14.4 Illegal Identification Procedures

A. Pretrial Identification Procedures: Constitutional and Statutory Requirements

A pretrial identification procedure violates due process when (i) the procedure is suggestive, and (ii) the suggestiveness of the procedure results in a strong probability of misidentification. *See Manson v. Brathwaite*, 432 U.S. 98 (1977) (requiring both suggestiveness and unreliability); *Neil v. Biggers*, 409 U.S. 188 (1972) (to same effect); *accord State v. Harris*, 308 N.C. 159 (1983). A violation of due process requires suppression of the pretrial identification and possibly any later identifications.

In 2007, the North Carolina General Assembly recognized the need for uniform, reliable eyewitness identification procedures to reduce the risk of misidentification and enacted the Eyewitness Identification Reform Act. *See* G.S. 15A-284.50 through G.S. 15A-284.53; *see also* John Rubin, *2007 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/01, at 2–4 (UNC School of Government, Jan. 2008), *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0801.pdf. While suppression is not mandatory for a violation of statutory requirements, the court must consider noncompliance in adjudicating motions to suppress. G.S. 15A-284.52(d)(1). Therefore, counsel should move to suppress suggestive pretrial identification procedures under the Due Process Clause, article I, section 19 of the North Carolina Constitution, and North Carolina statutes. *See United States v. Greene*, 704 F.3d 298, 305 n.3 (4th Cir. 2013) (in suppressing identification under U.S. Constitution, court notes that some states have provided greater protections for defendants under their state constitutions "based on the last 35 years of social science research into the reliability of eyewitness identifications"). The statutory requirements are discussed first because they provide guidance on the characteristics of a reliable identification procedure.

B. Statutory Requirements for Lineups

Requirements for lineup. Under G.S. 15A-284.52(b), a lineup must meet all of the requirements set out in subdivisions (1) through (15), including:

- the lineup shall be conducted by a neutral administrator, a person who does not know which person is the suspect;
- where an independent administrator is not used, an alternative method must be used that has been approved by the North Carolina Criminal Justice Education and Training Standards Commission, e.g., an automated computer program;
- individuals or photos shall be presented sequentially, one at a time;
- specific instructions must be given to the eyewitness, including that the suspect may not be in the lineup and that it is as important to exclude the innocent as it is to identify the perpetrator;
- at least five fillers must be included and they must resemble the eyewitness's description of the perpetrator.
- the suspect or the photo of the suspect must not stand out from the fillers;
- nothing shall be said to influence the identification;

- the eyewitness shall provide a statement regarding his or her level of confidence in the identification;
- live identification procedures shall be recorded on video (where video is not practical, an audio recording shall be made of live lineups, and a written record of the live lineup shall be made if neither video nor audio is practical);
- for any identification procedure, a detailed record shall be made including all of the information described in G.S. 15A-284.52(b)(15).

Remedies for noncompliance. While suppression does not automatically follow from failure to comply with the requirements of G.S. 15A-284.52(b), the court must consider noncompliance when deciding whether to grant a motion to suppress the identification. Counsel also may argue that noncompliance constitutes a violation of the Due Process Clause and a substantial violation of statutory criminal procedure provisions, requiring exclusion under G.S. 15A-974.

Evidence of noncompliance is admissible at trial to support a claim of misidentification, unless the evidence is otherwise barred. In the event that evidence of noncompliance is presented at trial, the judge must instruct the jury that it may consider such evidence in determining the reliability of the identification. G.S. 15A-284.52(d). *See State v. Stowes*, ___ N.C. App. ___, 727 S.E.2d 351 (2012) (trial court did not exclude evidence for violation of the Eyewitness Identification Reform Act but granted the other statutory relief).

C. Constitutional Requirements

Suggestiveness of procedure. A pretrial identification procedure may be unconstitutionally suggestive if:

- the defendant stands out in the lineup based on his or her size, age, or apparel (*see State v. Pigott*, 320 N.C. 96 (1987) (photo array suggestive where 6 of 10 photos unclear and seventh photo showed deputy in uniform); *State v. Harris*, 308 N.C. 159, 166 (1983) (assuming arguendo that photo array suggestive where defendant was shown wearing cap and scarf similar to ones worn by assailant); *State v. Gaines*, 283 N.C. 33 (1973) (lineup not unduly suggestive even though defendant only juvenile in group));
- an officer makes comments during the identification procedure that taint the process (*see State v. Wilson*, 313 N.C. 516 (1985) (identification procedure tainted by officer suggesting to witness that perpetrator was in lineup); *State v. Headen*, 295 N.C. 437 (1978) (deputy's comments naming defendant as perpetrator tainted identification procedure));
- the defendant is shown alone to the witness in a showup (*see State v. Capps*, 114 N.C. App. 156 (1994) (witness shown defendant alone in police car); *see also Stovall v. Denno*, 388 U.S. 293 (1967) (practice of showing suspect singly for purposes of identification and not as part of lineup has been widely condemned)).

Where law enforcement officers conduct an unduly suggestive procedure, exclusion of the identification is not automatically required under the Due Process Clause. The trial judge must screen the evidence for reliability, discussed below. *Perry v. New Hampshire*, ___ U.S. ___, 132 S. Ct. 716 (2012). Where the suggestive circumstances are not the result of government action, the trial court may admit the identification without performing this preliminary inquiry into the reliability of the identification. "When no improper law enforcement activity is involved . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Id.* at 721.

Risk of misidentification. In addition to showing that an identification procedure was suggestive, the defendant must show that the procedure created a strong probability of misidentification. *See State v. Harris*, 308 N.C. 159 (1983); *State v. McCraw*, 300 N.C. 610 (1980); *State v. Breeze*, 130 N.C. App. 344 (1998). If there is a substantial likelihood of misidentification, the judge must exclude the evidence. If the indicia of reliability are strong enough to outweigh the corrupting effect of the suggestive circumstances, the identification evidence remains admissible. *Perry v. New Hampshire*, 132 S. Ct. at 720.

In deciding whether the suggestive procedure impermissibly influenced the identification, the courts consider the totality of the circumstances. Key factors include: (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the time of confrontation; and (5) the length of time between the crime and the confrontation. *See, e.g.*, *State v. Harris*, 308 N.C. 159, 164 (1983) (citing *Neil v. Biggers*, 409 U.S. 188 (1972)).

D. Showups

Constitutional considerations. The North Carolina courts have recognized that showup procedures, whereby a single suspect is shown to a witness for the purpose of identification, are "inherently suggestive." *State v. Turner*, 305 N.C. 356, 364 (1982); *State v. Oliver*, 302 N.C. 28, 45 (1981). Because of its suggestiveness, the procedure is frowned upon and should be utilized in limited circumstances. *See* FARB at 558–59 (noting that a showup is a suggestive identification procedure that normally should be avoided but that it may be permissible in an emergency or soon after a crime is committed)**.**

An unnecessary showup may still be admissible if the witness's identification of the defendant is otherwise reliable. *See Stovall v. Denno*, 388 U.S. 293, 302 (1967) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . . ."), *abrogation on other grounds recognized by Harper*

v. Virginia Dept. of Taxation, 509 U.S. 86 (1993); *see also Turner*, 305 N.C. at 364–65 (upholding admission of identification from showup where, among other things, witness knew defendant from having previously seen him in the neighborhood); *State v. Rawls*, 207 N.C. App. 415 (2010) (finding showup unduly suggestive where an officer told the witness beforehand that "they think they found the guy" and at the showup the defendant was detained and several officers were present; but, holding that there was not a substantial likelihood of irreparable misidentification because, among other things, before the showup the witness had looked directly at the suspect and made eye contact with him from a table's length away during daylight hours and the showup occurred only fifteen minutes later); *State v. Pinchback*, 140 N.C. App. 512 (2000) (considering the five factors for assessing the reliability of an identification [discussed under "Risk of misidentification" in subsection C., above], court finds that identification was unreliable and should have been suppressed). For a further discussion of showups, see FARB at 558–59.

Statutory considerations. In *State v. Rawls*, 207 N.C. App. 415 (2010), the court held that the Eyewitness Identification Reform Act (EIRA) does not apply to showups. The EIRA sets out procedural requirements that an officer must follow in conducting a photographic or live lineup. *See* G.S. 15A-284.52. The court distinguished a showup from a live lineup and held that a showup does not have to conform to EIRA requirements. However, *Rawls* does not necessarily mean that officers may avoid EIRA lineup requirements by conducting showups when not warranted by legitimate law enforcement objectives. *Rawls* involved a classic situation in which officers decided to do a showup in light of the exigencies of the situation. Officers arrived on the scene within minutes after the victim's apartment had been broken into; they located the defendant and other suspects shortly thereafter, who were still in the area; and they drove the victim to where the suspects were being held, which took a mere 45 seconds. Other instances, when a showup is unnecessary or is employed to avoid EIRA procedures, may violate both statutory as well as constitutional requirements.

E. In-Court Identification

An impermissibly suggestive pretrial identification procedure may taint an in-court identification. *See State v. Flowers*, 318 N.C. 208 (1986); *State v. Headen*, 295 N.C. 437 (1978). Before admitting an in-court identification that has been challenged, the trial court must conduct a voir dire, find facts, and determine that the in-court identification is of independent origin and not the result of an impermissibly suggestive pretrial procedure. *See Flowers*, 318 N.C. at 216 (so holding, but finding that failure to conduct voir dire was harmless error where evidence was clear and convincing that witness's in-court identification originated with the witness's observation of defendant at the time of the crime and not from an impermissibly suggestive pretrial identification procedure). In determining whether an in-court identification is independent of a flawed pretrial investigation, the court should consider the five factors listed under "Risk of misidentification in subsection C, above. *See State v. Harris*, 308 N.C. 159 (1983); *State v. Thompson*, 303 N.C. 169 (1981).

The lack of a pretrial identification procedure does not necessarily make an in-court identification inadmissible. *See State v. Fowler*, 353 N.C. 599 (2001) (fact that victim's first identification of defendant took place in courtroom did not render identification procedure impermissibly suggestive) *State v. Hussey*, 194 N.C. App. 516 (2008) (to same effect). *But see Moore v. Illinois*, 434 U.S. 220, 230 (1977) (in considering an in-court identification, court states that it "is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation than was employed in this case"; court does not rule on due process claim and instead finds violation of Sixth Amendment right to have counsel present at identification); 2 LAFAVE, CRIMINAL PROCEDURE § 7.4(g), at 963–67 (discussing possible ways in which to reduce suggestiveness of in-court identification).

Practice note: Generally you must make a motion before trial to suppress evidence of pretrial identifications and tainted in-court identifications (*see infra* § 14.6A, Timing of Motion). If your motion is denied, you also must object to the evidence of the pretrial identification procedure when it is introduced and to any in-court identification of the defendant when made to preserve those issues for appeal. *See State v. Hunt*, 324 N.C. 343, 355 (1989) ("[a]ssuming arguendo that defendant's constitutional right of assistance of counsel at the lineup was violated, defendant waived that error by failing to object when the witness later identified him before the jury as the man he had picked out of the lineup"). If you fail to do so, you will waive the objections and will have to meet the much higher standard of plain error on appeal. *See State v. Hammond*, 307 N.C. 662 (1983); *State v. Stowes*, ___ N.C. App. ___, 727 S.E.2d 351, 355 (2012).

F. Right to Counsel at Lineups

Constitutional considerations. Defendants have a Sixth Amendment right to have counsel present at a live lineup that occurs after adversary proceedings have begun. *See Gilbert v. California*, 388 U.S. 263 (1967). The right to counsel attaches after initial appearance or indictment, whichever occurs first. *See Rothgery v. Gillespie County*, 554 U.S. 191 (2008); *see also supra* § 12.4A, When Right to Counsel Attaches.

If the defendant's right to counsel is not honored, the pretrial identification must be suppressed. *See State v. Hunt*, 339 N.C. 622 (1994) (recognizing principle [note that decision was issued before *Rothgery*, when right to counsel was held by North Carolina courts to attach at defendant's first court appearance]). An in-court identification by a witness who took part in a pretrial lineup in violation of the defendant's right to counsel also must be excluded unless the State demonstrates by clear and convincing evidence that the in-court identification is of independent origin and not tainted by the illegal pretrial procedure. *See United States v. Wade*, 388 U.S. 218 (1967); *Hunt*, 339 N.C. at 647. While the accused may waive the right to have counsel present at a live lineup, the State bears the burden of demonstrating by clear and convincing evidence that the right was waived freely, voluntarily, and with full understanding. *See Wade*, 388 U.S. at 240; *State v. Harris*, 279 N.C. 177 (1971).

The Sixth Amendment does not guarantee the right to counsel where a lineup occurs

before adversarial proceedings have commenced. *Kirby v. Illinois*, 406 U.S. 682 (1972); *State v. Henderson*, 285 N.C. 1 (1974), *vacated on other grounds*, 428 U.S. 902 (1976); *see also State v. Taylor*, 354 N.C. 28 (2001) (holding in pre-*Rothgery* case in different context that Sixth Amendment right to counsel did not attach with issuance of arrest warrant). *But cf.* FARB at 559 n.156 (noting that U.S. Supreme Court has not yet decided whether the Sixth Amendment right to counsel begins with issuance of arrest warrant before the defendant's initial appearance). The Sixth Amendment also does not guarantee the right to counsel at a photographic identification procedure. *United States v. Ash*, 413 U.S. 300 (1973); *State v. Miller*, 288 N.C. 582 (1975).

Statutory considerations. G.S. 7A-451(b)(2) states that an indigent person is entitled to counsel after formal charges have been preferred for a pretrial identification procedure at which the presence of the accused is required. The North Carolina courts appear to have interpreted this provision as not affording a defendant a greater right to counsel than provided by the Sixth Amendment. *See State v. Henderson*, 285 N.C. 1 (1974), *vacated on other grounds*, 428 U.S. 902 (1976).

The Eyewitness Identification Reform Act does not state that there is a right to counsel at the identification proceedings covered by the act. It recognizes, however, that counsel is not excluded from identification procedures. *See* G.S. 15A-284.52(b)(13) (prohibiting anyone who knows the suspect's identity from being present during the lineup or identification procedure "except the eyewitness and counsel as required by law").

G. Nontestimonial Identification Procedures

Nontestimonial identification procedures, such as the taking of hair samples, may be ordered for suspects who have not been arrested or who have been formally charged and released from custody pending trial. *See* G.S. 15A-271 through G.S. 15A-282; *State v. Irick*, 291 N.C. 480 (1977) (discussing purpose of procedures); c*f. State v. Carter*, 322 N.C. 709 (1988) (probable cause and search warrant required for taking of blood sample unless exigent circumstances permit taking of blood without warrant; nontestimonial identification order not proper for taking of blood sample or for in-custody defendant). A suspect has a statutory right to have counsel present during a nontestimonial identification procedure and must be told about this right before the procedure takes place. *See* G.S. 15A-279(d); *State v. Satterfield*, 300 N.C. 621 (1980); *see also supra* "Nontestimonial identification procedures" in § 12.4C, Particular Proceedings (discussing right to counsel for such procedures). The statutory right to counsel does not apply to nontestimonial procedures lawfully conducted by law enforcement without a nontestimonial identification order. *See State v. Coplen*, 138 N.C. App. 48 (2000) (upholding denial of motion to suppress results of gunshot residue test that was based on probable cause and exigent circumstances and was conducted without a nontestimonial identification order).

G.S. 15A-279(d) states that any statements made during the proceeding must be suppressed if the defendant does not have counsel present. *See also State v. Page*, 169 N.C. App. 127 (2005) (officer violated statute by failing to advise defendant of right to

counsel before conducting gunshot residue test, but violation was not prejudicial because defendant did not identify any statements made during test); *State v. Coplen*, 138 N.C. App. 48 (2000) (refusing to suppress results of identification procedure, as distinguished from statements of defendant, for violation of statutory right to counsel). The results of a nontestimonial identification procedure may be subject to suppression on other grounds, however. *See, e.g., State v. Pearson*, 356 N.C. 22 (2002) (recognizing that results may be suppressed if affidavit does not provide reasonable suspicion for test or was based on falsehoods, but finding no violation in this case); *State v. Carter*, 322 N.C. 709 (1988) (nontestimonial identification order does not authorize taking of blood sample).

H. DNA Samples at Time of Arrest

Statutory authorization exists for taking DNA samples at the time of arrest for certain offenses. *See* G.S. 15A-502.1; G.S. 15A-266.3A; *see also Maryland v. King*, 569 U.S. ___, 133 S. Ct. 1958 (2013) (defendant's Fourth Amendment rights were not violated by the taking of a DNA cheek swab as part of booking procedures). The sample must be expunged if, among other reasons, there is no charge filed within the statute of limitations or if there is no conviction or active prosecution for an offense covered under the DNA sampling law within three years of the date of arrest. G.S. 15A-266.3A(h); *see also* "DNA Records" in John Rubin, *Relief from a Criminal Conviction: A Digital Guide to Expunctions, Certificates of Relief, and Other Procedures in North Carolina* (UNC School of Government, 2012), www.sog.unc.edu/node/2588.

Any identification, warrant, or arrest based on a DNA match that occurs after the statutory period for expunction expires is invalid and inadmissible. G.S. 15A-266.3A(m).