**Text of New York State Enacted Budget**

**Recording Interrogations & Eyewitness ID Reform**

**STATE OF NEW YORK** \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

A.3009-C/S. 2009-C

<http://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A03009&term=2017&Text=Y&LFIN=Y>

PART VVV

8 Section 1. Section 60.45 of the criminal procedure law is amended by

 9 adding a new subdivision 3 to read as follows:

 10 3. (a) Where a person is subject to custodial interrogation by a

 11 public servant at a detention facility, the entire custodial interro-

 12 gation, including the giving of any required advice of the rights of the

 13 individual being questioned, and the waiver of any rights by the indi-

 14 vidual, shall be recorded by an appropriate video recording device if

 15 the interrogation involves a class A-1 felony, except one defined in

 16 article two hundred twenty of the penal law; felony offenses defined in

 17 section 130.95 and 130.96 of the penal law; or a felony offense defined

 18 in article one hundred twenty-five or one hundred thirty of such law

 19 that is defined as a class B violent felony offense in section 70.02 of

 20 the penal law. For purposes of this paragraph, the term "detention

 21 facility" shall mean a police station, correctional facility, holding

 22 facility for prisoners, prosecutor's office or other facility where

 23 persons are held in detention in connection with criminal charges that

 24 have been or may be filed against them.

 25 (b) No confession, admission or other statement shall be subject to a

 26 motion to suppress pursuant to subdivision three of section 710.20 of

 27 this chapter based solely upon the failure to video record such interro-

 28 gation in a detention facility as defined in paragraph (a) of this

 29 subdivision. However, where the people offer into evidence a confession,

 30 admission or other statement made by a person in custody with respect to

 31 his or her participation or lack of participation in an offense speci-

 32 fied in paragraph (a) of this subdivision, that has not been video

 33 recorded, the court shall consider the failure to record as a factor,

 34 but not as the sole factor, in accordance with paragraph (c) of this

 35 subdivision in determining whether such confession, admission or other

 36 statement shall be admissible.

 37 (c) Notwithstanding the requirement of paragraph (a) of this subdivi-

 38 sion, upon a showing of good cause by the prosecutor, the custodial

 39 interrogation need not be recorded. Good cause shall include, but not be

 40 limited to:

 41 (i) If electronic recording equipment malfunctions.

 42 (ii) If electronic recording equipment is not available because it was

 43 otherwise being used.

 44 (iii) If statements are made in response to questions that are

 45 routinely asked during arrest processing.

 46 (iv) If the statement is spontaneously made by the suspect and not in

 47 response to police questioning.

 48 (v) If the statement is made during an interrogation that is conducted

 49 when the interviewer is unaware that a qualifying offense has occurred.

 50 (vi) If the statement is made at a location other than the "interview

 51 room" because the suspect cannot be brought to such room, e.g., the

 52 suspect is in a hospital or the suspect is out of state and that state

 53 is not governed by a law requiring the recordation of an interrogation.

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 1 (vii) If the statement is made after a suspect has refused to partic-

 2 ipate in the interrogation if it is recorded, and appropriate effort to

 3 document such refusal is made.

 4 (viii) If such statement is not recorded as a result of an inadvertent

 5 error or oversight, not the result of any intentional conduct by law

 6 enforcement personnel.

 7 (ix) If it is law enforcement's reasonable belief that such recording

 8 would jeopardize the safety of any person or reveal the identity of a

 9 confidential informant.

 10 (x) If such statement is made at a location not equipped with a video

 11 recording device and the reason for using that location is not to

 12 subvert the intent of the law. For purposes of this section, the term

 13 "location" shall include those locations specified in paragraph (b) of

 14 subdivision four of section 305.2 of the family court act.

 15 (d) In the event the court finds that the people have not shown good

 16 cause for the non-recording of the confession, admission, or other

 17 statement, but determines that a non-recorded confession, admission or

 18 other statement is nevertheless admissible because it was voluntarily

 19 made then, upon request of the defendant, the court must instruct the

 20 jury that the people's failure to record the defendant's confession,

 21 admission or other statement as required by this section may be weighed

 22 as a factor, but not as the sole factor, in determining whether such

 23 confession, admission or other statement was voluntarily made, or was

 24 made at all.

 25 (e) Video recording as required by this section shall be conducted in

 26 accordance with standards established by rule of the division of crimi-

 27 nal justice services.

 28 § 2. Subdivision 3 of section 344.2 of the family court act is renum-

 29 bered subdivision 4 and a new subdivision 3 is added to read as follows:

 30 3. Where a respondent is subject to custodial interrogation by a

 31 public servant at a facility specified in subdivision four of section

 32 305.2 of this article, the entire custodial interrogation, including the

 33 giving of any required advice of the rights of the individual being

 34 questioned, and the waiver of any rights by the individual, shall be

 35 recorded and governed in accordance with the provisions of paragraphs

 36 (a), (b), (c), (d) and (e) of subdivision three of section 60.45 of the

 37 criminal procedure law.

 38 § 3. Section 60.25 of the criminal procedure law, subparagraph (ii) of

 39 paragraph (a) of subdivision 1 as amended by chapter 479 of the laws of

 40 1977, is amended to read as follows:

 41 § 60.25 Rules of evidence; identification by means of previous recogni-

 42 tion, in absence of present identification.

 43 1. In any criminal proceeding in which the defendant's commission of

 44 an offense is in issue, testimony as provided in subdivision two may be

 45 given by a witness when:

 46 (a) Such witness testifies that:

 47 (i) He or she observed the person claimed by the people to be the

 48 defendant either at the time and place of the commission of the offense

 49 or upon some other occasion relevant to the case; and

 50 (ii) On a subsequent occasion he or she observed, under circumstances

 51 consistent with such rights as an accused person may derive under the

 52 constitution of this state or of the United States, a person or, where

 53 the observation is made pursuant to a blind or blinded procedure as

 54 defined in paragraph (c) of this subdivision, a pictorial, photographic,

 55 electronic, filmed or video recorded reproduction of a person whom he or

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 1 she recognized as the same person whom he or she had observed on the

 2 first or incriminating occasion; and

 3 (iii) He or she is unable at the proceeding to state, on the basis of

 4 present recollection, whether or not the defendant is the person in

 5 question; and

 6 (b) It is established that the defendant is in fact the person whom

 7 the witness observed and recognized or whose pictorial, photographic,

 8 electronic, filmed or video recorded reproduction the witness observed

 9 and recognized on the second occasion. Such fact may be established by

 10 testimony of another person or persons to whom the witness promptly

 11 declared his or her recognition on such occasion and by such pictorial,

 12 photographic, electronic, filmed or video recorded reproduction.

 13 (c) For purposes of this section, a "blind or blinded procedure" is

 14 one in which the witness identifies a person in an array of pictorial,

 15 photographic, electronic, filmed or video recorded reproductions under

 16 circumstances where, at the time the identification is made, the public

 17 servant administering such procedure: (i) does not know which person in

 18 the array is the suspect, or (ii) does not know where the suspect is in

 19 the array viewed by the witness. The failure of a public servant to

 20 follow such a procedure shall be assessed solely for purposes of this

 21 article and shall result in the preclusion of testimony regarding the

 22 identification procedure as evidence in chief, but shall not constitute

 23 a legal basis to suppress evidence made pursuant to subdivision six of

 24 section 710.20 of this chapter. This article neither limits nor expands

 25 subdivision six of section 710.20 of this chapter.

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

 27 such witness may testify at the criminal proceeding that the person whom

 28 he or she observed and recognized or whose pictorial, photographic,

 29 electronic, filmed or video recorded reproduction he or she observed and

 30 recognized on the second occasion is the same person whom he or she

 31 observed on the first or incriminating occasion. Such testimony,

 32 together with the evidence that the defendant is in fact the person whom

 33 the witness observed and recognized or whose pictorial, photographic,

 34 electronic, filmed or video recorded reproduction he or she observed and

 35 recognized on the second occasion, constitutes evidence in chief.

 36 § 4. Section 60.30 of the criminal procedure law, as amended by chap-

 37 ter 479 of the laws of 1977, is amended to read as follows:

 38 § 60.30 Rules of evidence; identification by means of previous recogni-

 39 tion, in addition to present identification.

 40 In any criminal proceeding in which the defendant's commission of an

 41 offense is in issue, a witness who testifies that (a) he or she observed

 42 the person claimed by the people to be the defendant either at the time

 43 and place of the commission of the offense or upon some other occasion

 44 relevant to the case, and (b) on the basis of present recollection, the

 45 defendant is the person in question and (c) on a subsequent occasion he

 46 or she observed the defendant, or where the observation is made pursuant

 47 to a blind or blinded procedure, as defined in paragraph (c) of subdivi-

 48 sion one of section 60.25 of this article, a pictorial, photographic,

 49 electronic, filmed or video recorded reproduction of the defendant,

 50 under circumstances consistent with such rights as an accused person may

 51 derive under the constitution of this state or of the United States, and

 52 then also recognized him or her or the pictorial, photographic, elec-

 53 tronic, filmed or video recorded reproduction of him or her as the same

 54 person whom he or she had observed on the first or incriminating occa-

 55 sion, may, in addition to making an identification of the defendant at

 56 the criminal proceeding on the basis of present recollection as the

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 1 person whom he or she observed on the first or incriminating occasion,

 2 also describe his or her previous recognition of the defendant and

 3 testify that the person whom he or she observed or whose pictorial,

 4 photographic, electronic, filmed or video recorded reproduction he or

 5 she observed on such second occasion is the same person whom he or she

 6 had observed on the first or incriminating occasion. Such testimony and

 7 such pictorial, photographic, electronic, filmed or video recorded

 8 reproduction constitutes evidence in chief.

 9 § 5. Subdivision 6 of section 710.20 of the criminal procedure law, as

 10 amended by chapter 8 of the laws of 1976 and as renumbered by chapter

 11 481 of the laws of 1983, is amended to read as follows:

 12 6. Consists of potential testimony regarding an observation of the

 13 defendant either at the time or place of the commission of the offense

 14 or upon some other occasion relevant to the case, which potential testi-

 15 mony would not be admissible upon the prospective trial of such charge

 16 owing to an improperly made previous identification of the defendant or

 17 of a pictorial, photographic, electronic, filmed or video recorded

 18 reproduction of the defendant by the prospective witness. A claim that

 19 the previous identification of the defendant or of a pictorial, photo-

 20 graphic, electronic, filmed or video recorded reproduction of the

 21 defendant by a prospective witness did not comply with paragraph (c) of

 22 subdivision one of section 60.25 of this chapter or with the protocol

 23 promulgated in accordance with subdivision twenty-one of section eight

 24 hundred thirty-seven of the executive law shall not constitute a legal

 25 basis to suppress evidence pursuant to this subdivision. A claim that a

 26 public servant failed to comply with paragraph (c) of subdivision one of

 27 section 60.25 of this chapter or of subdivision twenty-one of section

 28 eight hundred thirty-seven of the executive law shall neither expand nor

 29 limit the rights an accused person may derive under the constitution of

 30 this state or of the United States.

 31 § 6. Subdivision 1 of section 710.30 of the criminal procedure law, as

 32 separately amended by chapters 8 and 194 of the laws of 1976, is amended

 33 to read as follows:

 34 1. Whenever the people intend to offer at a trial (a) evidence of a

 35 statement made by a defendant to a public servant, which statement if

 36 involuntarily made would render the evidence thereof suppressible upon

 37 motion pursuant to subdivision three of section 710.20, or (b) testimony

 38 regarding an observation of the defendant either at the time or place of

 39 the commission of the offense or upon some other occasion relevant to

 40 the case, to be given by a witness who has previously identified him or

 41 her or a pictorial, photographic, electronic, filmed or video recorded

 42 reproduction of him or her as such, they must serve upon the defendant a

 43 notice of such intention, specifying the evidence intended to be

 44 offered.

 45 § 7. Section 343.3 of the family court act, as added by chapter 920 of

 46 the laws of 1982, is amended to read as follows:

 47 § 343.3. Rules of evidence; identification by means of previous recog-

 48 nition in absence of present identification. 1. In any juvenile delin-

 49 quency proceeding in which the respondent's commission of a crime is in

 50 issue, testimony as provided in subdivision two may be given by a

 51 witness when:

 52 (a) such witness testifies that:

 53 (i) he or she observed the person claimed by the presentment agency to

 54 be the respondent either at the time and place of the commission of the

 55 crime or upon some other occasion relevant to the case; and

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 1 (ii) on a subsequent occasion he or she observed, under circumstances

 2 consistent with such rights as an accused person may derive under the

 3 constitution of this state or of the United States, a person, or, where

 4 the observation is made pursuant to a blind or blinded procedure as

 5 defined herein, a pictorial, photographic, electronic, filmed or video

 6 recorded reproduction of a person whom he or she recognized as the same

 7 person whom he or she had observed on the first incriminating occasion;

 8 and

 9 (iii) he or she is unable at the proceeding to state, on the basis of

 10 present recollection, whether or not the respondent is the person in

 11 question; and

 12 (b) it is established that the respondent is in fact the person whom

 13 the witness observed and recognized or whose pictorial, photographic,

 14 electronic, filmed or video recorded reproduction the witness observed

 15 and recognized on the second occasion. Such fact may be established by

 16 testimony of another person or persons to whom the witness promptly

 17 declared his or her recognition on such occasion and by such pictorial,

 18 photographic, electronic, filmed or video recorded reproduction.

 19 (c) For purposes of this section, a "blind or blinded procedure" is

 20 one in which the witness identifies a person in an array of pictorial,

 21 photographic, electronic, filmed or video recorded reproductions under

 22 circumstances where, at the time the identification is made, the public

 23 servant administering such procedure: (i) does not know which person in

 24 the array is the suspect, or (ii) does not know where the suspect is in

 25 the array viewed by the witness. The failure of a public servant to

 26 follow such a procedure shall be assessed solely for purposes of this

 27 article and shall result in the preclusion of testimony regarding the

 28 identification procedure as evidence in chief, but shall not constitute

 29 a legal basis to suppress evidence made pursuant to subdivision six of

 30 section 710.20 of the criminal procedure law. This article neither

 31 limits not expands subdivision six of section 710.20 of the criminal

 32 procedure law.

 33 2. Under circumstances prescribed in subdivision one, such witness may

 34 testify at the proceeding that the person whom he or she observed and

 35 recognized or whose pictorial, photographic, electronic, filmed or video

 36 recorded reproduction he or she observed and recognized on the second

 37 occasion is the same person whom he or she observed on the first or

 38 incriminating occasion. Such testimony, together with the evidence that

 39 the respondent is in fact the person whom the witness observed and

 40 recognized or whose pictorial, photographic, electronic, filmed or video

 41 recorded reproduction he or she observed and recognized on the second

 42 occasion, constitutes evidence in chief.

 43 § 8. Section 343.4 of the family court act, as added by chapter 920 of

 44 the laws of 1982, is amended to read as follows:

 45 § 343.4. Rules of evidence; identification by means of previous recog-

 46 nition, in addition to present identification. In any juvenile delin-

 47 quency proceeding in which the respondent's commission of a crime is in

 48 issue, a witness who testifies that: (a) he or she observed the person

 49 claimed by the presentment agency to be the respondent either at the

 50 time and place of the commission of the crime or upon some other occa-

 51 sion relevant to the case, and (b) on the basis of present recollection,

 52 the respondent is the person in question, and (c) on a subsequent occa-

 53 sion he or she observed the respondent, or, where the observation is

 54 made pursuant to a blind or blinded procedure, a pictorial, photograph-

 55 ic, electronic, filmed or video recorded reproduction of the respondent

 56 under circumstances consistent with such rights as an accused person may

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 1 derive under the constitution of this state or of the United States, and

 2 then also recognized him or her or the pictorial, photographic, elec-

 3 tronic, filmed or video recorded reproduction of him or her as the same

 4 person whom he or she had observed on the first or incriminating occa-

 5 sion, may, in addition to making an identification of the respondent at

 6 the delinquency proceeding on the basis of present recollection as the

 7 person whom he or she observed on the first or incriminating occasion,

 8 also describe his or her previous recognition of the respondent and

 9 testify that the person whom he or she observed or whose pictorial,

 10 photographic, electronic, filmed or video recorded reproduction he or

 11 she observed on such second occasion is the same person whom he or she

 12 had observed on the first or incriminating occasion. Such testimony and

 13 such pictorial, photographic, electronic, filmed or video recorded

 14 reproduction constitutes evidence in chief. For purposes of this

 15 section, a "blind or blinded procedure" shall be as defined in paragraph

 16 (c) of subdivision one of section 343.3 of this part.

 17 § 9. Section 837 of the executive law is amended by adding a new

 18 subdivision 21 to read as follows:

 19 21. Promulgate a standardized and detailed written protocol that is

 20 grounded in evidence-based principles for the administration of photo-

 21 graphic array and live lineup identification procedures for police agen-

 22 cies and standardized forms for use by such agencies in the reporting

 23 and recording of such identification procedure. The protocol shall

 24 address the following topics:

 25 (a) the selection of photographic array and live lineup filler photo-

 26 graphs or participants;

 27 (b) instructions given to a witness before conducting a photographic

 28 array or live lineup identification procedure;

 29 (c) the documentation and preservation of results of a photographic

 30 array or live lineup identification procedure;

 31 (d) procedures for eliciting and documenting the witness's confidence

 32 in his or her identification following a photographic array or live

 33 lineup identification procedure, in the event that an identification is

 34 made; and

 35 (e) procedures for administering a photographic array or live lineup

 36 identification procedure in a manner designed to prevent opportunities

 37 to influence the witness.

 38 § 10. Subdivision 4 of section 840 of the executive law is amended by

 39 adding a new paragraph (c) to read as follows:

 40 (c) Disseminate the written policies and procedures promulgated in

 41 accordance with subdivision twenty-one of section eight hundred thirty-

 42 seven of this article to all police departments in this state and imple-

 43 ment a training program for all current and new police officers regard-

 44 ing the policies and procedures established pursuant to such

 45 subdivision.