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

6800--A

2013-2014 Regular Sessions

I N A S S E M B L Y

April 18, 2013

Introduced by M. of A. LENTOL -- (at request of the Office of Court Administration) -- read once and referred 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, the executive 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:

Section 1. Section 60.25 of the criminal procedure law, subparagraph (ii) of paragraph (a) of subdivision 1 as amended by chapter 479 of the laws of 1977, is amended to read as follows:

S 60.25 Rules of evidence; identification by means of previous recognition, in absence of present identification.

1. In any criminal proceeding in which the defendant's commission of an offense is in issue, testimony as provided in subdivision two OF THIS SECTION may be given by a witness when:

(a) Such witness testifies that:

(i) 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

(ii) On a subsequent occasion he OR SHE observed, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, a person OR, WHERE THE OBSERVATION IS MADE PURSUANT TO AN IDENTIFICATION PROCEDURE AS DEFINED IN THIS SECTION, A PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION OF A PERSON whom he OR SHE recognized as the same person whom he OR SHE had observed on the first or incriminating occasion; and

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

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(iii) He OR SHE is unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question; and

(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" IS ONE IN WHICH THE WITNESS IDENTIFIES A PERSON IN AN ARRAY OF PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTIONS UNDER CIRCUMSTANCES WHERE: (I) 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, (II) 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 is the same person whom he OR SHE had observed on the first or incriminating occasion. Such testimony AND SUCH PICTORIAL, PHOTOGRAPHIC, ELEC-

TRONIC, FILMED OR VIDEO RECORDED REPRODUCTION constitutes evidence in chief.

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

6. Consists of potential 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, which potential testimony would not be admissible upon the prospective trial of such charge owing to an improperly made previous identification of the defendant OR A PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION OF THE DEFENDANT by the prospective witness.

S 4. 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 OR HER OR A PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION OF HIM OR HER as such, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.

S 5. Section 840 of the executive law is amended by adding a new subdivision 5 to read as follows:

5. (A) THE COUNCIL SHALL, IN ADDITION, IN CONSULTATION WITH SCIENTIFIC EXPERTS IN EYEWITNESS MEMORY RESEARCH AND THE CRIMINAL JUSTICE COMMUNITY, DEVELOP AND, FOLLOWING A PERIOD OF PUBLIC COMMENT, MAINTAIN AND DISSEMINATE TO ALL POLICE AND PROSECUTORIAL AGENCIES IN THE STATE A MODEL POLICY FOR THE PERSONNEL OF SUCH AGENCIES INVOLVED IN CRIMINAL INVESTIGATIONS THAT EMBODIES CURRENT BEST PRACTICES FOR CONDUCTING PHOTOGRAPHIC AND LIVE LINEUPS. THESE BEST PRACTICES MUST BE CONSISTENT WITH RECOMMENDATIONS INCORPORATED IN "BEST PRACTICES FOR THE ADMINISTRATION OF IDENTIFICATION PROCEDURES" PUBLISHED IN TWO THOUSAND ELEVEN BY THE JUSTICE TASK FORCE ESTABLISHED BY THE CHIEF JUDGE OF THE STATE IN MAY, TWO THOUSAND NINE, AND MUST INCLUDE BUT NEED NOT BE LIMITED TO THOSE PRACTICES DESCRIBED THEREIN AS "I. INSTRUCTIONS TO WITNESS," "II. WITNESS CONFIDENCE STATEMENTS," "III. DOCUMENTATION OF IDENTIFICATION PROCEDURES," AND "V. LIVE LINEUPS." FOR PURPOSES OF THIS SUBDIVISION, THE "CRIMINAL JUSTICE COMMUNITY" SHALL INCLUDE POLICE AND PROSECUTORIAL AGENCIES OF THE STATE AND REPRESENTATIVES OF THE CRIMINAL DEFENSE BAR.

(B) EACH POLICE AND PROSECUTORIAL AGENCY IN THE STATE SHALL ADOPT WRITTEN POLICIES RELATING TO THE CONDUCT OF PHOTOGRAPHIC AND LIVE LINEUPS THAT CONFORM WITH THE MODEL POLICY PRESCRIBED BY PARAGRAPH (A) OF THIS SUBDIVISION.

S 6. Section 343.3 of the family court act, as added by chapter 920 of the laws of 1982, is amended to read as follows:

S 343.3. Rules of evidence; identification by means of previous recognition in absence of present identification. 1. In any juvenile delinquency proceeding in which the respondent's commission of a crime is in issue, testimony as provided in subdivision two may be given by a witness when:

(a) such witness testifies that:

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

(ii) on a subsequent occasion he OR SHE observed, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, a person OR, WHERE THE OBSERVATION IS MADE PURSUANT TO AN IDENTIFICATION PROCEDURE AS DEFINED IN PARAGRAPH (C) OF SUBDIVISION ONE OF SECTION 60.25 OF THE CRIMINAL PROCEDURE LAW, A PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION OF A PERSON whom he OR SHE recognized as the same person whom he OR SHE had observed on the first incriminating occasion; and

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

(b) it is established that the respondent 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.

2. Under circumstances prescribed in subdivision one, such witness may testify at the 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 respondent 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 7. Section 343.4 of the family court act, as added by chapter 920 of the laws of 1982, is amended to read as follows:

S 343.4. Rules of evidence; identification by means of previous recognition, in addition to present identification. In any juvenile delinquency proceeding in which the respondent's commission of a crime is in issue, a witness who testifies that: (a) he OR SHE observed the person claimed by the presentment agency to be the respondent either at the time and place of the commission of the crime or upon some other occasion relevant to the case, and (b) on the basis of present recollection, the respondent is the person in question, and (c) on a subsequent occasion he OR SHE observed the respondent, OR A PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION OF THE RESPONDENT 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 THE CRIMINAL PROCEDURE LAW, 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 respondent at the delinquency 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 respondent and testify that the person whom he OR SHE observed OR WHOSE PICTORIAL, PHOTOGRAPH-

IC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION HE OR SHE OBSERVED on such second occasion is the same person whom he OR SHE had observed on the first or incriminating occasion. Such testimony AND SUCH PICTORIAL, PHOTOGRAPHIC, ELECTRONIC, FILMED OR VIDEO RECORDED REPRODUCTION constitutes evidence in chief.

S 8. Section 60.45 of the criminal procedure law is amended by adding a new subdivision 3 to read as follows:

3. (A) WHERE A DEFENDANT IS SUBJECT TO CUSTODIAL INTERROGATION BY A PUBLIC SERVANT AT A DETENTION FACILITY, THE ENTIRE CUSTODIAL INTERROGATION, INCLUDING THE GIVING OF ANY REQUIRED ADVICE TO THE DEFENDANT AS TO HIS OR HER RIGHTS AND DEFENDANT'S WAIVER OF ANY RIGHTS SHALL BE VIDEO RECORDED, BY VIDEOTAPE OR OTHER APPROPRIATE VIDEO RECORDING DEVICE IF THE CUSTODIAL INTERROGATION INVOLVES: A CLASS A-1 FELONY EXCEPT ONE DEFINED IN ARTICLE TWO HUNDRED TWENTY OF THE PENAL LAW; OR A FELONY OFFENSE DEFINED IN ARTICLE ONE HUNDRED TWENTY-FIVE OR ARTICLE ONE HUNDRED THIRTY OF SUCH LAW THAT IS DEFINED AS A CLASS B VIOLENT FELONY OFFENSE IN SECTION 70.02 OF SUCH LAW. FOR PURPOSES OF THIS SUBDIVISION, THE TERM "PUBLIC SERVANT" SHALL HAVE THE MEANING PROVIDED IN SECTION 10.00 OF THE PENAL LAW AND A "DETENTION FACILITY" SHALL MEAN A POLICE STATION, CORRECTIONAL FACILITY, HOLDING FACILITY FOR PRISONERS, PROSECUTOR'S OFFICE OR OTHER FACILITY WHERE PERSONS ARE HELD IN DETENTION IN CONNECTION WITH CRIMINAL CHARGES THAT HAVE BEEN OR MAY BE FILED AGAINST THEM.

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

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

S 9. Section 710.70 of the criminal procedure law is amended by adding a new subdivision 4 to read as follows:

4. IN THE EVENT THAT THE COURT DETERMINES THAT A CONFESSION, ADMISSION OR OTHER STATEMENT SHALL BE ADMISSIBLE, NOTWITHSTANDING THE PEOPLE'S FAILURE TO SHOW GOOD CAUSE PURSUANT TO SUBDIVISION THREE OF SECTION 60.45 OF THIS CHAPTER FOR FAILING TO VIDEO RECORD IT, THE COURT, IN ITS CHARGE TO THE JURY AND UPON REQUEST OF THE DEFENDANT, MUST INSTRUCT THE JURY THAT THE PEOPLE'S FAILURE TO RECORD THE DEFENDANT'S CONFESSION,

ADMISSION OR OTHER STATEMENT AS REQUIRED BY SECTION 60.45 OF THIS CHAPTER SHOULD BE WEIGHED AS A FACTOR IN DETERMINING WHETHER SUCH CONFESSION, ADMISSION OTHER STATEMENT WAS VOLUNTARILY MADE OR WAS MADE AT ALL.

S 10. Subdivision 3 of section 344.2 of the family court act is renumbered subdivision 4 and a new subdivision 3 is added to read as follows:

3. (A) WHERE A RESPONDENT IS SUBJECT TO CUSTODIAL INTERROGATION BY A PUBLIC SERVANT AT A FACILITY SPECIFIED IN SUBDIVISION FOUR OF SECTION 305.2 OF THIS ARTICLE, THE ENTIRE CUSTODIAL INTERROGATION, INCLUDING THE GIVING OF ANY REQUIRED ADVICE TO THE RESPONDENT AS TO HIS OR HER RIGHTS AND RESPONDENT'S WAIVER OF ANY RIGHTS SHALL BE VIDEO RECORDED, BY VIDEOTAPE OR OTHER APPROPRIATE VIDEO RECORDING DEVICE IF THE CUSTODIAL INTERROGATION INVOLVES: A CLASS A-1 FELONY EXCEPT ONE DEFINED IN ARTICLE TWO HUNDRED TWENTY OF THE PENAL LAW; OR A FELONY OFFENSE DEFINED IN ARTICLE ONE HUNDRED TWENTY-FIVE OR ARTICLE ONE HUNDRED THIRTY OF SUCH LAW THAT IS DEFINED AS A CLASS B VIOLENT FELONY OFFENSE IN SECTION 70.02 OF SUCH LAW. FOR PURPOSES OF THIS SUBDIVISION, THE TERM "PUBLIC SERVANT" SHALL HAVE THE MEANING PROVIDED IN SECTION 10.00 OF THE PENAL LAW.

(B) WHERE THE PRESENTMENT AGENCY OFFERS INTO EVIDENCE A CONFESSION, ADMISSION OR OTHER STATEMENT MADE BY A RESPONDENT IN CUSTODY WITH RESPECT TO HIS OR HER PARTICIPATION OR LACK OF PARTICIPATION IN AN OFFENSE SPECIFIED IN PARAGRAPH (A) OF THIS SUBDIVISION THAT HAS NOT BEEN VIDEO RECORDED AS REQUIRED BY SUCH PARAGRAPH, THE COURT SHALL CONSIDER THE FAILURE TO COMPLY WITH THIS REQUIREMENT AS A FACTOR IN DETERMINING WHETHER SUCH CONFESSION, ADMISSION OR OTHER STATEMENT SHALL BE ADMISSIBLE UNLESS THE PRESENTMENT AGENCY SHOWS GOOD CAUSE FOR SUCH FAILURE, WHICH SHALL INCLUDE, BUT NOT BE LIMITED TO: (I) MALFUNCTION OF THE VIDEO RECORDING EQUIPMENT OR OTHER INADVERTENT ERROR THAT PREVENTS OR INTERRUPTS THE VIDEO RECORDING, (II) UNAVAILABILITY OF SUCH EQUIPMENT BECAUSE IT WAS OTHERWISE BEING USED, (III) RESPONDENT'S REFUSAL TO MAKE A CONFESSION, ADMISSION OR OTHER STATEMENT IF IT IS VIDEO RECORDED OR HIS OR HER REQUEST THAT IT NOT BE VIDEO RECORDED (AND SUCH REFUSAL OR REQUEST IS IN WRITING SIGNED BY THE RESPONDENT, UNLESS THE RESPONDENT DECLINES TO DO SO), (IV) THE PRESENTMENT AGENCY'S REASONABLE BELIEF THAT SUCH VIDEO RECORDING WOULD JEOPARDIZE THE SAFETY OF ANY PERSON OR REVEAL THE IDENTITY OF A CONFIDENTIAL INFORMANT, OR (V) THE PUBLIC SERVANT OR SERVANTS HAVING CUSTODY OF THE RESPONDENT REASONABLY BELIEVED, AT THE TIME THE RESPONDENT MADE THE CONFESSION, ADMISSION OR OTHER STATEMENT, THAT SUCH CONFESSION, ADMISSION OR OTHER STATEMENT WOULD NOT RELATE TO RESPONDENT'S PARTICIPATION OR LACK OF PARTICIPATION IN AN OFFENSE SPECIFIED IN PARAGRAPH (A) OF THIS SUBDIVISION.

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

S 11. This act shall take effect immediately; provided that the provisions of sections eight, nine and ten of this act shall take effect on the first of November in the year next succeeding the year in which this act shall have become a law; provided, further, sections eight, nine and ten of this act shall apply only to confessions, admissions or other statements made on or after the effective date of such sections.