

STATE OF NEW YORK

1819

2017-2018 Regular Sessions

IN SENATE

January 11, 2017

Introduced by Sen. KENNEDY -- 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 eyewitness identification procedures

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 60.17 to read as follows:

3 § 60.17 Rules of evidence; expert testimony in certain identification
4 cases.

5 In any criminal proceeding in which eyewitness identification testimo-
6 ny is introduced, or in other cases where the interests of justice so
7 require, the court may admit expert testimony regarding relevant aspects
8 of identification procedures, including but not limited to factors that
9 affect the reliability and accuracy of eyewitness identification.

10 § 2. Title D of the criminal procedure law is amended by adding a new
11 article 80 to read as follows:

ARTICLE 80

IDENTIFICATION PROCEDURES

14 Section 80.10 Identification procedures; definitions.

15 80.20 Identification procedures; generally.

16 80.30 Identification procedures; evidentiary matters.

17 80.40 Identification procedures; professional training.

18 § 80.10 Identification procedures; definitions.

19 As used in this article, the following terms shall have the following
20 meanings:

21 1. "Administrator" means the person conducting the photo or live line-
22 up.

23 2. "Suspect" means the person believed by law enforcement to be the
24 possible perpetrator of the crime.

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

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1 3. "Blind" means the administrator does not know the identity of the
2 suspect.

3 4. "Blinded" means the administrator may know who the suspect is, but
4 does not know which lineup member is being viewed by the eyewitness at
5 any given time.

6 5. "Eyewitness" means a person who observes another person at or near
7 the scene of an offense or upon some other occasion relevant to the
8 case.

9 6. "Filler" means either a person or a photograph of a person who is
10 not suspected of an offense and is included in an identification proce-
11 dure.

12 7. "Identification procedure" means a live lineup, a photo lineup, or
13 a showup.

14 8. "Live lineup" means an identification procedure in which a group of
15 persons, including the suspected perpetrator of an offense and other
16 persons not suspected of the offense, is displayed to an eyewitness for
17 the purpose of determining whether the eyewitness identifies the suspect
18 as the perpetrator.

19 9. "Photo lineup" means an identification procedure in which an array
20 of photographs, including a photograph of the suspected perpetrator of
21 an offense and additional photographs of other persons not suspected of
22 the offense, is displayed to an eyewitness either in hard copy form or
23 via computer for the purpose of determining whether the eyewitness iden-
24 tifies the suspect as the perpetrator.

25 10. "Showup" means an identification procedure in which an eyewitness
26 is presented with a single suspect for the purpose of determining wheth-
27 er the eyewitness identifies this individual as the perpetrator.

28 § 80.20 Identification procedures; generally.

29 1. If identification procedures (a) have been conducted in accordance
30 with this section and under circumstances consistent with such rights as
31 an accused person may derive under the constitution of this state or of
32 the United States; and (b) are properly documented in accordance with
33 paragraphs (t), (u) and (v) of subdivision two of this section, testimo-
34 ny may be given by a witness that he or she observed a person or photo-
35 graph of a person on an occasion prior to his or her testimony whom he
36 or she recognizes as the same person whom he or she had observed on the
37 first or incriminating occasion.

38 2. Any criminal justice entity conducting eyewitness identification
39 procedures shall adopt specific written procedures for conducting photo
40 and live lineups that comply with the following requirements:

41 (a) Prior to a photo or live lineup, law enforcement shall record as
42 complete a description as possible of the perpetrator provided by the
43 eyewitness, in the eyewitness's own words. This statement shall also
44 include information regarding the witness's degree of attention during
45 the incident and the witness's opportunity to view the perpetrator, as
46 well as the conditions under which the eyewitness observed the perpetra-
47 tor, including location, time, distance, obstructions, lighting, weather
48 conditions and other impairments, including but not limited to alcohol,
49 drugs, stress and visual/auditory disabilities. The eyewitness also
50 shall be asked if he or she needs glasses or contact lenses and whether
51 he or she was wearing them at the time of the offense. The administrator
52 shall note whether the eyewitness was wearing glasses or contact lenses
53 at the time of the identification procedures;

54 (b) Unless impracticable, a blind administrator shall conduct the live
55 or photo lineup;

1 (c) When it is impracticable for a blind administrator to conduct the
2 eyewitness identification procedure, the investigator shall state in
3 writing the reason therefor, and shall conduct the lineup blinded;

4 (d) The eyewitness shall be instructed, without other eyewitnesses
5 present, prior to any live or photo lineup that:

6 (i) the perpetrator may or may not be among the persons in the iden-
7 tification procedure;

8 (ii) the administrator does not know who the perpetrator is;

9 (iii) the eyewitness should not feel compelled to make an identifica-
10 tion;

11 (iv) the investigation will continue whether or not an identification
12 is made;

13 (v) the procedure requires the administrator to ask the eyewitness to
14 state, in his or her own words, how certain he or she is of any iden-
15 tification; and

16 (vi) the eyewitness is not to discuss the identification procedure or
17 its results with other eyewitnesses involved in the case and should not
18 speak with the media;

19 (e) Unless impracticable, the photograph of the suspect used in a
20 photo lineup shall be contemporary and shall resemble his or her appear-
21 ance at the time of the offense. When it is impracticable, the investi-
22 gator shall state in writing the reason therefor;

23 (f) In a photo lineup, there shall be no characteristics of the photo-
24 graphs themselves or the background context in which they are placed
25 which shall make any of the photographs stand out;

26 (g) A photo or live lineup shall be composed so that the fillers
27 generally resemble the eyewitness's description of the perpetrator,
28 while ensuring that the suspect does not stand out from the fillers;

29 (h) In a photo or live lineup, fillers shall possess the following
30 characteristics:

31 (i) all fillers selected shall resemble the eyewitness's description
32 of the perpetrator in significant features including, but not limited to
33 face, weight, build and skin tone, and including any unique or unusual
34 features to the extent possible including, but not limited to any scars
35 or tattoos; if the suspect does not resemble the eyewitness's
36 description of the perpetrator in significant features, the fillers
37 selected shall resemble the suspect in significant features;

38 (ii) at least five fillers shall be included in a photo lineup, in
39 addition to the suspect;

40 (iii) at least four fillers shall be included in a live lineup, in
41 addition to the suspect; and

42 (iv) if the eyewitness has previously viewed a photo lineup or live
43 lineup in connection with the identification of another person suspected
44 of involvement in the offense, the fillers in the lineup in which the
45 instant suspect participates shall be different from the fillers used in
46 any prior lineups;

47 (i) If there are multiple eyewitnesses:

48 (i) each eyewitness shall view photo or live lineups separately;

49 (ii) the suspect shall be placed in a different position in the live
50 lineup and/or photo lineup for each eyewitness; and

51 (iii) the eyewitnesses shall not be permitted to communicate with each
52 other until all identification procedures have been completed;

53 (j) In an identification procedure, no writings or information
54 concerning the instant or any previous arrest, indictment or conviction
55 of the suspect shall be visible or made known to the eyewitness;

1 (k) In a live lineup, any identifying actions, such as speech,
2 gestures or other movements, shall be performed by all lineup partic-
3 ipants;

4 (l) In a live lineup, all lineup participants must be out of view of
5 the eyewitness prior to the identification procedure;

6 (m) When there are multiple suspects, each identification procedure
7 shall include only one suspect;

8 (n) Nothing shall be said to the eyewitness regarding the suspect's
9 position in the photo or live lineup;

10 (o) Nothing shall be said to the eyewitness that might influence the
11 eyewitness's identification of any particular lineup member;

12 (p) If the eyewitness makes an identification, the administrator shall
13 seek and document a clear statement from the eyewitness, at the time of
14 the identification and in the eyewitness's own words, as to the eyewit-
15 ness's confidence level that the person identified in a given identifi-
16 cation procedure is the perpetrator;

17 (q) If the eyewitness identifies a person as the perpetrator, the
18 eyewitness shall not be provided any information concerning such person
19 before the administrator obtains the eyewitness's confidence statement
20 about the selection;

21 (r) A record of the identification procedure shall be made that
22 includes all identification and non-identification results obtained
23 during the identification procedures, signed by the eyewitnesses;

24 (s) Efforts shall be made to perform a live or photo lineup instead of
25 a showup. In addition:

26 (i) showups shall only be performed within a reasonable time of an
27 offense, using a live suspect and in exigent circumstances that require
28 the immediate display of a suspect to an eyewitness;

29 (ii) in the event of the administration of a showup procedure:

30 (A) a full and detailed description of the perpetrator shall be
31 provided by the eyewitness before the eyewitness observes the suspect.
32 This statement shall also include information regarding the witness's
33 degree of attention during the incident and the witness's opportunity to
34 view the perpetrator, as well as the conditions under which the eyewit-
35 ness observed the perpetrator including location, time, distance,
36 obstructions, lighting, weather conditions and other impairments,
37 including but not limited to alcohol, drugs, stress and visual/auditory
38 disabilities. The eyewitness shall also be asked if he or she needs
39 glasses or contact lenses and whether he or she was wearing them at the
40 time of the offense. The administrator shall note whether the eyewitness
41 was wearing glasses or contact lenses at the time of the identification
42 procedure;

43 (B) unless impracticable the eyewitness shall be transported to a
44 neutral, non-law enforcement location where the suspect is being
45 detained for the purposes of a showup procedure;

46 (C) eyewitnesses shall be provided with instructions prior to the
47 showup, including that:

48 (1) the perpetrator may or may not be the person that is presented to
49 the eyewitness;

50 (2) the eyewitness should not feel compelled to make an identifica-
51 tion;

52 (3) the investigation will continue whether or not an identification
53 is made;

54 (4) the procedure requires the administrator to ask the eyewitness to
55 state, in his or her own words, how certain he or she is of any iden-
56 tification; and

1 (5) the eyewitness is not to discuss the identification procedure or
2 its results with other eyewitnesses involved in the case and should not
3 speak with the media;

4 (D) measures shall be taken by investigators at the showup, including
5 the administrator of the showup, to reduce potentially damaging or
6 prejudicial inferences that may be drawn by the eyewitness, including:

7 (1) refraining from suggesting, through statements or non-verbal
8 conduct, that the suspect is or may be the perpetrator of the crime;

9 (2) removing the suspect from a squad car; and

10 (3) when practicable, removing handcuffs from the suspect;

11 (E) if there are multiple eyewitnesses, only one eyewitness at a time
12 shall participate in the showup procedure. Only one of the eyewitnesses
13 shall be present at the location of the showup procedure. If a positive
14 identification is made, and an arrest is justified, additional eyewit-
15 nesses shall be shown live or photo lineups;

16 (F) if there are multiple suspects, these suspects shall be separated
17 and subjected to separate showup procedures; and

18 (G) if the eyewitness makes an identification, the administrator shall
19 seek and document a clear statement from the eyewitness, at the time of
20 the identification and in the eyewitness's own words, as to the eyewit-
21 ness's confidence level that the person identified in a given identifi-
22 cation procedure is the perpetrator. If the eyewitness identifies a
23 person as the perpetrator, the eyewitness shall not be provided any
24 information concerning such person before the administrator obtains the
25 eyewitness's confidence statement about the selection;

26 (t) Unless impracticable, a video record of the identification proce-
27 dure shall be made that includes the following information:

28 (i) all identification and non-identification results obtained during
29 the identification procedures, signed by the eyewitnesses, including the
30 eyewitnesses' confidence statements;

31 (ii) the names of all persons present at the identification procedure;

32 (iii) the date and time of the identification procedure;

33 (iv) in a photo or live lineup, any eyewitness identifications of any
34 fillers; and

35 (v) in a photo or live lineup, the names of the lineup members and
36 other relevant identifying information, and the sources of all photo-
37 graphs or persons used in the lineup;

38 (u) If a video record of the identification procedure is impractica-
39 ble, the officer conducting the lineup shall document the reason there-
40 for, and an audio record of the identification procedure shall be made
41 which includes the items specified in paragraph (t) of this subdivision.
42 The audio record shall be supplemented by all of the photographs used in
43 a photo lineup, and photographs of all of the individuals used in a live
44 lineup or showup; and

45 (v) If both a video and audio record of the identification procedure
46 are impracticable, the officer conducting the lineup shall document in
47 writing the reason therefor, and a written record of the lineup shall be
48 made which includes the items specified in paragraph (t) of this subdivi-
49 sion. The written record shall be supplemented by all of the photo-
50 graphs used in a photo lineup, and photographs of all of the individuals
51 used in a live lineup or showup.

52 § 80.30 Identification procedures; evidentiary matters.

53 For any photo or live lineup, or showup procedure that was adminis-
54 tered after the date upon which this article took effect:

55 1. If law enforcement officials or prosecuting agencies do not
56 substantially comply with the provisions of this article, the defendant

1 may move to suppress eyewitness identification evidence pursuant to
2 article seven hundred ten of this chapter.

3 2. Courts shall consider evidence of a failure to comply with any of
4 the provisions of section 80.20 of this article when adjudicating
5 motions to suppress eyewitness identification evidence.

6 3. If the court does not suppress eyewitness identification evidence
7 but finds that law enforcement officials or prosecuting agencies failed
8 to substantially comply with the provisions of this article, the court
9 shall instruct the jury that eyewitness identification procedure
10 requirements as set forth in this chapter were designed to reduce the
11 risk of misidentification and the jury may consider credible evidence of
12 non-compliance when assessing the reliability of eyewitness identifica-
13 tions.

14 4. Additionally, if the court finds that such substantial non-compli-
15 ance with the provisions of this article have undermined the court's
16 confidence in the reliability of the eyewitness identification, the
17 court shall also instruct the jury that it should view the identifica-
18 tion evidence with distrust.

19 § 80.40 Identification procedures; professional training.

20 The division of criminal justice services shall create, administer and
21 conduct training programs for professionals involved in law enforcement,
22 including but not limited to police and other law enforcement officials
23 and recruits, prosecutors, judges and defense counsel, regarding the
24 methods, technical aspects and scientific findings regarding the basis
25 of the eyewitness identification practices and procedures referenced in
26 this article.

27 § 3. This act shall take effect on the one hundred eightieth day after
28 it shall have become a law, and shall apply to all identification proce-
29 dures that take place on or after such date.