

ACT 281

S.B. NO. 414

A Bill for an Act Relating to Criminal Procedure.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that the goal of a police investigation is to apprehend the person or persons responsible for the commission of a crime. Mistaken eyewitness identification contributed to approximately seventy per cent of the more than three hundred fifty wrongful convictions overturned by DNA evidence in the United States. Over the past thirty years, a large body of peer-reviewed, scientific research and practice has emerged showing that simple systemic changes in administering eyewitness identification procedures can greatly improve the accuracy of eyewitness identifications. Policies and procedures to improve the accuracy of eyewitness identifications, such as those recommended by the National Institute of Justice, the American Bar Association, the New Jersey Office of the Attorney General, the Wisconsin Office of the Attorney

General, the California Commission on the Fair Administration of Justice, and the North Carolina Center on Actual Innocence, are readily available for review.

The legislature further finds 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.

The purpose of this Act is to create procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations.

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

“CHAPTER EYEWITNESS IDENTIFICATION PROCEDURES

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

“Administrator” means the person conducting the photo lineup, live lineup, or showup for law enforcement.

“Blind” means the administrator does not know the identity of the suspect in the identification procedure.

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

“Contamination” means the alteration, replacement, or impairment of an eyewitness' memory of a person or event as a result of exposure to extrinsic information related to that person or event.

“Eyewitness” means a person who observes another person at or near the scene of an offense.

“Filler” means either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure.

“Identification” means the identification by the eyewitness of a specific person as the possible perpetrator.

“Identification procedure” means a live lineup, a photo lineup, or a showup.

“Law enforcement” means any law enforcement entity conducting an investigation.

“Live lineup” means an identification procedure in which a group of persons, including the suspect and other persons acting as fillers, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the possible perpetrator.

“Photo lineup” means an identification procedure in which an array of photographs, including a photograph of the suspect and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness either in hard copy form or via computer or other electronic means for the purpose of determining whether the eyewitness identifies the suspect as the possible perpetrator.

“Showup” means an identification procedure in which an eyewitness is presented in-person with a single suspect for the purpose of determining whether the eyewitness identifies this individual as the possible perpetrator.

“Suspect” means the person believed by law enforcement to be the possible perpetrator of the crime.

§ -2 Eyewitness identification procedures for live lineups and photo lineups. (a) Any law enforcement entity conducting eyewitness identification procedures shall adopt specific procedures for conducting photo lineups and live lineups that comply with the following requirements:

- (1) Prior to a photo lineup or live lineup, law enforcement shall record in writing as complete a description as possible of the possible perpetrator provided by the eyewitness in the eyewitness’ own words. This statement shall also include information regarding the conditions under which the eyewitness observed the possible perpetrator including location, time, distance, obstructions, lighting, weather conditions, and other impairments, including but not limited to alcohol, drugs, stress, and visual or auditory disabilities;
- (2) The eyewitness shall also be asked if the eyewitness’ vision needs correction by glasses or contact lenses and whether the eyewitness was wearing them at the time of the offense. The administrator shall note whether the eyewitness was wearing glasses or contact lenses at the time of the identification procedure;
- (3) All live lineups and photo lineups shall be conducted blind unless to do so would place an undue burden on law enforcement or the investigation; and
- (4) The eyewitness shall be instructed, without other eyewitnesses present, prior to any live lineup or photo lineup, that:
 - (A) The suspect may or may not be among the persons in the identification procedure;
 - (B) The administrator does not know the identity of the suspect, if applicable;
 - (C) The eyewitness should not feel compelled to make an identification;
 - (D) The investigation will continue whether or not an identification is made;
 - (E) The procedure requires the administrator to ask the eyewitness to make a statement, in the eyewitness’ own words, if the eyewitness makes an 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, 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 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.
- (e) When there are multiple suspects, each identification procedure shall include only one suspect.
- (f) In any identification procedure where an eyewitness makes an identification, the administrator shall seek and document a clear statement from the eyewitness at the time of the identification in the eyewitness' own words.
- (g) In any identification procedure where an eyewitness makes an identification, the eyewitness shall not be provided with any information concerning the person identified before the administrator obtains the eyewitness' statement about the identification.
- (h) Law enforcement shall make a record of each identification procedure, including all identification and non-identification results obtained, undertaken during all investigations. Each identification procedure record shall be signed by the relevant eyewitness.
- (i) When it is impracticable for a blind administrator to conduct a lineup, the investigator shall state in writing, in the identification procedure record, the reason therefor.

§ -3 Eyewitness identification procedures for showups. (a) The administrator shall comply with the following in conducting a showup:

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

- (4) An administrator shall not conduct a showup with a photograph. If investigators wish to determine if an eyewitness can make an identification using a photograph, a photo lineup shall be used;
- (5) Prior to any showup, law enforcement shall record in writing as complete a description as possible of the possible perpetrator provided by the eyewitness in the eyewitness' own words. This record shall also include information regarding the conditions under which the eyewitness observed the possible perpetrator including location, time, distance, obstructions, lighting, weather conditions, and other impairments including but not limited to alcohol, drugs, stress, and visual or auditory disabilities;
- (6) The eyewitness shall also be asked if the eyewitness' vision needs correction by glasses or contact lenses and whether the eyewitness was wearing them at the time of witnessing the offense. The administrator shall note whether the eyewitness was wearing glasses or contact lenses at the time of the identification procedure;
- (7) The eyewitness shall be transported to a neutral, non-law enforcement location where the suspect is being detained for the purposes of a showup;
- (8) The eyewitness shall be instructed, without other eyewitnesses present, prior to any showup that:
 - (A) The suspect may or may not be the person that is presented to the eyewitness;
 - (B) The administrator does not know the identity of the suspect, if applicable;
 - (C) The eyewitness should not feel compelled to make an identification;
 - (D) The investigation will continue whether or not an identification is made;
 - (E) The procedure requires the administrator to ask the eyewitness to make a statement, in the eyewitness' own words, if the eyewitness makes an identification; and
 - (F) Speaking with other witnesses or the media may hinder prosecution.
- (b) At any showup, in order to reduce potentially damaging or prejudicial inferences that may be drawn by the eyewitness, the administrator shall:
 - (1) Refrain from suggesting, through statements or nonverbal conduct, that the suspect is or may be the perpetrator of the crime;
 - (2) Refrain from removing the suspect from a squad car in front of the eyewitness; and
 - (3) When practicable, present the suspect to the eyewitness without handcuffs.
- (c) When there are multiple eyewitnesses, the following procedure shall apply:
 - (1) Only one eyewitness at a time shall be present at the location of the showup to participate in the showup; and
 - (2) If a positive identification is made and an arrest is justified, subsequent eyewitnesses shall be shown live lineups or photo lineups.
- (d) If there are multiple suspects, the suspects shall be separated and participate in separate showups.
- (e) If an eyewitness makes an identification, the administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness' own words.

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

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

§ -4 Video record of identification procedures; impracticability; alternative record. (a) Unless impracticable, a video record of each identification procedure shall be made that includes the following information:

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

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

- (1) All of the photographs used in a photo lineup; and
- (2) Photographs of all of the individuals used in a live lineup or showup.

(c) If both a video and audio record of the identification procedure are impracticable, the administrator shall document in writing the reason therefor, and a written record of the identification procedure shall be made. The written record shall be supplemented by the following:

- (1) All of the photographs used in a photo lineup; and
- (2) Photographs of all of the individuals used in a live lineup or showup.

§ -5 Training by law enforcement entities. Law enforcement entities shall include in their training programs for law enforcement officers and recruits information on the methods, technical aspects, and scientific findings regarding the basis of the eyewitness identification practices and procedures referenced in this chapter.”

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 4. This Act shall take effect on June 1, 2020.

(Became law on July 9, 2019, without the governor’s signature, pursuant to Art. III, §16, State Constitution.)