



Office of the Public Defender State of Hawai'i



Testimony of the Office of the Public Defender, State of Hawai'i to the House Committee on Judiciary

March 14, 2019

S.B. No. 414 SD1: RELATING TO CRIMINAL PROCEDURE

Chair Lee and Members of the Committee:

The Office of the Public Defender strongly **supports** S.B. No. 414 SD1.

Our office supports that standardization of eyewitness identification procedures that comply with current research and provides protection from implicit bias.

The Hawai'i Supreme Court, has held that the courts must give the jury a specific eyewitness identification instruction whenever identification evidence is a central issue in a case. In State v. Cabagbag, 127 Hawai'i 302, 310-311, 277 P.3d 1027, 1035-36 (2012), the Court provided the following:

Since the first cases addressing the reliability of eyewitness testimony were decided in the 1970s, a robust body of research in the area of eyewitness identification has emerged. Many studies now confirm that false identifications are more common than was previously believed. For example, Professor Brandon L. Garrett concluded in a study involving 250 exonerated defendants that “[e]yewitnesses misidentified 76% of the exonerees (190 of 250 cases).” Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong, 48 (2011). Professor Garrett’s original study of 200 such cases in 2008 concluded that eyewitness identification testimony was the leading contributing factor to wrongful convictions and was four times more likely to contribute to a wrongful conviction than a false confession. Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 76 (2008). Other studies have reached similar results. See, e.g., Edward Connors, et. al., Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial, 15, 96 (1996), available at

<https://www.ncjrs.gov/pdffiles/dnaevid.pdf> (reviewing 28 sexual assault cases in which defendants were later exonerated and concluding that all cases, except those involving homicide, “involved victim eyewitness identification both prior to and at trial,” and that in those cases “eyewitness testimony was the most compelling evidence”); Gary L. Wells, et. al., Recommendations for Properly Conducted Lineup Identification Tasks, in Adult Eyewitness Testimony: current Trends and Developments 223-24 (1994) (studying over 1,000 wrongful convictions and concluding that recall errors by witnesses were the leading cause of such convictions).

Researchers have found that several variables tend to affect the reliability of an eyewitness’s identification. These include the passage of time, witness stress, duration of exposure, distance, “weapon focus” (visual attention eyewitnesses give to a perpetrator’s weapon during crime), and cross-race bias (eyewitnesses are more accurate at identifying persons of their own race). Juries, however, may not be aware of the extent to which these factors affect an individual’s ability to make an accurate identification, and thus tend to “over believe” witness identification testimony. In a 1983 study, for example, researchers presented individuals with crime scenarios derived from previous empirical studies. See Brigham & Bothwell, The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications, 7 Law & Hum. Behav. 19, 22-24 (1983). Researchers found that the study’s respondents estimated an average accuracy rate of 71 percent for a highly unreliable scenario in which only 12.5 percent of eyewitnesses had in fact made a correct identification. See id.

Empirical research has also undermined the common sense notion that the confidence of the witness is a valid indicator of the accuracy of the identification. See [State v. Long, 721 P.2d 483, 490 (Utah 1986)] (explaining that the accuracy of an identification is only poorly associated with witness confidence and is sometimes inversely associated with witness confidence) (citing K. Deffenbacher, Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?, 4 Law & Hum. Behav. 243 (1980); Lindsay, et. al., Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?, 66 J. Applied Psych. 79, 80-82 (1981)). However, courts and juries continue to place great weight on the confidence expressed by the witness in assessing reliability. See Cutler & Penrod, Jury Sensitivity to Witness Identification Testimony, 14 Law & Hum. Behav. 185, 185 (1990) (finding that what

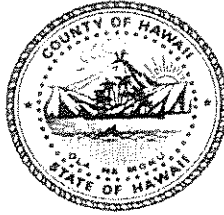
most affects jurors' assessment of witness identification testimony is the confidence expressed by the witness).

We encourage the use of best practices by law enforcement and the establishment of procedural protections, especially where there is risk of misidentification that can have serious and long-term consequences that impact the lives of innocent citizens.

Thank you for the opportunity to comment on S.B. No. 414 SD1.

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OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN OPPOSITION TO SB 414, SD 1

A BILL FOR AN ACT RELATING TO CRIMINAL
PROCEDURE

COMMITTEE ON JUDICIARY

Rep. Chris Lee, Chair
Rep. Joy A. San Buenaventura, Vice Chair

Thursday, March 14, 2019, 2:00 p.m.
State Capitol, House Conference Room 325

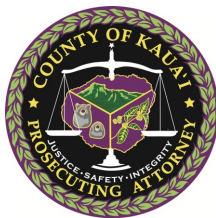
Honorable Chair Lee, Honorable Vice Chair San Buenaventura, and Members of the Committee on Judiciary, the Office of the Prosecuting Attorney, County of Hawai'i submits the following testimony in OPPOSITION to Senate Bill 414, SD 1.

While the Office of the Prosecuting Attorney, County of Hawai'i supports procedures for eyewitness identification, the bill creates more problems than it solves. Currently, the concerns set out by this bill are handled by the Courts, using the totality of the circumstances.

The Office of the Prosecuting Attorney, County of Hawai'i, opposes the passage of Senate Bill No. 414, SD 1. Thank you for the opportunity to testify on this matter.

Justin F. Kollar
Prosecuting Attorney

Jennifer S. Winn
First Deputy



Rebecca A. Vogt Like
Second Deputy

Diana Gausepohl-White
Victim/Witness Program Director

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**THE HONORABLE CHRIS LEE, CHAIR
HOUSE COMMITTEE ON JUDICIARY
The Thirtieth Legislature
Regular Session of 2019
State of Hawai'i**

March 14, 2019

RE: S.B. 414 S.D. 1: RELATING TO CRIMINAL PROCEDURE.

Chair Lee, Vice-Chair San Buenaventura, and members of the House Committee on Judiciary, the Office of the Prosecuting Attorney of the County of Kaua'i is in strong opposition to this measure.

This bill will create procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations and grant a defendant the right to challenge any eyewitness identification to be used at trial in a pretrial evidentiary hearing.

There are already established and existing procedural and administrative requirements regarding eyewitness identification set by case law and judicial precedent. Defendants in criminal cases already have the ability to file a motion to suppress an eyewitness identification in a pretrial evidentiary hearing. This bill, which crops up like a noxious weed each session, is superfluous and will create situations where crime goes unpunished due to a technical or administrative failure to comply with a procedure that is unrelated to the merits or substance of the actual eyewitness identification.

Thank you for this opportunity to testify on this bill.

Harry Kim
Mayor



Paul K. Ferreira
Police Chief

Kenneth Bugado Jr.
Deputy Police Chief

County of Hawai'i

POLICE DEPARTMENT

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March 13, 2019

Representative Chris Lee
Chairperson and Committee Members
Committee On Judiciary
415 South Beretania Street, Room 325
Honolulu, Hawai'i 96813

RE: **SENATE BILL 414, SD1, RELATING TO CRIMINAL PROCEDURE**

Dear Representative Lee:

The Hawai'i Police Department **opposes Senate Bill 414, SD1**, with its purpose to create procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations. It further grants a defendant the right to challenge any eyewitness identification to be used at trial in a pretrial evidentiary hearing.

We believe the requirements set forth within this bill are extremely onerous and our Department is opposed to this measure as it places very restrictive burdens on all state and county law enforcement agencies with regards to eyewitness identifications. We also find ourselves concerned that this legislation attempts to develop internal policies and procedures for an agency that is overseen by the executive branch of government. In essence, this legislation seemingly attempts to detail specific investigative procedures to be followed, which usurp the authority vested in the various Police Chiefs and other State law enforcement directors. We are unaware of any other investigative procedure which is so specific as to dictate the methodology to be used in conducting a criminal investigation aside from those procedures that are constitutional in nature.

Further, the Bill as written seeks to infer that any time one of the procedures is not followed that the identification is somewhat flawed regardless of the individual facts and circumstances connected to each and every particular investigation. Our department fully believes the positive identification process is **best left to the "Trier of the Facts" (Judge or Jury)** during the judicial adjudication of the case, which is also subject to Defense Counsel scrutiny and objection.

We also note our Judicial System's strong appeals process exists to ensure all proper rights are afforded to those accused of criminal activity.

It is for these reasons, we urge this committee to **not support** this legislation.

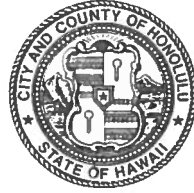
Thank you for allowing the Hawai'i Police Department to provide comments relating to Senate Bill 414, SD1.

Sincerely,

PAUL K. FERREIRA
POLICE CHIEF

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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DEPUTY CHIEFS

OUR REFERENCE **WO-KK**

March 14, 2019

The Honorable Chris Lee, Chair
and Members
Committee on Judiciary
House of Representative
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Lee and Members:

SUBJECT: Senate Bill No. 414, S.D. 1, Relating to Criminal Procedure

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

The HPD opposes Senate Bill No. 414, S.D. 1, Relating to Criminal Procedure.

While the HPD is in agreement that meaningful polices and procedures can greatly improve 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 that is not supported by corroborating facts is not sufficient to successfully prosecute a case.

Recognizing the importance of minimizing the possibility of misidentification during investigations, the HPD has already voluntarily adopted the majority of procedures as outlined in this bill. However, there are a few areas that we are concerned with. The HPD has adopted the use of blind photograph lineups as the preferential method of presenting photograph lineups. Given the number of personnel involved in conducting live lineups, the training involved in properly conducting these lineups, and the limited number of personnel to select from, it would be difficult to adopt "blind" live lineups as the preferential method of choice.

With the preference of tattoos (including facial tattoos), it has become increasingly difficult to exactly replicate these features without dramatically altering photographs or the appearance of fillers. The blanket requirement that fillers shall include any unique or unusual feature such as a scar, tattoo, or other unique identifying marks may be too prohibitive.

The Honorable Chris Lee, Chair
and Members
March 14, 2019
Page 2

This bill also mandates that "in a live lineup, no identifying actions, such as speech, gestures, or other movements, shall be performed by a lineup participant." In situations where the perpetrator seeks to conceal his appearance utilizing some type of face covering; speech, gestures, or other movements would not be the sole factor in confirming identification. They can, however, be very important contributing factors that may be considered. Elimination of this tool 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.

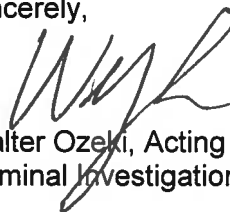
Lastly, the prohibition of utilizing a photograph as a "show up" could be problematic. A show up with a photograph (what we refer to as "confirmation photo") is utilized only in limited circumstances when there is an established relationship between the victim and the perpetrator. It can be particularly useful when the relationship is a familial one in such cases as domestic violence or sexual assault. In these (cases especially when the victim is a child), the presentation of a lineup will only serve as a further unnecessary stressor, particularly if the perpetrator is a family member.

Legislating the actual procedures as it pertains to the identification process is unnecessary and fails to take into consideration unusual circumstance and idiosyncrasies of Hawaii laws. The current process of exclusion, which is based on the evaluation of the relevant factors by a judge, has proved to be an effective and appropriate safeguard towards protecting the citizens of Hawaii from law enforcements use of prejudicial practices.

The Honolulu Police Department opposes Senate Bill No. 414, S.D. 1, Relating to Criminal Procedure.

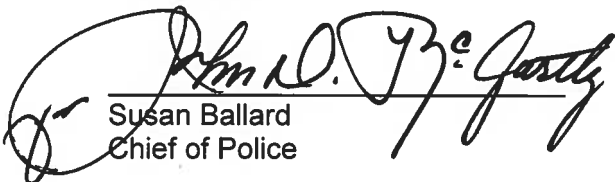
Thank you for the opportunity to testify.

Sincerely,



Walter Ozeki, Acting Major
Criminal Investigation Division

APPROVED:



Susan Ballard
Chief of Police

SB-414-SD-1

Submitted on: 3/12/2019 3:25:45 PM

Testimony for JUD on 3/14/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Victor K. Ramos	Maui Police Department	Oppose	No

Comments: