

JAN 27 2021

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# A BILL FOR AN ACT

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RELATING TO EYEWITNESS IDENTIFICATIONS.

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

1       SECTION 1. Chapter 801K, Hawaii Revised Statutes, is  
2       amended by adding a new section to be appropriately designated  
3       and to read as follows:

4       "§801K-       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. Section 801K-2, Hawaii Revised Statutes, is  
16       amended by amending subsections (a), (b), (c), and (d) to read  
17       as follows:



1        "(a) Any law enforcement entity conducting eyewitness  
2        identification procedures shall adopt specific procedures for  
3        conducting photo lineups and live lineups that comply with the  
4        following requirements:

5        ~~[(1) Prior to a photo lineup or live lineup, law~~  
6        ~~enforcement shall record in writing as complete a~~  
7        ~~description as possible of the possible perpetrator~~  
8        ~~provided by the eyewitness in the eyewitness' own~~  
9        ~~words. This statement shall also include information~~  
10       ~~regarding the conditions under which the eyewitness~~  
11       ~~observed the possible perpetrator including location,~~  
12       ~~time, distance, obstructions, lighting, weather~~  
13       ~~conditions, and other impairments, including but not~~  
14       ~~limited to alcohol, drugs, stress, and visual or~~  
15       ~~auditory disabilities;~~

16       ~~-(2)]~~ (1) The eyewitness shall also be asked if the  
17       eyewitness' vision needs correction by glasses or  
18       contact lenses and whether the eyewitness was wearing  
19       them at the time of the offense. The administrator  
20       shall note whether the eyewitness was wearing glasses



1 or contact lenses at the time of the identification  
2 procedure;

3 ~~[(3)]~~ (2) All live lineups and photo lineups shall be  
4 conducted blind unless to do so would place an undue  
5 burden on law enforcement or the investigation; and

6 ~~[(4)]~~ (3) The eyewitness shall be instructed, without other  
7 eyewitnesses present, prior to any live lineup or  
8 photo lineup, that:

9 (A) The suspect may or may not be among the persons  
10 in the identification procedure;

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

13 (C) The eyewitness should not feel compelled to make  
14 an identification;

15 (D) The investigation will continue whether or not an  
16 identification is made;

17 (E) The procedure requires the administrator to ask  
18 the eyewitness to make a statement, in the  
19 eyewitness' own words, if the eyewitness makes an  
20 identification; and



(F) Speaking with other witnesses or the media may hinder prosecution.

(b) The administrator shall comply with the following:

(1) In a photo lineup, any photograph of the suspect ~~[shall be contemporary and]~~ shall resemble the suspect's appearance at the time of the offense;

(2) In a photo lineup, to the extent practicable, there shall be no characteristics of the photographs themselves or the background context in which they are placed that makes any of the photographs unduly stand out;

(3) A photo lineup or live lineup shall be composed so that the fillers generally resemble the eyewitness' description of the possible perpetrator, while ensuring that the suspect does not unduly stand out from the fillers;

(4) In a photo lineup or live lineup, the administrator shall comply with the following:

(A) All fillers selected shall resemble the eyewitness' description of the possible perpetrator in significant features including but



not limited to face, weight, build, and skin  
tone;

(B) At least five fillers shall be included in a  
photo lineup in addition to the suspect;

(C) At least four fillers shall be included in a live  
lineup in addition to the suspect; and

(D) If the eyewitness has previously viewed a photo  
lineup or live lineup in connection with the  
identification of another person suspected of  
involvement in the offense, the fillers in the  
lineup in which the instant suspect participates  
shall be different from the fillers used in any  
prior lineups;

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

(6) In a live lineup, all lineup participants shall be out  
of view of the eyewitness prior to the identification  
procedure;



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

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

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

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

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

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

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



SECTION 3. Section 801K-3, Hawaii Revised Statutes, is amended to read as follows:

"[+]§801K-3[+] Eyewitness identification procedures for showups. (a) The administrator shall comply with the following in conducting a showup:

(1) ~~[Where possible,]~~ Except as provided herein, the administrator shall perform a live lineup or photo lineup instead of a showup;

(2) A showup shall only be performed using a live suspect and only in exigent circumstances [that require the immediate display of a suspect to an eyewitness;].

For purposes of this paragraph, "exigent circumstances" means circumstances that involve the temporary detention or arrest of a suspect at or near the scene of an offense, or during the suspect's flight therefrom, pending procedures that attempt to verify the identity of the suspect;

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



1       ~~+(4)]~~ (3) An administrator shall not conduct a showup with a  
2       photograph~~[. If investigators wish to determine if an~~  
3       eyewitness can make an identification using a  
4       photograph, a photo lineup shall be used;] unless the  
5       suspect is someone already familiar to the eyewitness,  
6       including but not limited to a spouse, partner, child,  
7       relative, co-worker, or neighbor;

8       ~~[(5) Prior to any showup, law enforcement shall record in~~  
9       writing as complete a description as possible of the  
10      possible perpetrator provided by the eyewitness in the  
11      eyewitness' own words. This record shall also include  
12      information regarding the conditions under which the  
13      eyewitness observed the possible perpetrator including  
14      location, time, distance, obstructions, lighting,  
15      weather conditions, and other impairments including  
16      but not limited to alcohol, drugs, stress, and visual  
17      or auditory disabilities;

18      ~~+(6)]~~ (4) The eyewitness shall also be asked if the  
19      eyewitness' vision needs correction by glasses or  
20      contact lenses and whether the eyewitness was wearing  
21      them at the time of witnessing the offense. The



1 administrator shall note whether the eyewitness was  
2 wearing glasses or contact lenses at the time of the  
3 identification procedure;

4 ~~[(+7)]~~ (5) The eyewitness shall be ~~[transported]~~ escorted to  
5 ~~[a neutral, non-law enforcement]~~ the location where  
6 the suspect is being detained for the purposes of a  
7 showup;

8 ~~[(+8)]~~ (6) The eyewitness shall be instructed, without other  
9 eyewitnesses present, prior to any showup that:

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

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

14 (C) The eyewitness should not feel compelled to make  
15 an identification;

16 (D) The investigation will continue whether or not an  
17 identification is made;

18 (E) The procedure requires the administrator to ask  
19 the eyewitness to make a statement, in the  
20 eyewitness' own words, if the eyewitness makes an  
21 identification; and



1 (F) Speaking with other witnesses or the media may  
2 hinder prosecution.

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

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

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

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

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

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

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



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

3 (e) If an eyewitness makes an identification, the  
4 administrator shall seek and document a clear statement from the  
5 eyewitness, at the time of the identification and in the  
6 eyewitness' own words.

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

11 [~~(g) When it is impracticable for a blind administrator to~~  
12 ~~conduct a showup, the investigator shall state in writing the~~  
13 ~~reason therefor.] "~~

14 SECTION 4. Section 801K-4, Hawaii Revised Statutes, is  
15 amended to read as follows:

16 " [~~{~~] §801K-4 [~~{~~] ~~Video record~~ Record of identification  
17 procedures [~~;~~ ~~impracticability~~ ~~;~~ ~~alternative record~~]. [~~(a)~~]  
18 Unless impracticable, a [~~videe~~] record of each identification  
19 procedure shall be made that includes the following information:



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

17          ~~[(b) If a video record of the identification procedure is~~  
18          ~~impracticable, the administrator shall document the reason~~  
19          ~~therefor, and an audio record of the identification procedure~~  
20          ~~shall be made. The audio record shall be supplemented by the~~  
21          ~~following:~~



1       ~~(1) All of the photographs used in a photo lineup; and~~  
2       ~~(2) Photographs of all of the individuals used in a live~~  
3           ~~lineup or showup.~~  
4       ~~(c) If both a video and audio record of the identification~~  
5       ~~procedure are impracticable, the administrator shall document in~~  
6       ~~writing the reason therefor, and a written record of the~~  
7       ~~identification procedure shall be made. The written record~~  
8       ~~shall be supplemented by the following:~~

9       ~~(1) All of the photographs used in a photo lineup; and~~  
10       ~~(2) Photographs of all of the individuals used in a live~~  
11           ~~lineup or showup.] "~~

12       SECTION 5. Statutory material to be repealed is bracketed  
13       and stricken. New statutory material is underscored.

14       SECTION 6. This Act shall take effect upon its approval.

15  
INTRODUCED BY:           *M. D. M.*            
By Request



# S.B. NO. 1239

**Report Title:**

Honolulu Prosecuting Attorney Package; Criminal Procedure;  
Eyewitness Identification

**Description:**

Amends Chapter 801K, Hawaii Revised Statutes, to provide clarification and flexibility in eyewitness identification procedures.

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

