
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 The legislature further finds that more accurate eyewitness
2 identifications increase the ability of police and prosecutors
3 to solve crime, convict the guilty, and protect the innocent.
4 The integrity of the State's criminal justice process is
5 enhanced by adherence to best practices in evidence gathering.
6 The people of the State of Hawai'i will benefit from the
7 improvement of the accuracy of eyewitness identifications.

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

11 "CHAPTER
12 EYEWITNESS IDENTIFICATION PROCEDURES

13 § -1 Definitions. As used in this chapter, unless the
14 context clearly requires otherwise:

15 "Administrator" means the person conducting the photo
16 lineup or live lineup or showup for law enforcement.

17 "Blind" means the administrator does not know the identity
18 of the suspect in the identification procedure.

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



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 acting
18 as fillers, is displayed to an eyewitness for the purpose of
19 determining whether the eyewitness identifies the suspect as the
20 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 suspect may or may not be among the persons
- 2 in the identification procedure;
- 3 (B) The administrator does not know the identity of
- 4 the suspect, 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 make a statement, in the
- 11 eyewitness' own words, if the eyewitness makes an
- 12 identification; and
- 13 (F) Speaking with other witnesses or the media may
- 14 hinder prosecution.
- 15 (b) The administrator shall comply with the following:
- 16 (1) In a photo lineup, any photograph of the suspect shall
- 17 be contemporary and shall resemble the suspect's
- 18 appearance at the time of the offense;
- 19 (2) In a photo lineup, there shall be no characteristics
- 20 of the photographs themselves or the background



1 context in which they are placed that makes any of the
2 photographs unduly stand out;

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

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

10 (A) All fillers selected shall resemble the
11 eyewitness' description of the possible
12 perpetrator in significant features including but
13 not limited to face, weight, build, and skin
14 tone;

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

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

19 (D) If the eyewitness has previously viewed a photo
20 lineup or live lineup in connection with the
21 identification of another person suspected of



1 involvement in the offense, the fillers in the
2 lineup in which the instant suspect participates
3 shall be different from the fillers used in any
4 prior lineups;

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

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

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

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

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

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



1 (2) The suspect shall be randomly positioned in the live
2 lineup or photo lineup for each eyewitness; and

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

6 (d) In any identification procedure, no writings or
7 information concerning the current investigation or any previous
8 arrest, indictment, or conviction of the suspect shall be
9 visible or made known to an eyewitness.

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

12 (f) In any identification procedure where an eyewitness
13 makes an identification, the administrator shall seek and
14 document a clear statement from the eyewitness at the time of
15 the identification in the eyewitness' own words.

16 (g) In any identification procedure where an eyewitness
17 makes an identification, the eyewitness shall not be provided
18 with any information concerning the person identified before the
19 administrator obtains the eyewitness' statement about the
20 identification.



1 (h) Law enforcement shall make a record of each
2 identification procedure, including all identification and non-
3 identification results obtained, undertaken during all
4 investigations. Each identification procedure record shall be
5 signed by the relevant eyewitness.

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

9 **§ -3 Eyewitness identification procedures for showups.**

10 (a) The administrator shall comply with the following in
11 conducting a showup:

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

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

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

20 (4) An administrator shall not conduct a showup with a
21 photograph. If investigators wish to determine if an



1 eyewitness can make an identification using a
2 photograph, a photo lineup shall be used;
3 (5) Prior to any showup, law enforcement shall record in
4 writing as complete a description as possible of the
5 possible perpetrator provided by the eyewitness in the
6 eyewitness' own words. This record shall also include
7 information regarding the conditions under which the
8 eyewitness observed the possible perpetrator including
9 location, time, distance, obstructions, lighting,
10 weather conditions, and other impairments including
11 but not limited to alcohol, drugs, stress, and visual
12 or auditory disabilities;
13 (6) The eyewitness shall also be asked if the eyewitness'
14 vision needs correction by glasses or contact lenses
15 and whether the eyewitness was wearing them at the
16 time of the offense. The administrator shall note
17 whether the eyewitness was wearing glasses or contact
18 lenses at the time of the identification procedure;
19 (7) The eyewitness shall be transported to a neutral, non-
20 law enforcement location where the suspect is being
21 detained for the purposes of a showup;



- 1 (8) The eyewitness shall be instructed, without other
2 eyewitnesses present, prior to any showup that:
- 3 (A) The suspect may or may not be the person that is
4 presented to the eyewitness;
- 5 (B) The administrator does not know the identity of
6 the suspect;
- 7 (C) The eyewitness should not feel compelled to make
8 an identification;
- 9 (D) The investigation will continue whether or not an
10 identification is made;
- 11 (E) The procedure requires the administrator to ask
12 the eyewitness to make a statement, in the
13 eyewitness' own words, if the eyewitness makes an
14 identification; and
- 15 (F) Speaking with other witnesses or the media may
16 hinder prosecution.
- 17 (b) At any showup, in order to reduce potentially damaging
18 or prejudicial inferences that may be drawn by the eyewitness,
19 the administrator shall:



1 (1) Refrain from suggesting, through statements or non-
2 verbal conduct, that the suspect is or may be the
3 perpetrator of the crime;

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

6 (3) When practicable, present the suspect to the
7 eyewitness without handcuffs.

8 (c) When there are multiple eyewitnesses, the following
9 procedure shall apply:

10 (1) Only one eyewitness at a time shall be present at the
11 location of the showup to participate in the showup;
12 and

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

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

18 (e) If an eyewitness makes an identification, the
19 administrator shall seek and document a clear statement from the
20 eyewitness, at the time of the identification and in the
21 eyewitness' own words.



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

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

8 § -4 Video record of identification procedures;
9 impracticability; alternative record. (a) Unless
10 impracticable, a video record of each identification procedure
11 shall be made that includes the following information:

12 (1) All identification and non-identification results
13 obtained during the identification procedure, signed
14 by each eyewitness;

15 (2) The names of all persons present at the identification
16 procedure, including the name of the administrator and
17 whether the administrator was blind, blinded, or non-
18 blind;

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

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



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

3 (6) In a photo lineup or live lineup, the names of the
4 lineup members and other relevant identifying
5 information, and the sources of all photographs or
6 persons used in the lineup.

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

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

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

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

20 (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 § -5 Remedies for noncompliance or contamination. (a)

4 The prosecutor or the defendant may request, upon motion, a
5 pretrial evidentiary hearing as to the reliability of the
6 eyewitness identification evidence offered. The motion shall
7 state as completely and specifically as possible what procedures
8 the movant alleges were not conducted in compliance with this
9 chapter.

10 (b) If the court grants the motion for a hearing, the
11 judge shall make a determination as to whether any deviations
12 from the procedure set forth in this chapter were so egregious
13 as to require exclusion of any relevant eyewitness
14 identifications.

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



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

4 SECTION 4. This Act shall take effect on February 1, 2021.



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 the prosecution and the defense the right to challenge any eyewitness identification to be used at trial in a pretrial evidentiary hearing. Effective February 1, 2021. (SD1)

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

