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

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I N S E N A T E

May 19, 2010

Introduced by Sens. PERKINS, SCHNEIDERMAN -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to the electronic recording of interrogations

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 60.47 to read as follows:

S 60.47 RULES OF EVIDENCE; ELECTRONIC RECORDING OF STATEMENTS OF DEFENDANTS.

1. DEFINITIONS. AS USED IN THIS SECTION:

(A) "ELECTRONIC RECORDING" MEANS A CONTEMPORANEOUS VIDEO AND AUDIO RECORDING, OR WHERE VIDEO RECORDING IS IMPRACTICABLE, A CONTEMPORANEOUS AUDIO RECORDING.

(B) "CUSTODIAL INTERROGATION" MEANS ANY QUESTIONING WHICH IS CONDUCTED IN A PLACE OF DETENTION OR DURING WHICH A REASONABLE PERSON IN THE SUBJECT'S POSITION WOULD CONSIDER HIMSELF OR HERSELF TO BE IN CUSTODY.

(C) "PLACE OF DETENTION" MEANS A POLICE STATION, CORRECTIONAL FACILITY, HOLDING FACILITY FOR PRISONERS, PROSECUTOR'S OFFICE, OR OTHER GOVERNMENT FACILITY WHERE PERSONS ARE HELD IN DETENTION IN CONNECTION WITH CRIMINAL CHARGES WHICH HAVE BEEN OR MAY BE FILED AGAINST THEM.

2. DURING THE PROSECUTION OF A FELONY, AN ORAL, WRITTEN, OR SIGN LANGUAGE STATEMENT OF A DEFENDANT MADE DURING A CUSTODIAL INTERROGATION SHALL BE PRESUMED INADMISSIBLE AS EVIDENCE AGAINST A DEFENDANT IN A CRIMINAL PROCEEDING UNLESS AN ELECTRONIC RECORDING IS MADE OF THE CUSTODIAL INTERROGATION IN ITS ENTIRETY, INCLUDING ANY ADMINISTRATION AND WAIVER, OR INVOCATION OF RIGHTS, THE RECORDING IS SUBSTANTIALLY ACCURATE AND NOT INTENTIONALLY ALTERED, AND ALL INDIVIDUALS WHO SPEAK DURING THE INTERROGATION ARE IDENTIFIED BY NAME ON THE RECORDING.

3. IF THE COURT FINDS THAT THE DEFENDANT WAS SUBJECTED TO A CUSTODIAL INTERROGATION IN VIOLATION OF SUBDIVISION TWO OF THIS SECTION, THEN ANY STATEMENTS MADE BY THE DEFENDANT FOLLOWING THAT CUSTODIAL INTERROGATION, EVEN IF OTHERWISE IN COMPLIANCE WITH THIS SECTION, ARE ALSO PRESUMED INADMISSIBLE.

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

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4. THE PEOPLE MAY REBUT A PRESUMPTION OF INADMISSIBILITY THROUGH CLEAR AND CONVINCING EVIDENCE THAT THE STATEMENT WAS BOTH VOLUNTARY AND IF THE STATEMENT IS INCULPATORY, WAS NOT MADE UNDER CIRCUMSTANCES CREATING A SUBSTANTIAL RISK THAT THE DEFENDANT MIGHT FALSELY INCRIMINATE HIMSELF OR HERSELF, AND:

(A) EXIGENT CIRCUMSTANCES EXISTED NECESSITATING INTERROGATION AT A PLACE IN A LOCATION OTHER THAN A POLICE STATION, CORRECTIONAL FACILITY, HOLDING FACILITY FOR PRISONERS, PROSECUTOR'S OFFICE, OR OTHER GOVERNMENT FACILITY WHERE PERSONS ARE HELD IN DETENTION IN CONNECTION WITH CRIMINAL CHARGES WHICH HAVE BEEN OR MAY BE FILED AGAINST THEM, AND WHERE THE REQUISITE RECORDING EQUIPMENT WAS NOT READILY AVAILABLE;

(B) THE ACCUSED REFUSED TO HAVE HIS OR HER INTERROGATION ELECTRONICALLY RECORDED, AND THE REFUSAL ITSELF WAS ELECTRONICALLY RECORDED; OR

(C) THE FAILURE TO ELECTRONICALLY RECORD AN ENTIRE INTERROGATION WAS THE RESULT OF EQUIPMENT FAILURE AND OBTAINING REPLACEMENT EQUIPMENT WAS NOT FEASIBLE.

5. NOTWITHSTANDING THE PROVISIONS OF SUBDIVISIONS TWO, THREE AND FOUR OF THIS SECTION, THE COURT MAY ADMIT A STATEMENT IF IT BELIEVES, BASED ON A SHOWING OF GOOD CAUSE BY THE PEOPLE, THAT SUPPRESSION OF THE STATEMENT IS TOO HARSH A REMEDY; THE COURT MUST THEN INSTRUCT THE JURY THAT IT SHOULD CONSIDER THE FAILURE TO MAKE A RECORDING AS A FACT ADVERSE TO THE PEOPLE ON ANY ISSUE OF VOLUNTARINESS, OF THE CONTENT OF THE STATEMENT, AND OF WHETHER THE STATEMENT WAS MADE.

6. NOTHING IN THIS SECTION PRECLUDES THE ADMISSION OF:

(A) A STATEMENT MADE BY THE ACCUSED IN OPEN COURT AT HIS OR HER TRIAL, BEFORE GRAND JURY, OR AT A PRELIMINARY HEARING;

(B) A SPONTANEOUS STATEMENT THAT IS NOT MADE IN RESPONSE TO INTERROGATION;

(C) A STATEMENT MADE DURING QUESTIONING THAT IS ROUTINELY ASKED DURING THE PROCESSING OF THE ARREST OF THE SUSPECT;

(D) A STATEMENT MADE DURING A CUSTODIAL INTERROGATION THAT IS CONDUCTED OUT-OF-STATE;

(E) A STATEMENT OBTAINED BY A FEDERAL LAW ENFORCEMENT OFFICER IN A FEDERAL PLACE OF DETENTION;

(F) A STATEMENT GIVEN AT A TIME WHEN THE INTERROGATORS ARE UNAWARE THAT A FELONY HAS IN FACT OCCURRED; OR

(G) A STATEMENT, OTHERWISE INADMISSIBLE UNDER THIS SECTION, THAT IS USED ONLY FOR IMPEACHMENT AND NOT AS SUBSTANTIVE EVIDENCE.

7. THE PEOPLE SHALL NOT DESTROY OR ALTER ANY ELECTRONIC RECORDING MADE OF A CUSTODIAL INTERROGATION FOR A PERIOD OF TEN YEARS, MEASURED FROM THE DATE OF JUDGMENT.

S 2. Section 710.20 of the criminal procedure law is amended by adding a new subdivision 8 to read as follows:

8. CONSISTS OF A RECORD OR POTENTIAL TESTIMONY RECITING OR DESCRIBING A STATEMENT OBTAINED IN VIOLATION OF SECTION 60.47 OF THIS CHAPTER.

S 3. Subdivision 1 of section 710.30 of the criminal procedure law, as separately amended by chapters 8 and 194 of the laws of 1976, is amended to read as follows:

1. Whenever the people intend to offer at a trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of section 710.20 OF THIS ARTICLE, or (b) testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such, they must serve upon the defendant a notice of

such intention, specifying the evidence intended to be offered AND, IN THE CASE OF A STATEMENT, WHETHER IT WAS ELECTRONICALLY RECORDED.

S 4. This act shall take effect on the ninetieth day after it shall have become a law, and shall apply to any custodial interrogations that take place on and after such date.