

4484

2013-2014 Regular Sessions

I N S E N A T E

April 3, 2013

Introduced by Sen. NOZZOLIO -- (at request of the Office of Court Administration) -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the criminal procedure law and the family court act, in relation to identifications by witnesses and the video recording of interrogations

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Section 60.25 of the criminal procedure law, subparagraph
2 (ii) of paragraph (a) of subdivision 1 as amended by chapter 479 of the
3 laws of 1977, is amended to read as follows:
4 S 60.25 Rules of evidence; identification by means of previous recogni-
5 tion, in absence of present identification.
6 1. In any criminal proceeding in which the defendant's commission of
7 an offense is in issue, testimony as provided in subdivision two OF THIS
8 SECTION may be given by a witness when:
9 (a) Such witness testifies that:
10 (i) He OR SHE observed the person claimed by the people to be the
11 defendant either at the time and place of the commission of the offense
12 or upon some other occasion relevant to the case; and
13 (ii) On a subsequent occasion he OR SHE observed, under circumstances
14 consistent with such rights as an accused person may derive under the
15 constitution of this state or of the United States AND PURSUANT TO AN
16 IDENTIFICATION PROCEDURE SET FORTH IN PARAGRAPH (C) OF THIS SUBDIVISION,
17 a person OR A PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO
18 RECORDED REPRODUCTION OF A PERSON whom he OR SHE recognized as the same
19 person whom he OR SHE had observed on the first or incriminating occa-
20 sion; and
21 (iii) He OR SHE is unable at the proceeding to state, on the basis of
22 present recollection, whether or not the defendant is the person in
23 question; and

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

LBD08982-01-3

(b) It is established that the defendant is in fact the person whom the witness observed and recognized OR WHOSE PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION THE WITNESS OBSERVED AND RECOGNIZED on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his OR HER recognition on such occasion AND BY SUCH PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION.

(C) FOR PURPOSES OF THIS SECTION, AN "IDENTIFICATION PROCEDURE" MEANS:

(I) THE WITNESS IDENTIFIES A PERSON AND, AT THE TIME THE IDENTIFICATION IS MADE, EACH PUBLIC SERVANT ADMINISTERING SUCH PROCEDURE AND WITH WHOM THE WITNESS COMMUNICATES DOES NOT KNOW WHO THE ACCUSED PERSON IS UNLESS, AT SUCH TIME, THERE IS NO PUBLIC SERVANT AVAILABLE TO ADMINISTER SUCH PROCEDURE WHO DOES NOT KNOW WHO THE ACCUSED PERSON IS; OR

(II) THE WITNESS IDENTIFIES A PERSON IN AN ARRAY OF PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTIONS AND SUCH IDENTIFICATION IS MADE UNDER CIRCUMSTANCES WHERE: (1) AT THE TIME THE IDENTIFICATION IS MADE, THE PUBLIC SERVANT ADMINISTERING SUCH PROCEDURE DOES NOT KNOW WHICH PERSON IN THE ARRAY IS THE ACCUSED PERSON OR, (2) IF, AT SUCH TIME, IT IS IMPRACTICABLE FOR THE PUBLIC SERVANT NOT TO KNOW WHO THE ACCUSED PERSON IS, THE PUBLIC SERVANT DOES NOT KNOW WHERE THE ACCUSED PERSON IS IN THE ARRAY VIEWED BY THE WITNESS.

2. Under circumstances prescribed in subdivision one OF THIS SECTION, such witness may testify at the criminal proceeding that the person whom he OR SHE observed and recognized OR WHOSE PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION HE OR SHE OBSERVED AND RECOGNIZED on the second occasion is the same person whom he OR SHE observed on the first or incriminating occasion. Such testimony, together with the evidence that the defendant is in fact the person whom the witness observed and recognized OR WHOSE PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION HE OR SHE OBSERVED AND RECOGNIZED on the second occasion, constitutes evidence in chief.

S 2. Section 60.30 of the criminal procedure law, as amended by chapter 479 of the laws of 1977, is amended to read as follows:

S 60.30 Rules of evidence; identification by means of previous recognition, in addition to present identification.

In any criminal proceeding in which the defendant's commission of an offense is in issue, a witness who testifies that (a) he OR SHE observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case, and (b) on the basis of present recollection, the defendant is the person in question and (c) on a subsequent occasion he OR SHE observed the defendant, OR A PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION OF THE DEFENDANT, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States AND PURSUANT TO AN IDENTIFICATION PROCEDURE SET FORTH IN PARAGRAPH (C) OF SUBDIVISION ONE OF SECTION 60.25 OF THIS ARTICLE, and then also recognized him OR HER OR THE PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION OF HIM OR HER as the same person whom he OR SHE had observed on the first or incriminating occasion, may, in addition to making an identification of the defendant at the criminal proceeding on the basis of present recollection as the person whom he OR SHE observed on the first or incriminating occasion, also describe his OR HER previous recognition of the defendant and testify that the person whom he OR SHE observed OR WHOSE PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION HE OR SHE OBSERVED on such second occasion

1 is the same person whom he OR SHE had observed on the first or incrimi-
2 nating occasion. Such testimony AND SUCH PICTORIAL, PHOTOGRAPHIC, ELEC-
3 TRONIC, FILMED OR VIDEO RECORDED REPRODUCTION constitutes evidence in
4 chief.

5 S 3. Subdivision 6 of section 710.20 of the criminal procedure law, as
6 amended by chapter 8 of the laws of 1976 and as renumbered by chapter
7 481 of the laws of 1983, is amended to read as follows:

8 6. Consists of potential testimony regarding an observation of the
9 defendant either at the time or place of the commission of the offense
10 or upon some other occasion relevant to the case, which potential testi-
11 mony would not be admissible upon the prospective trial of such charge
12 owing to an improperly made previous identification of the defendant OR
13 A PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPROD-
14 UCTION OF THE DEFENDANT by the prospective witness.

15 S 4. Subdivision 1 of section 710.30 of the criminal procedure law, as
16 separately amended by chapters 8 and 194 of the laws of 1976, is amended
17 to read as follows:

18 1. Whenever the people intend to offer at a trial (a) evidence of a
19 statement made by a defendant to a public servant, which statement if
20 involuntarily made would render the evidence thereof suppressible upon
21 motion pursuant to subdivision three of section 710.20 OF THIS ARTICLE,
22 or (b) testimony regarding an observation of the defendant either at the
23 time or place of the commission of the offense or upon some other occa-
24 sion relevant to the case, to be given by a witness who has previously
25 identified him OR HER OR A PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED
26 OR VIDEO RECORDED REPRODUCTION OF HIM OR HER as such, they must serve
27 upon the defendant a notice of such intention, specifying the evidence
28 intended to be offered.

29 S 5. Section 343.3 of the family court act, as added by chapter 920 of
30 the laws of 1982, is amended to read as follows:

31 S 343.3. Rules of evidence; identification by means of previous recog-
32 nition in absence of present identification. 1. In any juvenile delin-
33 quency proceeding in which the respondent's commission of a crime is in
34 issue, testimony as provided in subdivision two may be given by a
35 witness when:

36 (a) such witness testifies that:

37 (i) he OR SHE observed the person claimed by the presentment agency to
38 be the respondent either at the time and place of the commission of the
39 crime or upon some other occasion relevant to the case; and

40 (ii) on a subsequent occasion he OR SHE observed, under circumstances
41 consistent with such rights as an accused person may derive under the
42 constitution of this state or of the United States AND PURSUANT TO AN
43 IDENTIFICATION PROCEDURE SET FORTH IN PARAGRAPH (C) OF SUBDIVISION ONE
44 OF SECTION 60.25 OF THE CRIMINAL PROCEDURE LAW, a person OR A PICTORIAL,
45 PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION OF A
46 PERSON whom he OR SHE recognized as the same person whom he OR SHE had
47 observed on the first incriminating occasion; and

48 (iii) he OR SHE is unable at the proceeding to state, on the basis of
49 present recollection, whether or not the respondent is the person in
50 question; and

51 (b) it is established that the respondent is in fact the person whom
52 the witness observed and recognized OR WHOSE PICTORIAL, PHOTOGRAPHIC,
53 ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION THE WITNESS OBSERVED
54 AND RECOGNIZED on the second occasion. Such fact may be established by
55 testimony of another person or persons to whom the witness promptly

1 declared his OR HER recognition on such occasion AND BY SUCH PICTORIAL,
2 PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION.

3 2. Under circumstances prescribed in subdivision one, such witness may
4 testify at the proceeding that the person whom he OR SHE observed and
5 recognized OR WHOSE PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO
6 RECORDED REPRODUCTION HE OR SHE OBSERVED AND RECOGNIZED on the second
7 occasion is the same person whom he OR SHE observed on the first or
8 incriminating occasion. Such testimony, together with the evidence that
9 the respondent is in fact the person whom the witness observed and
10 recognized OR WHOSE PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO
11 RECORDED REPRODUCTION HE OR SHE OBSERVED AND RECOGNIZED on the second
12 occasion, constitutes evidence in chief.

13 S 6. Section 343.4 of the family court act, as added by chapter 920 of
14 the laws of 1982, is amended to read as follows:

15 S 343.4. Rules of evidence; identification by means of previous recog-
16 nition, in addition to present identification. In any juvenile delin-
17 quency proceeding in which the respondent's commission of a crime is in
18 issue, a witness who testifies that: (a) he OR SHE observed the person
19 claimed by the presentment agency to be the respondent either at the
20 time and place of the commission of the crime or upon some other occa-
21 sion relevant to the case, and (b) on the basis of present recollection,
22 the respondent is the person in question, and (c) on a subsequent occa-
23 sion he OR SHE observed the respondent, OR A PICTORIAL, PHOTOGRAPHIC,
24 ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION OF THE RESPONDENT
25 under circumstances consistent with such rights as an accused person may
26 derive under the constitution of this state or of the United States AND
27 PURSUANT TO AN IDENTIFICATION PROCEDURE SET FORTH IN PARAGRAPH (C) OF
28 SUBDIVISION ONE OF SECTION 60.25 OF THE CRIMINAL PROCEDURE LAW, and then
29 also recognized him OR HER OR THE PICTORIAL, PHOTOGRAPHIC, ELECTRONIC,
30 FILMED OR VIDEO RECORDED REPRODUCTION OF HIM OR HER as the same person
31 whom he OR SHE had observed on the first or incriminating occasion, may,
32 in addition to making an identification of the respondent at the delin-
33 quency proceeding on the basis of present recollection as the person
34 whom he OR SHE observed on the first or incriminating occasion, also
35 describe his OR HER previous recognition of the respondent and testify
36 that the person whom he OR SHE observed OR WHOSE PICTORIAL, PHOTOGRAPH-
37 IC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION HE OR SHE OBSERVED
38 on such second occasion is the same person whom he OR SHE had observed
39 on the first or incriminating occasion. Such testimony AND SUCH PICTORI-
40 AL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION
41 constitutes evidence in chief.

42 S 7. Section 60.45 of the criminal procedure law is amended by adding
43 a new subdivision 3 to read as follows:

44 3. (A) WHERE A DEFENDANT IS SUBJECT TO CUSTODIAL INTERROGATION AT A
45 DETENTION FACILITY, ANY CONFESSION, ADMISSION OR OTHER STATEMENT HE OR
46 SHE MAKES TO A PUBLIC SERVANT AT SUCH FACILITY WITH RESPECT TO SUCH
47 DEFENDANT'S PARTICIPATION OR LACK OF PARTICIPATION IN ANY OF THE FOLLOW-
48 ING OFFENSES SHALL BE VIDEO RECORDED, BY VIDEOTAPE OR OTHER APPROPRIATE
49 VIDEO RECORDING DEVICE: A CLASS A-1 FELONY EXCEPT ONE DEFINED IN ARTICLE
50 TWO HUNDRED TWENTY OF THE PENAL LAW; OR A FELONY OFFENSE DEFINED IN
51 ARTICLE ONE HUNDRED TWENTY-FIVE OR ARTICLE ONE HUNDRED THIRTY OF SUCH
52 LAW THAT IS DEFINED AS A CLASS B VIOLENT FELONY OFFENSE IN SECTION 70.02
53 OF SUCH LAW. FOR PURPOSES OF THIS SUBDIVISION, THE TERM "PUBLIC SERVANT"
54 SHALL HAVE THE MEANING PROVIDED IN SECTION 10.00 OF THE PENAL LAW AND A
55 "DETENTION FACILITY" SHALL MEAN A POLICE STATION, CORRECTIONAL FACILITY,
56 HOLDING FACILITY FOR PRISONERS, PROSECUTOR'S OFFICE OR OTHER FACILITY

1 WHERE PERSONS ARE HELD IN DETENTION IN CONNECTION WITH CRIMINAL CHARGES
2 THAT HAVE BEEN OR MAY BE FILED AGAINST THEM.

3 (B) WHERE THE PEOPLE OFFER INTO EVIDENCE A CONFESSION, ADMISSION OR
4 OTHER STATEMENT MADE BY A DEFENDANT IN CUSTODY WITH RESPECT TO HIS OR
5 HER PARTICIPATION OR LACK OF PARTICIPATION IN AN OFFENSE SPECIFIED IN
6 PARAGRAPH (A) OF THIS SUBDIVISION THAT HAS NOT BEEN VIDEO RECORDED AS
7 REQUIRED BY SUCH PARAGRAPH, THE COURT SHALL CONSIDER THE FAILURE TO
8 COMPLY WITH THIS REQUIREMENT AS A FACTOR IN DETERMINING WHETHER SUCH
9 CONFESSION, ADMISSION OR OTHER STATEMENT SHALL BE ADMISSIBLE UNLESS THE
10 PEOPLE SHOW GOOD CAUSE FOR SUCH FAILURE, WHICH SHALL INCLUDE, BUT NOT BE
11 LIMITED TO: (I) MALFUNCTION OF THE VIDEO RECORDING EQUIPMENT OR OTHER
12 INADVERTENT ERROR THAT PREVENTS OR INTERRUPTS THE VIDEO RECORDING, (II)
13 UNAVAILABILITY OF SUCH EQUIPMENT BECAUSE IT WAS OTHERWISE BEING USED,
14 (III) THE DEFENDANT'S REFUSAL TO MAKE A CONFESSION, ADMISSION OR OTHER
15 STATEMENT IF IT IS VIDEO RECORDED OR HIS OR HER REQUEST THAT IT NOT BE
16 VIDEO RECORDED (AND SUCH REFUSAL OR REQUEST IS IN WRITING SIGNED BY THE
17 DEFENDANT, UNLESS THE DEFENDANT DECLINES TO DO SO), (IV) THE PEOPLE'S
18 REASONABLE BELIEF THAT SUCH VIDEO RECORDING WOULD JEOPARDIZE THE SAFETY
19 OF ANY PERSON OR REVEAL THE IDENTITY OF A CONFIDENTIAL INFORMANT, OR (V)
20 THE PUBLIC SERVANT OR SERVANTS HAVING CUSTODY OF THE DEFENDANT REASON-
21 ABLY BELIEVED, AT THE TIME THE DEFENDANT MADE THE CONFESSION, ADMISSION
22 OR OTHER STATEMENT, THAT SUCH CONFESSION, ADMISSION OR OTHER STATEMENT
23 WOULD NOT RELATE TO DEFENDANT'S PARTICIPATION OR LACK OF PARTICIPATION
24 IN AN OFFENSE SPECIFIED IN PARAGRAPH (A) OF THIS SUBDIVISION.

25 (C) VIDEO RECORDING AS REQUIRED BY THIS SUBDIVISION SHALL BE CONDUCTED
26 IN ACCORDANCE WITH STANDARDS ESTABLISHED BY RULE OF THE DIVISION OF
27 CRIMINAL JUSTICE SERVICES.

28 S 8. Section 710.70 of the criminal procedure law is amended by adding
29 a new subdivision 4 to read as follows:

30 4. IN THE EVENT THAT THE COURT DETERMINES THAT A CONFESSION, ADMISSION
31 OR OTHER STATEMENT SHALL BE ADMISSIBLE, NOTWITHSTANDING THE PEOPLE'S
32 FAILURE TO SHOW GOOD CAUSE PURSUANT TO SUBDIVISION THREE OF SECTION
33 60.45 OF THIS CHAPTER FOR FAILING TO VIDEO RECORD IT, THE COURT, IN ITS
34 CHARGE TO THE JURY AND UPON REQUEST OF THE DEFENDANT, MUST INSTRUCT THE
35 JURY THAT THE PEOPLE'S FAILURE TO RECORD THE DEFENDANT'S CONFESSION,
36 ADMISSION OR OTHER STATEMENT AS REQUIRED BY SECTION 60.45 OF THIS CHAP-
37 TER SHOULD BE WEIGHED AS A FACTOR IN DETERMINING WHETHER SUCH
38 CONFESSION, ADMISSION OTHER STATEMENT WAS VOLUNTARILY MADE OR WAS MADE
39 AT ALL.

40 S 9. Subdivision 3 of section 344.2 of the family court act is renum-
41 bered subdivision 4 and a new subdivision 3 is added to read as follows:

42 3. (A) WHERE A RESPONDENT IS SUBJECT TO CUSTODIAL INTERROGATION AT A
43 FACILITY SPECIFIED IN SUBDIVISION FOUR OF SECTION 305.2 OF THIS ARTICLE,
44 ANY CONFESSION, ADMISSION OR OTHER STATEMENT HE OR SHE MAKES TO A PUBLIC
45 SERVANT AT SUCH FACILITY WITH RESPECT TO SUCH RESPONDENT'S PARTICIPATION
46 OR LACK OF PARTICIPATION IN ANY OF THE FOLLOWING OFFENSES SHALL BE VIDEO
47 RECORDED, BY VIDEOTAPE OR OTHER APPROPRIATE VIDEO RECORDING DEVICE: A
48 CLASS A-1 FELONY EXCEPT ONE DEFINED IN ARTICLE TWO HUNDRED TWENTY OF THE
49 PENAL LAW; OR A FELONY OFFENSE DEFINED IN ARTICLE ONE HUNDRED
50 TWENTY-FIVE OR ARTICLE ONE HUNDRED THIRTY OF SUCH LAW THAT IS DEFINED AS
51 A CLASS B VIOLENT FELONY OFFENSE IN SECTION 70.02 OF SUCH LAW. FOR
52 PURPOSES OF THIS SUBDIVISION, THE TERM "PUBLIC SERVANT" SHALL HAVE THE
53 MEANING PROVIDED IN SECTION 10.00 OF THE PENAL LAW.

54 (B) WHERE THE PRESENTMENT AGENCY OFFERS INTO EVIDENCE A CONFESSION,
55 ADMISSION OR OTHER STATEMENT MADE BY A RESPONDENT IN CUSTODY WITH
56 RESPECT TO HIS OR HER PARTICIPATION OR LACK OF PARTICIPATION IN AN

1 OFFENSE SPECIFIED IN PARAGRAPH (A) OF THIS SUBDIVISION THAT HAS NOT BEEN
2 VIDEO RECORDED AS REQUIRED BY SUCH PARAGRAPH, THE COURT SHALL CONSIDER
3 THE FAILURE TO COMPLY WITH THIS REQUIREMENT AS A FACTOR IN DETERMINING
4 WHETHER SUCH CONFESSION, ADMISSION OR OTHER STATEMENT SHALL BE ADMISSI-
5 BLE UNLESS THE PRESENTMENT AGENCY SHOWS GOOD CAUSE FOR SUCH FAILURE,
6 WHICH SHALL INCLUDE, BUT NOT BE LIMITED TO: (I) MALFUNCTION OF THE VIDEO
7 RECORDING EQUIPMENT OR OTHER INADVERTENT ERROR THAT PREVENTS OR INTER-
8 RUPTS THE VIDEO RECORDING, (II) UNAVAILABILITY OF SUCH EQUIPMENT BECAUSE
9 IT WAS OTHERWISE BEING USED, (III) RESPONDENT'S REFUSAL TO MAKE A
10 CONFESSION, ADMISSION OR OTHER STATEMENT IF IT IS VIDEO RECORDED OR HIS
11 OR HER REQUEST THAT IT NOT BE VIDEO RECORDED (AND SUCH REFUSAL OR
12 REQUEST IS IN WRITING SIGNED BY THE RESPONDENT, UNLESS THE RESPONDENT
13 DECLINES TO DO SO), (IV) THE PRESENTMENT AGENCY'S REASONABLE BELIEF THAT
14 SUCH VIDEO RECORDING WOULD JEOPARDIZE THE SAFETY OF ANY PERSON OR REVEAL
15 THE IDENTITY OF A CONFIDENTIAL INFORMANT, OR (V) THE PUBLIC SERVANT OR
16 SERVANTS HAVING CUSTODY OF THE RESPONDENT REASONABLY BELIEVED, AT THE
17 TIME THE RESPONDENT MADE THE CONFESSION, ADMISSION OR OTHER STATEMENT,
18 THAT SUCH CONFESSION, ADMISSION OR OTHER STATEMENT WOULD NOT RELATE TO
19 RESPONDENT'S PARTICIPATION OR LACK OF PARTICIPATION IN AN OFFENSE SPECI-
20 FIED IN PARAGRAPH (A) OF THIS SUBDIVISION.

21 (C) VIDEO RECORDING AS REQUIRED BY THIS SUBDIVISION SHALL BE CONDUCTED
22 IN ACCORDANCE WITH STANDARDS ESTABLISHED BY RULE OF THE DIVISION OF
23 CRIMINAL JUSTICE SERVICES.

24 S 10. This act shall take effect immediately; provided that the
25 provisions of sections seven, eight and nine of this act shall take
26 effect on the first of November in the year next succeeding the year in
27 which this act shall have become a law; provided, further, sections
28 seven, eight and nine of this act shall apply only to confessions,
29 admissions or other statements made on or after the effective date of
30 such sections.