Office of the Public Defender
State of Hawai‘i

Testimony of the Office of the Public Defender,
State of Hawai‘i to the Senate Committee on Judiciary

February 12, 2019

S.B. No. 414: RELATING TO CRIMINAL PROCEDURE

Chair Rhoads, Vice Chair Wakai and Members of the Committee:

The Office of the Public Defender strongly supports H.B. 1061.

Our office supports that standardization of eyewitness identification procedures that comply with current research and provides protection from implicit bias.

The Hawai‘i Supreme Court, has held that the courts must give the jury a specific eyewitness identification instruction whenever identification evidence is a central issue in a case. In State v. Cabagbag, 127 Hawai‘i 302, 310-311, 277 P.3d 1027, 1035-36 (2012), the Court provided the following:

> Since the first cases addressing the reliability of eyewitness testimony were decided in the 1970s, a robust body of research in the area of eyewitness identification has emerged. Many studies now confirm that false identifications are more common than was previously believed. For example, Professor Brandon L. Garrett concluded in a study involving 250 exonerated defendants that "[e]yewitnesses misidentified 76% of the exonerees (190 of 250 cases)." Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong, 48 (2011). Professor Garrett's original study of 200 such cases in 2008 concluded that eyewitness identification testimony was the leading contributing factor to wrongful convictions and was four times more likely to contribute to a wrongful conviction than a false confession. Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 76 (2008). Other studies have reached similar results. See, e.g., Edward Connors, et. al., Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial, 15, 96 (1996), available at

https://www.ncjrs.gov/pdffiles/dnaevid.pdf (reviewing 28 sexual assault cases in which defendants were later exonerated and concluding that all cases, except those involving homicide, "involved victim eyewitness identification both prior to and at trial," and that in those cases "eyewitness testimony was the most compelling evidence"); Gary L. Wells, et. al., Recommendations for Properly Conducted Lineup Identification Tasks, in Adult Eyewitness Testimony: current Trends and Developments 223-24 (1994) (studying over 1,000 wrongful convictions and concluding that recall errors by witnesses were the leading cause of such convictions).

Researchers have found that several variables tend to affect the reliability of an eyewitness's identification. These include the passage of time, witness stress, duration of exposure, distance, "weapon focus" (visual attention eyewitnesses give to a perpetrator's weapon during crime), and cross-race bias (eyewitnesses are more accurate at identifying persons of their own race). Juries, however, may not be aware of the extent to which these factors affect an individual's ability to make an accurate identification, and thus tend to "over believe" witness identification testimony. In a 1983 study, for example, researchers presented individuals with crime scenarios derived from previous empirical studies. See Brigham & Bothwell, The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications, 7 Law & Hum. Behav. 19, 22-24 (1983). Researchers found that the study's respondents estimated an average accuracy rate of 71 percent for a highly unreliable scenario in which only 12.5 percent of eyewitnesses had in fact made a correct identification. See id.

Empirical research has also undermined the common sense notion that the confidence of the witness is a valid indicator of the accuracy of the identification. See [State v. Long, 721 P.2d 483, 490 (Utah 1986)] (explaining that the accuracy of an identification is only poorly associated with witness confidence and is sometimes inversely associated with witness confidence) (citing K. Deffenbacher, Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?, 4 Law & Hum. Behav. 243 (1980); Lindsay, et. al., Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?, 66 J. Applied Psych. 79, 80-82 (1981)). However, courts and juries continue to place great weight on the confidence expressed by the witness in assessing reliability. See Cutler & Penrod, Jury Sensitivity to Witness Identification Testimony, 14 Law & Hum. Behav. 185, 185 (1990) (finding that what

most affects jurors' assessment of witness identification testimony is the confidence expressed by the witness).

We encourage the use of best practices by law enforcement and the establishment of procedural protections, especially where there is risk of misidentification that can have serious and long-term consequences that impact the lives of innocent citizens.

Thank you for the opportunity to comment on S.B. No. 414.

The Judiciary, State of Hawai‘i

Testimony to the Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Glenn Wakai, Vice Chair

Tuesday, February 12, 2019 9:00 AM
State Capitol, Conference Room 016

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

Bill No. and Title: Senate Bill No. 414, Relating to Criminal Procedure.

Purpose: 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.

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 414. The committee has no objection to and does not oppose the procedures included in Sections 1 through 4 and Section 6 of the proposed chapter. However, the committee does have strong objection to and strenuously opposes Section 5 of the proposed legislation beginning at page 16, line 11, encompassing so-called “remedies for non-compliance or contamination,” as these supposed mandates infringe upon and constrain the judgment and discretion of our trial judges, whose proper job it is to decide upon and craft such remedies in the first instance.

To begin with, the judicial procedures mandated by subsections (a) through (c) of proposed Section 5 are completely unnecessary, superfluous, and over-constraining of the discretion already properly exercised in this context by our criminal court judges. At present, criminal defendants are already “entitled to a pre-trial evidentiary hearing as to the reliability of” eyewitness identification evidence sought to be admitted at trial. In fact, defense motions to

suppress such evidence are already routinely filed in cases where such evidence is at issue, and once such a motion is filed, the trial court is obligated to hold a full evidentiary hearing on the matter.

In such a hearing, the court routinely considers at least the factors set forth in subsection (b) of the proposed Section 5, and almost always additional relevant factors as well. And if the court concludes that the identification evidence is insufficiently reliable for any reason, the court will order such evidence suppressed. To repeat, this is routine and current practice in our criminal courts, such that the mandates proposed in Section 5 are unnecessary, and as such, potentially mischievous. Were the remainder of the proposed legislation passed into law, then this would simply broaden the area of eyewitness identification procedures subject to the legitimate purview and oversight of the courts which they already exercise without the need for the superfluous mandates set forth in Section 5.

In addition, the mandates regarding jury instructions set forth in subsection (d) of the proposed Section 5 are not only unnecessary, but, in the considered judgment of this committee, ill-advised and potentially damaging to the integrity of the trial process. The first required jury instruction provided for in subsection (d)(1) mandates that the court inform the jury that the "chapter is designed to reduce the risk of eyewitness misidentification." However, in order for the jurors to be able to appreciate the chapter's design, the trial court would need to instruct them that the chapter authorizes the court "to [s]uppress the evidence of eyewitness identification when there is a substantial probability of eyewitness misidentification" resulting from the "failure" to comply with any of the provisions of the chapter. Accordingly, the trial court's admission of the evidence during the trial in the first instance would clearly provide basis for a jury inference that the court had already found such evidence sufficiently reliable for admission, and that any non-compliance with the policies and procedures of the chapter did not result in a misidentification. In the committee's view, the foregoing would essentially 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.

The second required instruction provided for in subsection (d)(2) mandates that the court inform the jury "[t]hat it may consider credible evidence of noncompliance with [the] chapter when assessing the reliability of the eyewitness identification evidence." For the jury to be able rationally to consider whether such supposed evidence of noncompliance 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 to Section 6, which sets forth the requirements to which law enforcement authorities must adhere in order to be in compliance with the chapter. However, 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 5 of the proposed chapter (page 16, line 11 through page 18, line 9), be deleted in its entirety, especially since to do so will not in any way impair the presumed efficacy of the specific eyewitness identification procedures mandated by the remainder of the proposed legislation.

Thank you for the opportunity to testify on this measure.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019

LATE

ON THE FOLLOWING MEASURE:
S.B. NO. 414, RELATING TO CRIMINAL PROCEDURE.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 12, 2019 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Clare E. Connors, Attorney General, or
Lance Goto, Deputy Attorney General

Chair Rhoads and Members of the Committee:

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

The purpose of this bill is to establish procedures for law enforcement to follow when conducting live lineups, photo lineups, and showups for the eyewitness identification of those suspected of committing offenses.

The Department notes that it strives to always conduct its investigations fairly and thoroughly, and the Investigations Division of the Department has already adopted strong eyewitness identification procedures.

The Department has significant concerns about the section entitled, "Remedies for noncompliance or contamination," starting on page 16 of the bill. On page 16, lines 11-15, the bill provides that a defendant is "entitled to a pretrial evidentiary hearing as to the reliability of the evidence offered." Currently, defendants who believe they have a basis to challenge the evidence already are able to file motions to suppress identifications to raise the issue before the court. Presently, the system already has an available remedy, which has been enhanced and sharpened over time through numerous appellate court decisions.

On page 16, at lines 16-20, and continuing on page 17, at lines 1-20, the bill provides:

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

(1) Whether any suggestive identification procedures were employed;
(2) Whether the eyewitness identification evidence may have been otherwise contaminated by law enforcement or non-law enforcement actors; and
(3) Any other factors bearing upon the reliability of the identification evidence, including but not limited to characteristics of the witness, possible perpetrator, or event.

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

(1) Consider this evidence in determining the admissibility of the eyewitness identification; and
(2) Suppress the evidence of eyewitness identification when there is a substantial probability of eyewitness misidentification.

Although this bill requires the court to "examine whether law enforcement or any administrator failed to substantially comply with any requirement contained in this chapter," it is then directed to consider factors that have nothing to do with ensuring law enforcement compliance with the chapter requirements. For example, the court is being directed to consider contamination as a result of acts by non--law enforcement actors. This could refer to acts by anyone, including nongovernment actors. The court is also directed to consider "any other factors bearing upon the reliability of the identification evidence, including but not limited to characteristics of the witness, possible perpetrator, or event." These factors have no bearing on whether law enforcement complied with the chapter. Moreover, these issues may be brought up during trial by both the prosecution and the defense and subsequently used by the jury in evaluating the evidence and determining the facts.

Subsection (c) refers to the court finding evidence of failure by prosecuting agencies to comply with provisions of the chapter. Prosecuting agencies however, are not involved in the eyewitness identification process, and are therefore not required to comply with any provisions in the chapter.

Subsection (d), on page 18, lines 1-9, provides:

> (d) When a court rules an eyewitness identification admissible after a pretrial evidentiary hearing, the court shall instruct the jury when admitting such evidence and prior to the jury's deliberation, where applicable:
>
> (1) That this chapter is designed to reduce the risk of eyewitness misidentification; and
>
> (2) That it may consider credible evidence of noncompliance with this chapter when assessing the reliability of the eyewitness identification evidence.

These provisions are ambiguous, confusing, and likely to create serious issues at trial. The bill requires both the court and then the jury to independently receive and assess evidence of pretrial identification procedures employed during the investigation, make findings regarding the State's compliance with the provisions of this bill, and use the findings of compliance or noncompliance in assessing the reliability of the eyewitness identification. While these provisions require the court to make pretrial findings with respect to compliance, noncompliance with the provisions may not result in the court's suppression of the eyewitness identification evidence. Moreover, this bill requires that any evidence of noncompliance shall be admissible at trial to support claims of misidentification; and, that the jury shall be instructed that it may consider evidence of noncompliance in determining reliability of the identification. If the jury were informed of the court's pretrial findings with respect to compliance with chapter requirements and the reliability of the eyewitness identification evidence, this would improperly impose the court's factual findings upon the jury. The jury would then have to be instructed on the statutory requirements of this bill and be required to independently determine whether or not there was compliance with the procedures set out in this bill, even where the court already had ruled that the eyewitness identification evidence was admissible. The collateral issues related to compliance will potentially distract the jury from the issue at hand, which is the innocence or guilt of the defendant.

There are many requirements in this bill that a jury would have to consider in determining compliance or noncompliance with the procedures. In the end,

however, compliance or noncompliance is not determinative of the reliability of the identification. Depending on the circumstances, eyewitness identification may still be highly reliable, even though there may have been some degree of noncompliance.

The Department appreciates this opportunity to share its concerns.

SB-414
Submitted on: 2/7/2019 7:50:35 AM
Testimony for JDC on 2/12/2019 9:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Victor K. Ramos	Testifying for Maui Police Department	Oppose	No

Comments:

Justin F. Kollar
Prosecuting Attorney

Jennifer S. Winn
First Deputy

Rebecca A. Vogt Like
Second Deputy

Diana Gausepohl-White
Victim/Witness Program Director

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THE HONORABLE KARL RHOADS, CHAIR
SENATE COMMITTEE ON JUDICIARY
The Thirtieth Legislature
Regular Session of 2019
State of Hawai`i

February 12, 2019

RE: S.B. 414: RELATING TO CRIMINAL PROCEDURE.

Chair Rhoads, Vice-Chair Wakai, and members of the Senate Committee on Judiciary, the Office of the Prosecuting Attorney of the County of Kauaʻi is in strong opposition to this measure.

This bill will create procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations and grant a defendant the right to challenge any eyewitness identification to be used at trial in a pretrial evidentiary hearing.

There are already established and existing procedural and administrative requirements regarding eyewitness identification set by case law and judicial precedent. Defendants in criminal cases already have the ability to file a motion to suppress an eyewitness identification in a pretrial evidentiary hearing. This bill, which crops up like a noxious weed each session, is superfluous and will create situations where crime goes unpunished due to a technical or administrative failure to comply with a procedure that is unrelated to the merits or substance of the actual eyewitness identification.

Thank you for this opportunity to testify on this bill.

POLICE DEPARTMENT

CITY AND COUNTY OF HONOLULU

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OUR REFERENCE
WO-KK

February 12, 2019

The Honorable Karl Rhoads, Chair
and Members
Committee on Judiciary
State Senate
Hawaii State Capitol
415 South Beretania Street, Room 016
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

SUBJECT: Senate Bill No. 414, Relating to Criminal Procedure

I am Walter Ozeki, Acting Major of the Criminal Investigation Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD opposes Senate Bill No. 414, Relating to Criminal Procedure.

While the HPD is in agreement that meaningful policies and procedures can greatly improve the accuracy of eyewitness identification, it is important to recognize that different jurisdictions deal with different restrictions relating to the introduction of evidence. While accurate identification is an essential factor in the prosecution of cases, identification alone that is not supported by corroboration facts is not sufficient to successfully prosecute a case.

Recognizing the importance of minimizing the possibility of misidentification during investigations, the HPD has already voluntarily adopted the majority of procedures as outlined in this bill. However, there are a few areas that we are concerned with. The HPD has adopted the use of blind photograph lineups as the preferential method of presenting photograph lineups. Given the number of personnel involved in conducting live lineups, the training involved in properly conducting these lineups, and the limited number of personnel to select from, it would be difficult to adopt "blind" live lineups as the preferential method of choice.

With the preference of tattoos (including facial tattoos), it has become increasingly difficult to exactly replicate these features without dramatically altering photographs or the appearance of fillers. The blanket requirement that fillers shall include any unique or unusual feature such as a scar, tattoo, or other unique identifying marks may be too prohibitive.

This bill also mandates that "in a live lineup, no identifying actions, such as speech, gestures, or other movements, shall be performed by a lineup participant." In situations where the perpetrator seeks to conceal his appearance utilizing some type of face covering; speech, gestures, or other movements would not be the sole factor in confirming identification. They can, however, be very important contributing factors that may be considered. Elimination of this tool would serve to further validate the use of masks or face coverings while committing crimes as a way of completely eliminating the possibility of identification.

Lastly, the prohibition of utilizing a photograph as a "show up" could be problematic. A show up with a photograph (what we refer to as "confirmation photo") is utilized only in limited circumstances when there is an established relationship between the victim and the perpetrator. It can be particularly useful when the relationship is a familial one in such cases as domestic violence or sexual assault. In these cases (especially when the victim is a child), the presentation of a lineup will only serve as a further unnecessary stressor, particularly if the perpetrator is a family member.

Legislating the actual procedures as it pertains to the identification process is unnecessary and fails to take into consideration unusual circumstance and idiosyncrasies of Hawaii laws. The current process of exclusion, which is based on the evaluation of the relevant factors by a judge, has proved to be an effective and appropriate safeguard towards protecting the citizens of Hawaii from law enforcements use of prejudicial practices.

The Honolulu Police Department opposes Senate Bill No. 414, Relating to Criminal Procedure.

Thank you for the opportunity to testify.

Sincerely,

Walter Ozeki, Acting Major
Criminal Investigation Division

APPROVED:

Susan Ballard
Chief of Police

Harry Kim
Mayor

Paul K. Ferreira
Police Chief

Kenneth Bugado Jr.
Deputy Police Chief

County of Hawai'i

POLICE DEPARTMENT

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February 7, 2019

Senator Karl Rhoads
Chairperson and Committee Members
Committee On Judiciary
415 South Beretania Street, Room 016
Honolulu, Hawai`i 96813

RE: SENATE BILL 414 RELATING TO CRIMINAL PROCEDURE

Dear Senator Rhoads:

The Hawai`i Police Department **opposes Senate Bill 414**, with its purpose to create procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations. It further grants a defendant the right to challenge any eyewitness identification to be used at trial in a pretrial evidentiary hearing.

We believe the requirements set forth within this bill are extremely onerous and our Department is opposed to this measure as it places very restrictive burdens on 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.

It is for these reasons, we urge this committee to not support this legislation.

Thank you for allowing the Hawai`i Police Department to provide comments relating to Senate Bill 414.

Sincerely,

Kenneth Bugado, Jr.
for
PAUL K. FERREIRA
POLICE CHIEF

DEPARTMENT OF THE PROSECUTING ATTORNEY

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THE HONORABLE KARL RHOADS, CHAIR
SENATE COMMITTEE ON JUDICIARY
Thirtieth State Legislature
Regular Session of 2019
State of Hawai`i

February 12, 2019

RE: S.B. 414; RELATING TO CRIMINAL PROCEDURE.

Chair Rhoads, Vice-Chair Wakai and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in opposition to S.B. 414.

Although the Department agrees that it is important for law enforcement to maintain best practices and standardized procedures for eyewitness identifications, it is our understanding that the Honolulu Police Department and neighbor island police departments already incorporate most or all of the procedures listed in S.B. 414. It is also our understanding that their protocol is based on local caselaw, local evidentiary requirements, and national law enforcement developments and discourse; all of which are constantly evolving. Thus, codifying these standards would be overly restrictive and unnecessary, keeping the procedures static, while caselaw and best practices continuously evolve. Moreover, the very fact that there is a checklist enumerated in statute creates an implied inference that, if anything on the checklist is missing or problematic, then the eyewitness identification is somehow substandard or unreliable. Such an inference would be inconsistent with well-established caselaw.

At present, there is already a wealth of caselaw, court rules, evidentiary rules, 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. They are repeatedly told to consider any potential biases, and the overall level of reliability, when a case involves eyewitness identification.

Instead of a checklist-type of approach, however, caselaw requires that eyewitness identifications be reviewed under a "totality of the circumstances," which makes sense, as there are so many case-specific factors that must be taken into account. The importance of considering a totality of the circumstances is well-established, in cases such as State v. Mason, 130 Haw. 347, Hawai'i App., February 24, 2012.

As jury instructions are instrumental to guiding juries through their analysis and decision-making process, at least three (3) Hawaii Supreme Court opinions have addressed when and what type of jury instructions must be given to juries, to ensure they are well-aware of the fallibility of eyewitness identifications. The Judiciary's Jury Instructions Committee also reviews this matter regularly, and approved new jury instructions regarding eyewitness identifications on October 29, 2014 and December 18, 2014, to properly guide juries in their consideration of eyewitness identification.

Furthermore, judges have the 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.

If the Legislature were to codify and require a specific list of procedures, directing law enforcement on how to conduct eyewitness identifications, the natural tendency for the public—and for juries—would be to consider those listed line items more than the true totality of circumstances. Codifying a list would also 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.

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 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 specifying a list of procedures, as contemplated by H.B. 1061. Please allow our ever-evolving caselaw, court rules, evidentiary rules & jury instructions to continue guiding our juries in their deliberations, and allow our law enforcement's procedures to continue to evolve along with caselaw and national best practices.

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. 414. Thank for you the opportunity to testify on this matter.