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# A BILL FOR AN ACT

RELATING TO EYEWITNESS IDENTIFICATION.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1 SECTION 1. Act 281, Session Laws of Hawaii 2019, is  
2 amended by amending section 2 to read as follows:

3 "SECTION 2. The Hawaii Revised Statutes is amended by  
4 adding a new chapter to be appropriately designated and to read  
5 as follows:

6 "CHAPTER

7 EYEWITNESS IDENTIFICATION PROCEDURES

8 § -1 Definitions. As used in this chapter, unless the  
9 context clearly requires otherwise:

10 "Administrator" means the person conducting the photo  
11 lineup, live lineup, or showup for law enforcement.

12 "Blind" means the administrator does not know the identity  
13 of the suspect in the identification procedure.

14 "Blinded" means the administrator may know who the suspect  
15 is, but by virtue of the use of procedures or technology, does  
16 not know which lineup member is being viewed by the eyewitness.



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 acting  
18 as fillers, is displayed to an eyewitness for the purpose of  
19 determining whether the eyewitness identifies the suspect as the  
20 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~~] Before 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  
10 eyewitness' vision needs correction by glasses or  
11 contact lenses and whether the eyewitness was wearing  
12 them at the time of the offense. The administrator  
13 shall note whether the eyewitness was wearing glasses  
14 or contact lenses at the time of the identification  
15 procedure;

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

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



- 1 (A) The suspect may or may not be among the persons  
2 in the identification procedure;
- 3 (B) The administrator does not know the identity of  
4 the suspect, 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 make a statement, in the  
11 eyewitness' own words, if the eyewitness makes an  
12 identification; and
- 13 (F) Speaking with other witnesses or the media may  
14 hinder prosecution.
- 15 (b) The administrator shall comply with the following:
- 16 (1) In a photo lineup, any photograph of the suspect  
17 [~~shall be contemporary and~~] shall resemble the  
18 suspect's appearance at the time of the offense;
- 19 (2) In a photo lineup, to the extent practicable, there  
20 shall be no characteristics of the photographs  
21 themselves or the background context in which they are



- 1 placed that makes any of the photographs unduly stand  
2 out;
- 3 (3) A photo lineup or live lineup shall be composed so  
4 that the fillers generally resemble the eyewitness'  
5 description of the possible perpetrator, while  
6 ensuring that the suspect does not unduly stand out  
7 from the fillers;
- 8 (4) In a photo lineup or live lineup, the administrator  
9 shall comply with the following:
- 10 (A) All fillers selected shall resemble the  
11 eyewitness' description of the possible  
12 perpetrator in significant features including but  
13 not limited to face, weight, build, and skin  
14 tone;
- 15 (B) At least five fillers shall be included in a  
16 photo lineup in addition to the suspect;
- 17 (C) At least four fillers shall be included in a live  
18 lineup in addition to the suspect; and
- 19 (D) If the eyewitness has previously viewed a photo  
20 lineup or live lineup in connection with the  
21 identification of another person suspected of



1           involvement in the offense, the fillers in the  
2           lineup in which the instant suspect participates  
3           shall be different from the fillers used in any  
4           prior lineups;

5           (5) In a live lineup, no identifying actions, such as  
6           ~~[speech,~~ gestures [7] or other movements, shall be  
7           performed by lineup participants;

8           (6) In a live lineup, all lineup participants shall be out  
9           of view of the eyewitness ~~[prior to]~~ before the  
10          identification procedure;

11          (7) In a photo lineup or live lineup, nothing shall be  
12          said to the eyewitness regarding the suspect's  
13          position in the lineup; and

14          (8) In a photo lineup or live lineup, nothing shall be  
15          said to the eyewitness that might influence the  
16          eyewitness' identification of any particular lineup  
17          member.

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

20          (1) Each eyewitness shall view photo lineups or live  
21          lineups separately;



1           (2) The suspect shall be [~~randomly positioned~~] permitted  
2           to select their position in the live lineup or photo  
3           lineup for each eyewitness; and

4           (3) The eyewitnesses shall not be permitted to communicate  
5           with each other until all identification procedures  
6           have been completed.

7           (d) In any identification procedure, no writings or  
8           information concerning [~~the current investigation or~~] any  
9           previous arrest, indictment, or conviction of the suspect shall  
10          be visible or made known to an eyewitness.

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

13          (f) In any identification procedure where an eyewitness  
14          makes an identification, the administrator shall seek and  
15          document a clear statement from the eyewitness of the  
16          eyewitness' confidence in the identification at the time of the  
17          identification in the eyewitness' own words.

18          (g) In any identification procedure where an eyewitness  
19          makes an identification, the eyewitness shall not be provided  
20          with any information concerning the person identified before the





1 administrator obtains the eyewitness' statement about the  
2 identification.

3 (h) Law enforcement shall make a record of each  
4 identification procedure, including all identification and non-  
5 identification results obtained, undertaken during all  
6 investigations. Each identification procedure record shall be  
7 signed by the relevant eyewitness.

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

11 **§ -3 Eyewitness identification procedures for showups.**

12 (a) The administrator shall comply with the following in  
13 conducting a showup:

- 14 (1) ~~[Where possible,]~~ Except as provided in this  
15 subsection, the administrator shall perform a live  
16 lineup or photo lineup instead of a showup;
- 17 (2) A showup shall only be performed using a live suspect  
18 and only in exigent circumstances ~~[that require the~~  
19 ~~immediate display of a suspect to an eyewitness,]~~ .  
20 For purposes of this paragraph, "exigent  
21 circumstances" means circumstances that involve the



1 temporary detention or arrest of a suspect at or near  
2 the scene of an offense, or during the suspect's  
3 flight therefrom, pending procedures that attempt to  
4 verify the identity of the suspect;

5 ~~[(3) All showups shall be conducted blind unless to do so~~  
6 ~~would place an undue burden on law enforcement or the~~  
7 ~~investigation;~~

8 ~~(4)]~~ (3) An administrator shall not conduct a showup with  
9 a photograph~~[- If investigators wish to determine if~~  
10 ~~an eyewitness can make an identification using a~~  
11 ~~photograph, a photo lineup shall be used;]~~ unless the  
12 suspect is someone already familiar to the eyewitness,  
13 including a spouse, partner, child, relative,  
14 coworker, or neighbor;

15 ~~[(5) Prior to any showup, law enforcement shall record in~~  
16 ~~writing as complete a description as possible of the~~  
17 ~~possible perpetrator provided by the eyewitness in the~~  
18 ~~eyewitness' own words. This record shall also include~~  
19 ~~information regarding the conditions under which the~~  
20 ~~eyewitness observed the possible perpetrator including~~  
21 ~~location, time, distance, obstructions, lighting,~~



1 ~~weather conditions, and other impairments including~~  
2 ~~but not limited to alcohol, drugs, stress, and visual~~  
3 ~~or auditory disabilities;~~

4 ~~(6)]~~ (4) The eyewitness shall also be asked if the  
5 eyewitness' vision needs correction by glasses or  
6 contact lenses and whether the eyewitness was wearing  
7 them at the time of witnessing the offense. The  
8 administrator shall note whether the eyewitness was  
9 wearing glasses or contact lenses at the time of the  
10 identification procedure;

11 ~~(7)]~~ (5) The eyewitness shall be ~~[transported to a~~  
12 ~~neutral, non law enforcement]~~ escorted to the location  
13 where the suspect is being detained for the purposes  
14 of a showup;

15 ~~(8)]~~ (6) The eyewitness shall be instructed, without other  
16 eyewitnesses present, ~~[prior to]~~ before any showup  
17 that:

18 (A) The suspect may or may not be the person that is  
19 presented to the eyewitness;

20 (B) The administrator does not know the identity of  
21 the suspect, if applicable;



- 1 (C) The eyewitness should not feel compelled to make  
2 an identification;
- 3 (D) The investigation will continue whether or not an  
4 identification is made;
- 5 (E) The procedure requires the administrator to ask  
6 the eyewitness to make a statement, in the  
7 eyewitness' own words, if the eyewitness makes an  
8 identification; and
- 9 (F) Speaking with other witnesses or the media may  
10 hinder prosecution.
- 11 (b) At any showup, in order to reduce potentially damaging  
12 or prejudicial inferences that may be drawn by the eyewitness,  
13 the administrator shall:
- 14 (1) Refrain from suggesting, through statements or  
15 nonverbal conduct, that the suspect is or may be the  
16 perpetrator of the crime;
- 17 (2) Refrain from removing the suspect from a squad car in  
18 front of the eyewitness; and
- 19 (3) When practicable, present the suspect to the  
20 eyewitness without handcuffs.



1 (c) When there are multiple eyewitnesses, [~~the following~~  
2 ~~procedure shall apply.~~

3 ~~(1) Only]~~ only one eyewitness at a time shall be present  
4 at [~~the location of]~~ the showup [~~to participate in the~~  
5 ~~showup; and~~

6 ~~(2) If a positive identification is made and an arrest is~~  
7 ~~justified, subsequent eyewitnesses shall be shown live~~  
8 ~~lineups or photo lineups].~~

9 (d) If there are multiple suspects, the suspects shall be  
10 separated and participate in separate showups.

11 (e) If an eyewitness makes an identification, the  
12 administrator shall seek and document a clear statement from the  
13 eyewitness[~~7~~] of the eyewitness' confidence in the  
14 identification at the time of the identification and in the  
15 eyewitness' own words.

16 (f) The administrator shall photograph each suspect or  
17 cause the suspect to be photographed at the time and place of  
18 the showup to preserve a record of the appearance of the suspect  
19 at the time of the showup.



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

4 § -4 Video record of identification procedures;

5 impracticability; alternative record. (a) Unless  
6 impracticable, a video record of each identification procedure  
7 shall be made that includes the following information:

- 8 (1) All identification and non-identification results  
9 obtained during the identification procedure, signed  
10 by each eyewitness;
- 11 (2) The names of all persons present at the identification  
12 procedure, including the name of the administrator and  
13 whether the administrator was blind, blinded, or non-  
14 blind;
- 15 (3) If an administrator other than a blind administrator  
16 was used, the reason therefor;
- 17 (4) The date and time of the identification procedure;
- 18 (5) In a photo lineup or live lineup, any eyewitness  
19 identifications of fillers; and
- 20 (6) In a photo lineup or live lineup, the names of the  
21 lineup members and other relevant identifying



1 information, and the sources of all photographs or  
2 persons used in the lineup.

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

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

17 ~~(2) Photographs of all of the individuals used in a live~~  
18 ~~lineup or showup.]~~

19 § -5 **Training by law enforcement entities.** Law  
20 enforcement entities shall include in their training programs  
21 for law enforcement officers and recruits information on the



1 methods, technical aspects, and scientific findings regarding  
2 the basis of the eyewitness identification practices and  
3 procedures referenced in this chapter.

4 § -6 Noncompliance. (a) Noncompliance with the  
5 requirements imposed by this chapter does not require the  
6 exclusion of eyewitness identification evidence.

7 (b) An impermissibly suggestive eyewitness identification  
8 procedure alone does not require the exclusion of identification  
9 evidence.

10 (c) No eyewitness identification shall be deemed  
11 inadmissible in any trial, hearing, or other proceeding in any  
12 court of this State unless a court determines that the  
13 identification lacks sufficient reliability, under the totality  
14 of the circumstances, to be admissible in evidence."

15 SECTION 2. Act 281, Session Laws of Hawaii 2019, is  
16 amended by amending section 4 to read as follows:

17 "SECTION 4. This Act shall take effect on [~~June 1, 2020.~~]  
18 September 1, 2020."





1 SECTION 3. Statutory material to be repealed is bracketed  
2 and stricken. New statutory material is underscored.

3 SECTION 4. This Act shall take effect on July 1, 2050.



**Report Title:**

Honolulu Prosecuting Attorney Package; Criminal Procedure;  
Eyewitness Identification

**Description:**

Amends Act 281, Session Laws of Hawaii 2019 (Act 281), to provide clarification and flexibility in eyewitness identification procedures. Amends the effective date of Act 281 to 9/1/2020. Takes effect on 7/1/2050. (HD1)

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