



*The Judiciary, State of Hawai‘i*

**Testimony to the Senate Committee on Judiciary and Labor**

Senator Gilbert S. C. Keith-Agaran, Chair

Senator Karl Rhoads, Vice Chair

and

**The Senate Committee on Ways and Means**

Senator Jill N. Tokuda, Chair

Senator Donovan Dela Cruz, Vice Chair

Tuesday, February 28, 2017 9:50 AM

State Capitol, Conference Room 211

**WRITTEN TESTIMONY ONLY**

By

Judge Glenn J. Kim, Chair

Supreme Court Committee on the Hawai‘i Rules of Evidence

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**Bill No. and Title:** Senate Bill No. 674, Relating to Criminal Procedure.

**Purpose:** Creates procedural and administrative requirements for law enforcement agencies for eyewitness identifications of suspects in criminal investigations. Establishes jury instructions when the court determines that the eyewitness identification is admissible. Requires the attorney general to establish procedures for the implementation of uniform statewide eyewitness identification procedures.

**Judiciary's Position:**

The Hawai‘i Supreme Court’s Committee on the Rules of Evidence respectfully submits the following comments on the eyewitness identification procedures proposed by Senate Bill No. 674. The committee has no comment on the procedures stated in Sections 1 and 2 of the proposed chapter because they do not affect any of the provisions of the Hawai‘i Rules of Evidence. However, the committee does have a strong objection to and strenuously opposes Section 3 of the proposed legislation entitled “Admissibility of eyewitness identification.” This



section requires a court to instruct the jury when admitting evidence of eyewitness identification as follows:

- (1) That the purpose of this chapter is to reduce the risk of eyewitness misidentification; and**
- (2) That the jury may consider credible evidence of noncompliance with this chapter when assessing the reliability of eyewitness identification evidence.**

These proposed statutory requirements would infringe upon and constrain the judgment and discretion of our trial judges, whose proper job it is to decide upon and craft instructions to the jury. The Hawai'i Supreme Court has held that the trial courts have the duty and ultimate responsibility to insure that juries are properly instructed. State v. Haanio, 94 Hawai'i 405 (2001). The requirements in Section 3 of the bill are potentially damaging to the integrity of the trial process.

With regard to the requirement in subsection (1), in the committee's view, this proposed instruction would constitute a comment on the evidence on the court's part, and such comment is explicitly proscribed in this jurisdiction by Hawai'i Rules of Evidence Rule 1102, presumably because of the danger that such comment will illegitimately influence the jury's reception and evaluation of the evidence.

With regard to the requirement in subsection (2), for the jury to be able to rationally consider whether evidence of noncompliance with the chapter is credible would require the trial court to provide the jury with the sections of the chapter applicable to the particular identification procedure to which the eyewitness making the identification was exposed, as well as the requirements to which law enforcement authorities must adhere in order to be in compliance with the chapter. To provide such a lengthy instruction prior to the elicitation of the eyewitness testimony would be at best very confusing to the jury, a confusion which would be further compounded by such a written instruction to the jury prior to their deliberations.

Finally, it is the committee's belief that mandating such instructions poses an unnecessary burden on a defendant's constitutional right to conduct his or her own defense. A defendant should be able to seek the suppression of arguably tainted eyewitness identification evidence pre-trial without fearing that the consequences of not prevailing on such a motion would then include a requirement that the court instruct the jury in that regard.

In sum, the committee respectfully recommends that Section 3 of the proposed chapter be deleted in its entirety, especially since to do so will not in any way impair the presumed efficacy



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of the specific eyewitness identification procedures mandated by the remainder of the proposed legislation.

Thank you for the opportunity to testify on this measure.