

Changes in Laws Regarding Admissibility of Photographic Identifications and Video Recording of Interrogations

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At the Governor's instigation, the Legislature has passed a bill that (1.) makes certain kinds of photographic identifications admissible in New York for the first time, and (2.) requires the police to video record custodial interrogations in a limited number of cases (albeit without a suppression remedy if they improperly fail to do so).

This Practice Advisory summarizes the changes:

1.) THE IDENTIFICATION EVIDENCE REFORMS (changes to CPL 60.25, 60.30, 710.20, 710.30, and FCA 343.3, 343.4, Executive Law 837):

Effective July 1, 2017, photo identifications will be admissible provided that they were administered either "blind or blinded."

A "blind" procedure is one in which the officer conducting the procedure does not know which person in the array is the suspect. A "blinded" procedure is one in which the officer conducting the procedure knows who the suspect is but does not know where the suspect is in the array viewed by the witness. Needless to say, by allowing "blinded" procedures – rather than insisting upon "blind" procedures – the legislation allows wide room for abuse by unscrupulous officers who do not wish to comply.

If the police fail to conduct the procedure "blind or blinded," the results will be precluded in the prosecution's case-in-chief. But note that it is unlikely the defense would be entitled to an "independent source" hearing if that is the only flaw in the procedure, since the statute states that is not creating a new ground for suppression and the Court of Appeals has never ruled that a non-blinded procedure is "unnecessarily suggestive."

Obviously, because photo arrays are so much easier for police to conduct than live lineups, we can expect to see far fewer lineups (and there will be fewer motions for court-ordered lineups and less attendance at lineups by defense lawyers).

DCJS will also promulgate new written protocols – or "best practices" – for photo arrays and lineups, including on issues such as how fillers are chosen, instructions to be given to the witness, documentation of the results, obtaining witness confidence statements, etc. Nevertheless, failure by the police to adhere to these "best practices" will not be grounds for suppression. But failure to follow one of the "best practices" will be a valuable area for cross-examination and arguments to the jury.

One of the biggest flaws in the statute is that it does not require the court to give a jury instruction explaining that there are many sources from which police obtain photos to put in arrays, such as from DMV records or the internet, and not to speculate about the matter. Of course, for the past half-century, the Court of Appeals has refused to allow photo identifications in evidence for policy reasons – because of the tremendous risk that jurors will “infer” that the defendant must have a prior criminal record, since the police already possessed his photograph when they put it into the array. Although the statute does not require such an instruction, defense counsel can still request it and presumably most judges would be willing to give a “no-speculation” charge. It will be a tough tactical issue whether to draw the jurors’ attention to this issue at all, but asking the judge to instruct that police draw upon various sources for photos and that the jury may not speculate will be an option.

CPL § 710.30 has been amended to require the prosecution to give notice of photo identifications in all circumstances. (The Court of Appeals had held that CPL § 710.30 notice rules do not apply to some photo identifications – see *People v. Grajales*, 8 NY3d 861 [2007]).

One related point that is not addressed by the statute: It seems there will be an issue to litigate involving the right of defense counsel to a “reasonable opportunity” to attend a photo array in certain circumstances. Under current law, when the police are aware that counsel has entered the matter under investigation, or the defendant in custody has counsel on an unrelated pending case and invokes counsel, the police must give the lawyer a “reasonable opportunity” to attend a *pre-accusatory* investigatory lineup unless there are exigent circumstances (but they need not secure counsel for an unrepresented suspect who requests counsel at an investigatory lineup). The defense can now argue that the same rule should apply to pre-accusatory investigatory photo arrays.

Another point is that, under the statutory scheme now, a conviction could rest solely upon a photo identification in cases where the single eyewitness could not identify the defendant in court and did not pick the person out of a lineup (see CPL 60.25, 60.30). This a potential wrongful conviction in the making.

APPLICABILITY TO CURRENT CASES: Photo identifications will remain inadmissible under current law until July 1st. After July 1st, they will be admissible only if the police conducted the procedure “blind or blinded.” Presumably police will act quickly to try to have officers start administering (supposedly) “blind or blinded” photo arrays for use in future cases, since this is such a great advantage to them given that they will no longer have the burden of assembling lineups. The exact scope of “blinded” is also not clear (e.g., can the officer view the array simultaneously with the witness, which still leaves room for him to cue or reinforce the identification?) and a “blinded” officer’s post-viewing comments also can improperly reinforce the witness’s confidence.

As for 710.30 notice, prosecutors will presumably start being more consistent about serving notice for photo identifications. In cases that go to trial after July 1st in which notice was not given, the defense can ask for preclusion – but prosecutors might have an argument that in

older cases, there was “good cause” under 710.30(2) to excuse the lack of notice. A response to that point would be that the DA still had to serve notice within 15 days of when the Governor signed this bill, and also that the Court of Appeals has narrowly interpreted “good cause” and this legislation doesn’t qualify.

2.) THE POLICE INTERROGATION REFORMS (changes to CPL 60.45 and FCA 344.2):

Effective April 1, 2018, custodial interrogations in certain highly serious cases are supposed to be video recorded.

The recording rule applies only to Class A-1 (non-drug) offenses, Class A-II sex offenses, and Class B violent homicide and sex offenses. (The legislature rejected attempts to extend it to other violent felonies, such as robberies and burglaries.)

The rule applies only to “custodial” interrogations at police stations, correctional facilities, DA’s offices, and similar holding facilities. By restricting the recording obligation to persons who are “in custody,” it effectively leaves in place a recording-free zone in many cases. Specifically, often the suspect comes to the stationhouse voluntarily and is not legally “in custody” for much of the questioning. In those situations, the police would not have to record their interrogation from the start – they need to turn on the camera only when legal “custody” has developed. *When* during an interrogation the recording requirement was triggered will be another frequently litigated issue at Huntley hearings.

The law is riddled with “good cause” exceptions that allow the police to not record. The exceptions include for: “inadvertent error or oversight”; lack of awareness that a qualifying offense occurred; equipment was otherwise being used; equipment malfunction; etc., etc. There are actually 10 separate exceptions!

Police failure to record a qualifying interrogation will NOT result in suppression of the defendant’s statement. It is simply one factor – and can’t be the sole factor – in the judge’s assessment of admissibility (i.e., along with traditional “voluntariness” factors).

Whether the prosecution has established “good cause” to excuse non-recording will be determined by the judge. The statute does not specify what standard applies to finding “good cause” (e.g., preponderance?). Also, the statute does not provide for relitigation of “good cause” questions at trial before the jury – which might become an issue if the defense wishes to make such arguments to the jury, but the trial court precludes them or instructs the jury that there was in fact no duty to record.

If the judge finds that there was an unexcused and improper failure to record an interrogation, but rules that the statement is “voluntary” and admissible, the statute requires that the court give a jury instruction upon defense request. But the particular instruction in the statute is *seriously deficient*. It tells the jurors that they may consider the failure to record as a

factor, but not the sole factor, in determining whether the statement “was voluntarily made, or was made at all.”

But the key point regarding this charge is that jurors should ALSO be told that they may consider that the testimony about the contents of the defendant’s statement “may not be accurate” (not merely that the statement may be involuntary or not made at all). This is important because voluntariness is rarely litigated at trial, and normally there is no dispute that the defendant made *some* statement. The main problem is that police witnesses are free to mis-describe or misrepresent the contents of the defendant’s statement when there is no video record of it. In cases where the defense argues that police testimony about the statement was inaccurate, judges will have to be persuaded to add that point to the required jury charge.

In addition, defense attorneys should consider making a constitutional objection to the statutory jury charge that instructs jurors that they “may not” consider the failure to record “as the sole factor” in determining voluntariness or if the statement whether a statement was made. This improperly restricts the jury’s deliberations on the evidence, and may implicitly place a burden on the defense to prove “other” factors.

APPLICABILITY TO CURRENT CASES: The recording obligation for interrogations does not take effect until April 2018. Presumably police departments will soon begin recording more interrogations in eligible cases than they currently do.

The full text of the bill (Part VVVV - note that it is buried alongside other budget items) can be found in the link below at pages pp. 202-209:

<http://legislation.nysenate.gov/pdf/bills/2017/a3009c>

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