STATE OF NEW YORK

4826

2017-2018 Regular Sessions

IN SENATE

March 2, 2017

Introduced by Sen. BAILEY -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the criminal procedure law, the family court act and the executive law, in relation to statements of those accused of crimes and eyewitness identifications, to enhance criminal investigations and prosecutions and to promote confidence in the criminal justice system of this state

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 60.45 of the criminal procedure law is amended by adding a new subdivision 3 to read as follows:

3. (a) When a person is subject to interrogation by a public servant at a detention facility, and the public servant is aware or has reason to suspect that the person interrogated committed a crime under investigation by such public servant or a law enforcement entity associated with such public servant, the entire interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded by an appropriate video recording device, if the interrogation involves a class A-1 felony or a violent felony offense as defined in section 70.02 of the penal law. The interrogation shall be recorded in a manner such that the persons in the recording are shown and the speech is intelligible. Such recording may also be conducted outside of a detention facility. For purposes of this paragraph, the term "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) No confession, admission or other statement shall be subject to a motion to suppress pursuant to subdivision three of section 710.20 of this chapter based solely upon the failure to video record such interro-

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

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gation in a detention facility as defined in paragraph (a) of this subdivision. However, when the people offer into evidence against a defendant a confession, admission or other statement made by a person with respect to an alleged offense specified in paragraph (a) of this subdivision that has not been video recorded, the court shall consider the failure to record as a factor, in accordance with paragraph (c) of this subdivision, in determining whether such confession, admission or other statement shall be admissible.

(c) Notwithstanding the requirement of paragraph (a) of this subdivision, following a written motion of the prosecutor asserting good cause pursuant to this paragraph, filed within the time periods specified in section 710.30 of this chapter, and after an opportunity for a hearing, upon clear and convincing proof of such good cause, the court may find that such interrogation need not have been recorded. Such good cause may include the following:

(i) The video recording equipment malfunctioned while the recording of the interrogation was attempted.

(ii) Video recording equipment was not reasonably available because it was being used to record other interrogations in accordance with this section, and no such interrogation could reasonably have been delayed.

(iii) The statement was made in response to pedigree questions that are reasonably and routinely asked during arrest processing.

(iv) The statement was made spontaneously by the individual and not in response to questioning by a public servant.

(v) The statement was made during an interrogation that was conducted when the interviewer was unaware and had no reason to suspect that a qualifying offense may have occurred.

(vi) The statement was made after the individual voluntarily, and without express or implied encouragement by a public servant, refused to participate in the interrogation if recorded, and the circumstances of the refusal were recorded or, if such a record of the refusal was refused as well, reasonably contemporaneous documentation of the circumstances of the refusal was made.

(vii) It was the reasonable belief of the appropriate law enforcement official or officials that a video recording would jeopardize the safety of a specific person or persons or reveal the identity of one or more specific confidential informants, and reasonably contemporaneous documentation of the circumstances of such belief was made.

(viii) Such statement was made at a location not equipped with an appropriate recording device, it was not reasonably possible, under the circumstances, to bring equipment to such location or transfer the individual to a detention facility for interrogation, and the reason for using such location was not to subvert the intent of the law. For purposes of this section, the term "location" shall include those locations specified in paragraph (b) of subdivision four of section 305.2 of the family court act.

(d) In the event that an interrogation that qualified for recording under paragraph (a) of this subdivision was not recorded and the court determines that the non-recorded, alleged confession, admission or other statement is lawfully admissible, then, upon request of the defendant, the court must instruct the jury that the law generally requires recording under such circumstances and that the people's failure to record the defendant's alleged confession, admission or other statement may be considered in its deliberations, including, but not limited to, in determining whether such alleged confession, admission or other statement was voluntarily made, is accurate or truthful, or was made at all.

When so instructing the jury, if the court has found that good cause for non-recording existed in accordance with paragraph (c) of this subdivision, the court, at the request of the people, shall advise the jury of the factor or factors set forth in paragraph (c) of this subdivision that the court found to be proved, without disclosing the court's finding with respect thereto, and advise the jury that it may make an independent determination concerning what weight, if any, to give to the failure to record.

(e) Video recording as required by this section shall be conducted in accordance with standards consistent with this subdivision established in regulations by the division of criminal justice services.

§ 2. Subdivision 8 of section 305.2 of the family court act, as amended by chapter 398 of the laws of 1983, is amended and a new subdivision 5-a is added to read as follows:

5-a. When at any time a child is subject to interrogation by a public servant at a facility designated by the chief administrator of the courts as a suitable place for the questioning of juveniles pursuant to subdivision four of this section, and the public servant is aware or has reason to suspect that the child interrogated committed an act that would be a crime if committed by an adult and which is under investigation by such public servant or a law enforcement entity associated with such public servant, the entire interrogation, including the giving of any required notice to the child as to his or her rights and his or her waiver of any rights, shall be video recorded and governed in accordance with the provisions of subdivision three of section 60.45 of the criminal procedure law. The interrogation shall be recorded in a manner such that the persons in the recording are shown and the speech is intelligible. A copy of the recording shall be subject to discovery pursuant to section 331.2 of this article. This subdivision shall not apply to a statement made to the probation service, in accordance with subdivision seven of section 308.1 of this part, except when such statement may be admissible under such subdivision seven of section 308.1.

8. In determining the suitability of questioning and determining the reasonable period of time for questioning such a child, the child's age, the presence or absence of his or her parents or other persons legally responsible for his or her care [~~and~~], notification pursuant to subdivision three and, where the child has been interrogated at a facility designated by the chief administrator of the courts as a suitable place for the questioning of juveniles, whether the interrogation was in compliance with the video-recording and disclosure requirements of subdivision five-a of this section shall be included among relevant considerations.

§ 3. 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. When at any time a child is subject to interrogation by a public servant at a facility designated by the chief administrator of the courts as a suitable place for the questioning of juveniles pursuant to subdivision four of section 305.2 of this article, and the public servant is aware or has reason to suspect that the child interrogated committed an act that would constitute a crime if committed by an adult and which is under investigation by such public servant or a law enforcement entity associated with such public servant, the entire interrogation, including the giving of any required notice to the child as to his or her rights and his or her waiver of any rights, shall be video recorded and governed in accordance with the provisions of subdivision three of section 60.45 of the criminal procedure law. The inter-

rogation shall be recorded in a manner such that the persons in the recording are shown and the speech is intelligible. A copy of the recording shall be subject to discovery pursuant to section 331.2 of this article. This subdivision shall not apply to a statement made to the probation service, in accordance with subdivision seven of section 308.1 of this article, except when such statement may be admissible under such subdivision seven of section 308.1.

§ 4. 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:

§ 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 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 a blind procedure as defined in paragraph (c) of this subdivision, 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

(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) (i) For purposes of this section, a "blind procedure" is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproductions under circumstances that comply with the applicable provisions of section 60.80 of the criminal procedure law and the protocols promulgated in accordance with subdivision twenty-one of section eight hundred thirty-seven of the executive law and where, at the time the identification is made, each public servant administering such procedure and with whom the witness communicates with respect to the conducting of such procedure does not know which person in the array is the suspect.

(ii) The failure of a public servant to follow such a procedure shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not, in and of itself, constitute a legal basis to suppress evidence in response to a motion made pursuant to subdivision six of section 710.20 of this chapter. This paragraph, in and of itself, neither limits nor expands subdivision six of section 710.20 of this chapter.

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.

§ 5. Section 60.30 of the criminal procedure law, as amended by chapter 479 of the laws of 1977, is amended to read as follows:

§ 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 where the observation is made pursuant to a blind procedure, as defined in paragraph (c) of subdivision one of section 60.25 of this article, 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 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, electronic, filmed or video recorded reproduction constitutes evidence in chief.

§ 6. The criminal procedure law is amended by adding a new section 60.80 to read as follows:

§ 60.80 Eyewitness identification procedures.

In any array and any live lineup identification procedure conducted by a public servant, the following procedures shall be followed:

1. The identification procedure shall be conducted as a "blind procedure" as defined in subparagraph (i) of paragraph (c) of subdivision one of section 60.25 of this article.

2. Prior to any such identification procedure, the eyewitness shall be instructed that:

(a) the perpetrator may or may not be among the persons in the identification procedure;

(b) the administrator does not know who the perpetrator is;

(c) the eyewitness should not feel compelled to make an identification;

(d) the investigation will continue whether or not an identification is made; and

(e) the procedure requires the administrator to ask and then document a statement, made in the witness's own words, of the witness's level of confidence in the accuracy of any identification.

3. (a) Unless impracticable, the photograph of the suspect used in a photo array shall be contemporary and resemble the suspect's appearance at the time of the offense. When such is impracticable, the investigator shall document, in reasonably contemporaneous written form, the reasons therefor.

(b) In a photo array, there shall be no characteristics of the photographs themselves or the background on which they are placed that would make any photograph stand out.

(c) A photo array or live lineup shall be composed so that the fillers generally resemble the eyewitness's description of the perpetrator, while ensuring that the suspect does not stand out from the fillers.

(d) If there are multiple eyewitnesses, each eyewitness shall view the photo array or live lineup separately, the suspect shall be placed in a different position in the live lineup and/or photo array for each eyewitness, and the eyewitnesses shall not be permitted to communicate with each other until all of the identification procedures have been completed.

4. (a) Nothing shall be said to an eyewitness that might influence his or her identification of any particular person in the live lineup or photo array.

(b) If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning such person before the administrator obtains the eyewitness's confidence statement about the selection.

5. (a) A record of the identification procedure shall be made that includes all identification and non-identification results obtained during the identification procedures.

(b) (i) A video recording shall be made of the entire identification procedure, including but not limited to the setting up of the procedure and the instructions and statements of witnesses and the statement or statements made in compliance with paragraph (e) of subdivision two of this section.

(ii) Notwithstanding the requirements of subparagraph (i) of this paragraph, following a written motion of the prosecutor, and after an opportunity for a hearing, the court may find that a video recording was not required if the people show by clear and convincing evidence that (A) the video recording equipment malfunctioned while the recording of the identification procedure was attempted; (B) video recording equipment was not reasonably available because it was being used to record other identification procedures in accordance with this section, and no such identification procedure could reasonably have been delayed; or (C) such identification procedure was made at a location not equipped with an appropriate recording device, it was not reasonably possible, under the circumstances, to bring equipment to such location or move the procedure to a location at which appropriate video recording was available, and the reason for using the location was not to subvert the intent of the law.

(iii) Video recording, as required by this paragraph, shall be conducted in accordance with standards consistent with this paragraph established in regulations by the division of criminal justice services.

6. The following definitions shall apply to this section:

(a) "Blind" means at the time the identification is made, each public servant administering the identification procedure and with whom the

witness communicates does not know which person in the array is the suspect.

(b) "Eyewitness" or "witness" means a person who observes another person at or near the scene of an offense or upon some other occasion relevant to the investigation or case.

(c) "Filler" means either a person or a photograph of a person who is not suspected of the offense under investigation and is included in an identification procedure.

(d) "Identification procedure" means a live lineup or a photo array.

(e) "Live lineup" means an identification procedure in which a group of persons, including the suspected perpetrator of an offense and other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.

(f) "Array" means any photographic array.

(g) "Photographic array" or "photo array" means an identification procedure in which an array of photographs, including a photograph of the suspected perpetrator of an offense and other persons not suspected of the offense, is displayed to an eyewitness either in hard copy form or via computer for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.

§ 7. 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 identification of a pictorial, photographic, electronic, filmed or video recorded reproduction of the defendant by the prospective witness. A claim that such previous identification of the defendant or identification of a pictorial, photographic, electronic, filmed or video recorded reproduction of the defendant by a prospective witness did not comply with paragraph (c) of subdivision one of section 60.25 or section 60.80 of this chapter or with the protocols promulgated in accordance with subdivision twenty-one of section eight hundred thirty-seven of the executive law shall not, in and of itself, constitute a legal basis to suppress evidence in response to a motion made pursuant to this subdivision.

§ 8. 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.

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

§ 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 a blind procedure as defined in paragraph (c) of this subdivision, 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**.

(c) (i) For purposes of this section, a "blind procedure" is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproductions under circumstances that comply with the applicable provisions of section 60.80 of the criminal procedure law and the protocols promulgated in accordance with subdivision twenty-one of section eight hundred thirty-seven of the executive law and where, at the time the identification is made, each public servant administering such procedure and with whom the witness communicates with respect to the conducting of such procedure does not know which person in the array is the suspect.

(ii) The failure of a public servant to follow such a procedure shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not, in of of itself, constitute a legal basis to suppress evidence made pursuant to subdivision six of section 710.20 of the criminal procedure law. This paragraph, in and of itself, neither limits nor expands subdivision six of section 710.20 of the criminal procedure law.

2. Under circumstances prescribed in subdivision one **of this section**, 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.

§ 10. Section 343.4 of the family court act, as added by chapter 920 of the laws of 1982, is amended to read as follows:

§ 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, where the observation is made pursuant to a blind procedure, 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 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, 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, electronic, filmed or video recorded reproduction** constitutes evidence in chief. **For purposes of this section, a "blind procedure" shall be as defined in subparagraph (i) of paragraph (c) of subdivision one of section 343.3 of this part.**

§ 11. Section 837 of the executive law is amended by adding a new subdivision 21 to read as follows:

21. Promulgate by regulation a standardized and detailed written protocol that is grounded in evidence-based principles for the administration of photographic array and live lineup identification procedures for police agencies and standardized forms for use by such agencies in the reporting and recording of such identification procedure. Such protocol shall be consistent in all respects with section 60.80 of the criminal procedure law.

§ 12. Subdivision 4 of section 840 of the executive law is amended by adding a new paragraph (c) to read as follows:

(c) Disseminate the written policies and procedures promulgated in accordance with section 60.80 of the criminal procedure law and subdivision twenty-one of section eight hundred thirty-seven of this article to all police departments and law enforcement agencies in this state and implement a training program for all current and new police officers and for relevant law enforcement officials regarding the policies and procedures established pursuant to section 60.80 of the criminal procedure law and subdivision twenty-one of section eight hundred thirty-seven of this article.

§ 13. This act shall take effect on the ninetieth day after it shall have become a law.