



Office of the Public Defender State of Hawaii



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

January 28, 2020

S.B. No. 2184: RELATING TO EYEWITNESS IDENTIFICATION

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

The Office of the Public Defender opposes certain parts of S.B. 2184. The purpose of S.B. 2184 is to establish procedures for the use of eye witness identification by law enforcement agencies. The OPD asks that Section -2 (1) which is proposed to be deleted from the final bill, be re-instated as the procedure outlined therein is necessary for law enforcement to be in compliance with proposed sections (3) (b) (1) and (3). The relevant law enforcement agency should be required prior to any live or photo lineup to record, in writing, as complete a description as possible of the alleged perpetrator of the crime etc, so that said agency can comply with sections (3) (b)(1) and (3) which requires that the photos used or the fillers of said photo or live lineup consists of those resembling the eye witnesses description of the perpetrator. Otherwise, there would be no ability to judge whether the photo or live lineup was fair and proper. (It should be noted that the Honolulu Police department currently uses a form that requires eye witnesses to record a written description of the perpetrator)

The OPD has the same opposition to the deletion of the same requirements regarding field show ups as stated in section -3(5).

Furthermore, the OPD opposes the deletion of any section requiring all lineups and show ups from being recorded by way of video or photography, as this is a safeguard that allows for proper review of the law enforcement procedures involved for any identification. (It should be noted that the

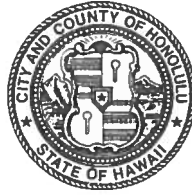
Honolulu Police Department currently photographs all participants of live lineups and video records all live lineups.)

Lastly, the OPD objects to the entirety of section -6 dealing with non-compliance. This section will serve only to complicate any discussion or objection to the fairness of any identification procedure. The fairness, legal compliance of or constitutionality of any identification procedure should be judged strictly by its ability to withstand due process scrutiny, and not by statutory passage or compliance.

Thank you for the opportunity to comment on S.B. 2184.

POLICE DEPARTMENT
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OUR REFERENCE WO-KK

January 31, 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 414
Honolulu, Hawaii 96813

Dear Chair Nishihara and Members:

SUBJECT: Senate Bill No. 2184, 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 Senate Bill No. 2184, Relating to Eyewitness Identification.

While the HPD is in agreement that meaningful policies and procedures can ensure 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 without supporting, corroborating evidence is not sufficient to successfully prosecute a case.

Recognizing the importance of eliminating the possibility of misidentification during investigations, the HPD has already voluntarily adopted the majority of the procedures as outlined in Act 281. However, it is in the 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 get prosecuted as opposed to the intended purpose of protecting potential suspects from misidentification, an issue which has never been identified as a prevalent problem within this jurisdiction.

With that in mind, there are a few specific areas within Act 281 that we find problematic. The requirement that a written description of the possible perpetrator be obtained from the eyewitnesses prior to a photo lineup or live lineup being conducted fails to take into consideration dynamic situations where a possible perpetrator may already be detained as officers are still in the process of

responding. Any identification and the subsequent detention of the possible perpetrator would have to be delayed to complete the written description prior to the identification process being conducted. This could potentially result in the extended detention of an uninvolved person who could have been quickly eliminated absent this requirement.

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 aid in contributing to the reliable identification or elimination of an innocent person. Restricting the use of any speech as supporting evidence 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.

The HPD's policy currently allows the suspect to choose his/her position in the live lineup as opposed to "randomly" positioning the suspect to eliminate bias in the positioning of the suspects in a live lineup. In our experience of conducting numerous live lineups over the years, random positioning would provide additional grounds to contest the fairness of the lineup. Similarly in conducting a photographic lineup best practices dictate that the suspects should not be placed in the number one position to avoid bias.

The utilization of a photograph in a "showup" is limited to circumstances when there is already an established and clear relationship between the victim and the perpetrator. It is particularly useful when the relationship is a familial one such as in domestic violence or sexual assault. In these cases, especially where the victim is a child, the requirement that the victim is forced to view a lineup and have to choose an already known perpetrator will only serve as a further, unnecessary stressor to a fragile victim particularly in cases where the perpetrator is a family member.

While we believe that the current process of exclusion of identification evidence, which is based on the evaluation of the relevant factors by a judge, has already proved to be an effective and appropriate safeguard towards protecting the citizens of Hawaii, the aforementioned amendments to Act 281 would help to maintain the balance between the safeguarding of citizen's rights and the prosecution of offenders.

The HPD urges you to support Senate Bill No. 2184, Relating to Eyewitness Identification.

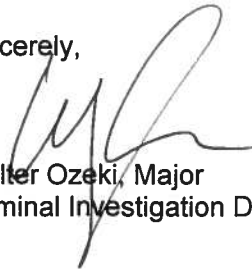
Thank you for the opportunity to testify.

APPROVED:

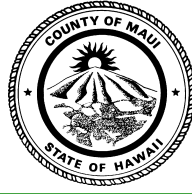


Susan Ballard
Chief of Police

Sincerely,



Walter Ozeki, Major
Criminal Investigation Division



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TESTIMONY
ON
S.B. 2184 - RELATING TO
EYEWITNESS IDENTIFICATION

January 29, 2020

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

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

The Department of the Prosecuting Attorney, County of Maui respectfully submits the following comments concerning S.B. 2184, Relating to Eyewitness Identification. Specifically, we would like to express our strong support for S.B. 2184, which would amend the eyewitness identification procedures for live lineups and photo lineups.

Our Department's primary mission is to seek justice. To that end, we have a strong interest in ensuring that the person who commits an offense is held accountable for their actions. We also have a strong interest in ensuring that we are holding the correct person accountable for their actions.

However, our Department's ability to hold a person accountable for their actions is often dependent upon a witness having a full and fair opportunity to identify the person who committed a crime at the investigative and pre-trial/trial stages. In our Department's view, the additional requirements imposed by Act 281 in 2019 create an undue burden for law enforcement, resulting in increased expenses, the need for additional personnel and an increased opportunity for procedural errors to creep in.

S.B. 2184 addresses some of our concerns by modifying or removing requirements that were unduly burdensome or extraneous, such as the requirement that a suspect's photograph be both contemporary and resemble their appearance at the time of the offense. It also clarifies the effect of noncompliance with the requirements, language that did not appear to be present in Act 281, and requires a court make a determination that an identification lacks sufficient reliability,

under the totality of the circumstances, to be admissible.

Furthermore, although S.B. 2184 amends the requirements for eyewitness identification procedures, it does not remove them entirely. There are still statutory procedures that need to be followed. Moreover, both the Hawaii pattern jury instructions (3.19 and 3.19A, specifically) and recent Hawaii case law (e.g. State v. Kaneaikala, SCWC-16-0000647 (October 1, 2019)) set forth factors for a jury or judge to consider when looking at an eyewitness' identification of a defendant. In fact, the Kaneaikala case sets forth a variety of factors, including the ones contained within the pattern jury instructions, that must be considered by a fact finder.

For these reasons, the Department of the Prosecuting Attorney, County of Maui strongly supports the passage of S.B. 2184. Please feel free to contact our office at (808) 270-7777 if you have any questions or inquiries.

Thank you very much for the opportunity to provide testimony on this bill.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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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**

January 31, 2020

RE: S.B. 2184; RELATING TO EYEWITNESS IDENTIFICATION.

Chair Nishihara, Vice Chair Wakai, and members of the Senate Committee on Public Safety, Intergovernmental and Military Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in strong support of S.B. 2184. 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.

S.B. 2184 would make crucial amendments to Act 281, to make it more practicable for real-life application. Specifically:

- details about the circumstances surrounding the eyewitness need not be written before lineup/showup is conducted;
- 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;
- record of must be made of each identification procedure, but need not be video;
- 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)

On a larger discussion, the Department does understand the Legislature’s concern that eyewitness identifications can be wrong, and also understands the Legislature 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, and make her explain why she did not do B—because it is exquisitely easy to say in hindsight, “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 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 S.B. 2184. Thank you for the opportunity to testify on this matter.