The Judiciary, State of Hawai‘i

Testimony to the House Committee on Judiciary
Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair

Friday, February 1, 2019 2:00 PM
State Capitol, Conference Room 325

WRITTEN TESTIMONY ONLY
by
Judge Glenn J. Kim, Chair
Hawai‘i Supreme Court Standing Committee
on the Hawai‘i Rules of Evidence

Bill No. and Title: House Bill No. 1061, Relating to Criminal Procedure.

Purpose: 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.

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 House Bill 1061. The committee has no objection to and does not oppose the procedures included in Sections 1 through 4 and Section 6 of the proposed chapter. However, the committee does have strong objection to and strenuously opposes Section 5 of the proposed legislation beginning at page 16, line 11, encompassing so-called “remedies for non-compliance or contamination,” as these supposed mandates infringe upon and constrain the judgment and discretion of our trial judges, whose proper job it is to decide upon and craft such remedies in the first instance.

To begin with, the judicial procedures mandated by subsections (a) through (c) of proposed Section 5 are completely unnecessary, superfluous, and over-constraining of the discretion already properly exercised in this context by our criminal court judges. At present, criminal defendants are already “entitled to a pre-trial evidentiary hearing as to the reliability of” eyewitness identification evidence sought to be admitted at trial. In fact, defense motions to

suppress such evidence are already routinely filed in cases where such evidence is at issue, and once such a motion is filed, the trial court is obligated to hold a full evidentiary hearing on the matter.

In such a hearing, the court routinely considers at least the factors set forth in subsection (b) of the proposed Section 5, and almost always additional relevant factors as well. And if the court concludes that the identification evidence is insufficiently reliable for any reason, the court will order such evidence suppressed. To repeat, this is routine and current practice in our criminal courts, such that the mandates proposed in Section 5 are unnecessary, and as such, potentially mischievous. Were the remainder of the proposed legislation passed into law, then this would simply broaden the area of eyewitness identification procedures subject to the legitimate purview and oversight of the courts which they already exercise without the need for the superfluous mandates set forth in Section 5.

In addition, the mandates regarding jury instructions set forth in subsection (d) of the proposed Section 5 are not only unnecessary, but, in the considered judgment of this committee, ill-advised and potentially damaging to the integrity of the trial process. The first required jury instruction provided for in subsection (d)(1) mandates that the court inform the jury that the "chapter is designed to reduce the risk of eyewitness misidentification." However, in order for the jurors to be able to appreciate the chapter's design, the trial court would need to instruct them that the chapter authorizes the court "to [s]uppress the evidence of eyewitness identification when there is a substantial probability of eyewitness misidentification" resulting from the "failure" to comply with any of the provisions of the chapter. Accordingly, the trial court's admission of the evidence during the trial in the first instance would clearly provide basis for a jury inference that the court had already found such evidence sufficiently reliable for admission, and that any non-compliance with the policies and procedures of the chapter did not result in a misidentification. In the committee's view, the foregoing would essentially 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.

The second required instruction provided for in subsection (d)(2) mandates that the court inform the jury "[t]hat it may consider credible evidence of noncompliance with [the] chapter when assessing the reliability of the eyewitness identification evidence." For the jury to be able rationally to consider whether such supposed evidence of noncompliance 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 to Section 6, which sets forth the requirements to which law enforcement authorities must adhere in order to be in compliance with the chapter. However, 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 5 of the proposed chapter (page 16, line 11 through page 18, line 9), be deleted in its entirety, especially since to do so will not in any way impair the presumed efficacy of the specific eyewitness identification procedures mandated by the remainder of the proposed legislation.

Thank you for the opportunity to testify on this measure.