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**THE HONORABLE WILL ESPERO, CHAIR
SENATE COMMITTEE ON PUBLIC SAFETY,
INTERGOVERNMENTAL AND MILITARY AFFAIRS
Twenty-seventh State Legislature
Regular Session of 2014
State of Hawai'i**

March 24, 2014

**RE: S.C.R. 134; REQUESTING THE CONVENING OF A TASK FORCE TO
ESTABLISH STATEWIDE PROCEDURAL AND ADMINISTRATIVE
REQUIREMENTS FOR EYEWITNESS IDENTIFICATION AND
INTERROGATION OF SUSPECTS IN CRIMINAL INVESTIGATIONS.**

Chair Espero, Vice Chair Baker and members of the Senate Committee on Public Safety, Intergovernmental and Military Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in opposition to S.C.R. 134.

Hawai'i's caselaw, procedures, and jury instructions have greatly evolved over the years, and now go to great lengths to protect defendants' rights; juries are made well-aware--by both prosecution and defense--that eyewitness testimony is not determinative. While the Department strongly agrees that Hawai'i's law enforcement agencies should 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 national law enforcement developments and discourse; all of which are constantly evolving.

To mandate a specific list of procedures would be overly restrictive, discount the value of having our courts and juries assess a "totality of circumstances," and detract from the flexibility needed for law enforcement to adjust to unique circumstances in each case. In addition, it would create an implication that if any of the listed items are missing, then the eyewitness identification is somehow substandard or unreliable. Hawai'i's caselaw on this subject does not endorse this type of checklist-approach, as shown in a multitude cases, such as State v. Mason, 130 Haw. 347, 2012 WL 603953, Hawai'i App., February 24, 2012 (emphasizing the totality of circumstances).

In addition, please note that the Hawai'i Supreme Court recently approved new jury instructions governing eyewitness testimony in 2013. This is yet another legal procedure and safeguard in place to protect defendants' rights. In addition, our courts have ample discretion to

suppress eyewitness identification if it is "impermissibly or unnecessarily suggestive," which also requires a judge to carefully consider the totality of the circumstances. *Id.* Furthermore, throughout the course of trials today, juries are repeatedly told to consider all of the facts and circumstances of the case--including potential biases and room for human error--by both the prosecution and defense. Their review cannot be based on a simple checklist of "do's and don'ts," but is rather a careful examination of all evidence put forth by all parties, as a "totality of circumstances."

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, and allow the type of flexibility needed for our law enforcement to adjust to each scenario as it arises, eyewitness identification procedures must be allowed to develop internally--rather than being imposed by an outside body--subject to the well-established and still-evolving caselaw developed by our courts and juries.

For all of the reasons noted above, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes S.C.R. 134. Thank for you the opportunity to testify on this matter.