S T A T E O F N E W Y O R K

4292--A

2009-2010 Regular Sessions

I N S E N A T E

April 21, 2009

Introduced by Sen. PARKER -- read twice and ordered printed, and when printed to be committed to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the criminal procedure law and the family court act, in relation to the conduct of line-ups

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

Section 1. The criminal procedure law is amended by adding a new section 60.78 to read as follows:

S 60.78 IDENTIFICATION PROCEDURES.

1. DEFINITIONS. FOR PURPOSES OF THIS SECTION:

(A) "ADMINISTRATOR" MEANS A PERSON CONDUCTING A PHOTO LINEUP, LIVE LINEUP OR SHOWUP;

(B) "BLIND" MEANS THE ADMINISTRATOR DOES NOT KNOW WHICH PERSON, IF ANY, IN THE IDENTIFICATION PROCEDURE IS A SUSPECT;

(C) "BLINDED" MEANS THE ADMINISTRATOR MAY KNOW WHICH PERSON IN THE IDENTIFICATION PROCEDURE IS A SUSPECT, BUT DOES NOT KNOW WHICH PHOTOGRAPH IS BEING VIEWED BY THE EYEWITNESS;

(D) "CUSTODY" SHALL MEAN INCARCERATED, CIVILLY COMMITTED, ON PAROLE OR PROBATION, OR SUBJECT TO SEX OFFENDER REGISTRATION;

(E) "EYEWITNESS" MEANS A PERSON WHO OBSERVES ANOTHER PERSON AT OR NEAR THE SCENE OF, OR ANOTHER LOCATION RELEVANT TO, AN OFFENSE;

(F) "FILLER" MEANS EITHER A PERSON OR A PHOTOGRAPH OF A PERSON WHO IS NOT A SUSPECT CONCERNING THE OFFENSE BUT WHO IS INCLUDED IN AN IDENTIFICATION PROCEDURE;

(G) "IDENTIFICATION PROCEDURE" MEANS A LIVE LINEUP, PHOTO LINEUP, OR SHOWUP;

(H) "LIVE LINEUP" MEANS AN IDENTIFICATION PROCEDURE IN WHICH A GROUP OF PERSONS, WHICH SHALL INCLUDE THE SUSPECT AND OTHER PERSONS NOT

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

LBD07326-03-9

SUSPECTED OF THE OFFENSE, IS DISPLAYED TO AN EYEWITNESS FOR THE PURPOSE OF DETERMINING WHETHER THE EYEWITNESS MAY IDENTIFY THE SUSPECT;

(I) "PHOTO LINEUP" MEANS AN INDEMNIFICATION PROCEDURE IN WHICH PHOTOGRAPHS, WHICH SHALL INCLUDE A PHOTOGRAPH OF THE SUSPECT AND OTHER PERSONS NOT SUSPECTED OF THE OFFENSE, ARE DISPLAYED TO AN EYEWITNESS EITHER IN HARD COPY FORM OR VIA COMPUTER OR OTHERWISE, FOR THE PURPOSE OF DETERMINING WHETHER THE EYEWITNESS MAY IDENTIFY THE SUSPECT;

(J) "SHOWUP" MEANS AN IDENTIFICATION PROCEDURE IN WHICH AN EYEWITNESS IS PRESENTED WITH A SINGLE SUSPECT FOR THE PURPOSE OF DETERMINING WHETHER THE EYEWITNESS MAY IDENTIFY THE INDIVIDUAL; AND

(K) "SUSPECT" MEANS A PERSON BELIEVED BY LAW ENFORCEMENT TO BE A POSSIBLE PERPETRATOR OF, OR A PERSON OF INTEREST WITH RESPECT TO, AN OFFENSE.

2. EYEWITNESS IDENTIFICATION PROCEDURES; GENERALLY. (A) PRIOR TO CONDUCTING A PHOTO OR LIVE LINEUP OR SHOWUP, THE INVESTIGATING PERSONNEL SHALL OBTAIN AND RECORD AS COMPLETE A DESCRIPTION AS POSSIBLE OF THE PERSON DESCRIBED BY THE EYEWITNESS, IN THE EYEWITNESS'S OWN WORDS, INCLUDING THE CONDITIONS UNDER WHICH THE EYEWITNESS OBSERVED THE PERSON INCLUDING LOCATION, TIME, DISTANCE, OBSTRUCTIONS, LIGHTING, WEATHER CONDITIONS, AND OTHER IMPAIRMENTS, INCLUDING BUT NOT LIMITED TO ALCOHOL, DRUGS, STRESS, AND VISUAL/AUDITORY DISABILITIES. THE EYEWITNESS SHALL BE ASKED AND THE RESPONSE RECORDED ABOUT HIS OR HER VISUAL ACUITY, WHETHER HE OR SHE HAS EVER BEEN PRESCRIBED EYEGLASSES OR CONTACT LENSES AND WHETHER HE OR SHE WAS WEARING THEM AT THE TIME OF THE OFFENSE. THE ADMINISTRATOR SHALL NOTE WHETHER THE EYEWITNESS WAS WEARING GLASSES OR CONTACT LENSES AT THE TIME OF THE IDENTIFICATION PROCEDURE.

(B) UNLESS IMPRACTICABLE, A BLIND OR BLINDED ADMINISTRATOR SHALL CONDUCT THE LIVE OR PHOTO LINEUP. WHEN IT IS IMPRACTICABLE FOR A BLIND ADMINISTRATOR TO CONDUCT SUCH EYEWITNESS IDENTIFICATION PROCEDURE, THE INVESTIGATOR SHALL STATE IN WRITING THE REASON THEREFOR.

(C) PRIOR TO ANY LIVE LINEUP, PHOTO LINEUP OR SHOWUP, THE EYEWITNESS SHALL BE INSTRUCTED, WITHOUT OTHER EYEWITNESSES PRESENT, IN SUM AND SUBSTANCE, THAT:

(I) THE PERPETRATOR MAY OR MAY NOT BE AMONG THE PERSONS IN THE IDENTIFICATION PROCEDURE OR, IN THE CASE OF A SHOWUP, MAY OR MAY NOT BE THE PERSON WHO IS PRESENTED TO THE EYEWITNESS;

(II) WHERE APPLICABLE, THE ADMINISTRATOR DOES NOT KNOW WHO THE PERPETRATOR IS;

(III) THE EYEWITNESS SHOULD NOT FEEL COMPELLED TO MAKE AN IDENTIFICATION;

(IV) THE INVESTIGATION WILL CONTINUE WHETHER OR NOT AN IDENTIFICATION IS MADE;

(V) THE PROCEDURE REQUIRES THE ADMINISTRATOR TO ASK THE EYEWITNESS TO STATE, IN HIS OR HER OWN WORDS, HOW CERTAIN HE OR SHE IS OF ANY IDENTIFICATION; AND

(VI) THE EYEWITNESS IS NOT TO DISCUSS THE IDENTIFICATION PROCEDURE OR ITS RESULTS WITH OTHER EYEWITNESSES INVOLVED IN THE CASE OR OTHER PERSONS NOT INVOLVED IN THE MATTER.

(D) IF THE EYEWITNESS MAKES AN IDENTIFICATION, THE ADMINISTRATOR SHALL SEEK AND DOCUMENT A CLEAR STATEMENT FROM THE EYEWITNESS, AT THE TIME OF THE IDENTIFICATION AND IN THE EYEWITNESS' OWN WORDS, AS TO THE EYEWITNESS' CONFIDENCE LEVEL THAT THE PERSON IDENTIFIED IN A GIVEN IDENTIFICATION PROCEDURE IS THE PERSON THE EYEWITNESS OBSERVED IN CONNECTION WITH THE EVENTS HE OR SHE REPORTED TO INVESTIGATORS. THE EYEWITNESS SHALL NOT BE PROVIDED ANY INFORMATION CONCERNING SUCH PERSON BEFORE THE ADMINISTRATOR OBTAINS THE EYEWITNESS' CONFIDENCE STATEMENT.

(E) A RECORD OF THE IDENTIFICATION PROCEDURE SHALL BE MADE THAT INCLUDES ALL IDENTIFICATION AND NON-IDENTIFICATION RESULTS OBTAINED DURING THE IDENTIFICATION PROCEDURES, SIGNED BY THE EYEWITNESSES. IF THE EYEWITNESS REFUSES TO SIGN, THAT OCCURRENCE SHALL BE DOCUMENTED.

(F) UNLESS IMPRACTICABLE, A VIDEO RECORD OF THE IDENTIFICATION PROCEDURE SHALL BE MADE THAT INCLUDES THE FOLLOWING INFORMATION:

(I) ALL IDENTIFICATION AND NON-IDENTIFICATION RESULTS OBTAINED DURING THE IDENTIFICATION PROCEDURES, SIGNED BY THE EYEWITNESSES, INCLUDING THE EYEWITNESSES' CONFIDENCE STATEMENTS;

(II) THE NAMES OF ALL PERSONS PRESENT AT THE IDENTIFICATION PROCEDURE;

(III) THE DATE, TIME AND LOCATION OF THE IDENTIFICATION PROCEDURE;

(IV) IN A PHOTO OR LIVE LINEUP, ANY EYEWITNESS IDENTIFICATION OF A FILLER, OR IDENTIFICATIONS OF FILLERS; AND

(V) IN A PHOTO OR LIVE LINEUP, THE NAMES OF THE LINEUP MEMBERS AND OTHER RELEVANT IDENTIFYING INFORMATION, AND THE SOURCES OF ALL PHOTOGRAPHS OR PERSONS USED IN THE LINEUP.

(G) IF A VIDEO RECORD OF THE IDENTIFICATION PROCEDURE IS IMPRACTICABLE, THE OFFICER CONDUCTING THE IDENTIFICATION PROCEDURE SHALL DOCUMENT THE REASON THEREFOR, AND AN AUDIO RECORD OF THE IDENTIFICATION PROCEDURE SHALL BE MADE WHICH INCLUDES THE ITEMS SPECIFIED IN PARAGRAPH (F) OF THIS SUBDIVISION. THE AUDIO RECORD SHALL BE SUPPLEMENTED BY ALL OF THE PHOTOGRAPHS USED IN A PHOTO LINEUP, INCLUDING PRESERVATION OF THE ORDER IN WHICH THE PHOTOS WERE VIEWED, OR BY A GROUP PHOTOGRAPH OR PHOTOGRAPHS PRESERVING THE LIVE LINEUP THAT REPRESENTS THE GROUP FAIRLY AND CLEARLY, OR BY A PHOTOGRAPH OF THE SHOWUP INCLUDING THE IMMEDIATE SURROUNDING AREA OF THE LOCATION OF THE SHOWUP. IF BOTH A VIDEO AND AUDIO RECORD OF THE IDENTIFICATION PROCEDURE ARE IMPRACTICABLE, THE IDENTIFICATION PROCEDURE SHALL BE PRESERVED FOLLOWING THE SAME PRESERVATION PROCEDURE DELINEATED IN THIS SECTION WITH RESPECT TO AN AUDIO RECORD, WITH THE EXCEPTION OF CREATING SUCH AUDIO RECORD.

(H) RECORDINGS OF IDENTIFICATION PROCEDURES THAT ARE SECURED IN RELATION TO AN INVESTIGATION OR PROSECUTION OF AN OFFENSE SHALL BE PRESERVED FOR THE PERIOD OF TIME THAT A PERSON CONVICTED OF THAT OFFENSE COULD REMAIN IN CUSTODY FOR SUCH OFFENSE.

3. ADDITIONAL PROVISIONS CONCERNING PHOTO LINEUPS AND LIVE LINEUPS.

(A) A PHOTO OR LIVE LINEUP SHALL BE COMPOSED SO THAT THE FILLERS GENERALLY RESEMBLE THE EYEWITNESS' DESCRIPTION OF THE PERSON WHILE ENSURING THAT THE SUSPECT DOES NOT UNDULY STAND OUT FROM THE FILLERS. THE FILLERS SHALL RESEMBLE THE SUSPECT'S FACIAL FEATURES, WEIGHT, BUILD AND SKIN TONE AND BE CLOSE TO HIS OR HER AGE, AND IF VISIBLE, INCLUDE ANY UNIQUE OR UNUSUAL FEATURES SUCH AS SCARS OR TATTOOS.

(B) IF THE EYEWITNESS HAS PREVIOUSLY VIEWED A PHOTO LINEUP OR LIVE LINEUP IN CONNECTION WITH THE IDENTIFICATION OF ANOTHER PERSON SUSPECTED OF INVOLVEMENT IN THE OFFENSE, THE FILLERS IN THE LINEUP IN WHICH THE INSTANT SUSPECT PARTICIPATES SHALL BE DIFFERENT FROM THE FILLERS USED IN ANY PRIOR LINEUPS.

(C) IF THERE ARE MULTIPLE EYEWITNESSES, EACH EYEWITNESS SHALL VIEW PHOTO OR LIVE LINEUPS SEPARATELY, THE SUSPECT SHALL BE PLACED IN A DIFFERENT POSITION IN THE LIVE LINEUP AND/OR PHOTO LINEUP FOR EACH EYEWITNESS, THE EYEWITNESSES SHALL NOT BE PERMITTED TO COMMUNICATE WITH EACH OTHER UNTIL ALL IDENTIFICATION PROCEDURES HAVE BEEN COMPLETED, AND NO ADMINISTRATOR, WITNESS, OR OTHER PERSON MAY WRITE OR MARK ANY MATERIALS THAT MAY BE USED IN SUBSEQUENT IDENTIFICATION PROCEDURES.

(D) NO WRITINGS OR INFORMATION CONCERNING THE INSTANT OR ANY PREVIOUS ARREST, INDICTMENT OR CONVICTION OF THE SUSPECT SHALL BE VISIBLE OR MADE KNOWN TO THE EYEWITNESS.

(E) WHEN THERE ARE MULTIPLE SUSPECTS, EACH IDENTIFICATION PROCEDURE SHALL INCLUDE ONLY ONE SUSPECT.

(F) NOTHING SHALL BE SAID TO THE EYEWITNESS REGARDING THE SUSPECT'S POSITION OR ANY OTHER COMMENT THAT MIGHT OTHERWISE INFLUENCE HIS OR HER IDENTIFICATION.

(G) IN A PHOTO LINEUP, THE PHOTOGRAPH OF THE SUSPECT SHALL BE CONTEMPORARY AND SHALL RESEMBLE HIS OR HER APPEARANCE AT THE TIME OF THE ALLEGED OFFENSE.

(H) IN A PHOTO LINEUP, ONLY ONE PHOTOGRAPH OF THE SUSPECT SHALL BE PRESENTED IN EACH IDENTIFICATION PROCEDURE AND THERE SHALL BE PHOTOGRAPHS OF AT LEAST FIVE FILLERS, IN ADDITION TO THE SUSPECT.

(I) IN A PHOTO LINEUP, THERE SHALL BE NO CHARACTERISTICS OF THE PHOTOGRAPHS THEMSELVES OR THE BACKGROUND CONTEXT IN WHICH THEY ARE PLACED WHICH SHALL MAKE ANY OF THE PHOTOGRAPHS UNDULY STAND OUT.

(J) IN A LIVE LINEUP, THERE SHALL BE AT LEAST FOUR FILLERS, IN ADDITION TO THE SUSPECT.

(K) IN A LIVE LINEUP, ANY IDENTIFYING ACTIONS, SUCH AS SPEECH, GESTURES OR MOVEMENTS, SHALL BE PERFORMED BY ALL LINEUP PARTICIPANTS.

(L) IN A LIVE LINEUP, ALL LINEUP PARTICIPANTS MUST BE OUT OF VIEW OF THE EYEWITNESS PRIOR TO THE IDENTIFICATION PROCEDURE.

4. ADDITIONAL PROVISIONS CONCERNING SHOWUPS. (A) EFFORTS SHALL BE MADE TO PERFORM A LIVE OR PHOTO LINEUP INSTEAD OF A SHOWUP. A SHOWUP MAY ONLY BE PERFORMED WHEN EXIGENT CIRCUMSTANCES REQUIRE THE IMMEDIATE DISPLAY OF A SUSPECT TO AN EYEWITNESS.

(B) ABSENT EMERGENCY CIRCUMSTANCES, THE EYEWITNESS SHALL BE TRANSPORTED TO A NEUTRAL, NON-PREJUDICIAL LOCATION FOR THE PURPOSES OF ANY SHOWUP PROCEDURE.

(C) MEASURES SHALL BE TAKEN BY THE ADMINISTRATOR OF THE SHOWUP TO REDUCE POTENTIALLY DAMAGING OR PREJUDICIAL INFERENCES THAT MAY BE DRAWN BY THE EYEWITNESS, INCLUDING REFRAINING FROM SUGGESTING, THROUGH STATEMENTS OR NON-VERBAL CONDUCT, THAT THE PERSON TO BE OBSERVED IS A SUSPECT OR MAY BE THE PERPETRATOR OF THE OFFENSE, REMOVING THE PERSON OBSERVED FROM THE POLICE CAR, AND WHEN PRACTICABLE, REMOVING HANDCUFFS FROM THE PERSON OBSERVED.

(D) IF THERE ARE MULTIPLE EYEWITNESSES, ONLY ONE EYEWITNESS AT A TIME SHALL BE PRESENT AT THE SHOWUP LOCATION AND PARTICIPATE IN THE SHOWUP PROCEDURE. IF A POSITIVE IDENTIFICATION IS MADE, AND AN ARREST IS LEGALLY JUSTIFIED, ADDITIONAL EYEWITNESSES SHALL BE SHOWN LIVE OR PHOTO LINEUPS.

(E) IF THERE ARE MULTIPLE SUSPECTS, EACH SUCH PERSON SHALL BE SEPARATED AND SUBJECTED TO SEPARATE SHOWUP PROCEDURES.

5. WITH RESPECT TO ANY PHOTO LINEUP, LIVE LINEUP OR SHOWUP:

(A) IF LAW ENFORCEMENT OFFICIALS OR PROSECUTING AGENCIES DO NOT SUBSTANTIALLY COMPLY WITH THE PROVISIONS OF THIS SECTION, THE TRIAL COURT SHALL, ON MOTION OF THE DEFENDANT, CONDUCT A HEARING AS TO WHETHER AN IDENTIFICATION BY THE WITNESS OF THE DEFENDANT AT THE CRIMINAL PROCEEDING WOULD BE NEVERTHELESS SUFFICIENTLY RELIABLE;

(B) EVIDENCE OF A FAILURE TO COMPLY WITH ANY OF THE PROVISIONS OF THIS SECTION SHALL BE CONSIDERED BY TRIAL COURTS IN ADJUDICATING MOTIONS PURSUANT TO SECTION 710.60 OF THIS CHAPTER;

(C) EVIDENCE OF A FAILURE TO COMPLY WITH ANY OF THE PROVISIONS OF THIS SECTION SHALL BE ADMISSIBLE IN SUPPORT OF CLAIMS OF EYEWITNESS MISIDENTIFICATION;

(D) WHEN EVIDENCE OF A FAILURE TO COMPLY WITH ANY OF THE PROVISIONS OF THIS SECTION HAS BEEN PRESENTED AT TRIAL, THE TRIAL COURT SHALL INSTRUCT THE JURY THAT THE PROVISIONS WERE DESIGNED TO REDUCE THE RISK OF MISI-

DENTIFICATION AND THAT IT MAY CONSIDER CREDIBLE EVIDENCE OF NONCOMPLIANCE WHEN ASSESSING THE RELIABILITY OF EYEWITNESS IDENTIFICATIONS; AND

(E) WHEN EVIDENCE OF A FAILURE TO COMPLY WITH ANY OF THE PROVISIONS OF THIS SECTION, OR OF ANY OTHER UNNECESSARILY SUGGESTIVE PROCEDURE, HAS UNDERMINED THE COURT'S CONFIDENCE IN THE RELIABILITY OF THE EYEWITNESS IDENTIFICATION, THE COURT MAY INSTRUCT THE JURY THAT IT MUST EXAMINE THE IDENTIFICATION EVIDENCE WITH THE GREATEST OF CAUTION.

S 2. The family court act is amended by adding a new section 303.4 to read as follows:

S 303.4. CERTAIN IDENTIFICATION PROCEDURES. 1. WHENEVER AN EYEWITNESS IDENTIFICATION PROCEDURE IS CONDUCTED WITH RESPECT TO A SUSPECT WHO, WHILE LESS THAN SIXTEEN YEARS OF AGE, IS ALLEGED TO HAVE COMMITTED AN ACT THAT WOULD CONSTITUTE A CRIME IF COMMITTED BY AN ADULT, THE PROVISIONS OF SECTION 60.78 OF THE CRIMINAL PROCEDURE LAW SHALL APPLY.

2. FOR PURPOSES OF THIS SECTION AND SUCH APPLICATION OF SECTION 60.78 OF THE CRIMINAL PROCEDURE LAW:

(A) "SUSPECT" MEANS A PERSON BELIEVED BY LAW ENFORCEMENT TO BE A POSSIBLE PERPETRATOR OF AN ACT THAT WOULD CONSTITUTE A CRIME IF COMMITTED BY AN ADULT OR A PERSON OF INTEREST WITH RESPECT TO ANY SUCH ACT; AND

(B) "IDENTIFICATION PROCEDURE" MEANS A LIVE LINEUP, PHOTO LINEUP OR SHOWUP.

S 3. This act shall take effect on the one hundred eightieth day after it shall have become a law.