



The Judiciary, State of Hawai‘i

Testimony to the Senate Committee on Judiciary and Labor

Senator Gilbert S. C. Keith-Agaran, Chair

Senator Karl Rhoads, Vice Chair

and

The Senate Committee on Ways and Means

Senator Jill N. Tokuda, Chair

Senator Donovan Dela Cruz, Vice Chair

Tuesday, February 28, 2017 9:50 AM

State Capitol, Conference Room 211

WRITTEN TESTIMONY ONLY

By

Judge Glenn J. Kim, Chair

Supreme Court Committee on the Hawai‘i Rules of Evidence

Bill No. and Title: Senate Bill No. 674, Relating to Criminal Procedure.

Purpose: Creates procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations. Establishes jury instructions when the court determines that the eyewitness identification is admissible. Requires the attorney general to establish procedures for the implementation of uniform statewide eyewitness identification procedures.

Judiciary's Position:

The Hawai‘i Supreme Court’s Committee on the Rules of Evidence respectfully submits the following comments on the eyewitness identification procedures proposed by Senate Bill No. 674. The committee has no comment on the procedures stated in Sections 1 and 2 of the proposed chapter because they do not affect any of the provisions of the Hawai‘i Rules of Evidence. However, the committee does have a strong objection to and strenuously opposes Section 3 of the proposed legislation entitled “Admissibility of eyewitness identification.” This



Senate Bill No. 674, Relating to Criminal Procedure
Senate Committee on Judiciary and Labor
Senate Committee on Ways and Means
February 28, 2017 9:50 AM
Page 2

section requires a court to instruct the jury when admitting evidence of eyewitness identification as follows:

- (1) That the purpose of this chapter is to reduce the risk of eyewitness misidentification; and**
- (2) That the jury may consider credible evidence of noncompliance with this chapter when assessing the reliability of eyewitness identification evidence.**

These proposed statutory requirements would infringe upon and constrain the judgment and discretion of our trial judges, whose proper job it is to decide upon and craft instructions to the jury. The Hawai'i Supreme Court has held that the trial courts have the duty and ultimate responsibility to insure that juries are properly instructed. State v. Haanio, 94 Hawai'i 405 (2001). The requirements in Section 3 of the bill are potentially damaging to the integrity of the trial process.

With regard to the requirement in subsection (1), in the committee's view, this proposed instruction would constitute a comment on the evidence on the court's part, and such comment is explicitly proscribed in this jurisdiction by Hawai'i Rules of Evidence Rule 1102, presumably because of the danger that such comment will illegitimately influence the jury's reception and evaluation of the evidence.

With regard to the requirement in subsection (2), for the jury to be able to rationally consider whether evidence of noncompliance with the chapter is credible would require the trial court to provide the jury with the sections of the chapter applicable to the particular identification procedure to which the eyewitness making the identification was exposed, as well as the requirements to which law enforcement authorities must adhere in order to be in compliance with the chapter. To provide such a lengthy instruction prior to the elicitation of the eyewitness testimony would be at best very confusing to the jury, a confusion which would be further compounded by such a written instruction to the jury prior to their deliberations.

Finally, it is the committee's belief that mandating such instructions poses an unnecessary burden on a defendant's constitutional right to conduct his or her own defense. A defendant should be able to seek the suppression of arguably tainted eyewitness identification evidence pre-trial without fearing that the consequences of not prevailing on such a motion would then include a requirement that the court instruct the jury in that regard.

In sum, the committee respectfully recommends that Section 3 of the proposed chapter be deleted in its entirety, especially since to do so will not in any way impair the presumed efficacy

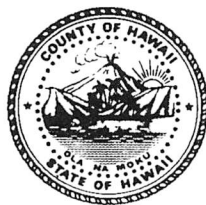


Senate Bill No. 674, Relating to Criminal Procedure
Senate Committee on Judiciary and Labor
Senate Committee on Ways and Means
February 28, 2017 9:50 AM
Page 3

of the specific eyewitness identification procedures mandated by the remainder of the proposed legislation.

Thank you for the opportunity to testify on this measure.

Harry Kim
Mayor



Paul K. Ferreira
Police Chief

Kenneth Bugado Jr.
Deputy Police Chief

County of Hawai'i

POLICE DEPARTMENT

349 Kapi'olani Street • Hilo, Hawai'i 96720-3998
(808) 935-3311 • Fax (808) 961-2389

February 27, 2017

Senator Gilbert S. C. Keith-Agaran, Chair
Chairman and Committee Members
Committee on Judiciary and Labor
Senator Jill N. Tokuda, Chair
Chairman and Committee Members
Committee on Ways and Means
415 South Beretania Street, Room 308
Honolulu, Hawai'i 96813

Re: Senate Bill 674, Relating to Criminal Procedure

Dear Senators Keith-Agaran and Tokuda:

The Hawai'i Police Department **opposes** passage of Senate Bill 674, 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 all state and county law enforcement agencies with regards to eyewitness identifications. We also find ourselves concerned that this legislation attempts to develop internal policies and procedures for an agency that is overseen by the executive branch of government. 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 somewhat 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. We also note our Judicial System's strong appeals process exists to ensure all proper rights are afforded to those accused of criminal activity.

In that we are a nationally accredited agency, the Hawai'i Police Department does already have a standard for eyewitness identification that is in keeping with a modern law enforcement agency.

SENATOR GILBERT S. C. KEITH-AGARAN
SENATOR JILL N. TOKUDA
RE: SENATE BILL 674, RELATING TO CRIMINAL PROCEDURE
PAGE 2

For these reasons, we strongly **oppose** this legislation. Thank you for allowing the Hawai`i Police Department to provide comments relating to Senate Bill 674.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul K. Ferreira", with a long horizontal flourish extending to the right.

PAUL K. FERREIRA
POLICE CHIEF

COMMUNITY ALLIANCE ON PRISONS

P.O. Box 37158, Honolulu, HI 96837-0158

Phone/E-Mail: (808) 927-1214 / kat.caphi@gmail.com



COMMITTEE ON JUDICIARY AND LABOR

Sen. Gil Keith-Agaran, Chair

Sen. Karl Rhoads, Vice Chair

COMMITTEE ON WAYS AND MEANS

Sen. Jill Tokuda, Chair

Sen. Donovan Dela Cruz, Vice Chair

Tuesday, February 28, 2017

9:45 am

Room 211

SUPPORT WITH COMMENTS ON SB 674 - EYEWITNESS ID

Aloha Chairs Keith-Agaran and Tokuda and Members of the Committees!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai'i for two decades. This testimony is respectfully offered on behalf of the approximately 6,000 Hawai'i individuals living behind bars or under the "care and custody" of the Department of Public Safety on any given day. We are always mindful that approximately 1,700 of Hawai'i's imprisoned people 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.

Community Alliance on Prisons supports improving eyewitness identification. Eyewitness mis-identification has been one of the main factors in more than 70% of the exonerations since 1970. We respectfully offer some comments to strengthen the bill so it comports with national standards recently released by the National Academy of Sciences¹.

RECOMMENDATIONS TO ESTABLISH BEST PRACTICES FOR THE LAW ENFORCEMENT COMMUNITY²

The committee's review of law enforcement practices and procedures, coupled with its consideration of the scientific literature, has identified a number of areas where eyewitness identification procedures could be strengthened. The practices and procedures considered here involve acquisition of data that reflect a witness' identification and the contextual factors that bear

¹ IDENTIFYING THE CULPRIT, <https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification>

² IDENTIFYING THE CULPRIT, pages 4-5

on that identification. A recurrent theme underlying the committee's recommendations is development of and adherence to guidelines that are consistent with scientific standards for data collection and reporting.

Recommendation #1: Train All Law Enforcement Officers in Eyewitness Identification The committee recommends that all law enforcement agencies provide their officers and agents with training on vision and memory and the variables that affect them, on practices for minimizing contamination, and on effective eyewitness identification protocols.

Recommendation #2: Implement Double-Blind Lineup and Photo Array Procedures The committee recommends blind (double-blind or blinded) administration of both photo arrays and live lineups and the adoption of clear, written policies and training on photo array and live lineup administration.

Recommendation #3: Develop and Use Standardized Witness Instructions The committee recommends the development of a standard set of easily understood instructions to use when engaging a witness in an identification procedure.

Recommendation #4: Document Witness Confidence Judgments The committee recommends that law enforcement document the witness' level of confidence verbatim at the time when she or he first identifies a suspect.

Recommendation #5: Videotape the Witness Identification Process The committee recommends that the video recording of eyewitness identification procedures become standard practice.

Page 4, line 1 reads: *(1) The suspect may or may not be among the persons in the identification procedure;*

This would be more accurate if it read: The perpetrator may or may not be among the persons or photos featured in the identification procedure.

Page 4, lines 9-17 reads: *The identification procedure requires the administrator to ask the eyewitness to state, in the eyewitness' own words, how certain the eyewitness is of any identification, including but not limited to the conditions under which the eyewitness observed the suspect, including location, time, distance, obstructions, lighting, weather conditions, and other impairments, such as alcohol, drugs, stress, and visual or auditory impairments;*

We ask that this section be separated: 1. eyewitness statement and 2. Viewing conditions.

A confidence statement is only a statement of relative certainty expressed by the eyewitness. That level of confidence may be based upon some of the factors that follow but the eyewitness's explanation of the conditions of observation should be separate from the confidence statement. Immediately after the identification is made, the eyewitness should be asked, "In your own words, tell me how certain you are in the identification you just made."

The instructions speak to the confidence statement but does not require it anywhere. We would similarly recommend that fillers should be selected to match the description provided by the eyewitness of the perpetrator of the crime.

While the instructions to the witness indicate that the administrator doesn't know the suspect's identity, **nowhere in the bill is there a requirement that a live lineup be conducted by a blind administrator and that in a photo lineup, it should be conducted by a blind administrator or blinded administrator. This is the single most important reform.**

The eyewitness should separately be asked about viewing conditions.

Page 7, Section 4 describes the creation of a statewide policy. We would recommend that this section require that the statewide policy include provisions relating to blind/blinded administration, proper fillers (match to description provided by eyewitness), instructions to the witness and confidence statements.

Another important element that should be included is recordation of the eyewitness process. A possible fix is to require video and if impracticable, audio. If audio is also unviable, an option is a list of important elements documented in a written format.

We recommend that the committee review the Honolulu Police Department's Policy 4.30, October 24, 2014³ for your information. We recommend using these protocols statewide. We have attached them for your review and consideration.

If the committee is going to pass this measure, Community Alliance on Prisons respectfully asks the committee to include our amendments so that they conform to the best practices developed by the National Academy of Sciences.

Elizabeth F. Loftus is an American cognitive psychologist and expert on human memory. She has conducted extensive research on the malleability of human memory. Loftus is best known for her ground-breaking work on the misinformation effect and eyewitness memory, and the creation and nature of false memories, including recovered memories of childhood sexual abuse. She said: “

The problem is clear: the unreliability of eyewitness identification evidence poses one of the most serious problems in the administration of criminal justice and civil litigation.”

Mahalo for this opportunity to testify.

³ Honolulu Police Department Policy Law Enforcement Operations, October 24, 2014, Policy Number 4.30, Field Showups, Field Lineups, Photographic Lineups, And Physical Lineups
<http://www.honolulu.org/information/pdfs/FieldShowupsFieldLineupsPhotographicLineupsandPhysicalLineups-07-21-2015-10-43-00.pdf>