

JAN 18 2019

S.B. NO. 414

A BILL FOR AN ACT

RELATING TO CRIMINAL PROCEDURE.

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

1 SECTION 1. The legislature finds that the goal of a police
2 investigation is to apprehend the person or persons responsible
3 for the commission of a crime. Mistaken eyewitness
4 identification contributed to seventy per cent of the three
5 hundred fifty wrongful convictions overturned by DNA evidence.
6 Over the past thirty years, a large body of peer-reviewed,
7 scientific research and practice has emerged showing that simple
8 systemic changes in administering eyewitness identification
9 procedures can greatly improve the accuracy of eyewitness
10 identifications. Policies and procedures to improve the
11 accuracy of eyewitness identifications, such as those
12 recommended by the United States National Institute of Justice,
13 the American Bar Association, the New Jersey Office of the
14 Attorney General, the Wisconsin Office of the Attorney General,
15 the California Commission on the Fair Administration of Justice,
16 and the North Carolina Center on Actual Innocence, are readily
17 available for review.



1 "Contamination" means the alteration, replacement, or
2 impairment of an eyewitness' memory of a person or event as a
3 result of exposure to extrinsic information related to that
4 person or event.

5 "Eyewitness" means a person who observes another person at
6 or near the scene of an offense.

7 "Filler" means either a person or a photograph of a person
8 who is not suspected of an offense and is included in an
9 identification procedure.

10 "Identification" means the identification by the eyewitness
11 of a specific person as the possible perpetrator.

12 "Identification procedure" means a live lineup, a photo
13 lineup, or a showup.

14 "Law enforcement" means any law enforcement entity
15 conducting an investigation.

16 "Live lineup" means an identification procedure in which a
17 group of persons, including the suspect and other persons not
18 suspected of the offense, is displayed to an eyewitness for the
19 purpose of determining whether the eyewitness identifies the
20 suspect as the possible perpetrator.



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

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

12 "Suspect" means the person believed by law enforcement to
13 be the possible perpetrator of the crime.

14 **§ -2 Eyewitness identification procedures for live**
15 **lineups and photo lineups.** (a) Any law enforcement entity
16 conducting eyewitness identification procedures shall adopt
17 specific procedures for conducting photo lineups and live
18 lineups that comply with the following requirements:

19 (1) Prior to a photo lineup or live lineup, law
20 enforcement shall record in writing as complete a
21 description as possible of the possible perpetrator



1 provided by the eyewitness in the eyewitness' own
2 words. This statement shall also include information
3 regarding the conditions under which the eyewitness
4 observed the possible perpetrator including location,
5 time, distance, obstructions, lighting, weather
6 conditions, and other impairments, including but not
7 limited to alcohol, drugs, stress, and visual or
8 auditory disabilities;

9 (2) The eyewitness shall also be asked if the eyewitness'
10 vision needs correction by glasses or contact lenses
11 and whether the eyewitness was wearing them at the
12 time of the offense. The administrator shall note
13 whether the eyewitness was wearing glasses or contact
14 lenses at the time of the identification procedure;

15 (3) All live lineups and photo lineups shall be conducted
16 blind unless to do so would place an undue burden on
17 law enforcement or the investigation; and

18 (4) The eyewitness shall be instructed, without other
19 eyewitnesses present, prior to any live lineup or
20 photo lineup, that:



- 1 (A) The possible perpetrator may or may not be among
- 2 the persons in the identification procedure;
- 3 (B) The administrator does not know the identity of
- 4 the possible perpetrator, if applicable;
- 5 (C) The eyewitness should not feel compelled to make
- 6 an identification;
- 7 (D) The investigation will continue whether or not an
- 8 identification is made;
- 9 (E) The procedure requires the administrator to ask
- 10 the eyewitness to state, in the eyewitness' own
- 11 words, how certain the eyewitness is of any
- 12 identification; and
- 13 (F) The eyewitness is not to discuss the
- 14 identification procedure or its results with
- 15 other eyewitnesses involved in the case and
- 16 should not speak with the media.
- 17 (b) The administrator shall comply with the following:
- 18 (1) In a photo lineup, any photograph of the suspect shall
- 19 be contemporary and shall resemble the suspect's
- 20 appearance at the time of the offense;



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

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

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

12 (A) All fillers selected shall resemble the
13 eyewitness' description of the possible
14 perpetrator in significant features including but
15 not limited to face, weight, build, and skin
16 tone, including any unique or unusual feature
17 such as a scar, tattoo, or other unique
18 identifying mark;

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



- 1 (C) At least four fillers shall be included in a live
2 lineup in addition to the suspect; and
- 3 (D) If the eyewitness has previously viewed a photo
4 lineup or live lineup in connection with the
5 identification of another person suspected of
6 involvement in the offense, the fillers in the
7 lineup in which the instant suspect participates
8 shall be different from the fillers used in any
9 prior lineups;
- 10 (5) In a live lineup, no identifying actions, such as
11 speech, gestures, or other movements, shall be
12 performed by lineup participants;
- 13 (6) In a live lineup, all lineup participants must be out
14 of view of the eyewitness prior to the identification
15 procedure;
- 16 (7) In a photo lineup or live lineup, nothing shall be
17 said to the eyewitness regarding the suspect's
18 position in the lineup; and
- 19 (8) In a photo lineup or live lineup, nothing shall be
20 said to the eyewitness that might influence the



1 eyewitness' identification of any particular lineup
2 member.

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

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

7 (2) The suspect shall be placed in a different position in
8 the live lineup or photo lineup for each eyewitness;
9 and

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

13 (d) In any identification procedure, no writings or
14 information concerning the current investigation or any previous
15 arrest, indictment, or conviction of the suspect shall be
16 visible or made known to an eyewitness.

17 (e) When there are multiple suspects, each identification
18 procedure shall include only one suspect.

19 (f) In any identification procedure where an eyewitness
20 makes an identification, the administrator shall seek and
21 document a clear statement from the eyewitness at the time of



1 the identification in the eyewitness' own words, including a
2 statement describing the eyewitness' confidence level that the
3 person identified is the possible perpetrator.

4 (g) In any identification procedure where an eyewitness
5 makes an identification, the eyewitness shall not be provided
6 with any information concerning the person identified before the
7 administrator obtains the eyewitness' statement about the
8 identification.

9 (h) Law enforcement shall make a record of each
10 identification procedure, including all identification and non-
11 identification results obtained, undertaken during all
12 investigations. Each identification procedure record shall be
13 signed by the relevant eyewitness.

14 (i) When it is impracticable for a blind administrator to
15 conduct a lineup, the investigator shall state in writing, in
16 the identification procedure record, the reason therefor.

17 **§ -3 Eyewitness identification procedures for showups.**

18 (a) The administrator shall comply with the following in
19 conducting a showup:

20 (1) Where possible, the administrator shall perform a live
21 lineup or photo lineup instead of a showup;



- 1 (2) A showup shall only be performed using a live suspect
2 and only in exigent circumstances that require the
3 immediate display of a suspect to an eyewitness;
- 4 (3) An administrator shall not conduct a showup with a
5 photograph. If investigators wish to determine if an
6 eyewitness can make an identification using a
7 photograph, a photo lineup must be used;
- 8 (4) 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 (5) The eyewitness shall also be asked if the eyewitness'
19 vision needs correction by glasses or contact lenses
20 and whether the eyewitness was wearing them at the
21 time of the offense. The administrator shall note



- 1 whether the eyewitness was wearing glasses or contact
2 lenses at the time of the identification procedure;
- 3 (6) The eyewitness shall be transported to a neutral, non-
4 law enforcement location where the suspect is being
5 detained for the purposes of a showup;
- 6 (7) The eyewitness shall be instructed, without other
7 eyewitnesses present, prior to any showup that:
- 8 (A) The possible perpetrator may or may not be the
9 person that is presented to the eyewitness;
- 10 (B) The administrator does not know the identity of
11 the possible perpetrator;
- 12 (C) The eyewitness should not feel compelled to make
13 an identification;
- 14 (D) The investigation will continue whether or not an
15 identification is made;
- 16 (E) The procedure requires the administrator to ask
17 the eyewitness to state, in the eyewitness' own
18 words, how certain the eyewitness is of any
19 identification; and
- 20 (F) The eyewitness is not to discuss the
21 identification procedure or its results with



1 other eyewitnesses involved in the case and
2 should not speak with the media.

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 non-
7 verbal 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 one eyewitness at a time shall be present at the
16 location of the showup to participate in the showup;
17 and

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



1 (d) If there are multiple suspects, the suspects shall be
2 separated and subjected to separate showup procedures.

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, as to the eyewitness' confidence level
7 that the person identified in the showup is the possible
8 perpetrator.

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

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

16 § -4 Video record of identification procedures;
17 impracticability; alternative record. (a) Unless
18 impracticable, a video record of each identification procedure
19 shall be made that includes the following information:

20 (1) All identification and non-identification results
21 obtained during the identification procedure, signed



1 by each eyewitness, including any eyewitness'

2 confidence statements;

3 (2) The names of all persons present at the identification
4 procedure, including the name of the administrator and
5 whether the administrator was blind, blinded, or non-
6 blind;

7 (3) If an administrator other than a blind administrator
8 was used, the reason therefor;

9 (4) The date and time of the identification procedure;

10 (5) In a photo lineup or live lineup, any eyewitness
11 identifications of fillers; and

12 (6) In a photo lineup or live lineup, the names of the
13 lineup members and other relevant identifying
14 information, and the sources of all photographs or
15 persons used in the lineup.

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

21 (1) All of the photographs used in a photo lineup; and



1 (2) Photographs of all of the individuals used in a live
2 lineup or showup.

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

8 (1) All of the photographs used in a photo lineup; and

9 (2) Photographs of all of the individuals used in a live
10 lineup or showup.

11 § -5 Remedies for noncompliance or contamination. (a)

12 When the prosecution intends to offer eyewitness identification
13 evidence at trial, the defendant is entitled to a pretrial
14 evidentiary hearing as to the reliability of the eyewitness
15 identification evidence offered.

16 (b) At the hearing, the court shall examine whether law
17 enforcement or any administrator failed to substantially comply
18 with any requirement contained in this chapter, resulting in the
19 contamination of the eyewitness. In making its determination,
20 the court shall consider the following:



- 1 (1) Whether any suggestive identification procedures were
2 employed;
- 3 (2) Whether the eyewitness identification evidence may
4 have been otherwise contaminated by law enforcement or
5 non-law enforcement actors; and
- 6 (3) Any other factors bearing upon the reliability of the
7 identification evidence, including but not limited to
8 characteristics of the witness, possible perpetrator,
9 or event.
- 10 (c) If the trial court finds evidence of a failure of law
11 enforcement, an administrator, or prosecuting agencies to comply
12 with any of the provisions of this chapter, of the use of any
13 other suggestive identification procedures, or of any other
14 contamination of identification evidence by law enforcement or
15 non-law enforcement actors, it shall:
- 16 (1) Consider this evidence in determining the
17 admissibility of the eyewitness identification; and
- 18 (2) Suppress the evidence of eyewitness identification
19 when there is a substantial probability of eyewitness
20 misidentification.



1 (d) When a court rules an eyewitness identification
2 admissible after a pretrial evidentiary hearing, the court shall
3 instruct the jury when admitting such evidence and prior to the
4 jury's deliberation, where applicable:

5 (1) That this chapter is designed to reduce the risk of
6 eyewitness misidentification; and

7 (2) That it may consider credible evidence of
8 noncompliance with this chapter when assessing the
9 reliability of the eyewitness identification evidence.

10 § -6 Training by law enforcement entities. Law
11 enforcement entities shall include in their training programs
12 for law enforcement officers and recruits information on the
13 methods, technical aspects, and scientific findings regarding
14 the basis of the eyewitness identification practices and
15 procedures referenced in this chapter."

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

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

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INTRODUCED BY:

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S.B. NO. 414

Report Title:

Criminal Procedure; Eyewitness Identification; Remedies

Description:

Creates procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations. Grants a defendant the right to challenge any eyewitness identification to be used at trial in a pretrial evidentiary hearing. Effective January 1, 2020.

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

