

1683

2011-2012 Regular Sessions

I N A S S E M B L Y

January 11, 2011

Introduced by M. of A. KAVANAGH -- read once and referred to the Committee on Codes

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:

1 Section 1. The criminal procedure law is amended by adding a new
2 section 60.78 to read as follows:
3 S 60.78 RULES OF EVIDENCE; IDENTIFICATION PROCEDURES.
4 1. DEFINITIONS. FOR PURPOSES OF THIS SECTION:
5 (A) "ADMINISTRATOR" MEANS A PERSON CONDUCTING A PHOTO LINEUP, LIVE
6 LINEUP OR SHOWUP;
7 (B) "BLIND" MEANS THE ADMINISTRATOR DOES NOT KNOW WHICH PERSON, IF
8 ANY, IN THE IDENTIFICATION PROCEDURE IS A SUSPECT;
9 (C) "BLINDED" MEANS THE ADMINISTRATOR MAY KNOW WHICH PERSON IN THE
10 IDENTIFICATION PROCEDURE IS A SUSPECT, BUT DOES NOT KNOW WHICH PHOTO-
11 GRAPH IS BEING VIEWED BY THE EYEWITNESS;
12 (D) "CUSTODY" SHALL MEAN INCARCERATED, CIVILLY COMMITTED, ON PAROLE OR
13 PROBATION, OR SUBJECT TO SEX OFFENDER REGISTRATION;
14 (E) "EYEWITNESS" MEANS A PERSON WHO OBSERVES ANOTHER PERSON AT OR NEAR
15 THE SCENE OF, OR ANOTHER LOCATION RELEVANT TO, AN OFFENSE;
16 (F) "FILLER" MEANS EITHER A PERSON OR A PHOTOGRAPH OF A PERSON WHO IS
17 NOT A SUSPECT CONCERNING THE OFFENSE BUT WHO IS INCLUDED IN AN IDENTIFI-
18 CATION PROCEDURE;
19 (G) "IDENTIFICATION PROCEDURE" MEANS A LIVE LINEUP, PHOTO LINEUP, OR
20 SHOWUP;
21 (H) "LIVE LINEUP" MEANS AN IDENTIFICATION PROCEDURE IN WHICH A GROUP
22 OF PERSONS, WHICH SHALL INCLUDE THE SUSPECT AND OTHER PERSONS NOT
23 SUSPECTED OF THE OFFENSE, IS DISPLAYED TO AN EYEWITNESS FOR THE PURPOSE
24 OF DETERMINING WHETHER THE EYEWITNESS MAY IDENTIFY THE SUSPECT;

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

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1 (I) "PHOTO LINEUP" MEANS AN INDEMNIFICATION PROCEDURE IN WHICH PHOTO-
2 GRAPHS, WHICH SHALL INCLUDE A PHOTOGRAPH OF THE SUSPECT AND OTHER
3 PERSONS NOT SUSPECTED OF THE OFFENSE, ARE DISPLAYED TO AN EYEWITNESS
4 EITHER IN HARD COPY FORM OR VIA COMPUTER OR OTHERWISE, FOR THE PURPOSE
5 OF DETERMINING WHETHER THE EYEWITNESS MAY IDENTIFY THE SUSPECT;
6 (J) "SHOWUP" MEANS AN IDENTIFICATION PROCEDURE IN WHICH AN EYEWITNESS
7 IS PRESENTED WITH A SINGLE SUSPECT FOR THE PURPOSE OF DETERMINING WHETH-
8 ER THE EYEWITNESS MAY IDENTIFY THE INDIVIDUAL; AND
9 (K) "SUSPECT" MEANS A PERSON BELIEVED BY LAW ENFORCEMENT TO BE A
10 POSSIBLE PERPETRATOR OF, OR A PERSON OF INTEREST WITH RESPECT TO, AN
11 OFFENSE.

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

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

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

32 (I) THE PERPETRATOR MAY OR MAY NOT BE AMONG THE PERSONS IN THE IDEN-
33 TIFICATION PROCEDURE OR, IN THE CASE OF A SHOWUP, MAY OR MAY NOT BE THE
34 PERSON WHO IS PRESENTED TO THE EYEWITNESS;

35 (II) WHERE APPLICABLE, THE ADMINISTRATOR DOES NOT KNOW WHO THE PERPE-
36 TRATOR IS;

37 (III) THE EYEWITNESS SHOULD NOT FEEL COMPELLED TO MAKE AN IDENTIFICA-
38 TION;

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

41 (V) THE PROCEDURE REQUIRES THE ADMINISTRATOR TO ASK THE EYEWITNESS TO
42 STATE, IN HIS OR HER OWN WORDS, HOW CERTAIN HE OR SHE IS OF ANY IDEN-
43 TIFICATION; AND

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

47 (D) IF THE EYEWITNESS MAKES AN IDENTIFICATION, THE ADMINISTRATOR SHALL
48 SEEK AND DOCUMENT A CLEAR STATEMENT FROM THE EYEWITNESS, AT THE TIME OF
49 THE IDENTIFICATION AND IN THE EYEWITNESS' OWN WORDS, AS TO THE EYEWIT-
50 NESS' CONFIDENCE LEVEL THAT THE PERSON IDENTIFIED IN A GIVEN IDENTIFICA-
51 TION PROCEDURE IS THE PERSON THE EYEWITNESS OBSERVED IN CONNECTION WITH
52 THE EVENTS HE OR SHE REPORTED TO INVESTIGATORS. THE EYEWITNESS SHALL NOT
53 BE PROVIDED ANY INFORMATION CONCERNING SUCH PERSON BEFORE THE ADMINIS-
54 TRATOR OBTAINS THE EYEWITNESS' CONFIDENCE STATEMENT.

55 (E) A RECORD OF THE IDENTIFICATION PROCEDURE SHALL BE MADE THAT
56 INCLUDES ALL IDENTIFICATION AND NON-IDENTIFICATION RESULTS OBTAINED

1 DURING THE IDENTIFICATION PROCEDURES, SIGNED BY THE EYEWITNESSES. IF THE
2 EYEWITNESS REFUSES TO SIGN, THAT OCCURRENCE SHALL BE DOCUMENTED.

3 (F) UNLESS IMPRACTICABLE, A VIDEO RECORD OF THE IDENTIFICATION PROCE-
4 DURE SHALL BE MADE THAT INCLUDES THE FOLLOWING INFORMATION:

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

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

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

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

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

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

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

33 3. ADDITIONAL PROVISIONS CONCERNING PHOTO LINEUPS AND LIVE LINEUPS.

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

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

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

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

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

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

4 (G) IN A PHOTO LINEUP, THE PHOTOGRAPH OF THE SUSPECT SHALL BE CONTEM-
5 PORARY AND SHALL RESEMBLE HIS OR HER APPEARANCE AT THE TIME OF THE
6 ALLEGED OFFENSE.

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

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

13 (J) IN A LIVE LINEUP, THERE SHALL BE AT LEAST FOUR FILLERS, IN ADDI-
14 TION TO THE SUSPECT.

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

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

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

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

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

33 (D) IF THERE ARE MULTIPLE EYEWITNESSES, ONLY ONE EYEWITNESS AT A TIME
34 SHALL BE PRESENT AT THE SHOWUP LOCATION AND PARTICIPATE IN THE SHOWUP
35 PROCEDURE. IF A POSITIVE IDENTIFICATION IS MADE, AND AN ARREST IS LEGAL-
36 LY JUSTIFIED, ADDITIONAL EYEWITNESSES SHALL BE SHOWN LIVE OR PHOTO LINE-
37 UPS.

38 (E) IF THERE ARE MULTIPLE SUSPECTS, EACH SUCH PERSON SHALL BE SEPA-
39 RATED AND SUBJECTED TO SEPARATE SHOWUP PROCEDURES.

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

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

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

49 (C) EVIDENCE OF A FAILURE TO COMPLY WITH ANY OF THE PROVISIONS OF THIS
50 SECTION SHALL BE ADMISSIBLE IN SUPPORT OF CLAIMS OF EYEWITNESS MISIDEN-
51 TIFICATION;

52 (D) WHEN EVIDENCE OF A FAILURE TO COMPLY WITH ANY OF THE PROVISIONS OF
53 THIS SECTION HAS BEEN PRESENTED AT TRIAL, THE TRIAL COURT SHALL INSTRUCT
54 THE JURY THAT THE PROVISIONS WERE DESIGNED TO REDUCE THE RISK OF MISI-
55 DENTIFICATION AND THAT IT MAY CONSIDER CREDIBLE EVIDENCE OF NONCOMPLI-
56 ANCE WHEN ASSESSING THE RELIABILITY OF EYEWITNESS IDENTIFICATIONS; AND

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

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

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

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

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

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

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