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# 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 contributed to seventy per cent of the three  
5 hundred fifty wrongful convictions overturned by DNA evidence.  
6 Over the past thirty years, a large body of peer-reviewed,  
7 scientific research and practice has emerged showing that simple  
8 systemic changes in administering eyewitness identification  
9 procedures can greatly improve the accuracy of eyewitness  
10 identifications. Policies and procedures to improve the  
11 accuracy of eyewitness identifications, such as those  
12 recommended by the United States National Institute of Justice,  
13 the American Bar Association, the New Jersey Office of the  
14 Attorney General, the Wisconsin Office of the Attorney General,  
15 the California Commission on the Fair Administration of Justice,  
16 and the North Carolina Center on Actual Innocence, are readily  
17 available for review.





1 "Contamination" means the alteration, replacement, or  
2 impairment of an eyewitness' memory of a person or event as a  
3 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 identification by the eyewitness  
11 of a specific person as the possible 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 possible perpetrator.



1 "Photo lineup" means an identification procedure in which  
2 an array of photographs, including a photograph of the suspect  
3 and additional photographs of other persons not suspected of the  
4 offense, is displayed to an eyewitness either in hard copy form  
5 or via computer or other electronic means for the purpose of  
6 determining whether the eyewitness identifies the suspect as the  
7 possible perpetrator.

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

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

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

19 (1) Prior to a photo lineup or live lineup, law  
20 enforcement shall record in writing as complete a  
21 description as possible of the possible perpetrator



1 provided by the eyewitness in the eyewitness' own  
2 words. This statement shall also include information  
3 regarding the conditions under which the eyewitness  
4 observed the possible perpetrator including location,  
5 time, distance, obstructions, lighting, weather  
6 conditions, and other impairments, including but not  
7 limited to alcohol, drugs, stress, and visual or  
8 auditory disabilities;

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

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

18 (4) The eyewitness shall be instructed, without other  
19 eyewitnesses present, prior to any live lineup or  
20 photo lineup, that:



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- 1 (A) The possible perpetrator may or may not be among
- 2 the persons in the identification procedure;
- 3 (B) The administrator does not know the identity of
- 4 the possible perpetrator, if applicable;
- 5 (C) The eyewitness should not feel compelled to make
- 6 an identification;
- 7 (D) The investigation will continue whether or not an
- 8 identification is made;
- 9 (E) The procedure requires the administrator to ask
- 10 the eyewitness to state, in the eyewitness' own
- 11 words, how certain the eyewitness is of any
- 12 identification; and
- 13 (F) The eyewitness is not to discuss the
- 14 identification procedure or its results with
- 15 other eyewitnesses involved in the case and
- 16 should not speak with the media.
- 17 (b) The administrator shall comply with the following:
- 18 (1) In a photo lineup, any photograph of the suspect shall
- 19 be contemporary and shall resemble the suspect's
- 20 appearance at the time of the offense;



- 1           (2) In a photo lineup, there shall be no characteristics  
2           of the photographs themselves or the background  
3           context in which they are placed that makes any of the  
4           photographs unduly stand out;
- 5           (3) A photo lineup or live lineup shall be composed so  
6           that the fillers generally resemble the eyewitness'  
7           description of the possible perpetrator, while  
8           ensuring that the suspect does not unduly stand out  
9           from the fillers;
- 10          (4) In a photo lineup or live lineup, the administrator  
11          shall comply with the following:
- 12           (A) All fillers selected shall resemble the  
13           eyewitness' description of the possible  
14           perpetrator in significant features including but  
15           not limited to face, weight, build, and skin  
16           tone, including any unique or unusual feature  
17           such as a scar, tattoo, or other unique  
18           identifying mark;
- 19           (B) At least five fillers shall be included in a  
20           photo lineup in addition to the suspect;



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- 1 (C) At least four fillers shall be included in a live  
2 lineup in addition to the suspect; and
- 3 (D) If the eyewitness has previously viewed a photo  
4 lineup or live lineup in connection with the  
5 identification of another person suspected of  
6 involvement in the offense, the fillers in the  
7 lineup in which the instant suspect participates  
8 shall be different from the fillers used in any  
9 prior lineups;
- 10 (5) In a live lineup, no identifying actions, such as  
11 speech, gestures, or other movements, shall be  
12 performed by lineup participants;
- 13 (6) In a live lineup, all lineup participants must be out  
14 of view of the eyewitness prior to the identification  
15 procedure;
- 16 (7) In a photo lineup or live lineup, nothing shall be  
17 said to the eyewitness regarding the suspect's  
18 position in the lineup; and
- 19 (8) In a photo lineup or live lineup, nothing shall be  
20 said to the eyewitness that might influence the





1           eyewitness' identification of any particular lineup  
2           member.

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

5           (1) Each eyewitness shall view photo lineups or live  
6           lineups separately;

7           (2) The suspect shall be placed in a different position in  
8           the live lineup or photo lineup for each eyewitness;  
9           and

10          (3) The eyewitnesses shall not be permitted to communicate  
11          with each other until all identification procedures  
12          have been completed.

13          (d) In any identification procedure, no writings or  
14 information concerning the current investigation or any previous  
15 arrest, indictment, or conviction of the suspect shall be  
16 visible or made known to an eyewitness.

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

19          (f) In any identification procedure where an eyewitness  
20 makes an identification, the administrator shall seek and  
21 document a clear statement from the eyewitness at the time of



1 the identification in the eyewitness' own words, including a  
2 statement describing the eyewitness' confidence level that the  
3 person identified is the possible perpetrator.

4 (g) In any identification procedure where an eyewitness  
5 makes an identification, the eyewitness shall not be provided  
6 with any information concerning the person identified before the  
7 administrator obtains the eyewitness' statement about the  
8 identification.

9 (h) Law enforcement shall make a record of each  
10 identification procedure, including all identification and non-  
11 identification results obtained, undertaken during all  
12 investigations. Each identification procedure record shall be  
13 signed by the relevant eyewitness.

14 (i) When it is impracticable for a blind administrator to  
15 conduct a lineup, the investigator shall state in writing, in  
16 the identification procedure record, the reason therefor.

17 **§ -3 Eyewitness identification procedures for showups.**

18 (a) The administrator shall comply with the following in  
19 conducting a showup:

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



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- 1           (2) A showup shall only be performed using a live suspect  
2           and only in exigent circumstances that require the  
3           immediate display of a suspect to an eyewitness;
- 4           (3) An administrator shall not conduct a showup with a  
5           photograph. If investigators wish to determine if an  
6           eyewitness can make an identification using a  
7           photograph, a photo lineup must be used;
- 8           (4) Prior to any showup, law enforcement shall record in  
9           writing as complete a description as possible of the  
10          possible perpetrator provided by the eyewitness in the  
11          eyewitness' own words. This record shall also include  
12          information regarding the conditions under which the  
13          eyewitness observed the possible perpetrator including  
14          location, time, distance, obstructions, lighting,  
15          weather conditions, and other impairments including  
16          but not limited to alcohol, drugs, stress, and visual  
17          or auditory disabilities;
- 18          (5) The eyewitness shall also be asked if the eyewitness'  
19          vision needs correction by glasses or contact lenses  
20          and whether the eyewitness was wearing them at the  
21          time of the offense. The administrator shall note



- 1           whether the eyewitness was wearing glasses or contact
- 2           lenses at the time of the identification procedure;
- 3       (6)   The eyewitness shall be transported to a neutral, non-
- 4           law enforcement location where the suspect is being
- 5           detained for the purposes of a showup;
- 6       (7)   The eyewitness shall be instructed, without other
- 7           eyewitnesses present, prior to any showup that:
- 8           (A)   The possible perpetrator may or may not be the
- 9                 person that is presented to the eyewitness;
- 10          (B)   The administrator does not know the identity of
- 11                 the possible perpetrator;
- 12          (C)   The eyewitness should not feel compelled to make
- 13                 an identification;
- 14          (D)   The investigation will continue whether or not an
- 15                 identification is made;
- 16          (E)   The procedure requires the administrator to ask
- 17                 the eyewitness to state, in the eyewitness' own
- 18                 words, how certain the eyewitness is of any
- 19                 identification; and
- 20          (F)   The eyewitness is not to discuss the
- 21                 identification procedure or its results with



1                   other eyewitnesses involved in the case and  
2                   should not speak with the media.

3           (b) At any showup, in order to reduce potentially damaging  
4 or prejudicial inferences that may be drawn by the eyewitness,  
5 the administrator shall:

6           (1) Refrain from suggesting, through statements or non-  
7           verbal conduct, that the suspect is or may be the  
8           perpetrator of the crime;

9           (2) Refrain from removing the suspect from a squad car in  
10          front of the eyewitness; and

11          (3) When practicable, present the suspect to the  
12          eyewitness without handcuffs.

13          (c) When there are multiple eyewitnesses, the following  
14 procedure shall apply:

15          (1) Only one eyewitness at a time shall be present at the  
16          location of the showup to participate in the showup;  
17          and

18          (2) If a positive identification is made and an arrest is  
19          justified, subsequent eyewitnesses shall be shown live  
20          or photo lineups.



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

3 (e) If an eyewitness makes an identification, the  
4 administrator shall seek and document a clear statement from the  
5 eyewitness, at the time of the identification and in the  
6 eyewitness' own words, as to the eyewitness' confidence level  
7 that the person identified in the showup is the possible  
8 perpetrator.

9 (f) The administrator shall photograph each suspect or  
10 cause the suspect to be photographed at the time and place of  
11 the showup to preserve a record of the appearance of the suspect  
12 at the time of the showup.

13 (g) When it is impracticable for a blind administrator to  
14 conduct a showup, the investigator shall state in writing the  
15 reason therefor.

16 **§ -4 Video record of identification procedures;**  
17 **impracticability; alternative record.** (a) Unless  
18 impracticable, a video record of each identification procedure  
19 shall be made that includes the following information:

20 (1) All identification and non-identification results  
21 obtained during the identification procedure, signed



- 1 by each eyewitness, including any eyewitness'  
2 confidence statements;
- 3 (2) The names of all persons present at the identification  
4 procedure, including the name of the administrator and  
5 whether the administrator was blind, blinded, or non-  
6 blind;
- 7 (3) If an administrator other than a blind administrator  
8 was used, the reason therefor;
- 9 (4) The date and time of the identification procedure;
- 10 (5) In a photo lineup or live lineup, any eyewitness  
11 identifications of fillers; and
- 12 (6) In a photo lineup or live lineup, the names of the  
13 lineup members and other relevant identifying  
14 information, and the sources of all photographs or  
15 persons used in the lineup.
- 16 (b) If a video record of the identification procedure is  
17 impracticable, the administrator shall document the reason  
18 therefor, and an audio record of the identification procedure  
19 shall be made. The audio record shall be supplemented by the  
20 following:
- 21 (1) All of the photographs used in a photo lineup; and



1           (2) Photographs of all of the individuals used in a live  
2           lineup or showup.

3           (c) If both a video and audio record of the identification  
4 procedure are impracticable, the administrator shall document in  
5 writing the reason therefor, and a written record of the  
6 identification procedure shall be made. The written record  
7 shall be supplemented by the following:

8           (1) All of the photographs used in a photo lineup; and

9           (2) Photographs of all of the individuals used in a live  
10          lineup or showup.

11          § -5 Remedies for noncompliance or contamination. (a)

12 When the prosecution intends to offer eyewitness identification  
13 evidence at trial, the defendant is entitled to a pretrial  
14 evidentiary hearing as to the reliability of the eyewitness  
15 identification evidence offered.

16          (b) At the hearing, the court shall examine whether law  
17 enforcement or any administrator failed to substantially comply  
18 with any requirement contained in this chapter, resulting in the  
19 contamination of the eyewitness. In making its determination,  
20 the court shall consider the following:





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1           (1) Whether any suggestive identification procedures were  
2           employed;

3           (2) Whether the eyewitness identification evidence may  
4           have been otherwise contaminated by law enforcement or  
5           non-law enforcement actors; and

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

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

16          (1) Consider this evidence in determining the  
17           admissibility of the eyewitness identification; and

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



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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

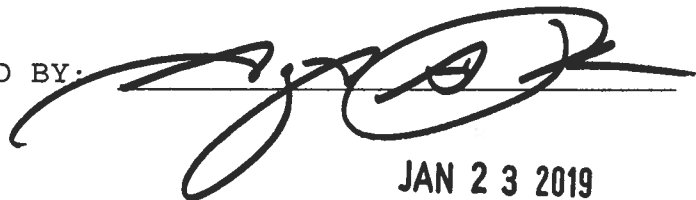
7 (2) That it may consider credible evidence of  
 8 noncompliance with this chapter when assessing the  
 9 reliability of the eyewitness identification evidence.

10 § -6 Training by law enforcement entities. Law  
 11 enforcement entities shall include in their training programs  
 12 for law enforcement officers and recruits information on the  
 13 methods, technical aspects, and scientific findings regarding  
 14 the basis of the eyewitness identification practices and  
 15 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 SECTION 4. This Act shall take effect on January 1, 2020.  
 20

INTRODUCED BY:



JAN 23 2019



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**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. Effective January 1, 2020.

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

