

---

---

## A BILL FOR AN ACT

RELATING TO CRIMINAL PROCEDURE.

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

1           SECTION 1. The legislature finds that the goal of a police  
2 investigation is to apprehend the person or persons responsible  
3 for the commission of a crime. Mistaken eyewitness  
4 identification has been shown to have contributed to the  
5 wrongful conviction in approximately seventy-five per cent of  
6 the nation's two hundred eighty-nine exonerations. Over the  
7 past thirty years, a large body of peer-reviewed, scientific  
8 research and practice has emerged showing that simple systemic  
9 changes in administering eyewitness identification procedures  
10 can greatly improve the accuracy of eyewitness identifications.  
11 Policies and procedures to improve the accuracy of eyewitness  
12 identifications, such as those recommended by the United States  
13 National Institute of Justice, the American Bar Association, the  
14 New Jersey Office of the Attorney General, the Wisconsin Office  
15 of the Attorney General, the California Commission on the Fair  
16 Administration of Justice, and the North Carolina Actual  
17 Innocence Commission, are readily available for review.





1 "Contamination" occurs when an eyewitness' memory of a  
2 person or event becomes altered, replaced, or otherwise impaired  
3 as a result of exposure to extrinsic information related to that  
4 person or event.

5 "Eyewitness" means a person who observes another person at  
6 or near the scene of an offense.

7 "Filler" means either a person or a photograph of a person  
8 who is not suspected of an offense and is included in an  
9 identification procedure.

10 "Identification" means the eyewitness has identified a  
11 specific person as the perpetrator.

12 "Identification procedure" means a live lineup, a photo  
13 lineup, or a showup.

14 "Law enforcement" means any law enforcement entity  
15 conducting an investigation.

16 "Live lineup" means an identification procedure in which a  
17 group of persons, including the suspect and other persons not  
18 suspected of the offense, is displayed to an eyewitness for the  
19 purpose of determining whether the eyewitness identifies the  
20 suspect as the perpetrator.

21 "Photo lineup" means an identification procedure in which  
22 an array of photographs, including a photograph of the suspect



1 and additional photographs of other persons not suspected of the  
2 offense, is displayed to an eyewitness either in hard copy form  
3 or via computer or other electronic means for the purpose of  
4 determining whether the eyewitness identifies the suspect as the  
5 perpetrator.

6 "Showup" means an identification procedure in which an  
7 eyewitness is presented in-person with a single suspect for the  
8 purpose of determining whether the eyewitness identifies this  
9 individual as the perpetrator.

10 "Suspect" means the person believed by law enforcement to  
11 be the possible perpetrator of the crime.

12 § -2 **Eyewitness identification procedures for live and**  
13 **photo lineups.** (a) Any law enforcement entity conducting  
14 eyewitness identification procedures shall adopt specific  
15 procedures for conducting photo and live lineups that comply  
16 with the following requirements:

17 (1) Prior to a photo or live lineup, law enforcement shall  
18 record in writing as complete a description as  
19 possible of the perpetrator provided by the eyewitness  
20 in the eyewitness' own words. This statement shall  
21 also include information regarding the conditions  
22 under which the eyewitness observed the perpetrator



1 including location, time, distance, obstructions,  
2 lighting, weather conditions, and other impairments,  
3 including but not limited to alcohol, drugs, stress,  
4 and visual or auditory disabilities;

5 (2) The eyewitness shall also be asked if the eyewitness'  
6 vision needs correction by glasses or contact lenses  
7 and whether the eyewitness was wearing them at the  
8 time of the offense. The administrator shall note  
9 whether the eyewitness was wearing glasses or contact  
10 lenses at the time of the identification procedure;

11 (3) All live and photo lineups shall be conducted blind  
12 unless to do so would place an undue burden on law  
13 enforcement or the investigation; and

14 (4) The eyewitness shall be instructed, without other  
15 eyewitnesses present, prior to any live or photo  
16 lineup, that:

17 (A) The perpetrator may or may not be among the  
18 persons in the identification procedure;

19 (B) The administrator does not know the identity of  
20 the perpetrator, if applicable;

21 (C) The eyewitness should not feel compelled to make  
22 an identification;



- 1 (D) The investigation will continue whether or not an
- 2 identification is made;
- 3 (E) The procedure requires the administrator to ask
- 4 the eyewitness to state, in the eyewitness' own
- 5 words, how certain the eyewitness is of any
- 6 identification; and
- 7 (F) The eyewitness is not to discuss the
- 8 identification procedure or its results with
- 9 other eyewitnesses involved in the case and
- 10 should not speak with the media.
- 11 (b) The administrator shall comply with the following:
- 12 (1) In a photo lineup, any photograph of the suspect shall
- 13 be contemporary and shall resemble the suspect's
- 14 appearance at the time of the offense;
- 15 (2) In a photo lineup, there shall be no characteristics
- 16 of the photographs themselves or the background
- 17 context in which they are placed that makes any of the
- 18 photographs unduly stand out;
- 19 (3) A photo or live lineup shall be composed so that the
- 20 fillers generally resemble the eyewitness' description
- 21 of the perpetrator, while ensuring that the suspect
- 22 does not unduly stand out from the fillers;



- 1           (4) In a photo or live lineup, the administrator shall  
2           comply with the following:
- 3           (A) All fillers selected shall resemble the  
4           eyewitness' description of the perpetrator in  
5           significant features including but not limited to  
6           face, weight, build, and skin tone, including any  
7           unique or unusual features such as a scar,  
8           tattoo, or other unique identifying mark;
- 9           (B) At least five fillers shall be included in a  
10          photo lineup in addition to the suspect;
- 11          (C) At least four fillers shall be included in a live  
12          lineup in addition to the suspect; and
- 13          (D) If the eyewitness has previously viewed a photo  
14          lineup or live lineup in connection with the  
15          identification of another person suspected of  
16          involvement in the offense, the fillers in the  
17          lineup in which the instant suspect participates  
18          shall be different from the fillers used in any  
19          prior lineups;
- 20          (5) In a live lineup, no identifying actions, such as  
21          speech, gestures, or other movements, shall be  
22          performed by lineup participants;



1 (6) In a live lineup, all lineup participants must be out  
2 of view of the eyewitness prior to the identification  
3 procedure;

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

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

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

12 (1) Each eyewitness shall view photo or live lineups  
13 separately;

14 (2) The suspect shall be placed in a different position in  
15 the live lineup or photo lineup for each eyewitness;  
16 and

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

20 (d) In any identification procedure, no writings or  
21 information concerning the current investigation or any previous





1 arrest, indictment, or conviction of the suspect shall be  
2 visible or made known to an eyewitness.

3 (e) When there are multiple suspects, each identification  
4 procedure shall include only one suspect.

5 (f) In any identification procedure where an eyewitness  
6 makes an identification, the administrator shall seek and  
7 document a clear statement from the eyewitness at the time of  
8 the identification in the eyewitness' own words, including a  
9 statement describing the eyewitness' confidence level that the  
10 person identified is the perpetrator.

11 (g) In any identification procedure where an eyewitness  
12 makes an identification, the eyewitness shall not be provided  
13 any information concerning the person identified before the  
14 administrator obtains the eyewitness' statement about the  
15 selection.

16 (h) Law enforcement shall make record of the  
17 identification procedure that includes all identification and  
18 non-identification results obtained during all identification  
19 procedures during an investigation, which record shall be signed  
20 by the eyewitness.



1 (i) When it is impracticable for a blind administrator to  
2 conduct a lineup, the investigator shall state in writing the  
3 reason therefore.

4 § -3 **Eyewitness identification procedures for showups.**

5 (a) The administrator shall comply with the following in  
6 conducting a showup:

7 (1) Where possible, the administrator shall perform a live  
8 or photo lineup instead of a showup;

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

12 (3) An administrator shall not conduct a showup with a  
13 photograph. If investigators wish to determine if an  
14 eyewitness can make an identification using a  
15 photograph, a photo lineup must be used;

16 (4) Prior to any showup, law enforcement shall record in  
17 writing as complete a description as possible of the  
18 perpetrator provided by the eyewitness in the  
19 eyewitness' own words. This statement shall also  
20 include information regarding the conditions under  
21 which the eyewitness observed the perpetrator  
22 including location, time, distance, obstructions,



1 lighting, weather conditions, and other impairments  
2 including but not limited to alcohol, drugs, stress,  
3 and visual or auditory disabilities;

4 (5) The eyewitness shall also be asked if the eyewitness'  
5 vision needs correction by glasses or contact lenses  
6 and whether the eyewitness was wearing them at the  
7 time of the offense. The administrator shall note  
8 whether the eyewitness was wearing glasses or contact  
9 lenses at the time of the identification procedure;

10 (6) The eyewitness shall be transported to a neutral, non-  
11 law enforcement location where the suspect is being  
12 detained for the purposes of a showup procedure;

13 (7) The eyewitness shall be instructed, without other  
14 eyewitnesses present, prior to any showup that:

15 (A) The perpetrator may or may not be the person that  
16 is presented to the eyewitness;

17 (B) The administrator does not know the identity of  
18 the perpetrator;

19 (C) The eyewitness should not feel compelled to make  
20 an identification;

21 (D) The investigation will continue whether or not an  
22 identification is made;



1 (E) The procedure requires the administrator to ask  
2 the eyewitness to state, in the eyewitness' own  
3 words, how certain the eyewitness is of any  
4 identification; and

5 (F) The eyewitness is not to discuss the  
6 identification procedure or its results with  
7 other eyewitnesses involved in the case and  
8 should not speak with the media.

9 (b) At any showup, in order to reduce potentially damaging  
10 or prejudicial inferences that may be drawn by the eyewitness,  
11 the administrator shall comply with the following:

12 (1) Refraining from suggesting, through statements or non-  
13 verbal conduct, that the suspect is or may be the  
14 perpetrator of the crime;

15 (2) Refraining from removing the suspect from a squad car  
16 in front of the eyewitness; and

17 (3) When practicable, the administrator shall present the  
18 suspect to the eyewitness without handcuffs.

19 (c) When there are multiple eyewitnesses, the  
20 administrator shall comply with the following:



1 (1) Only one eyewitness at a time shall be present at the  
2 location of the showup to participate in the showup  
3 procedure; and

4 (2) If a positive identification is made, and an arrest is  
5 justified, additional eyewitnesses shall be shown live  
6 or photo lineups.

7 (d) If there are multiple suspects, the suspects shall be  
8 separated and subjected to separate showup procedures.

9 (e) If the eyewitness makes an identification, the  
10 administrator shall seek and document a clear statement from the  
11 eyewitness, at the time of the identification and in the  
12 eyewitness' own words, as to the eyewitness' confidence level  
13 that the person identified in a given identification procedure  
14 is the perpetrator.

15 (f) The administrator shall photograph a suspect or cause  
16 the suspect to be photographed at the time and place of the  
17 showup to preserve a record of the appearance of the suspect at  
18 the time of the showup procedure.

19 (g) When it is impracticable for a blind administrator to  
20 conduct a showup, the investigator shall state in writing the  
21 reason therefore.



1           §   -4 Video record of identification procedures;  
2 impracticability; alternative record. (a) Unless  
3 impracticable, a video record of the identification procedure  
4 shall be made that includes the following information:

5           (1) All identification and non-identification results  
6               obtained during the identification procedures, signed  
7               by any eyewitness, including any eyewitness'  
8               confidence statements;

9           (2) The names of all persons present at the identification  
10               procedure, including the name of the lineup  
11               administrator and whether the administrator was blind,  
12               blinded or non-blind;

13           (3) If an administrator other than a blind administrator  
14               was used, the reason therefore;

15           (4) The date and time of the identification procedure;

16           (5) In a photo or live lineup, any eyewitness  
17               identification of filler; and

18           (6) In a photo or live lineup, the names of the lineup  
19               members and other relevant identifying information,  
20               and the sources of all photographs or persons used in  
21               the lineup.



1 (b) If a video record of the lineup is impracticable, the  
2 administrator of the lineup shall document the reason therefore  
3 and an audio record of the identification procedure shall be  
4 made. The audio record shall be supplemented by the following:

- 5 (1) All of the photographs used in a photo lineup; and
- 6 (2) Photographs of all of the individuals used in a live  
7 lineup or showup.

8 (c) If both a video and audio record of the lineup are  
9 impracticable, the administrator of the lineup shall document in  
10 writing the reason therefore and a written record of the lineup  
11 shall be made. The written record shall be supplemented by all  
12 of the following:

- 13 (1) All of the photographs used in a photo lineup; and
- 14 (2) Photographs of all of the individuals used in a live  
15 lineup.

16 § -5 Remedies for noncompliance or contamination. (a)  
17 When the prosecution intends to offer eyewitness identification  
18 evidence at trial, the defendant is entitled to a pretrial  
19 evidentiary hearing as to the reliability of the evidence  
20 offered.

21 (b) At the hearing, the court shall examine whether law  
22 enforcement or any administrator failed to substantially comply



1 with any requirement contained in this chapter, resulting in the  
2 contamination of the eyewitness. In making its determination,  
3 the court shall consider the following:

4 (1) Whether any suggestive identification procedures were  
5 employed;

6 (2) Whether the eyewitness identification evidence may  
7 have been otherwise contaminated by state or non-state  
8 actors; and

9 (3) Any other factors bearing upon the reliability of the  
10 identification evidence, including but not limited to  
11 characteristics of the witness, perpetrator, or event.

12 (c) If the trial court finds evidence of a failure of law  
13 enforcement, an administrator, or prosecuting agencies to comply  
14 with any of the provisions of this chapter, of the use of any  
15 other suggestive identification procedures, or of any other  
16 contamination of identification evidence by state or non-state  
17 actors, it shall:

18 (1) Consider this evidence in determining the  
19 admissibility of the eyewitness identification; and

20 (2) Suppress the evidence of eyewitness identification  
21 when there is a substantial probability of eyewitness  
22 misidentification.





1 (d) When a court rules an eyewitness identification  
2 admissible after a pretrial evidentiary hearing, the court shall  
3 instruct the jury when admitting such evidence and prior to the  
4 jury's deliberation, where applicable:

5 (1) That this chapter is designed to reduce the risk of  
6 eyewitness misidentification; and

7 (2) That it may consider credible evidence of  
8 noncompliance with this chapter when assessing the  
9 reliability of the eyewitness identification evidence.

10 § -6 Training of law enforcement officers. The county  
11 police departments shall create, administer, and conduct  
12 training programs for law enforcement officers and recruits  
13 regarding the methods, technical aspects, and scientific  
14 findings regarding the basis of the eyewitness identification  
15 practices and procedures referenced in this chapter."

16 SECTION 3. This Act does not affect rights and duties that  
17 matured, penalties that were incurred, and proceedings that were  
18 begun before its effective date.

19



1 SECTION 4. This Act shall take effect on January 1, 2014.

2

INTRODUCED BY: Kal Rhodes

JAN 18 2013



# H.B. NO. 274

**Report Title:**

Criminal Procedure; Eyewitness Identification; Remedies

**Description:**

Creates procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations. Grants a defendant the right to challenge any eyewitness identification to be used at trial in a pretrial evidentiary hearing. Takes effect 1/1/2014.

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

