



The Judiciary, State of Hawai‘i

Testimony to the Senate Committee on Judiciary and Labor

Senator Gilbert S. C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

Friday, January 30, 2015, 8:30 a.m.
State Capitol, Conference Room 016

WRITTEN TESTIMONY ONLY

by

Judge Glenn J. Kim, Chair
Hawai‘i Supreme Court Standing Committee on the Rules of Evidence

Bill No. and Title: Senate Bill No. 147 Relating to Criminal Procedure

Purpose: Senate Bill No. 147 creates procedural and administrative requirements for law enforcement agencies for eyewitness identification of suspects in criminal investigations; also grants a defendant the right to challenge an eyewitness identification to be used at trial in a pretrial evidentiary hearing. Takes effect 01/01/2016.

Judiciary's Position:

This bill creates sets forth requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations. It also grants a defendant the right to a pretrial evidentiary hearing to challenge an eyewitness identification to be used at trial.

The Standing Committee on Rules of Evidence was established by the Chief Justice on 15 July 1993 “to study and evaluate proposed evidence law measures referred by the Hawaii Legislature, and to consider and propose appropriate amendments to the Hawaii Rules of Evidence.” The scope and balance sought after in the proposed methodology are issues that should be addressed, in the first instance, to the Supreme Court’s Standing Committee on Rules of Evidence. The Evidence Committee is scheduled to meet in early February and plans to discuss and evaluate the proposed legislation at that time, with a view toward developing a position for the current legislative session. Accordingly, the Committee requests that the Legislature, recognizing the principle of shared governance of the Hawaii Rules of Evidence,



Senate Bill No. 1147, Relating to Criminal Procedures
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allow a little more time for the Evidence Committee to consider this bill. Perhaps, respectfully, the Committee on Judiciary and Labor could consider re-scheduling the hearing on the instant measure for a bit later in the session.

Thank you for the opportunity to provide comments on S.B. No. 147.

**Testimony of the Office of the Public Defender, State of Hawaii,
to the Senate Committee on Judiciary and Labor**

January 30, 2015

S.B. No. 147: RELATING TO CRIMINAL PROCEDURE

Chair Keith-Agaran and Members of the Committee:

We support S.B. No. 147 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 is necessary to reform police

department procedures to improve the accuracy and reliability of eyewitness identifications.

Thank for the opportunity to comment on this measure.

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THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR
Twenty-Eighth State Legislature
Regular Session of 2015
State of Hawai`i

January 30, 2015

RE: S.B. 147; RELATING TO CRIMINAL PROCEDURE.

Chair Keith-Agaran, Vice Chair Shimabukuro and members of the Senate Committee on Judiciary and Labor, the Department of the Prosecuting Attorney, City and County of Honolulu, submits the following testimony in opposition to S.B. 147.

Although the Department agrees that it is important for law enforcement to maintain standardized procedures for eyewitness identifications, it is our understanding that Honolulu Police Department and the neighbor island police departments already incorporate most or all of the procedures listed in S.B. 147. To codify these standards would be both overly restrictive and unnecessary; if anything on the checklist is missing or problematic, this bill seems to create an implied presumption that the eyewitness identification was substandard or unreliable.

Moreover, there is already a wealth of case law on this subject, and there are numerous legal procedures and safeguards in place, to ensure that a defendant's rights are protected, and to ensure that juries are aware eyewitness identifications are not determinative. Under current law, eyewitness identifications are reviewed under a "totality of the circumstances," which is most appropriate, because there are so many case-specific factors that must be taken into account.

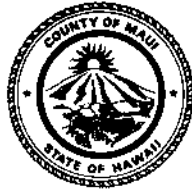
During trial, juries are repeatedly told to consider any potential biases, and the overall level of reliability, when a case involves eyewitness identification. In addition, our courts have ample discretion to suppress an eyewitness identification if it is "unnecessarily suggestive"; this determination also requires the judge's careful consideration of the totality of the circumstances.

In terms of specific jury instructions, there are at least three (3) Hawaii Supreme Court decisions addressing when a specific jury instruction (pertaining to eyewitness identification) is

necessary. Moreover, it is our understanding that the Judiciary's Jury Instructions Committee reviews this matter regularly, and in fact approved new jury instructions regarding "Show-Up Identification" on December 18, 2014, to address situations when an eyewitness identification is considered suggestive.

For all of the reasons noted above, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes S.B. 147. Thank for you the opportunity to testify on this matter.

ALAN M. ARAKAWA
Mayor



JOHN D. KIM
Acting Prosecuting Attorney

ROBERT D. RIVERA
Acting First Deputy Prosecuting Attorney

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TESTIMONY
ON
SB 147 - RELATING TO CRIMINAL PROCEDURE

January 30, 2015

The Honorable Gilbert S. C. Keith-Agaran
Chair
The Honorable Maile S. L. Shimabukuro
Vice Chair
and Members
Senate Committee on Judiciary and Labor

Chair Keith-Agaran, Vice Chair Shimabukuro and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui, OPPOSES SB 147 - Relating to Criminal Procedure. The bill would create procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations, and grant defendants the right to challenge pretrial eyewitness identification in a pretrial evidentiary hearing.

We join the Department of the Prosecuting Attorney, City and County of Honolulu and the Office of the Prosecuting Attorney, County of Kauai, in their opposition to this bill. We agree that numerous safeguards are already in place regarding eyewitness testimony. Furthermore, regularly reviewed jury instructions are also available to address this issue.

Accordingly, the Department of the Prosecuting Attorney, County of Maui, OPPOSES the passage of this bill. We ask that the committee HOLD SB 147.

Thank you very much for the opportunity to provide testimony on this bill.

Justin F. Kollar
Prosecuting Attorney

Kevin K. Takata
First Deputy



Rebecca A. Vogt
Second Deputy

Diana Gausepohl-White
Victim/Witness Program Director

OFFICE OF THE PROSECUTING ATTORNEY

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**TESTIMONY IN OPPOSITION TO
SB 147 – RELATING TO CRIMINAL PROCEDURE**

Justin F. Kollar, Prosecuting Attorney
County of Kaua'i

Senate Committee on Judiciary & Labor
January 30, 2015, 8:30 a.m., Conference Room 016

Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee:

The County of Kauai, Office of the Prosecuting Attorney, OPPOSES SB 147 – Relating to Criminal Procedure. As grounds therefore, we note that the Hawaii Supreme Court, in the course of fifty years of jurisprudence, in conjunction with guidance from the United States Supreme Court, has established a thorough and comprehensive set of legal guidelines setting forth the procedures to be followed by law enforcement in conducting eyewitness identification. The same courts have also established strict guidelines to be followed by law enforcement in the interrogation of suspects in criminal investigations.

This office submits that the implementation of new guidelines could not, legally, have the effect of running counter to or relaxing the requirements imposed by the courts. Moreover, the impacts of new, additional requirements, would be unduly burdensome in that current procedures already comply with the requirements of the Hawai'i and United States Supreme Courts. There already exist remedies in cases where said procedures are violated – the right to exclude the identification from use at trial, and of appeal, the same remedies that would follow from any violation of new administrative regulations.

In conclusion, any recommendations adopted by the Task Force would duplicate already existing protections and impose new burdens on law enforcement agencies that are already held to very stringent standards in a

State that affords criminal defendants protections that extend beyond those offered by the United States Constitution.

Based on the foregoing, the County of Kauai, Office of the Prosecuting Attorney, OPPOSES this Bill. We ask that the Committee HOLD SB 147.

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", with a large, sweeping flourish extending to the right.

Justin F. Kollar
Prosecuting Attorney

COMMUNITY ALLIANCE ON PRISONS

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COMMITTEE ON JUDICIARY and LABOR

Chair: Sen. Gil Keith-Agaran

Vice Chair: Sen. Maile Shimabukuro

Friday, January 30, 2015

8:30 a.m.

Room 016

SUPPORT for SB 147 - EYEWITNESS ID

Aloha Chair Keith-Agaran, Vice Chair Shimabukuro 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 almost two decades. This testimony is respectfully offered on behalf of the 5,600 Hawai`i individuals living behind bars, always mindful that more than 1,600, and soon to be rising number of Hawai`i individuals who 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.

SB 147 creates procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations and grants a defendant the right to challenge any eyewitness identification to be used at trial in a pretrial evidentiary hearing. Takes effect 1/1/2016.

Community Alliance on Prisons is in strong support of measures that improve the quality of justice in Hawai`i nei. This measure that would do just that.

We are happy that the Honolulu Police Department has revised their eyewitness identification procedures and hope that they furnished copies of new procedures to all sitting legislators, as requested,

The National Research Council of the National Academies released the report **IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION** in the Fall of 2014.

Below is a thumbnail sketch of their recommendations:

IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION

Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts; Committee on Science, Technology, and Law; Policy and Global Affairs; Committee on Law and Justice; Division of Behavioral and Social Sciences and Education; National Research Council

National Research Council of the National Academies

OVERARCHING FINDINGS

The committee is confident that the law enforcement community, while operating under considerable pressure and resource constraints, is working to improve the accuracy of eyewitness identifications. These efforts, however, have not been uniform and often fall short as a result of insufficient training, the absence of standard operating procedures, and the continuing presence of actions and statements at the crime scene and elsewhere that may intentionally or unintentionally influence eyewitness' identifications.

Basic scientific research on human visual perception and memory has provided an increasingly sophisticated understanding of how these systems work and how they place principled limits on the accuracy of eyewitness identification (see Chapter 4).¹ Basic research alone is insufficient for understanding conditions in the field, and thus has been augmented by studies applied to the specific practical problem of eyewitness identification (see Chapter 5). Applied research has identified key variables that affect the accuracy and reliability of eyewitness identifications and has been instrumental in informing law enforcement, the bar, and the judiciary of the frailties of eyewitness identification testimony.

A range of best practices has been validated by scientific methods and research and represents a starting place for efforts to improve eyewitness identification procedures. A number of law enforcement agencies have, in fact, adopted research-based best practices. This report makes actionable recommendations on, for example, the importance of adopting "blinded" eyewitness identification procedures.

RECOMMENDATIONS TO ESTABLISH BEST PRACTICES FOR THE LAW ENFORCEMENT COMMUNITY

Recommendation #1: Train All Law Enforcement Officers in Eyewitness Identification

Recommendation #2: Implement Double-Blind Lineup and Photo Array Procedures

Recommendation #3: Develop and Use Standardized Witness Instructions

Recommendation #4: Document Witness Confidence Judgments

Recommendation #5: Videotape the Witness Identification Process

RECOMMENDATIONS FOR BEST PRACTICES FOR COURTS

The report also surveys state and federal court decisions and state statutes that alter the Manson test in light of the scientific research. The cited decisions include those by the New Jersey and Oregon Supreme Courts (Henderson and Lawson, respectively) which rely on the robust research on memory and identification in overhauling the way courts in those states deal with identification evidence. This report should help to accelerate this trend by making the following recommendations for courts:

- *Conduct pre-trial judicial inquiry:* Judges should inquire about the eyewitness evidence being offered. If there are indicators of unreliable identifications, judges could limit portion of the eyewitness's testimony or instruct the jury on how to properly evaluate the reliability of the identification based on the scientific research.

- *Make juries aware of prior identifications:* Because in court identifications can unduly influence the jury, juries should hear detailed information about any earlier identification, including the confidence the witness expressed at the time of the identification.

• *Permit expert testimony:* The report recognizes that expert witness who are capable of explaining the nuances of memory and identification are helpful in assisting juries in how to evaluate eyewitness testimony and should be permitted. The report also encourages local jurisdictions to provide funding to defendants to engage qualified experts. The report acknowledges that experts offer distinct advantages over jury instructions.

• *Better instruct juries:* Jury instructions can be used to educate jurors on how to properly evaluate the factors affecting eyewitness identifications and should be tailored to the relevant facts in a particular case. The report urges further study of the effects of jury instructions, including the use of videotaped information to educate jurors and the role of the timing of jury instructions (i.e., presented prior to the witness's testimony rather than at the close of the case).¹

WHY THIS REPORT IS SO IMPORTANT:

Policy reform efforts have long been stalled by claims that the science relating to eyewitness identification continues to evolve and has not been settled. This report has at long last provided definitive answers in some key areas of eyewitness identification police practice.

The findings in this report are based on the first-ever *comprehensive evaluation of the state of the science of eyewitness identification*. Key to this inquiry was an in-depth review of existing research on eyewitness identification and the provision of recommendations about how to improve the administration of lineups and photo arrays to ensure accurate and appropriate use of eyewitness evidence.

WHY THIS IS AN IMPORTANT ISSUE FOR COMMUNITY ALLIANCE ON PRISONS:

Community Alliance is pursuing this justice issue because eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in 72% of convictions overturned through DNA testing. The wrongful conviction and imprisonment of a man on Maui, Alvin Jardine, who spent more than 20 years in prison for a crime he did not commit, involved eyewitness misidentification. This man lost his prime earning years because of the tremendous injustice perpetrated by the state despite 11 witnesses testifying that he was not near the location of the crime.

While eyewitness testimony can be persuasive evidence before a judge or jury, 30 years of strong social science research has proven that eyewitness identification is often unreliable. Research shows that the human mind is not like a tape recorder; we neither record events exactly as we see them, nor recall them like a tape that has been rewound. Instead, witness memory is like any other evidence at a crime scene; it must be preserved carefully and retrieved methodically, or it can be contaminated.

As far back as the late 1800s, experts have known that eyewitness identification is all-too-susceptible to error, and that scientific study should guide reforms for identification procedures. In 1907, Hugo Munsterberg published "On the Witness Stand," in which he questioned the reliability of eyewitness identification. When Yale law professor Edwin Borchard studied 65 wrongful convictions for his pioneering 1932 book, "Convicting the Innocent," he found that eyewitness misidentification was the leading cause of wrongful convictions.

¹ Report Urges Caution in Handling and Relying Upon Eyewitness Identifications in Criminal Cases, Recommends Best Practices for Law Enforcement and Courts, National Research Council, October 2014, <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=18891>

Since then, hundreds of scientific studies (particularly in the last three decades) have affirmed that eyewitness identification is often inaccurate – and that it can be made more accurate by implementing specific identification reforms.²

Professional Prosecutors³

... Jeff Rosen, district attorney of Santa Clara County, where the exoneration groups' best practices for eyewitness identifications have been employed for more than a decade, said, "I think that district attorneys should play a role in encouraging police departments to adopt best practices. District attorneys should educate law enforcement about best practices and encourage best practices.

(...)

Gil Garcetti, former Los Angeles County district attorney, agrees. "It is the responsibility of district attorneys to ensure that the practices being employed by law enforcement are the fairest practices. District attorneys should be working with each law enforcement agency to ensure that they are employing the most professional practices." ...

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

Our discussion about what the person looked like was very revealing. The one thing everyone got right was that it was a woman. After that, the descriptions of hair, height, ethnicity, and clothing ranged widely. (Here I must mention that the student who took the bag was not a very good actor because as she was leaving the room, she looked at the professor as if to verify that she grabbed the correct item!) This was just a short example of how wrong people can be when witnessing an event. When one adds the trauma of witnessing or being involved in a criminal event, it is easy to see how wrong we can be in 'remembering' the details.

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

72% of the 325 exonerations were the results of false eyewitness identifications. This should not be acceptable.

² Information from The Innocence Project website: <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>

³ **Oregon's Eyewitness Decision: Back to Basics**, By James M. Doyle, and December 13, 2012. <http://www.thecrimereport.org/viewpoints/2012-12-oregons-eyewitness-decision-back-to-basics>

Community Alliance on Prisons respectfully asks that the legislature mandate uniform eyewitness identification procedures statewide.

There are also good training videos available on line for police departments with resource issues.

Imagine if you, or someone you love, were one of the 234 wrongly convicted people. Would your vote be different?

Mahalo for this opportunity to share our research on this important justice issue and for your commitment to equal justice.



Committee: Committee on Judiciary and Labor
Hearing Date/Time: Friday, January 30, 2015, 8:30 a.m.
Place: Conference Room 016
Re: Testimony of the ACLU of Hawaii **in Support of S.B. 147**, Relating to Criminal Procedure

Dear Chair Keith-Agaran and Members of the Committee on Judiciary and Labor,

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in **support** of S. B. 147, Relating to Criminal Procedure.

The Innocence Project found that eyewitness identifications are “the single greatest cause of wrongful convictions nationwide, playing a role in 72% of convictions overturned through DNA testing.”¹ Hawaii law enforcement agencies must implement policies and procedures that will prevent mistaken eyewitness identifications whenever possible, particularly when something as fundamental as a person’s freedom and liberty are at stake.

S.B 147 seeks to propel Hawaii law enforcement in this direction by reducing any intentional or unintentional influence or suggestion to eyewitnesses about a suspect.

If law enforcement agencies are truly interested in justice, they should revise their eyewitness identification policies to conform to the best practices established by the state. Compliance will improve eyewitness accuracy, which means fewer innocent people may be convicted.

Thank you for this opportunity to testify.

Daniel M. Gluck
Legal Director
ACLU of Hawaii

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for 50 years.

¹ See <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>.

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Subject: *Submitted testimony for SB147 on Jan 30, 2015 08:30AM*
Date: Thursday, January 29, 2015 8:13:46 AM

SB147

Submitted on: 1/29/2015

Testimony for JDL on Jan 30, 2015 08:30AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Mitchell D. Roth	Hawaii County Office of the Prosecuting Attorney	Oppose	No

Comments:

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SB147

Submitted on: 1/29/2015

Testimony for JDL on Jan 30, 2015 08:30AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Teri Heede	Individual	Support	No

Comments:

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