TESTIMONY OF JUSTICE DAVID M. BORDEN ON RAISED BILL NO. 6344 AN ACT CONCERNING EYEWITNESS IDENTIFICATION

MARCH 9, 2011

COMMITTEE ON JUDICIARY

My name is David M. Borden, and I am a Retired Justice of the Connecticut Supreme Court, having reached the mandatory retirement age in 2007, and I now serve as a Judge Trial Referee on the state Appellate Court. I want to make it clear, however, that I appear here today solely in a private capacity; I do not appear as a representative of the Judicial Branch or any court within that branch.

While on the Supreme Court, I was the author in 2005 of the court's opinion in *State* v. *Ledbetter*, 275 Conn. 534, in which the court, for the first time, took notice of the body of science on the issue of eyewitness identification. Based on that science, the court mandated that, when an eyewitness was to be shown a photo or live lineup, it was required that he or she be instructed that the perpetrator may or may not be in the lineup. The purpose of this instruction was to reduce the likelihood of what the science terms the "relative judgment process." The relative judgment process is the process by which the eyewitness, having been shown, say, a photo lineup of six photographs of possible perpetrators, tends to choose that photo that most resembles the perpetrator *relative to the other photographs.* In other words, the witness is comparing the photos, not to his or her memory of the event, but to each other and choosing which of them *most resembles the perpetrator relative to each other.* It is like an SAT test in which there is no "none of the above" listed.

Since leaving the Supreme Court, I have become more deeply interested in, and have extensively studied, the entire issue of the science of eyewitness identification,

and its relation to how our law enforcement institutions and courts deal with the question of the reliability of eyewitness identification. I have read much of the scientific literature on the subject, have spoken with several of the leading researchers in the field as well as with several law enforcement officials who are familiar with the science and who have incorporated it into their protocols, and have given lectures and made presentations on the subject to interested groups, including the Judges of the Superior Court at their annual Connecticut Judges Institute, and a joint session of the state's attorneys and public defenders. All of this has led me to several conclusions.

First, eyewitness identification evidence is critical to the law enforcement process. In many cases it is the most telling evidence of guilt, and the evidence that juries are most prone to rely on. This, in turn, means that it is absolutely essential that it be secured in such a way that it is as reliable as we can make it. When it is reliable, it is an essential tool in convicting the guilty. When it is unreliable, however, it means, not only that an innocent person is likely to be convicted, but that, just as bad, a guilty person will be left free, uninvestigated, to continue to commit other crimes. In other words, once an innocent person has been misidentified, the investigation is likely to be discontinued and the real perpetrator is free to commit other crimes. Thus, it is in law enforcement's best interests to make sure that it follows protocols that will ensure, as much as possible, that eyewitness identification evidence be reliable. It is also essential that law enforcement--particularly the police departments and the state's attorneys--be persuaded of the propriety of any changes to be made, so that any such changes have their full support.

Second, we now know, because of the many DNA exonerations in the past

several years, that in the area of eyewitness identifications, we are doing something wrong. Of the approximately 270 DNA exonerations nationwide in the past several years--including several in Connecticut--more than 75% involved positive--yet false--eyewitness identifications. And, of course, because those were all DNA cases, they by definition do not include the many cases in which there is no DNA evidence--such as drive-by shootings, street muggings, convenience store robberies, and homicides and sexual assaults in which, for one reason or another, there is no DNA evidence. It is likely, therefore, that there are thousands of other cases, in which the conviction was based principally on an eyewitness identification, and in which the wrong person was identified and the real perpetrator is still at large.

Third, the scientific community has come to general consensus, based on literally thousands of experiments and hundreds of published, peer reviewed papers. That consensus centers on two main points. One: that any eyewitness identification procedure be administered in a double-blind manner. That is, the person administering the procedure should not be the investigating officer or be anyone else who may know which person in the photo array is the suspect. This is based on the universally accepted scientific principle that, in order for any scientific test--particularly one involving face to face contact between the tester and the person being tested--to be considered valid, it must be double blind—meaning that neither the tester nor the person being tested knows the desired answer--because science has conclusively demonstrated that testers with such knowledge unconsciously "leak" their knowledge to the person being tested--by body language, tone of voice, facial expression, and numerous other physical manifestations. This is not a matter of the integrity of the

tester; it is simply a matter of human nature.

The second point of scientific consensus is that using what is known as a "sequential" presentation of photos--that is, one photo at a time--is a more conservative and generally more reliable method than what is commonly known as a "simultaneous" presentation of photos--that is, six or eight photos shown at the same time. It is more conservative in that it produces significantly fewer misidentifications of innocent persons than does a simultaneous presentation. Its only drawback is that it does produce somewhat fewer "misses" on the identification of the actual perpetrator than does a simultaneous presentation. The scientific community, therefore, considers the question of whether to use the simultaneous or the more conservative sequential process as a matter, not of science, but of policy.

This brings me to what law enforcement is currently doing--not only by choice and custom, but because it is what the courts--including the United States Supreme Court--have been requiring since 1977, when the Supreme Court issued its landmark decision in *Manson* v. *Brathwaite*. Law enforcement has not been using double blind administration, and has been using simultaneous rather than sequential presentation of photos in eyewitness identification procedures. Thus, there is a disconnect between what the science tells us and what we are doing. And what we are doing is resulting in unreliable results in many cases.

What, then, should the state of Connecticut do about this? One approach is that taken by Raised Bill No. 6344. Admirably, this bill sets out protocols for both double blind administration, where practicable, and for sequential rather than simultaneous presentations. And, all other things being equal, I would support such a bill.

But, as in most areas of life, all other things are not equal. What is missing is the factor that will produce the necessary "buy in"--cooperation, if you will--of law enforcement, the process that will expose law enforcement personnel in this state to the science and convince them that is in their job's best interest--which is to convict the guilty and leave the innocent alone--to change their procedures so as to produce the most reliable eyewitness identification evidence that can be produced. That is, to treat one's memory like crime scene evidence--with an imaginary yellow tape around it so as to avoid corruption of the evidence.

I believe that the most effective legislative way to accomplish this necessary cooperation, rather than to mandate these procedures now, is instead to create a legislative task force to study the science in the next two years and then report back with a series of recommendations of best practices for law enforcement and the courts to follow in the area of eyewitness identification. This is the course followed by most of the jurisdictions that have adopted the protocols of both sequential and double blind procedures. This task force should gather and review all of the science on the issue of eyewitness identification in an unbiased and dispassionate manner. It should be composed of representatives of all the stakeholders: legislators; the Chief State's Attorneys and state's attorneys; municipal chiefs of police and trainers; the Chief Public Defender and public defenders, as well as a representative from the Innocence Project; the judiciary; and the Victim's Advocate; and should also include a dean of one of our state's law schools, and one or more social scientists. With a broad based constituency like this, the task force's recommendations will carry great weight; will be persuasive; will, I believe, help immeasurably in bringing Connecticut's procedures appropriately into

harmony with science; and will, most importantly, help to bring the guilty to justice and leave the innocent alone. I therefore urge that this course of legislative action be adopted.