



## Office of the Public Defender State of Hawaii



### Testimony of the Office of the Public Defender, State of Hawaii, to the House Committee on Public Safety, Intergovernmental Affairs and Military Affairs

March 9, 2020

#### H.B. No. 1744, HD1: RELATING TO EYEWITNESS IDENTIFICATION

Chair: Representative Clarence K. Nishihara, Vice Chair: Representative Glenn Wakai and Members of the Committee:

The Office of the Public Defender (OPD) supports the intent of H.B. 1744 HD1, in its goal to establish procedures for the use of eye witness identification by law enforcement agencies. However, the OPD has some concerns regarding this measure.

In section -3, the Bill deals with procedures for field show ups. The wording in sub-section (5) of -3 has been entirely eliminated, but is necessary to preserve evidence to determine the constitutionality of the show up. Prior to any show up, law enforcement officers need to have a written or verbal description of a suspect, or they would not know who to stop and hold for the show up. This identification information (evidence) needs to be preserved in some written form, for later review. The Honolulu Police Department (HPD) already has a form that allows witnesses to merely check off boxes relating to a suspect's appearance. This form takes only minutes to fill out, and can be done while officers are searching the area for a possible suspect. This procedure would not result in improper delays, and would insure that a witness had a clear description in mind prior to viewing the show up. This is important to prevent a witness from being improperly influenced by the appearance of the person being held for the show up. Without a prior description, no one would be able to evaluate whether the identification made during the show up was proper and accurate.

The OPD also objects to the inclusion of language in Section -6 dealing with Non-compliance. The wording in this part of the measure would allow law enforcement and prosecuting agencies to argue that mere non-compliance with the procedures of this measure, or a resulting impermissibly suggestive identification, would not, in and of itself, require the exclusion of this evidence. This language will only serve to complicate objections to the fairness of any identification procedure in any particular case. The fairness, or constitutionality of any identification procedure should be judged strictly by its ability to withstand due process scrutiny, and not by statutory compliance.

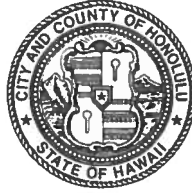
Thank you for the opportunity to comment on H.B. 1744 HD1.



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OUR REFERENCE WO-KK

March 10, 2020

The Honorable Clarence K. Nishihara, Chair  
and Members  
Committee on Public Safety,  
Intergovernmental, and Military Affairs  
State Senate  
Hawaii State Capitol  
415 South Beretania Street, Room 229  
Honolulu, Hawaii 96813

Dear Chair Nishihara and Members:

SUBJECT: House Bill No. 1744, H.D. 1, Relating to Eyewitness Identification

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

The HPD supports the intent of House Bill No. 1744, H.D. 1, Relating to Eyewitness Identification, but has the following concerns.

While the HPD is in agreement that meaningful policies and procedures can ensure the accuracy of eyewitness identification, it is important to recognize that while accurate identification is an essential factor in the prosecution of cases, eyewitness identification alone without supporting corroborating evidence is not sufficient to successfully prosecute a case.

Recognizing the importance of eliminating the possibility of misidentification during the investigation process, the HPD has already voluntarily adopted the majority of procedures as outlined in Act 281, Session Laws of Hawaii 2019. However, it is in our department's opinion that to legislatively mandate the actual procedures that law enforcement must follow in order to conduct an identification process would have a far greater negative effect of reducing the number of violent offenders who would be prosecuted as opposed to the intended purpose of protecting potential suspects from misidentification, an issue which has never been identified as a significant problem within this jurisdiction. Based on the judicial safeguards that are already in place, we believe that the current process of exclusion of identification evidence, which is based on the evaluation

The Honorable Clarence K. Nishihara, Chair  
and Members  
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of the relevant factors by a judge, has already proved to be an effective and appropriate safeguard towards protecting the right of the citizens of Hawaii.

While advances in technology have led to strides in the ability to memorialize events on digital audio and/or video recordings, the implementation of body worn cameras has demonstrated that in dealing with thousands of events, which this law would impact, the authentication, cataloguing, review, and storage of the recordings of these events is not a simple and straightforward process as one would believe. The mandated recording of each individual identification process would now subject each identification event to the rules of evidence and discovery, as well as the uniform information practices act. There are also no provisions for victims or witnesses who, out of fear, may be apprehensive of having themselves recorded knowing that ultimately this recording would be accessible to the defendant at pretrial.

Act 281 also mandates that, "...in a live lineup, no identifying actions to include speech shall be performed by a lineup participant." We increasingly face situations where perpetrators seek to conceal their appearance utilizing some type of face covering. While speech is never used as the sole element in confirming identification, the use of speech as supporting evidence can be a very powerful and impacting contributing factor to the reliable identification or elimination of an innocent person. Restricting the use of any speech as supporting evidence would serve to further encourage the use of masks or face coverings while committing crimes as a way of greatly minimizing the possibility of victims making identification.

The HPD urges you to support House Bill No. 1744, H.D. 1, Relating to Eyewitness Identification, with due regard to the aforementioned concerns.

Thank you for the opportunity to testify.

Sincerely,

  
Walter Ozeki, Major  
Criminal Investigation Division

APPROVED:

  
\_\_\_\_\_  
Susan Ballard  
Chief of Police



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OUR REFERENCE  
YOUR REFERENCE

March 9, 2020

**LATE**

The Honorable Clarence K. Nishihara, Chair  
The Honorable Glenn Wakai, Vice Chair  
and Members of the Committee on Public Safety,  
Intergovernmental, and Military Affairs

The Senate  
Hawaii State Capitol  
Honolulu, Hawaii 96813

**RE: House Bill No. 1744 – Relating To Eyewitness Identification**

Dear Chair Nishihara and Members of the Committee:

The Maui Police Department SUPPORTS the passage of H.B. No. 1744 to amend the eyewitness identification process for both live and photo lineups which are a critical part of the justice system.


Eliminating the language of "shall be contemporary" in regard to a photo lineup of the suspect which "shall resemble the suspect's appearance at the time of the offense" addresses an "undue burden" for law enforcement which in turn increases the likelihood of procedural errors.

In addition, clarifying the language of "Noncompliance" where "No eyewitness identification shall be deemed inadmissible in any trial, hearing, or other proceeding in any court of this State unless a court determines that the identification lacks sufficient reliability, under the totality of the circumstances, to be admissible in evidence," is also supported.

The Maui Police Department asks that you SUPPORT the passage of H.B. No. 1744.

Thank you for the opportunity to testify.

Sincerely,

  
TIVOLI S. FAAUMU  
Chief of Police

DEPARTMENT OF THE PROSECUTING ATTORNEY  
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**THE HONORABLE CLARENCE K. NISHIHARA, CHAIR  
SENATE COMMITTEE ON PUBLIC SAFETY,  
INTERGOVERNMENTAL AND MILITARY AFFAIRS  
Thirtieth State Legislature  
Regular Session of 2020  
State of Hawai'i**

March 10, 2020

**RE: H.B. 1744, H.D. 1; RELATING TO EYEWITNESS IDENTIFICATION.**

Chair Nishihara, Vice Chair Wakai, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in strong support of H.B. 1744, H.D. 1. This bill is part of the Department's 2020 legislative package.

In 2019, Act 281 codified investigation procedures for law enforcement to conduct eyewitness identifications, with a delayed effective date of July 1, 2020. On October 1, 2019, however, the Hawaii Supreme Court issued a pivotal decision in *State v. Kaneaiakala*, 450 P.3d 761 (Haw. 2019), which increased the factors needed to determine the admissibility of an eyewitness identification--from 5 factors to 13 factors (and arguably up to 22 factors)--and significantly raised the legal standards for admitting an eyewitness identification into evidence. While the Department strongly believes that the *Kaneaiakala* decision merits repeal of Act 281 (2019), we also understand that that may not be an option before the Committee today.

H.B. 1744, H.D. 1, would make crucial amendments to Act 281, to make it more practicable for real-life application. Specifically:

- photo need not be contemporary but must resemble the suspect;
- speech is allowed during live lineup;
- suspect chooses their own position during lineup;
- "exigent circumstances" is defined;
- photograph showup is permitted if the suspect is someone known by the eyewitness;
- eyewitness must be escorted to suspect's location, not necessarily transported;
- when there are multiple eyewitnesses, each of them may participate in a showup, but only one may be present at the showup at a time;
- provision regarding "blind showup" was deleted;

- new section added to clarify that exclusion of evidence is not the mandated remedy, and expressly maintain long-established standards for admissibility (e.g. sufficient reliability, totality of circumstances)

We greatly appreciate the willingness of this Committee and prior committees to keep this bill moving forward, as it provides practical, and much-needed, points of clarification and flexibility to Act 281 (2019).

On a larger discussion, the Department does understand legislators' concern that eyewitness identifications can be wrong, and also understands legislators wanting to feel assured that the justice system is protecting people's right to fair collection of evidence, fair presentation of that evidence to a judge or jury, and fair assessment of that evidence by the judge and jury. The people who work for our Department are citizens of the State of Hawaii too, and we also want to rest assured that our rights would be protected if we were ever to find ourselves in a situation where we are accused of committing a crime; but Act 281 does not further those protections. If anything, it only builds-in more ways for criminal cases to get dismissed on technicalities, or for more cases not to be charged in the first place, based on technicalities. This will be at the expense of victims in some cases, and to a certain extent, we feel this will at the expense of overall public safety and welfare.

Indeed, we cannot overemphasize the fact that there are currently legal safeguards in place—and in fact even higher safeguards since October 1, 2019—that do all of those things in a way that is broadly applicable to every situation, every case, by establishing legal standards that everyone has to live up to and abide by, rather than codifying rote instructions for each step in the process. These are rote instructions that—if not followed to a “T”—are likely to lead to constitutionally reliable evidence getting suppressed and constitutionally valid cases getting dismissed.

The proper way to determine if an officer's actions (on an eyewitness identification) were impermissibly suggestive is not by checking-off that she did steps A and C, then make her explain why she did not do B—as it is exceedingly easy for non-participants to later say, “you could've done more” or “you could've done better”—but rather, the process should be to look at the totality of circumstances, see what was in fact done, and hold that up to the legal standards of constitutionality, which have been established by decades of caselaw and fine-tuning.

Keeping all of these things in mind, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports the passage of H.B. 1744, H.D. 1. Thank you for the opportunity to testify on this matter.





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H.B. No. 1744 H.D. 1  
Relating to Eyewitness Identification  
House Committee on Judiciary  
Public Hearing – Tuesday, March 10, 2020  
1:45 PM, State Capital, Conference Room 229  
by  
Senator Clarence K. Nishihara, Chair  
Senator Glenn Wakai, Vice Chair

March 9, 2020

H.B. No. 1744 H.D. 1 amends Act 281, Session Laws of Hawai'i 2019, which procedures and administrative requirements for law enforcement agencies in eyewitness identification procedures statewide. Hawai'i Innocence Project submits this statement in strong opposition of the proposed amendments in H.B. No. 1744 H.D. 1, and asks the Committee to consider our concerns, proposed changes, and to reject the bill in it's current proposed form as it seeks, in part, to overturn the Hawai'i Supreme Court's decision in *State v. Kaneaiakala*, 145 Haw. 231 (2019) on the constitutionality of show-up lineups.

Hawai'i Innocence Project is a non-profit legal clinic with the goals of exonerating the wrongfully convicted, reforming the criminal justice system which failed the innocent, and ultimately seeking justice for the victim by determining the real perpetrator of the crime. Hawai'i Innocence Project supports the intent of this bill to establish a consistent practice and procedure for conducting eyewitness identifications of criminal suspects, as eyewitness misidentifications are one of the leading causes of wrongful convictions. While we support the intent of the bill, we submit these recommendations so that the bill may comply more fully with social science research, nationwide successful reform policies, and the practical experience of the many attorneys and experts who work to reform the criminal justice system.

Eyewitness misidentification is the leading cause of wrongful convictions and suggestive police procedures are a key culprit in these cases: they appear in 78% of the misidentification cases proven through DNA testing. Hawaii's current eyewitness identification law (Act 281, Session Law of Hawaii 2019) encodes proper law enforcement practices that have been endorsed and adopted by the National Academy of Sciences, the US Department of Justice, the International Association of Chiefs of Police, and jurisdictions across the nation. These procedures provide critical protections designed to facilitate effective police investigations and prevent wrongful conviction. As such, we request that these eyewitness procedures should not be disturbed.

The collaborations of Innocence Projects around the nation, law enforcement, and social science research have determined the best practices that provide the most credible eyewitness identification must include: blind administration, proper composition of fillers and instructions, obtaining confidence statements, and recording of the procedure. H.B. No. 1744 H.D. 1 seeks to eliminate important safeguards that represent best practices as established by the current research and reform efforts, and the Hawai'i Innocence Project asks the Committee to consider our recommendations in opposition of the proposed amendments as they are contrary to known and established best practices, policies, and reform used throughout the country.

Hawai'i Innocence Project requests that the Committee consider our commentary on the proposed amendments outlines in H.B. No. 1744 H.D. 1 as follows:

1. H.B. No. 1744 H.D. 1 § 2(b)1: in a photo lineup, the photograph of the suspect should be “contemporary” or current and also resemble the suspect’s appearance at the time of the offense. Therefore, this language should not be struck.
2. H.B. No. 1744 H.D. 1 § 2(b)2: adds the language that a photo lineup, “to the extent practicable” should have no characteristics that unduly stand out. Striking this language is problematic as it could lead to a highly suggestive photo lineup if one of the photos has a different background or characteristic that makes that photo stand out. Since there is no time limit with which to conduct a photo lineup, time can and should be taken to ensure that the photo lineup is composed of similar photographs bearing similar characteristics. Therefore, this added language should be stricken.
3. H.B. No. 1744 H.D. 1 § 2(b)5: while this provision specifies that no identifying actions should be conducted during a live lineup, the suggested change would allow for “speech” to be used during a live lineup. A live lineup often involves one suspect in a lineup with other police officers as fillers. Permitting the suspect to speak could be highly suggestive given the speech and accent of the people used as fillers in the lineup. For these reasons, the suggested omission of the term “speech” should not be permitted.
4. H.B. No. 1744 H.D. 1 § 2(c)2: in a live lineup, this provision changes the requirement that a suspect be “randomly positioned” and allows for the suspect to select their position. This change should not be incorporated. The police, trained in eyewitness identification procedures and with knowledge of composite of the lineup, are better situated than the suspect to determine the placement of the suspect in the lineup. The police, in light of the lineup composition, are able to determine what position in the lineup may be more suggestive not the suspect. For these reasons this language should not be changed.
5. H.B. No. 1744 H.D. 1 § 2(d): erroneously omits the requirement that the eyewitness not receive any information about “the current investigation”. This would allow law enforcement to share contaminating information with the eyewitness, compromising the reliability of a subsequent identification and raising the risk of misidentification. As a result, this provision should not be struck. Wrongful conviction cases and

extensive scientific research have also established that sharing information about an investigation (e.g. the fact that an arrest has been made, or that proceeds of the crime have been located) with an eyewitness before that eyewitness participates in an identification procedure encourages the eyewitness to assume that the perpetrator is present in the lineup or array. This natural assumption encourages the eyewitness to look for the “best fit” (i.e. the candidate who most resembles the perpetrator) rather than search their memory to see if they actually recognize the perpetrator – leading to an elevated risk of misidentification. This also undermines § 2(a)(3)(A)’s requirement that an eyewitness be instructed that “the suspect may or may not be among the persons in the identification procedure,” which is designed to encourage the eyewitness to see if they actually recognize the perpetrator rather than choose the candidate who looks most like the perpetrator. There is no reason by an eyewitness should receive any information about an active investigation, especially before an identification and arrest has been made. Providing the eyewitness with any information regarding the investigation could lead to a wrongful identification because the eyewitness may receive information that alters their identification and could also put undue pressure on the eyewitness to make an identification if they are given information about the status of an investigation. Therefore, we request that this language not be stricken.

6. H.B. No. 1744 H.D. 1 § 2(f): the word “blind” should be added to the section to read: “In any blind identification procedure where an eyewitness...” To ensure reliable identification, confidence statements are only useful when the photo or live lineup is conducted “blind” meaning that the person administering the lineup does not know the identity of the suspect. If a confidence statement is taken without a blind administrator, it can produce a confidence statement that is not based on the eyewitnesses own belief and confidence but instead reflect the confidence of the eyewitness based upon to intentional or unintentional suggestions by the administrator. Therefore, the word “blind” should be added to emphasize that confidence statements should only be elicited during a blind photo or live lineup.
7. H.B. No. 1744 H.D. 1 § 3(a)(2): the stricken language should be reintroduced, and the added language removed. Essentially, this section should revert back to the original language of Act 281. Here, they are attempting to define a showup as an exigent circumstance which it is not. This section also limits the use of show ups to exigent circumstances, such as circumstances that involve the “temporary detention ... of a suspect at or near the scene of an offense.” Showups are universally understood by courts and scientific experts as inherently suggestive identification procedures that lead to elevated rates of misidentification, contaminate eyewitness memory, and artificially inflate an eyewitness’s confidence in their identification, because they present only a single suspect to the eyewitness. As a result, all authorities including the International Association of Chiefs of Police recommend that “showups should be avoided whenever possible in preference for the use of a photo array or a lineup.” (IACP Model Policy, at IV(A)). Act 281 appropriately requires that where possible, a live or photo lineup should be used instead of a showup. However, in its definition of exigent circumstances, §3(a)(2) also includes circumstances that involve the “arrest of

a suspect at or near the scene of an offense.” Once a suspect has been arrested, there are no longer exigencies at play. There is no reason that the arrestee cannot be placed in a properly designed lineup or array that appropriately protects against the risk of misidentification. As a result, the inclusion of “arrest of a suspect” in H.B No. 1744’s definition of exigent circumstances should also be struck. Therefore, the original language of Act 281 should remain.

8. H.B. No. 1744 H.D. 1 § 3(a)(3): this language should remain, as it is possible for a showup to be conducted blind, and the police should attempt to do so in all circumstances. It is common that multiple police respond to even the most minor of incidents (i.e. routine traffic stop) and so it would not be impractical or unduly burdensome for the police to find an officer who is not connected to the crime they are investigating to conduct a showup identification. Therefore, this section should not be struck from Act 128.
9. H.B. No. 1744 H.D. 1 § 3(a)(5): eliminates Act 281’s requirement that, before conducting a showup, law enforcement should gather a complete description as possible of the perpetrator and the conditions under which the eyewitness observed the perpetrator. This provision should not be struck. As the wrongful conviction cases and extensive scientific research has established, eyewitness memory is highly malleable and can be profoundly influenced by post-event information (e.g. information from co-witnesses, the news media, or law enforcement). Promptly gathering a detailed description from an eyewitness at the earliest possible point and before conducting an identification procedure is proper practice, because the eyewitness’s memory will be at its freshest at that point, and there has been the least potential for contamination. Additionally, it is the current policy of the Honolulu Police Department (policy 4.30, 2015) to question the witness fully and document description of the suspect provided by the witness, verbatim before any identification is made. Providing a detailed description of the suspect creates the best possible record at the time of the conditions with which the identification was made ensuring the suspect’s due process rights are not violated. Having the eyewitness provide a detailed description of the suspect, further provides the defendant to have the information necessary to measure the accuracy of the description.

The prosecutor’s office and police department have submitted testimony that they rely on showup identifications in 80% of all identifications. This is problematic, as the Supreme Court notes in *State v. Kaneaiakala* 145 Haw. 231 (2019), showup identifications are inherently suggestive. Therefore, it is even more imperative that showups not be conducted until the police have taken a complete description of the suspect. Additionally, from a practical standpoint, it would seem impossible to conduct a showup of potential suspects if they eyewitness has not yet provided a detailed description of the suspect in the first place. Not taking the time to obtain a detailed description of the suspect before conducting a showup, could also lead to innocent people being stopped and detained by police because the eyewitness description if incomplete, and furthermore could lead to the wrongful identification

and arrest of an innocent person because of the suggestiveness of an incomplete showup.

10. H.B. No. 1744 H.D. 1 § 3(b)(3)(c)(2): without justification, eliminates the requirement that in cases with multiple eyewitnesses, that following a positive identification using a showup, that subsequent identifications be made by live or photo lineup. Conducting multiple showups is entirely unnecessary and raises the risk of misidentification by exposing multiple eyewitnesses to an inherently suggestive showup. This provision in Act 281 requirement should not be struck. As explained above, showups are highly suggestive, lead to elevated rates of misidentification, and should be avoided whenever possible in favor of a lineup or array. If a showup that is necessitated by exigent circumstances yields an identification by an eyewitness, that would allow for the arrest of the suspect. If the purpose of the showup is to identify the suspect and provide probable cause for an arrest, and that suspect is identified and placed under arrest, there is no temporal necessity once the suspect is under arrest for the additional identifications of the other eyewitnesses to be made by showup. At that point, there is no reason that other eyewitnesses should also participate in an inherently suggestive showup procedure because the suspect is under arrest and the additional eyewitnesses can participate in a photo or live lineup. Instead, any further eyewitnesses should participate in a properly conducted lineup or array. Act 281 appropriately requires that if a positive identification is made and an arrest is justified, subsequent eyewitnesses shall be shown live lineups or photo showups.
11. H.B. No. 1744 H.D. 1 § 4(c): improperly eliminates the requirement that if there is no audio or video recording, that the reason why no such recording exists be documented. Best practices for eyewitness identifications procedures recommends that all eyewitness procedures be video recorded when possible. This helps to ensure that eyewitness procedures are followed and if not, provides criminal defendants with the information necessary to challenge an improper eyewitness identification process. It is the current policy of the Honolulu Police Department (policy 4.30, 2015) that all physical lineups used in eyewitness identification be video recorded. However, in the event that a photo or live lineup not be audio or video recorded, that a detailed description of the lineup procedures, including photographs of the individuals in the lineup be recorded. Therefore, section 4(c) should not be struck.
12. H.B. No. 1744 H.D. 1 § 6: The proposed language of this section on noncompliance, seeks to circumvent the Hawai'i Supreme Court's ruling in *State v. Kaneaiakala*,<sup>145</sup> Haw. 231 (2019) that show up identifications are inherently suggestive in violation of the Hawai'i Constitution. The noncompliance section seeks to have the legislature pass a law that says that non-compliance, with constitutional mandates for eyewitness identification, does not require the exclusion from evidence for unconstitutional identification. In other words, the bill seeks to overrule the Hawai'i Supreme Court and circumvent the exclusionary rule as the constitutionally mandated remedy for a violation and seeks to have the legislature rewrite Article 1, § 14 of the Hawai'i Constitution and the Sixth Amendment of the United States Constitution. Therefore, this section should be struck.

Hawai'i Innocence Project believes that rejecting these proposed amendments will ensure that eyewitness identifications in Hawai'i are reliable, promote justice for all victims, and prevent the innocent from being wrongfully convicted. Thank you for your time and the opportunity to provide our testimony in opposition of H.B. No. 1744 H.D. 1.

With warm aloha and gratitude,

Kenneth Lawson, Co-Director, Hawai'i Innocence Project  
Jennifer Brown, Associate Director, Hawai'i Innocence Project