

STATE OF HAWAI‘I  
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,  
State of Hawai‘i to the Committee on Judiciary and Hawaiian Affairs**

February 24, 2021

H.B. No. 174: RELATING TO EYEWITNESS IDENTIFICATIONS

Chair Mark M. Nakashima  
Vice Chair Scot Z. Matayoshi  
Members of the Committee:

The Office of the Public Defender strongly opposes H.B. No. 174 because it will convert legislation requiring police officers to adhere to high standards in gathering eyewitness identification evidence that are based on scientific and sociological research and designed to ensure fairer and more equitable law enforcement tools into meaningless guidelines.

More than fifty years ago, Supreme Court Justice William Brennan wrote that the “vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.” *United States v. Wade*, 388 U.S. 218, 228 (1967). In the decades that followed, scientific research on human memory, perception, and brain function have confirmed Justice Brennan’s observations. Our own Supreme Court notes that “false identifications are more common than was previously believed.” *State v. Cabagbag*, 127 Hawai‘i 302, 310, 277 P.3d 1027, 1035 (2012). Indeed, “unreliable eyewitness identifications are the leading cause of wrongful convictions.” *State v. Kaneaiakala*, 145 Hawai‘i 231, 233, 450 P.3d 761, 763 (2019).

In 2019, the Legislature promulgated Hawai‘i Revised Statutes (HRS) Chapter 801K to provide law enforcement with the standardized “best practices” in gathering reliable, accurate, and equitable eyewitness identification evidence. The Legislature found that these practices strengthen the integrity of our criminal justice system and “[t]he people of the State of Hawai‘i will benefit from the improvement of the accuracy of eyewitness identifications.” 2019 Haw. Sess. L 281 § 1. The statutes have been in effect for less than a year.

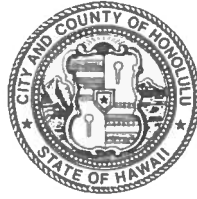
This bill undermines HRS Chapter 801K by allowing compromised eyewitness identification evidence gathered in violation of the statute to be admitted in a court of law. The bill claims to provide flexibility to the police in gathering evidence.

Flexibility, cost-saving measures, and efficiency must not trump the need to ensure that eyewitness identification evidence is accurate. If this bill becomes law, it will signal to the police and prosecutors that there are no consequences for violating the stringent provisions in HRS Chapter 801K, ignoring evidence gathering standards based on scientific research, and raising serious questions about the integrity of the State's evidence. The findings of the Legislature in 2019 should not be pushed aside so easily. Unreliable identifications, wrongful convictions, and the injustices observed by Justice Brennan will only continue.

Mahalo for this opportunity to oppose H.B. No. 174.

POLICE DEPARTMENT  
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OUR REFERENCE

RP-KK

February 26, 2021

The Honorable Mark M. Nakashima, Chair  
and Members  
Committee on Judiciary  
and Hawaiian Affairs  
House of Representatives  
Hawaii State Capitol  
415 South Beretania Street, Room 325  
Honolulu, Hawaii 96813

Dear Chair Nakashima and Members:

SUBJECT: House Bill No. 174, Relating to Eyewitness Identifications

I am Randall Platt, Captain of the Criminal Investigation Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports House Bill No. 174, Relating to Eyewitness Identifications.

The HPD finds that the amendments to Chapter 801K, Hawaii Revised Statutes (HRS), make the law more practical to apply while keeping the integrity of the identification process. In particular, removing the requirement to have a written description of the possible perpetrator from the eyewitness prior to a photographic lineup, live lineup, and field showup recognizes the dynamic situations where a possible perpetrator may already be detained. This prevents any potential unnecessary extended detention of the suspect that could occur while the HPD obtains the detailed written statement.

Furthermore, especially with the Coronavirus Disease 2019 mandated restrictions in place, we find that many offenses are committed by perpetrators legally wearing a face covering, which makes identifying them extremely difficult. While speech is never used as the sole element in confirming an identification, the use of speech as supporting evidence can be a very powerful and impacting aid in contributing

The Honorable Mark M. Nakashima, Chair  
and Members  
February 26, 2021  
Page 2

to the reliable identification or elimination of a suspect. Allowing the use of speech would help overcome some of the identification challenges posed by those wearing a face mask while committing crimes.

Allowing the suspect to choose his or her own position in the live lineup, as opposed to the HPD randomly positioning the suspect, eliminates any bias in the positioning of the suspect in the live lineup.

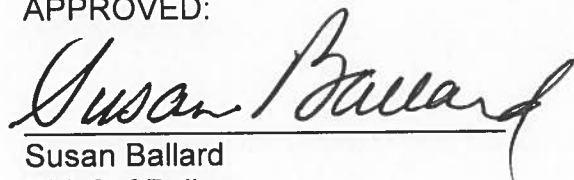
After the offense has occurred, a field showup takes place. We believe that witnesses are able to make a more reliable identification if they can see the person as he or she appeared at the time of the offense with the same clothing, hairstyle, physical build, and other features. The field showup is conducted one at a time and witnesses do not talk to each other at any time. Requiring subsequent witnesses to view a live lineup or photographic lineup at a later date (after the suspect has been identified by one witness) reduces the chances of the suspect being identified by other witnesses as memory fades and witnesses become reluctant to participate.

The HPD also supports the amendment to Section 801K-4, HRS, Record of identification procedures. However, we feel that to require a video recording for every procedure is impractical given the dynamic nature of some identifications, particularly the field showup. On occasion, photographic lineups are sometimes done in the field and setting up a video recording can be intimidating for witnesses.

We also believe that the inclusion or exclusion of identification evidence should be based on an evaluation of relevant factors by a judge, rather than mandated by legislation. We feel that the noncompliance amendments to Chapter 801K, HRS, helps to maintain the balance between the safeguarding of citizens' rights and the prosecution of offenders.

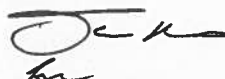
The HPD urges you to support House Bill No. 174, Relating to Eyewitness Identifications, and we appreciate the committee's consideration on these concerns. Thank you for the opportunity to testify.

APPROVED:



Susan Ballard  
Chief of Police

Sincerely,



Randall Platt, Captain  
Criminal Investigation Division



# POLICE DEPARTMENT

## COUNTY OF MAUI



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MAYOR

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YOUR REFERENCE

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TIVOLI S. FAAUMU  
CHIEF OF POLICE

DEAN M. RICKARD  
DEPUTY CHIEF OF POLICE

February 25, 2021

The Honorable Mark M. Nakashima, Chair  
The Honorable Scot Z. Matayoshi, Vice Chair  
31<sup>st</sup> State Legislature 2021  
Hawaii State Capitol  
415 South Beretania Street  
Honolulu, HI 96813

RE: HOUSE BILL 174 RELATING TO EYEWITNESS IDENTIFICATIONS

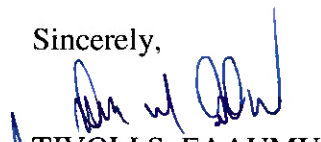
Dear Chair Nakashima and Committee Members:

The Maui Police Department SUPPORTS the passage of HB 174, clarifying eyewitness identification procedures specific to Hawaii Revised Statutes Chapter 801K.

The act allows our officers some flexibility while still keeping the basic procedures to ensure the reliability of the identification process as written. This includes removal of requiring the use of photographs that resemble the suspect at the time of the offense and adding that ruling an identification inadmissible must first take into consideration the totality of circumstances.

Thank you very much for the opportunity to testify.

Sincerely,

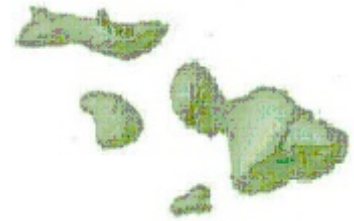
  
TIVOLI S. FAAUMU  
Chief of Police

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Mayor

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TESTIMONY  
ON  
H.B. 174  
RELATING TO EYEWITNESS IDENTIFICATIONS

February 26, 2021

The Honorable Mark M. Nakashima  
Chair  
The Honorable Scot Z. Matayoshi  
Vice Chair  
and Members of the Committee on Judiciary and Hawaiian Affairs

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui respectfully submits the following comments concerning H.B. 174, Relating to Eyewitness Identifications. Specifically, we would like to express our support for H.B. 174. We believe that this bill maintains the procedural and administrative requirements that are intended to improve the accuracy of eyewitness identification, while also easing some of the requirements that were unnecessarily impractical or burdensome upon law enforcement personnel.

Notably, H.B. 174 addresses some of our concerns about the current requirements for eyewitness identification by modifying or removing some of the more burdensome requirements, 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, a provision that is not present in the current statute, and requires that a court make a determination that an identification lacks sufficient reliability under the totality of the circumstances before ruling that it is inadmissible. This determination is fair to all parties, not just the State, as an identification that meets the statutory requirements could still be found inadmissible if a court determines that the totality of the circumstances render it unreliable.

Relatedly, both the Hawaii pattern jury instructions (3.19 and 3.19A, specifically) and recent Hawaii case law (e.g. State v. Kaneaikala, 145 Hawai'i 231, 450 P.3d 761 (2019)) set forth factors for a jury or judge to consider when examining the admissibility or reliability of an eyewitness' identification of a defendant. The Kaneaikala case in particular sets forth a variety of factors, including the ones contained within the pattern jury instructions and any future

amendments thereto, that must be considered by a fact finder. Finally, although H.B. 174 amends the requirements for eyewitness identification procedures, the basic statutory procedures that need to be followed to ensure the reliability of eyewitness identification are still present.

For these reasons, the Department of the Prosecuting Attorney, County of Maui supports the passage of H.B. 174. 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.

# Hawai'i Association of Criminal Defense Lawyers

Testimony of the Hawai'i Association of Criminal Defense Lawyers to  
Committee on Judiciary and Hawaiian Affairs

February 24, 2021

H. B. No. 174:           RELATING TO EYEWITNESS  
IDENTIFICATIONS

Chair Mark M. Nakashima  
Vice-Chair Scot Z. Matayoshi  
Honorable Committee Members

The Hawai'i Association of Criminal Defense Attorneys (HACDL) is an organization comprised of members of the bar practicing criminal defense in state, federal, and appellate courts throughout the State of Hawai'i. HACDL members include public defenders, private counsel, and other attorneys asserting the rights of the accused in criminal cases.

HACDL strongly **OPPOSES** H.B. No. 174. In 2019, the Legislature promulgated Hawai'i Revised Statutes Ch. 801K because it found that “[o]ver the past thirty years, a large body of peer-reviewed, scientific research and practice has emerged showing that simple system changes in administering eyewitness identification procedures can greatly improve the accuracy of eyewitness identifications.” 2019 Haw. Sess. L. Act 281, Sec. 1. The Legislature also found that “more accurate eyewitness identifications increase the ability of police and prosecutors to solve crime, convict the guilty, and protect the innocent. The integrity of the State’s criminal justice process is enhanced by adherence to best practices in evidence gathering. The people of the State of Hawai'i will benefit from the improvement of the accuracy of eyewitness identifications.” *Id.*

This bill waters down the scientific-based and rational approach to eyewitness identification that has been in effect for less than a year. Police departments and some prosecutors may claim that accurate identification procedures can be achieved without requiring standardized procedures throughout the State. The ever-growing body of research and the multiple cases in which a person is wrongly convicted based on improper eyewitness testimony proves otherwise.



The suppression of eyewitness evidence is the best incentive for law enforcement to comply with science-based and equitable approaches to gathering evidence. Without the threat of suppression at trial, noncompliance with the statute will become the norm and the important procedures in HRS Ch. 801K will become dead letter.

Thank you for considering these concerns.



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H.B. No. 174  
Relating to Eyewitness Identification  
House Committee on Judiciary  
Public Hearing – Friday, February 26, 2021  
2:00 PM, State Capital, Conference Room 325  
by  
Reb. Mark M. Nakashima, Chair  
Rep. Scot Z. Matayoshi, Vice Chair

February, 25, 2021

H.B. No. 174 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. 174 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. 174 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. 174 as follows:

1. H.B. No. 174 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. 174 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. 174 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. 174 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. 174 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. 174 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. 174 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. 174 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*, 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. 174 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. 174 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.

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. 174.

With warm aloha and gratitude,

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

# COMMUNITY ALLIANCE ON PRISONS

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## COMMITTEE ON JUDICIARY

Rep. Mark Nakashima, Chair

Rep. Scot Matayoshi, Vice Chair

Friday, February 26, 2021

2 PM

### **STRONG OPPOSITION TO HB 174 - WEAKENING EYEWITNESS IDENTIFICATION**

Aloha Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee,

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai`i for more than two decades. This testimony is respectfully offered on behalf of the more than 4,100 Hawai`i individuals living behind bars or under the “care and custody” of the Department of Public Safety on any given day. We are always mindful that 1,000 of Hawai`i’s imprisoned people are serving their sentences abroad thousands of miles away from their loved ones, their homes and, for the disproportionate

Community Alliance on Prisons is strongly opposed to this measure. The National Registry of Exonerations reports<sup>1</sup> that since 1989 there have been 2,737 exonerations, which represent more than 24,770 years lost. This loss is not just suffered by the wrongly incarcerated person, it is suffered by their family and the larger community as the data show that incarceration impacts economic mobility.

The bill opens with this language: *“801K- Noncompliance. Noncompliance with the requirements imposed by this chapter does not require the exclusion of eyewitness identification evidence. An impermissibly suggestive eyewitness identification procedure alone does not require the exclusion of identification evidence. 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.”*

Imagine if other statutes had that kind of flexibility - where compliance with the law is optional. This is why the community has trust issues with law enforcement.

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<sup>1</sup> National Registry of Exonerations, A PROJECT OF THE UNIVERSITY OF CALIFORNIA IRVINE NEWKIRK CENTER FOR SCIENCE & SOCIETY, UNIVERSITY OF MICHIGAN LAW SCHOOL & MICHIGAN STATE UNIVERSITY COLLEGE OF LAW.  
<http://www.law.umich.edu/special/exoneration/Pages/about.aspx>

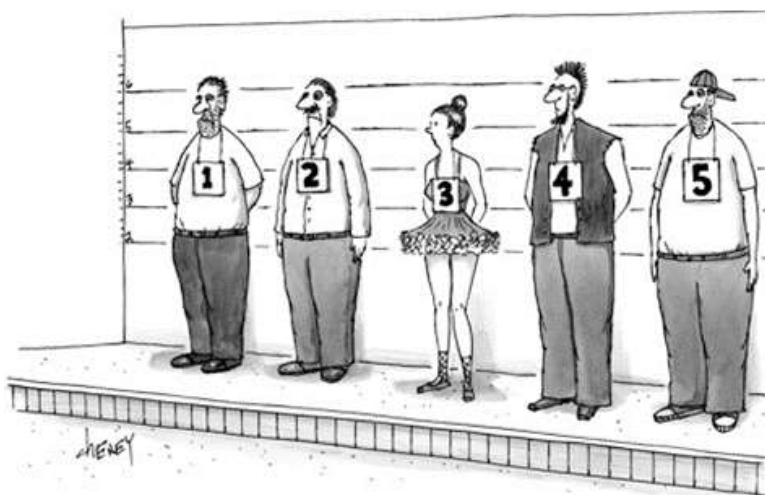
<sup>2</sup> TAINTED IDENTIFICATIONS, by Kaitlin Jackson and Samuel Gross, Posted on September 22, 2016.  
<http://www.law.umich.edu/special/exoneration/Pages/taintedids.aspx>

Eyewitness identification can be tainted as described in this article:<sup>2</sup>

## TAINTED IDENTIFICATIONS

### EYEWITNESS MISIDENTIFICATION GENERALLY

Many false eyewitness identifications are mistakes, often the result of suggestive identification procedures by police. These unintentional misidentifications contributed to 30% of the exonerations in the Registry (572/1,886). They are the cases that come to mind when we think of eyewitness misidentification, in part because they have been studied extensively by psychologists who have recommended reforms to reduce such errors.



Other misidentifications, however, are lies. In 26% of exonerations (482/1,864), witnesses deliberately misidentified the exonerees as the guilty parties in crimes that were committed by other people. And in another 17% of exonerations (315/1,854), supposed eyewitnesses – usually the alleged victims of violent crimes – accused the exonerees of committing crimes that never happened at all.

We see a few common patterns across all these false identifications, lies and mistakes alike:

- Misidentification by witnesses who know the suspect are generally lies.
- Misidentifications by strangers are generally mistakes.
- Police initiated identification procedures, generally in-person or photographic lineups, almost always involve witnesses who are strangers to the suspect.
- On the other hand, when a witness accuses someone she knows, accurately or not, no identification procedure is held; she simply tells the police who did it. No one needs a lineup to identify (or misidentify) her brother.

Leading social science researchers identify two main categories of variables affecting eyewitness identification: estimator variables and system variables.



**Estimator variables** are those that cannot be controlled by the criminal justice system. They include simple factors like the lighting when the crime took place or the distance from which the witness saw the perpetrator. Estimator variables also include more complex factors, including race (identifications have proven to be less accurate when witnesses are identifying perpetrators of a different race), the presence of a weapon during a crime, and the degree of stress or trauma a witness experienced while seeing the perpetrator.

**System variables** are those that the criminal justice system can and should control. They include all of the ways that law enforcement agencies retrieve and record witness memory, such as lineups, photo arrays, and other identification procedures. System variables that substantially impact the accuracy of identifications include the type of lineup used, the selection of “fillers” (or members of a lineup or photo array who are not the actual suspect), blind administration, instructions to witnesses before identification procedures, administration of lineups or photo arrays, and communication with witnesses after they make an identification.

I have been a member of the UH Institutional Review Board reviewing social science research for 20 years and one of the most important elements in research is the protection of human subjects from coercion, as described in CFR 46.

The legislature must mandate that law enforcement follow these same protocols for the protection of witnesses and suspects. This is human decency.

Community Alliance on Prisons is concerned that this bill removes the provisions that expert research has recommended. We find that so disheartening that we, therefore, urge the committee to hold this measure in the interest of justice.

Even one wrongfully convicted person is an affront to decency and justice and taints the system. Please hold this measure.

Mahalo for this opportunity to testify.

*If you are neutral in situations of injustice,  
you have chosen the side of the oppressor.*

*Archbishop Desmond Tutu*

**HB-174**

Submitted on: 2/25/2021 11:04:03 AM

Testimony for JHA on 2/26/2021 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Danielle Sears	Individual	Oppose	No

Comments:

Hold the police accountable for maintaining the best standards we have for eyewitness ID procedures.