



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2017**

ON THE FOLLOWING MEASURE:

S.B. NO. 674, RELATING TO CRIMINAL PROCEDURE.

BEFORE THE:

SENATE COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL, AND
MILITARY AFFAIRS

DATE: Thursday, February 2, 2017 **TIME:** 1:15 p.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Lance M. Goto, Deputy Attorney General

Chair Nishihara and Members of the Committee:

The Department of the Attorney General (the "Department") appreciates the intent of this bill to provide for more accurate and reliable eyewitness identifications, but submits these comments and concerns.

The purpose of this bill is to create procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations. It establishes jury instructions to be given to the trial jurors when the court determines that eyewitness identification evidence is admissible. And it requires the Attorney General to establish uniform statewide law enforcement procedures and protocols for eyewitness identification.

On page 4, lines 20-21, the bill requires law enforcement to inform an eyewitness or victim that the person "shall not speak with the media." Law enforcement may not be comfortable issuing such a gag order.

On page 6, at lines 16-20, the bill provides that the court shall instruct the jury when admitting eyewitness identification evidence, and again prior to jury deliberations, on the following:

- (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 the eyewitness identification evidence.

This jury instruction provision is broad, could be distracting and confusing to the jury, and could adversely impact the trial process.

These jury instructions would require the jury to assess "evidence of noncompliance with this chapter," the new chapter on eyewitness identification procedures. It appears this means the court would have to instruct the jury on all of the requirements of the chapter, as well as any additional procedures and protocols established by the Department pursuant to the chapter. The jury would then have to consider all of these requirements – and whether there was noncompliance with any of them – even though some of the requirements may have little impact on the reliability of the eyewitness identification.

Trial courts already are required to instruct a jury on eyewitness identification under certain circumstances. In State v. Cabagbag, 127 Haw. 302, 277 P.3d 1027 (2012), the Hawaii Supreme Court provided the following model eyewitness identification instructions to trial courts:

[T]he burden of proof is on the prosecution with reference to every element of a crime charged, and this burden includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person responsible for the crime charged.

You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave accurate testimony.

In evaluating identification testimony, consider the following factors:

The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;

The stress, if any, to which the witness was subject at the time of the observation;

The witness' ability, following the observation, to provide a description of the perpetrator of the act;

The extent to which the defendant fits or does not fit the description of the perpetrator previously given by the witness;

The cross-racial or ethnic nature of the identification;

The witness' capacity to make an identification;

[Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act;]

[Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;]

The period of time between the alleged criminal act and the witness' identification;

Whether the witness had prior contacts with the alleged perpetrator;

The extent to which the witness is either certain or uncertain of the identification;

Whether the witness identification is in fact the product of his own recollection;

Any other evidence relating to the witness' ability to make an identification.

Cabagbag, at p. 314.

The Court held that the trial courts must give the jury a specific eyewitness identification instruction whenever identification is a central issue in the case and it is requested by the defendant. The Court also stated that a trial court may, in its discretion, give the instruction if it believes the instruction is otherwise warranted in a particular case.

The Department appreciates the opportunity to share its concerns.

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, February 1, 2017 3:30 PM
To: PSMTestimony
Cc: lady.flach@gmail.com
Subject: *Submitted testimony for SB674 on Feb 2, 2017 13:15PM*

SB674

Submitted on: 2/1/2017

Testimony for PSM on Feb 2, 2017 13:15PM in Conference Room 229

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

Comments:

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INTERGOVERNMENTAL, AND MILITARY AFFAIRS
Twenty-Ninth State Legislature
Regular Session of 2017
State of Hawai'i

February 2, 2017

RE: S.B. 674; RELATING TO CRIMINAL PROCEDURE.

Chair Nishihara, Vice-Chair Wakai, 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 ("Department") submits the following testimony in opposition to S.B. 674.

S.B. 674 would codify certain procedures for the purpose of eyewitness identifications in criminal investigations, and would require the Department of the Attorney General to establish more specific procedures and protocols for eyewitness identification statewide.

While the Department strongly agrees that Hawai'i's law enforcement 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. For these reasons, we strongly believe it to be overly restrictive to codify and mandate a specific list of procedures, as this would discount the value of having our courts and juries assess a "totality of circumstances"—the current standard—and be detrimental to law enforcement's ability to adjust to unique circumstances in each case.

At present, there is already a wealth of caselaw, procedures, and jury instructions pertaining to eyewitness identifications, which go to great lengths to protect defendants' rights. Juries are made well-aware—by both prosecution and defense—that eyewitness testimony is not determinative and can always be subject to human error. Instead of a checklist-type of approach, current law requires that eyewitness identifications be 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. This has been a consistent holding in a multitude of cases, such as State v. Mason, 130 Haw. 347, 2012 WL 603953, Hawai'i App., February 24, 2012 (emphasizing the totality of circumstances).

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 did approve new jury instructions regarding eyewitness identifications on December 18, 2014 and October 29, 2014, to properly guide juries in their consideration of eyewitness identification.

If the Legislature were to codify and require a specific list of procedures, directing law enforcement how to conduct eyewitness identifications, the natural tendency for the public—and for juries—would be to consider the line items in such a list more than the true totality of circumstances. In essence, it would create an implication that if any of the listed items are missing, then the eyewitness identification is somehow substandard or unreliable; which is inconsistent with the “totality of circumstances” standard. As such, we respectfully request that this Committee allow law enforcement the discretion and flexibility to adjust to each situation as it arises, and the ability to continuously update their procedures with best practices; and allow Hawai'i's courts and juries to continue focusing on the totality of circumstances for each individual case, under the guidance of existing caselaw, rules and statutes. Under the current standards, any shortcomings in an eyewitness identification scenario are quickly pointed out and emphasized by defense attorneys, and are certainly part of the jury's consideration.

In order to ensure that our juries and our courts continue to consider the true totality of circumstances pertaining to eyewitness identifications, and continue to consider every aspect of the evidence and arguments presented by defense and prosecution, and continue to weigh every aspect of the evidence and arguments presented by each party—rather than a checklist—we believe it is imperative that the Legislature refrain from codifying or mandating a list of procedures, as contemplated by S.B. 674.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes the passage of S.B. 674. Thank for you the opportunity to testify on this matter.