: upright fingerprints showed an earlier N170 than the inverted fingerprints in two tasks, but only for experts [24]. Thus, if configural processing for upright faces contributes to the face inversion effect, the same seems to be true for fingerprints. This suggests that the same learning mechanisms that support expertise with faces also affect learning of other stimuli. However, it should be noted that

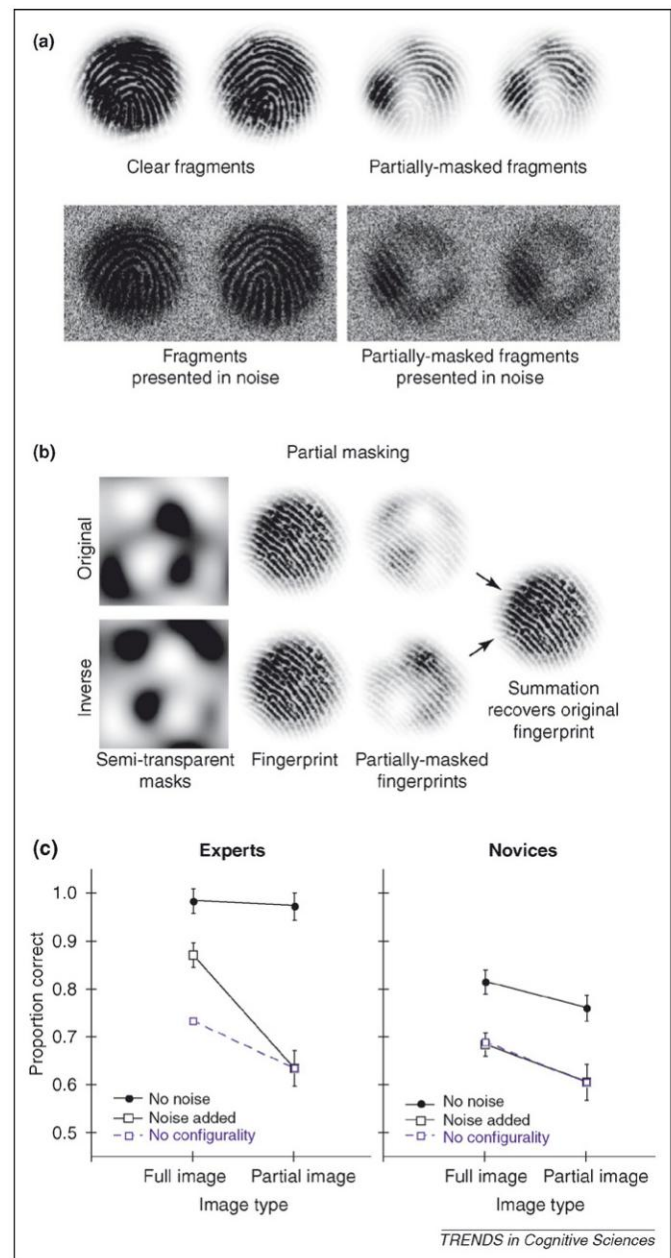


Figure 2. Data from Busey and Vanderkolk [24] that are consistent with configural processing in expert latent-print examiners but not in novices in an X-AB task. Observers viewed one fingerprint fragment without noise for one second; this was followed by a mask and then two fragments. (a) Four conditions used to simulate the transformations that latent prints often undergo. (b) Partial images are created by multiplying a mask and its inverse with the full print to create partially-masked fingerprints, which implies that, in noise, each partial image contains exactly half the information of a full print. This enables a probability summation model to be used, which assumes that the value of one half does not change when the second half is added, whereas a process such as configural processing predicts that the value will be greater. (c) Data from experts and novices. The partial-image data are used to make a prediction for full-image performance in noise (labeled 'No configularity'). The experts exceed this prediction, whereas the novices do not. This suggests that when experts view fingerprints in noise, they extract more information from the full images than would be predicted based on partial-image performance. A subsequent EEG/ERP experiment found converging evidence for this result. Adapted, with permission, from Ref. [24].

the same neurons need not be involved to suggest that similar processes are involved, but similar principles dictate the transition from processing that might involve individual features to one that begins to incorporate more holistic or configural processing [25,26].

Related studies from the perceptual-learning literature

Although there is no single training regime for latent-print examiners, they often apprentice for several years with a veteran examiner, and many police departments now require periodic proficiency tests. This training is expensive and often examiners must deal with poor-quality images. Doshier and Lu [27] addressed the question of whether novices should initially train using noisy images or clear images that are very low contrast. They used sine-wave Gabor patches, which locally seem to be much like fingerprint patches. They found that participants who trained with clear images could generalize their knowledge to noisy images, whereas participants who trained with noisy images could not generalize to clear, low-contrast images. They attributed this to two independent processes: external-noise filtering and improved stimulus enhancement. Low-noise stimuli enable both processes to improve [28,29]. Part of learning to process noisy images might be related to the process of learning what to look for in an image [30].

Research on cognitive factors

Once perceptual information has accumulated, the examiner must make a decision to exclude, individualize or declare insufficiency, which is not criterion free. Itiel Dror has addressed the influence of contextual factors on latent-print examinations extensively [31–33]. He and his colleagues asked latent-print examiners to perform latent-print examinations using the examiner's usual method. In some cases, they introduced contextual information, such as emotional pictures, supposed details about the facts of the case (i.e. the suspect had confessed) and the fact that the print in question was a known exclusion (the Mayfield print). What makes this research so compelling is that Dror used prints from files that represented previous decisions the examiners had made. The latent-print examiners were surprisingly vulnerable to this contextual information and, for difficult or ambiguous cases, they made decisions that were often inconsistent with previous decisions. When told that a print was the Mayfield print, only one out of five of the examiners remained consistent with their previous individualization [31]. This demonstrates how contextual information, perhaps unknowingly, can influence a skilled perceptual procedure.

Concluding remarks

The fundamental challenge of comparison judgments is that the conclusion that the two instances derive from the same source implies that the match that is observed is closer than any other possible match. This is impossible to verify because there are 6.5 billion people in the world, corresponding to 6.5 billion faces and 65 billion fingerprints. Nonetheless, probabilistic statements can still be made by eyewitnesses or fingerprint examiners, as well as relative statements such as 'This pair is closer in similarity than any other close non-match I have observed.' Observers in this situation struggle not only with the comparison but with an internal criterion that must be exceeded. Many of the errors that occur in eyewitness testimony and in the few fingerprint cases that have been studied are false positives on target-absent trials. Thus, pressure placed

on observers might affect how they evaluate evidence relative to this criterion. In addition, observers often have difficulty monitoring their own abilities, which can lead to unconscious overconfidence [34].

The issues raised above suggest that cognitive scientists who work on perceptual and/or memory tasks, such as eyewitness testimony or latent-print evaluation, should consider carefully the cognitive and social aspects of the environment. Bias shifts could underlie performance changes, and recent work by Wenger [35,36] suggests that changes in bias might not result from what are traditionally thought of as cognitive processes, but might reside closer to the perceptual processing and might not be under strategic control.

Because the decision criteria can be altered by the testing conditions, care should be taken to consider possible demand characteristics of experiments. One exemplary instance is the work of Itiel Dror, who has partnered with police agencies around the world to gain access to prior files, enabling him to insert cases into the normal workflow of agencies without the knowledge of individual examiners (who have given prior consent). This presumably maintains the same level of decision criteria that would normally exist for cases.

Eyewitness-testimony research would benefit not only from the consideration of the lineup procedures, but also from a physical analysis of the available information. As the cases discussed here have demonstrated, the human visual system places limitations on what information is available, and a careful analysis of a particular situation demonstrates how an eyewitness might be overstating their abilities. In our view, the research on eyewitness testimony has focused on mock lineups using college students and it should instead take a more naturalistic view.

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Trends in Neurosciences DOI:10.1016/j.tins.2007.01.001

Space, time and dopamine

Gordon W. Arbuthnott and Jeff Wickens

Trends in Neurosciences DOI:10.1016/j.tins.2006.12.003

A matter of time: internal delays in binaural processing

Philip Joris and Tom C.T. Yin

Trends in Neurosciences DOI:10.1016/j.tins.2006.12.004

What can microbial genetics teach sociobiology?

Kevin R. Foster, Katie Parkinson and Christopher R.L. Thompson

Trends in Genetics DOI:10.1016/j.tig.2006.12.003

HB274

Submitted on: 2/8/2014

Testimony for JUD on Feb 11, 2014 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Peter Gellatly	Individual	Support	No

Comments: Aloha, This bill is a no-brainer. We all have a vested interest in administering justice properly while protecting the innocent. This measure supports both, shielding us from unconscionable mistakes that are made too frequently here and elsewhere. The bill's intent is strongly supported by scientific data, and its adherence to our Constitutionally-guaranteed pursuit of life and liberty is indisputable. Please pass it. mahalo, Peter Gellatly

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HB274

Submitted on: 2/10/2014

Testimony for JUD on Feb 11, 2014 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
E. Ileina Funakoshi	Individual	Support	No

Comments: COMMITTEE ON JUDICIARY Rep. Karl Rhoads, Chair Rep. Sharon Har, Vice Chair Tuesday, February 11, 2014 2:00 p.m. Room 325 SUPPORT FOR HB 274 – EYEWITNESS ID Dear Chair Rhoads, Vice Chair Har, and Committee Members: I am E. Ileina Funakoshi, a constituent of the State of Hawai'i. I am asking for your support of HB274 because I believe passage of this bill very important for the safety of your constituents. Why? The greatest problem of wrongful convictions is the community having a false security that the perpetrator was apprehended when in reality he/she is walking around freely to claim another victim. And, the wrongfully convicted person to be incarcerated for a crime he/she did not commit. This bill will help to correct the situation. Eyewitness misidentification has contributed to nearly 75 percent of the 312 wrongful convictions overturned by DNA evidence. American Judicature Society's (AJS) rigorous, robust scientific field study demonstrated the superiority of the blind-sequential procedure over the blind-simultaneous procedure AJS study showed there was NO LOSS in correct identifications using the blind-sequential procedure and a 50% reduction in incorrect identifications Therefore, I humbly ask your committee to pass this bill out of committee. Thank you for the opportunity to submit my testimony. Aloha, E. Ileina Funakoshi

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HB274

Submitted on: 2/10/2014

Testimony for JUD on Feb 11, 2014 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Sandy Salmers	Individual	Support	No

Comments: Please support HB 274. Eye witness identification has been shown to be accurate in only 8% of test cases. HB274 will create important procedures and administrative requirements for law enforcement agencies regarding eye witness identifications of criminal suspects in criminal investigations. Thank you.

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HB274

Submitted on: 2/10/2014

Testimony for JUD on Feb 11, 2014 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Shannon Rudolph	Individual	Support	No

Comments: Strongly Support. Please listen to Kat Brady; she's always reasonable and has the very best interests of all Hawai'i residents in mind. She's one smart cookie and you should heed her free council to you.

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HB274

Submitted on: 2/10/2014

Testimony for JUD on Feb 11, 2014 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Margaret Maupin	Individual	Support	No

Comments:

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PROSECUTING ATTORNEY

DALE A. ROSS
FIRST DEPUTY
PROSECUTING ATTORNEY



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FAX: (808) 322-6584

OFFICE OF THE PROSECUTING ATTORNEY

LATE

TESTIMONY IN OPPOSITION OF HOUSE BILL 274

A BILL FOR AN ACT RELATING TO CRIMINAL
PROCEDURE

HOUSE COMMITTEE ON JUDICIARY
Rep. Karl Rhoads, Chair
Rep. Sharon E. Har, Vice Chair

Tuesday, February 11, 2014, 2:00 PM
State Capitol, Conference Room 325

Honorable Chair Rhoads, Vice-Chair Har, and Members of the House Committee on Judiciary, the Office of the Prosecuting Attorney, County of Hawai'i submits the following testimony in opposition of House Bill No. 274.

The purpose of this measure is to create procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations. The measure also grants a defendant the right to challenge any eyewitness identification to be used at trial in a pretrial evidentiary hearing.

These changes would be burdensome, time consuming and overly restrictive.

The Office of the Prosecuting Attorney of the County of Hawai'i opposes the passage of House Bill No. 274. Thank you for the opportunity to testify on this matter.

Respectfully,

Mitchell D. Roth
Prosecuting Attorney
County of Hawai'i

LATE

TESTIMONY OF THE HAWAII POLICE DEPARTMENT

HOUSE BILL 274

RELATING TO CRIMINAL PROCEDURE

BEFORE THE COMMITTEE ON JUDICIARY

DATE : Tuesday, February 11, 2014

TIME : 2:00 P.M.

PLACE : Conference Room 325
State Capitol
415 South Beretania Street

PERSON TESTIFYING:

Acting Police Chief Paul K. Ferreira
Hawai'i Police Department
County of Hawai'i

(Written Testimony Only)

William P. Kenoi
Mayor



Harry S. Kubojiri
Police Chief

Paul K. Ferreira
Deputy Police Chief

County of Hawai'i

POLICE DEPARTMENT

349 Kapiolani Street • Hilo, Hawai'i 96720-3998
(808) 935-3311 • Fax (808) 961-8865

February 10, 2014

Representative Karl Rhoads
Chairperson and Committee Members
Committee On Judiciary
415 South Beretania Street, Room 325
Honolulu, Hawai`i 96813

Re: House Bill 274 Relating to Criminal Procedure

Dear Representative Rhoads:

The Hawai`i Police Department opposes passage of House Bill 274, relating to Criminal Procedure. The stated intent of the appropriation is to require new eyewitness identification procedures.

Our Department is opposed to this measure as it places certain restrictive burdens on state and county law enforcement agencies with regards to eyewitness identifications.

In essence, this legislation seemingly attempts to detail specific investigative procedures to be followed which usurp the authority vested in the various Police Chiefs and other State law enforcement directors. We are unaware of any other investigative procedure which is so specific as to dictate the methodology to be used in conducting a criminal investigation aside from those procedures that are constitutional in nature.

Further, the Bill as written seeks to infer that any time one of the procedures is not followed that the identification is immediately flawed regardless of the individual facts and circumstances connected to each and every particular investigation. Our department fully believes the positive identification process is best left to the "Trier of the Facts" (Judge or Jury) during the judicial adjudication of the case which is also subject to Defense Counsel scrutiny and objection.

For these reasons, we strongly oppose this legislation. Thank you for allowing the Hawai`i Police Department to provide comments relating to House Bill 274.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul K. Ferreira".

PAUL K. FERREIRA
ACTING POLICE CHIEF

LATE

POLICE DEPARTMENT

CITY AND COUNTY OF HONOLULU

801 SOUTH BERETANIA STREET · HONOLULU, HAWAII 96813
TELEPHONE: (808) 529-3111 · INTERNET: www.honolulu.org



KIRK W. CALDWELL
MAYOR

LOUIS M. KEALOHA
CHIEF

DAVE M. KAJIHIRO
MARIE A. McCAULEY
DEPUTY CHIEFS

OUR REFERENCE RS-NTK

February 11, 2014

The Honorable Karl Rhoads, Chair
and Members
Committee on Judiciary
House of Representatives
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

Subject: House Bill No. 274, Relating to Criminal Procedure

I am Richard Schaab, Captain of the Criminal Investigation Division of the Honolulu Police Department, City and County of Honolulu.

The Honolulu Police Department opposes House Bill No. 274, Relating to Criminal Procedure.

The Honolulu Police Department currently adheres to nearly all of the recommendations of the National Institute of Justice for eyewitness evidence. We believe that the determination of the validity of any evidence is best handled by the Judiciary. In addition, the Judiciary is able to more quickly adapt to changes in court procedures and/or rules of evidence that may result from judicial findings of higher courts.

The Honolulu Police Department, upon conferral with Department of the Prosecuting Attorney and the State Department of the Attorney General, has recently written a policy to address the use of and the procedures for sequential lineups. This will be put into practice upon the approval of Chief Louis M. Kealoha and is anticipated to happen in the near future.

The Honorable Karl Rhoads, Chair
Page 2
February 11, 2014

The Honolulu Police Department urges you to oppose House Bill No. 274,
Relating to Criminal Procedure.

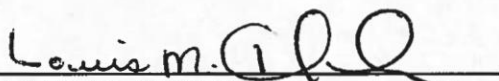
Thank you for the opportunity to testify.

Sincerely,



RICHARD SCHAAB, Captain
Criminal Investigation Division

APPROVED:



LOUIS M. KEALOHA
Chief of Police

LATE

HB274

Submitted on: 2/10/2014

Testimony for JUD on Feb 11, 2014 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Richard K. Minatoya	Dept. of the Prosecuting Attorney, County of Maui	Oppose	No

Comments: The Department of the Prosecuting Attorney, County of Maui joins in the Department of the Prosecuting Attorney, City & County of Honolulu's testimony in OPPOSITION to HB 274.

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HB274

Submitted on: 2/10/2014

Testimony for JUD on Feb 11, 2014 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Karen Martinez	Individual	Support	No

Comments:

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From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 11, 2014 11:10 AM
To: JUDtestimony
Cc: shaglund@hotmail.com
Subject: Submitted testimony for HB274 on Feb 11, 2014 14:00PM

LATE TESTIMONY

HB274

Submitted on: 2/11/2014

Testimony for JUD on Feb 11, 2014 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
sue haglund	Individual	Support	No

Comments: The single greatest contributing factor to wrongful convictions is eyewitness misidentification, contributing to nearly 75 percent of the 312 wrongful convictions overturned by DNA evidence. Fortunately, there are readily available changes to police identification procedures that can greatly improve the reliability of eyewitness evidence and enhance law enforcement's ability to zero in on true perpetrators early on in the investigative process. Failure to implement scientifically-supported best practices not only leaves innocent people vulnerable, it also puts the public at great risk since any focus on the wrong person allows the real perpetrator to remain undetected.

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

February 11, 2014

LATE TESTIMONY

H.B. No. 274: RELATING TO CRIMINAL PROCEDURE

Chair Rhoads and Members of the Committee:

We support the intent of H.B. No. 274 which seeks to reform the procedures under which eyewitnesses to crimes are asked to identify the perpetrators. Studies have shown that current procedures used by law enforcement authorities, including those used by the Honolulu Police Department, are in need of reform to reduce the chances of erroneous eyewitness identifications.

In the recent U.S. Supreme Court case of Perry v. New Hampshire, 132 S. Ct. 716 (January 11, 2012), the majority opinion quoted the case of United States v. Wade, 388 U.S. 218 (1967), in setting forth the dangers involved in police-arranged eyewitness identification procedures:

"A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."

388 U.S. at 228.

Moreover, Justice Sotomayor, in her dissenting opinion in Perry, boldly wrote:

The empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country. Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification. Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy

132 S. Ct. at 738-39.

Thus, it is clear that the United States Supreme Court recognizes the danger that is inherent in eyewitness identification. Law enforcement officials, however, are resistant to change and cling to long-held, disproved beliefs that the procedures being used to identify criminal suspects remain accurate. Legislation may therefore be necessary to reform police department procedures to improve the accuracy and reliability of eyewitness identifications.

Thank for the opportunity to comment on this measure.

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 11, 2014 11:10 AM
To: JUDtestimony
Cc: shaglund@hotmail.com
Subject: Submitted testimony for HB274 on Feb 11, 2014 14:00PM

LATE TESTIMONY

HB274

Submitted on: 2/11/2014

Testimony for JUD on Feb 11, 2014 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
sue haglund	Individual	Support	No

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to the House Committee on Judiciary

February 11, 2014

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Thank for the opportunity to comment on this measure.