

TESTIMONY OF JUSTICE DAVID M. BORDEN ON RAISED BILL NO. 5501 AN ACT
CONCERNING EYEWITNESS IDENTIFICATION PROCEDURES

MARCH 16, 2012

COMMITTEE ON THE JUDICIARY

My name is David M. Borden, and I am a Retired Justice of the Connecticut Supreme Court, now serving as a Judge Trial Referee on the State Appellate Court. I am the Chair of the Eyewitness Identification Task Force, which was created by the 2011 General Assembly. I appear here in support of Raised Bill No. 5501, An Act Concerning Eyewitness Identification Procedures, which bill incorporates the unanimous recommendations of the Eyewitness Identification Task Force.

First, some brief background. The Task Force was created because the more than 270 DNA exonerations in the past 15 years made clear that our currently employed eyewitness identification procedures were producing an unacceptably high rate of misidentifications. We know that because more than 75% of those exonerations involved positive eyewitness identifications. In addition, the scientific community had, on the basis of thousands of experiments and hundreds of peer-reviewed papers, concluded that there were two best practices that could significantly reduce the incidence of those misidentifications.

Those two best practices were, first, that the identification procedure be conducted in a double-blind way--that is, that the officer administering the procedure not know who in the identification array (the group of photographs shown to the eyewitness) the suspect was. This was in line with established scientific principles that, in any scientific test, the person administering the test not know the desired outcome, so that

he or she could not leak that information in any way to the person being tested or influence the response of the person being tested.

The second best practice was that the photos be shown sequentially--that is, one at time--rather than simultaneously, that is, all at once in a group. This was to reduce the incidence of what the social scientists called the "relative judgment process," by which a person looking at the photo array tended to pick out the photo that most resembled the perpetrator of the crime, relative to the other photos in the array, rather than the photo that most resembled his or her memory of the perpetrator. Thus, in a photo array in which the actual perpetrator was not present, the person making the identification tended to select someone who most resembled the perpetrator relative to the other photos in the array.

The legislation that you produced in 2011 had two parts. The first part mandated that, as of January 1, 2012, all police departments use double blind procedures where practicable. The second part established the Eyewitness Identification Task Force, to study the issue of sequential versus simultaneous procedures. At that point in time, although there was wealth of laboratory science supporting the use of the sequential method, there was no authoritative field study on the issue. The 2011 legislation required the Task Force to report back to you by April 1, 2012.

The Task Force was specifically designed to include all the relevant stakeholders. In addition to me as Chair, it consists of the following members: the co-chairs of this committee--Rep. Fox and Sen. Coleman; the two ranking members--Rep. Hetherington and Sen. Kissel; Dr. David Cameron, of Yale University; Senior Ass't State's Attorney Richard Colangelo; the state Victim's Advocate, Michelle Cruz; Dr.

John DeCarlo, of the University of New Haven; Deborah DelPrete Sullivan, of the Office of the Chief Public Defender; Attorney Rober Farr; Thomas Flaherty, Executive Director of the Police Officer Standards & Training Council (POST); Karen Goodrow, Director of the Connecticut Innocence Project; LaReese Harvey, of the Better Way Foundation; Chief State's Attorney Kevin Kane; Duane Lovello, the Chief of Police of Darien; Lt. Clayton Brown, of the State Police Training Academy (SPTA); Bradley Saxton, Dean of Quinnipiac University School of Law; Lisa Steele, of the Ct. Criminal Defense Lawyers Association; and Beau Thurnauer, Deputy Chief of the East Hartford Police Department. It was ably staffed, pro bono, by Sherry Haller and Ron Shack, of the Justice Education Center, and by Alex Tsarkov and Deborah Blanchard of this committee's staff. After meeting biweekly from November through January, hearing testimony from the most eminent scientists in the field, as well as from law enforcement officials, including from Chief Lovello, we issued our report on February 2, 2012, two months early, and our recommendations are unanimous. I also add that, in addition to considering the scientific studies, we were fortunate that, just prior to our first meeting on September 21, the results of a widespread field study, sponsored by the American Judicature Society, on the issue of sequential versus simultaneous procedures, was published, and the results of that study fully supported the science that had preceded it. And we were fortunate to hear personally from Dr. Gary Wells, of Iowa State University, and from Dr. Jennifer Dysart, of John Jay College of Criminal Justice, who were two of the persons responsible for that study and who are among the nation's leading scientists on the entire issue of eyewitness identification.

Let me now turn briefly to those recommendations, which are embodied in the bill

before you. First, the bill modifies the requirement that all procedures be double blind where practicable, by adding the option of it being what's called "blind," rather than double blind. This option, which is supported by the scientists and by law enforcement personnel elsewhere, simply means that the office administering the procedure does not know which photograph the eyewitness is viewing during the procedure, and so is not in a position to leak the information about whether the person chose the suspect or not. The most common method in this regard is what is known as the folder shuffle method, whereby each photo is placed in a folder, and the folders are then presented to the witness to view, without the officer knowing which of the photos the witness is viewing.

Second, the bill requires that all identification procedures be sequential, and that they be accompanied by a set of appropriate instructions. The purpose of these instructions is to ensure the integrity of the identification procedure.

Third, the bill requires that there be a written record of the identification procedure that includes all of the necessary information about it, again, to ensure the integrity of the procedure and to be sure that there is a reliable record of how the procedure was conducted. In this regard, however, there is one part of the bill as currently drafted that I suggest be amended. Section 15 (D) as drafted requires that there be a written record of the "order in which the photographs or persons were presented to the eyewitness." This is too broad, because where the folder shuffle method is used the office will not know, and cannot know, the order in which the witness viewed the photos. I suggest, therefore, that this section be eliminated and that what must be recorded in this regard be left to the guidelines that the bill contemplates will be established by POST and SPTA.

This brings me to the recommendation, incorporated by the bill, that both POST and SPTA jointly develop and promulgate uniform mandatory policies and appropriate guidelines, based on best practices, to be followed by all municipal and state law enforcement agencies. This is a key component of our recommendations and the bill, because it is imperative that all law enforcement agencies follow the same procedures and protocols, and that they be based on best practices, as those may be disclosed over time. Finally, the bill would continue the Task Force in existence for two years, during which it would aid both POST and SPTA in the establishment of those policies and guidelines, gather statistics regarding how the new procedures are working, and oversee the implementation of the new procedures. We contemplate that there will of necessity be major law enforcement training programs established by POST and SPTA, and that the Task Force will be available to help in that effort.

In conclusion, with the one suggested amendment that I have mentioned, I urge the committee to report the bill favorably. It will constitute a major step forward in the administration of criminal justice in this state.