Chapter 3
Eyewitness Identifications

3.1 Scope of Chapter

This chapter guides attorneys in protecting their clients against misidentifications. Counsel should ensure that procedures used to identify a client are lawful and insulated from suggestibility. Chapter 3 reviews the standards on unduly suggestive and thus unreliable identifications based on the due process clauses in the Fourteenth Amendment to the U.S. Constitution and article I, section 19 of the North Carolina Constitution, as well as the additional protections found in the North Carolina Eyewitness Identification Reform Act, G.S. 15A-284.50 through G.S. 15A-284.53, which regulates live lineups and photo identification procedures. This chapter also addresses the procedures for raising

claims of a violation, including the evidentiary showing required, the procedures for obtaining expert assistance when needed, and the type of relief available.

3.2 Overview of Risks of Misidentification

A. Nature of the Problem

Research and studies. Eyewitness identifications play a major role in the charging and conviction of criminal defendants, providing the basis for criminal charges against approximately 77,000 people each year. Gary L. Wells & Elizabeth A. Olson, *Eyewitness Identification: Information Gain from Incriminating and Exonerating Behaviors*, 8 J. EXPERIMENTAL PSYCHOL.: APPLIED 155 (2002).

Scientific research, academic literature, and overturned convictions, however, have raised concerns about the reliability of eyewitness identifications in general and cross-racial identifications in particular. *See also infra* "State guarantee of due process" in § 3.4A, Due Process (discussing recent cases from the U.S. Court of Appeals for the Fourth Circuit and state supreme courts reviewing research raising concerns about eyewitness identification evidence). The U.S. Supreme Court has observed that "the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967); *see also Perry v. New Hampshire*, 565 U.S. __, 132 S.Ct. 716, 738–39 (2012) (Sotomayor, J., dissenting) ("[A] staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification."). Experts believe that "eyewitness error is the leading contributing factor in wrongful convictions in the United States." *See* ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 1-2 (5th ed. 2013) [hereinafter EYEWITNESS TESTIMONY]; *see also* EDWARD CONNORS ET AL., NATIONAL INSTITUTE OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996); C. Ronald Huff et al., *Guilty Until Proved Innocent*, 32 CRIME & DELINQUENCY 518 (1986); Innocence Project, Facts on Post-Conviction DNA Exonerations, INNOCENCEPROJECT.ORG (last visited Sept. 25, 2014).

A review of post-conviction DNA exonerations found that at least 40% of cases in which the defendant was exonerated as a result of DNA evidence involved cross-racial eyewitness identifications. Innocence Project, Facts on Post-Conviction DNA Exonerations, INNOCENCEPROJECT.ORG (last visited Sept. 25, 2014). As discussed in greater detail below, researchers have found that White eyewitnesses are more likely than Black eyewitnesses to make erroneous cross-racial identifications and that most cross-racial identification errors made by White eyewitnesses are false positives—that is, the erroneous identification of a person as the perpetrator. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001); *see infra* § 3.3, Cross-Racial Impairment.

Case study: The role of race in the Shawn Massey case. Below are the reflections of Duke University School of Law John S. Bradway Professor of Law and Wrongful Convictions Clinic Co-Director James E. Coleman on the Shawn Massey case:

Shawn Massey spent twelve years in prison for crimes he did not commit, and the hard truth is that race played a role in this miscarriage of justice. In 1999, a jury wrongfully convicted him of kidnapping, armed robbery, and breaking and entering based on allegations that in May 1998 he forced a woman and her children at gunpoint into their Charlotte apartment and took $60 from them. The adult victim in this case, a White woman, described the perpetrator of the crime as a 5-foot-9, 180-pound African American male who wore his hair "pulled back from his face and four braids on the back of his head." At trial, the victim clarified that she meant to describe cornrows. However, the White police officers and prosecutors handling the case did not understand the cornrow hairstyle, and this misunderstanding caused them to focus on the wrong suspect, create a photo lineup with inappropriate fillers, and prosecute an innocent man. If the police officers investigating the case had been familiar with the cornrow hairstyle or had focused on Mr. Massey's appearance before concluding that he was the assailant, they would have discovered that he was both shorter and slimmer than the perpetrator, did not wear his hair in cornrows, did not have enough hair for that hairstyle, and should have been excluded as a suspect.

At the time of the offense, Mr. Massey was 26 years-old, working a construction job, and living with his grandmother. He had been charged with petty offenses, but had never been to prison. I became involved with his case through my work in Duke Law School's Wrongful Conviction Clinic. We decided to investigate his claim of innocence because the only evidence in the case was the victim's eyewitness identification of Mr. Massey, and her identification was always conditioned on the assailant having the cornrow hairstyle. Because of the general unreliability of eyewitness identification evidence, we believe that any prosecution based entirely on eyewitness identification evidence merits an innocence investigation.

In this case, the misidentification problem arose when the victim was shown a photo lineup including Mr. Massey and a number of fillers. Neither Mr. Massey nor the fillers wore their hair in cornrows. In the photo shown to the victim, Mr. Massey's hair was very short. Asked if she saw the assailant in the six- photograph lineup, the victim told police that Mr. Massey looked most like the man, except that Mr. Massey did not have braids and the assailant's hair was longer. This kind of relative judgment is typical in cases of misidentification. Because Mr. Massey's hair was not in cornrows, however, the victim stated that she couldn't be sure of her identification unless she saw Mr. Massey in person.

The first time the victim saw Mr. Massey in person was in court. Just before the trial started, she told the prosecutor that she had doubts about her identification, both because the defendant's hair was not in cornrows and because he appeared smaller than her attacker. Mr. Massey's trial attorney was not informed of the victim's eleventh-hour doubts; we uncovered this *Brady* violation during our innocence investigation. The only person who consistently maintained that Mr. Massey was the perpetrator was the investigating officer, a White detective who relied exclusively upon an alleged statement by Mr. Massey's friend that Mr. Massey wore his hair "pulled back and 4 or 5 braids on the back of his head." At trial, however, this friend denied making such a statement, and denied that Mr. Massey wore braids or that his hair was long enough to braid. Mr. Massey's friends and family members uniformly testified that he had never worn his hair in cornrows or long enough to braid, but the statements did not persuade the jury.

While investigating the case, we discovered seven photographs of Mr. Massey in the District Attorney's files, one of which was taken in March 1998, nine weeks before the crime. The seven photographs were taken over a nine-year period. In all of the photos, including the one taken in March 1998, Mr. Massey's hair was very short. We showed these photographs to professional barbers familiar with African American hairstyles, who all agreed that Mr. Massey could not have grown his hair long enough to wear cornrows by the time of the offense. At the time of Mr. Massey's prosecution, police and prosecutors did not appreciate the significance of these photographs because they were not familiar with the cornrow hairstyle; as a result, they did not disclose the photographs to the defense. Until the victim testified at trial, the police and prosecutor assumed that cornrows were worn only on the back of the head and neck, and therefore concluded that photographs showing only the front of Mr. Massey's head did not exclude him as a suspect.

At the conclusion of our investigation, we sent a letter to the Mecklenburg County District Attorney laying out the evidentiary basis of Mr. Massey's claim of innocence, along with a description of the *Brady* violations we uncovered. We included the photograph of Mr. Massey with short hair taken in March 1998, prior to the offense, along with the opinions of professional barbers familiar with African American hairstyles. In response to this evidence, District Attorney Peter Gilchrist filed an ex parte motion to vacate the conviction and dismiss the charges, which was granted by a superior court judge. Mr. Massey was released in 2010, approximately two years before the expiration of his sentence.

This was a case of cross-racial identification, and race played an important role in the wrongful conviction of Shawn Massey, beginning with the police and prosecutor's misinterpretation of the witness's description of the perpetrator. This misinterpretation illustrates the importance of obtaining an accurate description of the assailant from the very outset and making sure one understands what is being described. Prompt investigation of identification procedures also provides counsel with an opportunity to clarify any confusion or misunderstanding on the part of the police or prosecutor, or to litigate pretrial the admissibility of a questionable identification. If the issue is not raised until trial, jurors likely will see the dispute as one involving only the credibility of witnesses, and, as some studies have shown, the race of a witness may affect jurors' perceptions of whether the witness is telling the truth. In Mr. Massey's case, the jurors chose to believe the White police officers and not the Black witnesses who all testified Mr. Massey did not wear braids and did not have hair long enough to braid.

When the introduction of a flawed identification can't be avoided, defenders should emphasize not only the problems with cross-racial identification, but also specific contextual factors that may make the witness identification less reliable. For example, in this case, opinions from professional barbers familiar with African American hairstyles could have been introduced as evidence supporting Mr. Massey's claim that his hair could not have been worn in cornrows at the time of the offense. Without such information, jurors are often misled by the common but mistaken belief that a victim never forgets the face of his or her attacker.

Mr. Massey's experience also underscores the recommendation of scholar Elizabeth Loftus, that whenever possible, officers of the same race as the suspect should be involved in identification procedures. If an African American police officer had constructed the lineup in this case or been part of the investigation, he or she probably would have been familiar with the cornrow hairstyle and Mr. Massey might never have been wrongfully convicted. If the White police officers or prosecutor had queried the victim about her description, Mr. Massey also might never have been convicted. These are flaws that can be fixed or, at a minimum, raised early in the case by the defense attorney.

B. Factors Affecting Eyewitness Identifications

Assuming that witnesses for the most part are earnestly trying to construct an accurate account of a past event, why do eyewitness errors occur and why do they lead to wrongful convictions? This section discusses the causes of eyewitness errors, while subsection C, below, discusses jury perceptions of eyewitness testimony.

Generally. Researchers have concluded that eyewitness mistakes generally result from the "normal and natural processes that occur whenever human beings attempt to acquire, retain, and retrieve information." EYEWITNESS TESTIMONY at § 2-1. Some studies suggest that because of these natural processes eyewitnesses make correct identifications only 50% of the time. BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION 218 (1995) [hereinafter MISTAKEN IDENTIFICATION].

Factors affecting the accuracy of eyewitness identification fall into three broad categories: problems of acquisition, problems of retention, and problems of retrieval. EYEWITNESS TESTIMONY at § 2-2. Familiarity with these factors may assist counsel in assessing the possibility of a misidentification and preparing for discussions with expert witnesses. *See infra* § 3.6D, Expert Testimony.

Acquisition stage. In the acquisition stage, when an eyewitness memory is formed, the accuracy of the witness's perception may be affected by factors such as lighting conditions, the duration of the event at issue, violence, stress, fear, age, sex, race, and expectations. EYEWITNESS TESTIMONY at § 2-2. Research has found that cross-racial eyewitness identifications are particularly susceptible to error at this stage. *See infra* § 3.3, Cross-Racial Impairment.

Retention stage. The retention stage encompasses the time between when the witness's memory was formed and when the witness describes the memory. Memory is malleable. The accuracy of a memory during the retention stage is influenced by the length of the retention interval and post-event experiences. For example, a suggestive pretrial identification procedure, especially one involving cross-racial identification, could distort an eyewitness's memory of the actual event. "An eyewitness who is told that it is very important for her to view a photoarray or lineup immediately is more likely to infer that the investigators have identified the perpetrator than is an eyewitness who is told that she could drop by the station whenever it is convenient for her to do so," and this inference may exert subtle pressure on the witness to provide a positive identification. MISTAKEN IDENTIFICATION at 113–14. Similarly, the memory of an eyewitness who is given positive feedback after participating in an identification procedure may be influenced by such feedback. *Id.* at 186–90. One study concluded that in the trials of offenders exonerated by DNA evidence between 1989 and 2010 that involved eyewitness testimony, 57% of the eyewitnesses were initially uncertain of their eyewitness identifications, an indicator of unreliability at the retention stage. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 64 (2011).

Retrieval stage. In the context of a criminal trial, the retrieval stage refers to the moment when the witness testifies about the identification. When retrieving events from memory, eyewitnesses are susceptible to the manner in which information is solicited. Frequent review of the event, through questioning, identification procedures, and preparation to testify, may artificially increase witness confidence when retrieving the memory at trial. MISTAKEN IDENTIFICATION at 186–87. Witness confidence exerts a powerful influence on jurors, but researchers have found that "eyewitness confidence is not a great or consistent indicator of eyewitness accuracy." EYEWITNESS TESTIMONY at § 3-12; *see also* MISTAKEN IDENTIFICATION at 95; Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence/Accuracy Relation in Eyewitness Identification Studies,* 118 PSYCHOL. BULL. 315 (1995); Neil Vidmar et al., *Rethinking Reliance on Eyewitness Confidence*, 94 JUDICATURE 16 (2010).

Illustration: The wrongful conviction of Ronald Cotton illustrates the problems that may arise with the acquisition, retention, and retrieval stages of eyewitness identifications. Ronald Cotton was convicted of the rape of Jennifer Thompson in Burlington, North Carolina and sentenced to life plus 54 years based on Thompson's eyewitness identification. Ronald Cotton served 10.5 years in prison before he was exonerated by DNA evidence. Jennifer Thompson, a White woman, made a cross-racial identification of Ronald Cotton, a Black man. Ms. Thompson later observed that she "studied every single detail on the rapist's face . . . [and] was going to make sure he was put in prison." Jennifer Thompson, *I Was Certain, But I Was Wrong*, N.Y. TIMES, June 18, 2000. In the time between the crime and the trial of Mr. Cotton, Ms. Thompson grew more and more confident in her mistaken identification. She reflected that, when she saw Ronald Cotton in a photo array, she was "completely confident" that he was the assailant; and when she picked him out of a lineup, she was "sure . . . [she] had picked the right guy." *Id.* However, her confidence did not correspond with accuracy. "From description, to creating an Identikit, to reviewing a photo array, to identifying the wrong man in a lineup and in court—each step unconsciously became a process of picking the individual most resembling the prior step, not most resembling the perpetrator." Joseph F. Savage Jr. & James P. Devendorf, *Conviction After Misidentification: Are Jury Instructions a Solution?*, THE CHAMPION, June 2011, at 30, n.7 (discussing factors contributing to Jennifer Thompson's misidentification of Ronald Cotton).

Estimator and system variables. Variables that affect eyewitness identifications can be categorized as either "estimator" or "system" variables. *See* Gary L. Wells, *Applied Eyewitness Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546 (1978) (using these categories for the first time). Familiarity with these variables may assist counsel in assessing the identification and discussing it with an expert. Additionally, counsel may use these variables to structure cross-examination in order to show how a given variable, such as the presence of a gun, affected the reliability of eyewitness testimony.

Some variables that bear on the accuracy of eyewitness identifications are within the control of the criminal justice system while others are not. Estimator variables occur before the case enters the criminal justice system and include factors such as: the lighting

at the time of the event, the duration of the witness's exposure to the perpetrator, and the race of the witness and perpetrator. In contrast, system variables are or may be within the control of the criminal justice system, such as the construction of a lineup, the questioning of the eyewitness, and the method in which the lineup is presented. Examples of system and estimator variables are as follows. (The list is reproduced verbatim from Joseph F. Savage & James P. Devendorf, *Conviction After Misidentification: Are Jury Instructions a Solution?*, THE CHAMPION, June 2011, at 30, 31, except that examples of variables that have been added are set off in brackets.)

1. *Wording of questions:* The wording of questions posed to an eyewitness can affect the witness's testimony about an event. [For example, if an eyewitness is asked how many minutes she was able to observe the assailant, she may be more likely to estimate that the event took a matter of minutes, rather than seconds.]

2. *Lineup instructions:* The instructions given to the witness at a lineup can affect the witness's willingness to make an identification. [For example, studies have shown that instructions implying that the suspect is in fact in the photo array "increas[e] the likelihood that the eyewitness will make a positive—though not necessarily correct—identification." MISTAKEN IDENTIFICATION at 115–23.]

3. *Confidence malleability:* Factors unrelated to identification accuracy can influence a witness's confidence. [For example, a witness's confidence may rise when she is told that another witness has identified the same person. MISTAKEN IDENTIFICATION at 186–90.]

4. *Mugshot-induced bias:* Exposure to mugshots of a suspect increases the likelihood that the witness will later choose that suspect in a lineup.

5. *Post-event information:* Testimony of eyewitnesses about an event often reflects not only what they actually saw but information they obtained after the event.

6. *Child witness suggestibility:* Young children are more vulnerable than adults to interviewer suggestion, peer pressures, and other social influences.

7. *Attitudes and expectations:* A witness's perception and memory of an event may be affected by his or her attitudes and expectations. [For example, if a person is attacked in the dark in an area primarily frequented by Latinos, he or she may be more likely to believe that his or her attacker was Latino.]

8. *Hypnotic suggestibility:* Hypnosis increases suggestibility to leading and misleading questions.

9. *Alcohol intoxication:* Alcohol intoxication impairs an eyewitness's later ability to recall persons and events.

10. *Cross-race bias:* Eyewitnesses are more accurate when identifying members of their own race than members of other races.

11. *Weapon focus:* The presence of a weapon impairs an eyewitness's ability to accurately identify the perpetrator's face.

12. *Accuracy-confidence correlation:* A witness's confidence is not a good predictor of his or her identification accuracy.

13. *Forgetting curve:* The rate of memory loss for an event is greatest right after the event and then levels off over time.

14. *Exposure time:* The less time an eyewitness has to observe an event, the less well he or she will remember it.

15. *Presentation format:* Witnesses are more likely to misidentify someone by making a relative judgment when presented with a simultaneous (as opposed to sequential) lineup.

16. *Unconscious transference:* Eyewitnesses sometimes identify as a culprit someone they have seen in another situation or context.

Defense attorneys can attempt to mitigate the influence of system variables by, for example, ensuring that law enforcement officers present individuals or photographs to witnesses sequentially rather than simultaneously. *See infra* § 3.5, Eyewitness Identification Reform Act. Additionally, counsel can educate jurors about the impact of system and estimator variables on the reliability of eyewitness testimony through expert testimony, cross-examination of eyewitnesses, and jury instructions concerning factors influencing eyewitness reliability. *See infra* § 3.6, Procedures for Challenging Eyewitness Identification Evidence.

C. Jurors' Perceptions of Eyewitness Identification

Concerns about eyewitness identification, discussed in the preceding section, are compounded by the weight jurors may give such testimony. Studies have concluded that jurors tend to overestimate the reliability of eyewitness testimony. *See, e.g.*, Tanja Rapus Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115 (2006); Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS 177 (2006); *Perry v. New Hampshire*, ___ U.S. ___, ___, 132 S. Ct. 716, 739 (2012) (Sotomayor, J., dissenting) (observing that "jurors routinely overestimate the accuracy of eyewitness identifications"). In 2004, the Public Defender Service for the District of Columbia surveyed nearly 1,000 potential jurors about eyewitness identification. The researchers concluded that the survey members often underestimated the difficulties eyewitnesses experience in making cross-racial identifications, the impact of stress on memory, and the ways in which police

procedures may undermine eyewitness accuracy. Timothy P. O'Toole et al., *District of Columbia Public Defender Survey*, THE CHAMPION, Apr. 2005, at 28; *see also*, Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS 177 (2006); EYEWITNESS TESTIMONY at § 6-6.

One reason that lay people misunderstand the reliability of eyewitness identification is that much of what experts now know about memory and eyewitness testimony is counter-intuitive. For example, even though experts now recognize that eyewitness confidence is not reliably correlated with accuracy, "it would seem logical that a more certain witness would be a more accurate one, [and therefore] it would be surprising if jurors understood the relationship between confidence and accuracy as a matter of common sense." Timothy P. O'Toole et al., *District of Columbia Public Defender Survey*, THE CHAMPION, Apr. 2005, at 28, 29. As one court observed, "while science has firmly established the inherent unreliability of human perception and memory, this reality is outside the jury's common knowledge, and often contradicts jurors' commonsense understandings. To a jury, there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'" *United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006) (quotations and citations omitted). *See also Phillips v. Allen*, 668 F.3d 912, 916 (7th Cir. 2012) (stating that "nothing is obvious about the psychology of eyewitness identification" and "most people's intuitions on the subject of identification are wrong").

Practice note: Counsel may file a motion in limine requesting the court to preclude the prosecutor from drawing a correlation between witness confidence and witness accuracy. *See* Lisa Steele, *Trying Identification Cases: An Outline For Raising Eyewitness ID Issues*, THE CHAMPION, Nov. 2004, at 8.

3.3 Cross-Racial Impairment

A. Empirical Evidence of Cross-Racial Impairment

A cross-racial identification occurs when an eyewitness is asked to identify a person of another race. The effect of race on the accuracy of eyewitness identification was considered as early as 1914. *See* Gustave A. Feingold, *The Influence of Environment on Identification of Persons and Things*, 5. J. CRIM. L. & CRIMINOLOGY 39, 50 (1914) ("other things being equal, individuals of a given race are distinguishable from each other in proportion to our familiarity, to our contact with the race as a whole"). Researchers have since identified the phenomenon as own-race bias, cross-race effect, or other-race effect. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3, 4 (2001). Several studies have evaluated the difficulty of cross-racial identification and concluded that eyewitnesses are less likely to misidentify a person of their own race than a person of another race. Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821, 1822–23 (2003) (concluding that "[w]hile all eyewitness identifications are prone to

error, cross-racial eyewitness identifications are more often wrong than same-race identifications"); *see also* Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL'Y & L. 230, 230 (2001). Some courts, in reliance on such studies, have recognized that cross-racial identifications raise particular concerns about reliability. *See, e.g.*, *State v. Henderson*, 27 A.3d 872 (N.J. 2011) (referencing a Report of the Special Master prepared for the case regarding eyewitness identification science and law, *available at* www.eyeID.org); *Gonzales v. Thaler*, 643 F.3d 425, 432 (5th Cir. 2011); *United States v. Jernigan*, 492 F.3d 1050, 1054 (9th Cir. 2007).

B. Impact of Cross-Racial Impairment

The cross-racial effect may be stronger when White witnesses attempt to identify Black subjects. Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 938–39 (1984); MISTAKEN IDENTIFICATION at 104 (reviewing a set of studies and concluding that "the cross-racial effect appears to be stronger for whites than for blacks"). *But see* EYEWITNESS TESTIMONY at § 4-13 (noting that in studies concerning cross-racial impairment, "the cross-race effects were comparable for black witnesses and white witnesses"). Among White eyewitnesses, cross-racial impairment leads more often to false positives (the erroneous identification of a person as the perpetrator) than to false negatives (the erroneous failure to identify the perpetrator). James M. Doyle et al., *Discounting the Error Costs: Cross-Racial False Alarms in the Culture of Contemporary Criminal Justice*, 7 PSYCHOL. PUB. POL'Y & L. 253, 254 (2001). Studies have suggested that such false positives have risen over time. *Id.* (citing Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001)).

Among wrongful convictions uncovered by DNA analysis, 36% occurred in cases where White witnesses mistakenly identified innocent Black defendants. James M. Doyle et al., *Discounting the Error Costs: Cross-Racial False Alarms in the Culture of Contemporary Criminal Justice*, 7 PSYCHOL. PUB. POL'Y & L. 253, 253 (2001); *see also* Innocence Project, Facts on Post-Conviction DNA Exonerations, INNOCENCEPROJECT.ORG (last visited Sept. 25, 2014) (at least 40% of cases in which the defendant was exonerated as a result of DNA evidence involved cross-racial eyewitness identifications). The impact of cross-racial impairment may be magnified by the relative representation of people of color in the criminal justice system compared to their representation on juries. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201 (2001).

Case study: *State v. Terence Garner*. Below are the reflections of attorney Mark Montgomery on the role of race in the wrongful conviction of Terence Garner. More information about the case can be found at PBS Frontline: An Ordinary Crime, PBS.ORG (last visited Sept. 25, 2014).

In State v. Terence Garner, cross-racial eyewitness identifications played a role in Garner's wrongful conviction for robbery, kidnapping, and attempted murder. The case involved two young Black men with similar names: Terence Garner, who in 1997 was 16 years old and living with his mother in Goldsboro; and Terrance DeLoach, a 24-year-old man from New Jersey who spent five years in prison in New York for robbery before moving to Goldsboro where his cousin, Richard Keith Riddick, lived.

On April 25, 1997, Riddick and his acquaintance, Kendrick Henderson, robbed the Quality Finance Company in Princeton, North Carolina, along with a third man. In the course of the robbery, the third man shot one of the company employees, Alice Wise, assaulted her boss, Charles Woodard, and robbed a customer, Bertha Miller. When police officers questioned Henderson, whose fingerprints were found at the scene, he said that he committed the robbery with Riddick and Riddick's cousin from New York, "Terrance," and provided the address of Terrance DeLoach. When officers were unable to locate DeLoach, they arrested Terence Garner at a different address. Henderson told them they had the wrong "Terrance."

Alice Wise, who lost an eye in the shooting, first identified Terence Garner as the shooter under suggestive circumstances: Terence Garner was in a jail uniform and shackled to co-defendant Henderson. At trial, the two White victims, Ms. Wise and Mr. Woodard, identified Terence Garner as the shooter. In contrast, the lone Black victim, Ms. Miller, testified that she knew Terence Garner from the community and did not see him at the robbery. Co-defendant Henderson testified that Terence Garner was not involved; he always maintained that the police had picked up the wrong "Terrance." Several of Garner's friends and relatives testified that Garner was with them at the time of the robbery. Co-defendant Riddick testified that Terence Garner was the third robber and received a reduced sentence. Riddick perjured himself at trial by denying that he had a cousin named "Terrance," and later recanted his testimony identifying Terence Garner as the shooter.

Terence Garner was found guilty on the basis of eyewitness identifications from Alice Wise and Charles Woodard and the later recanted testimony of Keith Riddick. He was sentenced to over 25 years in prison. Subsequently, police located Terrance DeLoach, who confessed to being the third robber and shooter, but later recanted his confession. Terence Garner served nearly four years in prison. After his case received national attention in a PBS Frontline documentary, prosecutor Tom Lock consented to a Motion for Appropriate Relief granting Terence Garner a new trial. He then took a voluntary dismissal and said publicly that he no longer thought Terence Garner was guilty.

C. Causes of Cross-Racial Impairment

Several researchers have sought explanations for cross-racial impairment. June E. Chance & Alvin G. Goldstein, *The Other-Race Effect and Eyewitness Identification*, *in* PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 153, 155–56 (1996). Studies have concluded that cross-racial impairment does not stem from conscious racial prejudice; witnesses who do not harbor conscious racial prejudice are as likely to make an erroneous cross-racial identification as those who harbor racial prejudice. Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 943–44 (1984).

Some evidence suggests that the extent, frequency, and quality of a witness's contact with members of the subject's race may play a role in the witness's ability to make accurate cross-racial identifications. June E. Chance & Alvin G. Goldstein, *The Other-Race Effect and Eyewitness Identification*, *in* PSYCHOLOGICAL ISSUES IN EYEWITNESS

IDENTIFICATION 153, 158–68 (1996). However, the evidence also suggests that exposure to members of the other racial group, alone, does not necessarily improve the accuracy of identifications. *Id.* at 170–72.

Practice note: Some research indicates that frequent, quality contact with members of another race may improve cross-racial recognition. *See, e.g., id*. at 158–68. For example, a White witness who has Black family members, lives in a predominantly Black neighborhood, works with a large number of Black colleagues, or has numerous Black friends, may be more adept at making an eyewitness identification of a Black suspect than a White witness who has fewer cross-racial interactions. However, other studies indicate that contact with members of the defendant's race does not necessarily mitigate cross-racial impairment because implicit racial biases may be held even by those who encounter counterexamples to negative racial stereotypes in their daily lives. *See id.* at 170–72. Counsel therefore may raise the issue of cross-racial impairment in an appropriate case even if the eyewitness has had substantial interaction with members of the defendant's race. In such a case, counsel may want to employ an expert witness who can testify about the reliability of cross-racial identifications compared to same-race identifications. June E. Chance & Alvin G. Goldstein, *The Other-Race Effect and Eyewitness Identification*, *in* PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 153, 170–72 (1996).

3.4 Due Process, Right to Counsel, and Rules of Evidence

Because of concerns about the reliability of eyewitness identification in general, and cross-racial eyewitness identification in particular, it is important for counsel to be familiar with legal requirements relevant to the field of eyewitness identifications.

A. Due Process

State and federal guarantees of due process, under the Fourteenth Amendment to the U.S. Constitution and article I, section 19 of the North Carolina Constitution, protect defendants from suggestive eyewitness identification procedures that create a substantial likelihood of irreparable mistaken identification. *See Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *State v. Harris*, 308 N.C. 159 (1983); *State v. Pigott*, 320 N.C. 96 (1987); *State v. McCraw*, 300 N.C. 610 (1980); *State v. Breeze*, 130 N.C. App. 344 (1998). In reviewing a due process challenge to suggestive procedures, our courts employ a two step process:

> First, the court must determine whether the identification procedures were impermissibly suggestive. Second, if the procedures were impermissibly suggestive, the Court must then determine whether the procedures created a substantial likelihood of irreparable misidentification.

State v. Fowler, 353 N.C. 599 (2001) (citations omitted). North Carolina cases use the terms "impermissibly suggestive" and "unnecessarily suggestive" interchangeably. *Compare State v. Stowes*, ___ N.C. App. ___, 727 S.E.2d 351, 356 (2012) (using "impermissibly suggestive" terminology), *with State v. Jones*, 216 N.C. App. 225, 231 (2011) (using "unnecessarily suggestive" terminology). Federal and state courts have concluded that suggestive pretrial identification procedures that do not result from government action do not violate a defendant's due process rights. *Perry v. New Hampshire*, 565 U.S. ___, 132 S. Ct. 716 (2012); *State v. Fisher*, 321 N.C. 19, 24 (1987).

Impermissibly or unnecessarily suggestive. "A procedure is unnecessarily suggestive if a positive identification is likely to result from factors other than the witness's own recollection of the crime." *Satcher v. Pruett*, 126 F.3d 561, 566 (4th Cir. 1997). "To determine whether a pretrial identification procedure is suggestive, the court should consider: (1) whether the accused is somehow distinguished from others in the line-up or in a set of photographs; and (2) whether the witness is given some extraneous information by the police which leads her to identify the accused as the perpetrator of the offense." *State v. Rainey*, 198 N.C. App. 427, 435 (2009) (internal quotations omitted).

A lineup or photo array is suggestive if the defendant improperly stands out from the fillers. *See, e.g.*, *State v. Pigott*, 320 N.C. 96 (1987) (photo array suggestive where 6 of 10 photos unclear and seventh photo showed deputy in uniform). A showup, in which "a suspect is shown singularly to a witness or witnesses for the purposes of identification," is inherently suggestive. *State v. Harrison*, 169 N.C. App. 257, 262 (2005). This is because, when considering a suspect presented in a showup, "the witness would likely assume that the police have brought him to view persons whom they suspected might be the guilty parties." *State v. Oliver*, 302 N.C. 28, 45 (1981) (quotation omitted). *See also State v. Flowers*, 318 N.C. 208, 220 (1986); *see infra* "Suppressing showups" in § 3.6A, Motions to Suppress Pretrial Identifications and Prevent In-Court Identifications. While inherently suggestive, courts will look at the totality of the relevant circumstances to determine whether a showup resulted in a substantial risk of irreparable misidentification and violated a defendant's due process rights in an individual case. *State v. Turner*, 305 N.C. 356, 364 (1982) ("Pretrial show-up identifications . . . , even though suggestive and unnecessary, are not per se violative of a defendant's due process rights"). In some cases, courts have found that a showup's inherent suggestibility is outweighed by other indications of the identification's reliability. *See, e.g.*, *State v. Jackson*, __ N.C. App. __, 748 S.E.2d 50 (2013).

Substantial likelihood of irreparable misidentification. If it determines that a procedure was impermissibly suggestive, "a court must look at several factors to determine if the identification testimony is nevertheless reliable." *Satcher v. Pruett*, 126 F.3d 561, 566 (4th Cir. 1997). "Whether there is a substantial likelihood of misidentification depends upon the totality of the circumstances." *State v. Pigott*, 320 N.C. 96, 99 (1987) (photo array unconstitutionally suggestive where over half of the photos were unclear and one photo showed deputy in uniform). In determining whether a suggestive procedure resulted in a substantial likelihood of misidentification, the court generally considers five factors (hereinafter "the *Harris* factors"):

- the opportunity to view the perpetrator at the time of the crime;
- the witness's degree of attention;
- the accuracy of the witness's prior description of the perpetrator;
- the certainty of the witness at the time of confrontation;
- the time elapsed between the crime and the confrontation.

State v. Harris, 308 N.C. 159 (1983) (citing *Neil v. Biggers*, 409 U.S. 188 (1972)); *see also State v. Pinchback*, 140 N.C. App. 512, 518 (2000) (granting new trial to defendant where pretrial identification was suggestive and resulted in a substantial likelihood of misidentification).

In-court identifications may be tainted by unconstitutional pretrial identification procedures. An impermissibly suggestive pretrial identification procedure may taint an in-court identification. *State v. Flowers*, 318 N.C. 208 (1986); *State v. Headen*, 295 N.C. 437 (1978). Generally, the standard for permitting an in-court identification in the wake of an unconstitutional pretrial identification is identical to the standard for admitting an out-of-court identification. "In both cases, the eyewitness testimony will be permitted unless the pretrial identification procedure was so unnecessarily suggestive as to give rise to such a substantial likelihood of irreparable misidentification that admitting the identification testimony would be a denial of due process." *United States v. Clausen*, 328 F.3d 708, 713 (3d Cir. 2003). Before allowing an in-court identification that has been challenged as tainted by an impermissibly suggestive pretrial procedure, the court should conduct a voir dire of the witness and determine by clear and convincing evidence that the in-court identification does not result from the pretrial identification, but rather is of independent origin, meaning that it is based on the witness's observations of the suspect at the time of the crime. *Flowers*, 318 N.C. 208, 216; *State v. Freeman*, 313 N.C. 539, 545 (1985); *State v. Thompson*, 303 N.C. 169, 172–73 (1981). A court determines whether an eyewitness identification is of independent origin by weighing the *Harris* factors, discussed above, against the corrupting influence of the suggestive pretrial identification procedure. *State v. Farmer*, 177 N.C. App. 710, 717 (2006) (quoting *Flowers*, 318 N.C. 208, 220); *State v. Pigott*, 320 N.C. 96, 100 (1987).

Practice note: According to some scholars, the standard employed by North Carolina courts to determine whether an identification is admissible despite a suggestive pretrial identification procedure is based on a misinterpretation of U.S. Supreme Court case law. Law professor Brandon L. Garrett observes that most states, including North Carolina, allow in-court identifications following impermissibly suggestive pretrial identification procedures if the identification has an "independent origin" or "independent source," terms that are used interchangeably to indicate that the identification stems from the witness's observations of the suspect at the time of the crime rather than from the suggestive pretrial procedure. *See Farmer*, 177 N.C. App. 710, 716; *State v. Jordan*, 49 N.C. App. 561, 565 (1980). Garrett argues that this interpretation conflicts with the one announced in *Manson v. Brathwaite*, 432 U.S. 98 (1977), and confuses two lines of U.S. Supreme Court cases addressing the admissibility of eyewitness identifications. *See* Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 478–79 (2012).

Garrett posits that the applicable standard for evaluating an in-court identification should be the one articulated in *Brathwaite*, 388 U.S. 218—that is, whether the pretrial identification procedure was "unnecessarily suggestive" and, if so, whether the in-court identification is "nevertheless reliable." *See* Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 468. According to Garrett, the U.S. Supreme Court's opinions in *Brathwaite*, 432 U.S. 98 and *United States v. Wade,* 388 U.S. 218 (1967), instruct that the "independent origin" test only applies to challenges based on the Sixth Amendment right to counsel—that is, where defense counsel was not present during a post-indictment lineup and the State nevertheless seeks to introduce an identification by the witness who participated in the uncounseled lineup. *United States v. Wade,* 388 U.S. 218 (1967); *State v. Hunt,* 339 N.C. 622, 646–47 (1994). *See infra* § 3.4B, Right to Counsel. The "independent origin" inquiry is more appropriate in the context of a Sixth Amendment challenge, where the constitutional violation is primarily procedural, not substantive as in a case in which the pretrial identification procedure was unnecessarily suggestive. *See* Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 465 (2012) ("There are stronger arguments that an identification could have an 'independent origin' in court if the pretrial identification was not suggestive."). Garrett's view is bolstered by scientific evidence indicating the difficulty of determining how a witness's memory may have been affected by a suggestive pretrial identification procedure, which casts into doubt the ability of the court to determine whether a witness's in-court identification is based on observations of the suspect at the time of the crime, a pretrial identification procedure, or some combination of the two. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011).

In light of the above, in resisting a ruling that a challenged in-court identification is of independent origin and therefore reliable, defenders should argue that the "independent origin" standard is inconsistent with U.S. Supreme Court decisions governing the interpretation of the Due Process Clause and with scientific evidence about the impact of suggestive pretrial identification procedures on witness memory.

State guarantee of due process. Although North Carolina appellate courts have not found that the state constitutional guarantee of due process exceeds the protections provided by the Fourteenth Amendment in the eyewitness identification context, attorneys should continue to assert the law of the land clause of article I, section 19 of the North Carolina Constitution. Recently, judges in other jurisdictions have questioned the U.S. Supreme Court's test for the admissibility of eyewitness testimony "based on the last 35 years of social science research into the reliability of eyewitness identifications." *United States v. Greene*, 704 F.3d 298, 305 n.3 (4th Cir. 2013) (discussing *New Jersey v. Henderson*, 27 A.3d 872 (N.J. 2011) and *Oregon v. Lawson*, 291 P.3d 673 (Or. 2012)).

In *Henderson*, the New Jersey Supreme Court held that state guarantees of due process provided greater protections than those afforded by the Fourteenth Amendment as interpreted by the U.S. Supreme Court in *Manson v. Brathwaite*, 432 U.S. 98 (1977). The court found that a defendant is entitled to a hearing to explore "all relevant system and estimator variables" related to an eyewitness identification if he meets an initial burden of

showing some evidence of suggestiveness tied to a system variable (one that is a product of the criminal justice process) rather than an estimator variable (one that is not). *Henderson*, 27 A.3d 872, 919. (For a further discussion of system and estimator variables, see *supra* "Estimator and system variables" in § 3.2B, Factors Affecting Eyewitness Identifications.) On such a showing, the burden shifts to the State to offer proof that the eyewitness identification is reliable, considering both system and estimator variables. The identification must be suppressed if, under a totality of circumstances, the court determines that there is a very substantial likelihood of misidentification. If this standard is not met, the court still must provide tailored jury instructions concerning the problems with eyewitness identification.

The New Jersey Supreme Court determined that the governing test for evaluating the admissibility of identifications needed revision, since "[s]tudy after study revealed a troubling lack of reliability in eyewitness identifications." *Henderson*, 27 A.3d 872, 877. The court unanimously concluded that greater protections were needed to guard against suggestiveness caused by system variables, and warned that "the very integrity of the criminal justice system and the courts' ability to conduct fair trials" was at stake. *Id.* at 879. Similarly, the Oregon Supreme Court noted that in the past 33 years, over 2,000 empirical studies have attested to the unreliability of eyewitness identification, and that the court's existing method of evaluating the admissibility of eyewitness testimony was "incomplete and, at times, inconsistent with modern scientific findings." *Oregon v. Lawson*, 291 P.3d 673, 688 (Or. 2012). The Fourth Circuit Court of Appeals recently stated:

> The New Jersey and Oregon opinions represent a growing awareness that the continuing soundness of the *Manson* test has been undermined by a substantial body of peer-reviewed, highly reliable scientific research.

United States v. Greene, 704 F.3d 296, 305 n.3 (4th Cir. 2013) (citing Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 453 (2012) (observing that *Manson* was decided before the bulk of the research that has "revolutionize[d] our understanding of human memory")). While no North Carolina opinions have undertaken a similar review to date, the passage of the Eyewitness Identification Reform Act reflects the State's recognition of the importance of social science in devising standards and procedures to guard against the risks of misidentification. *See infra* § 3.5, Eyewitness Identification Reform Act.

B. Right to Counsel

Sixth Amendment right to counsel at lineups and showups. The right to counsel at a lineup after the initiation of adversary proceedings (the holding of initial appearance or indictment, whichever occurs first) in which the accused is exhibited to an identifying witness is assured by the Sixth Amendment. U.S. CONST. amend. VI; *see Rothgery v. Gillespie County*, 554 U.S. 191 (2008); *United States v. Wade,* 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *State v. Cherry*, 298 N.C. 86 (1979). The

presence of counsel in such circumstances is intended to guard against the "dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Wade*, 388 U.S. 218, 228. In contrast, the Sixth Amendment does not guarantee the right to counsel where a lineup occurs before adversarial proceedings have commenced. *State v. Henderson,* 285 N.C. 1 (1974), *vacated on other grounds,* 428 U.S. 902 (1976). Nor does the Sixth Amendment guarantee the right to counsel at a photographic identification procedure. *United States v. Ash,* 413 U.S. 300 (1973).

If a violation occurs, the identification must be suppressed. Further, an in-court identification by a witness who took part in an invalid pretrial lineup 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 State v. Hunt,* 339 N.C. 622, 646–47 (1994); *see also supra* "In-court identifications may be tainted by unconstitutional pretrial identification procedures" and "Practice note" in § 3.4A, Due Process.

For a further discussion of the right to counsel generally and at lineups, see 1 NORTH CAROLINA DEFENDER MANUAL Ch. 12 (Right to Counsel) (2d ed. 2013).

Statutory right to counsel during nontestimonial identification procedures. A suspect has a right to have counsel present during a nontestimonial identification procedure. *See* G.S. 15A-279(d); G.S. 7A-451(b)(2); *State v. Satterfield*, 300 N.C. 621 (1980). Any statements made during the proceeding must be suppressed if the defendant does not have counsel present. G.S. 15A-279(d); *see also 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); 1 NORTH CAROLINA DEFENDER MANUAL § 14.4 (Illegal Identification Procedures) (2d ed. 2013).

C. North Carolina Rules of Evidence

A largely untested but potential avenue for excluding unreliable identifications is through reliance on the North Carolina Rules of Evidence. The evidence arguments are that an unreliable identification: (1) risks prejudicing or misleading the jury in violation of N.C. R. EVID. 403; (2) is not based on "personal knowledge" but is instead based on the influence of system variables (*see supra* "Estimator and system variables" in § 3.2B, Factors Affecting Eyewitness Identifications) that have interfered with the eyewitness's memory in violation of N.C. R. EVID. 602; and (3) is not "rationally based on the perception of the witness" but is instead a result of post-event factors that have distorted the original memory in violation of N.C. R. EVID. 701.

Support for these arguments can be found in a recent U.S. Supreme Court decision, in which the court observed that one of the "safeguards built into our adversary system" in the context of fallible eyewitness identifications is "[s]tate . . . rules of evidence . . . [that] permit trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury." *Perry v. New Hampshire*, 565 U.S. ___, ___, 132 S.Ct. 716, 728–29 (2012). *See also Oregon v. Lawson*, 291 P.3d 673 (Or. 2012) (en banc) (analyzing admissibility of eyewitness

identifications under Oregon Rules of Evidence 602, 701, and 403). Seeking exclusion of unreliable identifications on the basis of evidentiary rules offers the additional benefits of: (1) protecting against unreliable identifications regardless of their source (after *Perry*, 565 U.S. ___, ___, 132 S.Ct. 716, federal due process guarantees only apply to cases in which the suggestive identification procedures are orchestrated by the police); and (2) potentially shifting the initial burden of establishing the reliability of the identification to the State for purposes of Rule 602 and 701 analyses. *See Lawson*, 291 P.3d 673, 689 (ruling that the State bears the initial burden of establishing the admissibility of eyewitness identification evidence challenged on evidentiary grounds since, "[i]n evidentiary matters . . . the proponent of the evidence—in identification matters, usually the state, although not necessarily so—traditionally bears the initial burden of establishing the admissibility of the proffered evidence").

3.5 Eyewitness Identification Reform Act

North Carolina's Eyewitness Identification Reform Act (EIRA), G.S. 15A-284.50 through G.S. 15A-284.53, was passed in 2007. EIRA sets forth rules governing pretrial eyewitness identification lineups, whether live or by photo array. The law was passed after organizations such as the North Carolina Actual Innocence Commission, among others, found that certain identification procedures help prevent wrongful identifications and wrongful convictions. The opening section of the EIRA reflects this view: "The purpose of this Article is to help solve crime, convict the guilty, and exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects." G.S. 15A-284.51. The law reflects best practices developed to prevent suggestive pretrial identification procedures, including a requirement that lineups must be "double-blind", i.e., conducted by someone who is not participating in the investigation and does not know which person is the suspect; that individuals or photographs should be presented to witnesses sequentially rather than simultaneously; and that lineups should include at least five fillers resembling the suspect at the time of the crime. G.S. 15A-284.52(b) and (c).

The specific statutory requirements go beyond the constitutional minimum in ensuring that lineups are conducted in a non-suggestive manner. Reliability is at the heart of whether an identification procedure is constitutional, however, and the EIRA requirements could be viewed as North Carolina's interpretation of what it takes to ensure that identification procedures are reliable.

In the case of an EIRA violation, the following remedies are available:

- Failure to comply with EIRA shall be considered by the court in adjudicating motions to suppress eyewitness identification.
- Failure to comply with the requirements of EIRA is admissible in support of claims of misidentification, so long as the evidence is otherwise admissible.

- When evidence of compliance or noncompliance with EIRA is presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance in determining the reliability of eyewitness identifications.

G.S. 15A-284.52(d).

3.6 Procedures for Challenging Eyewitness Identification Evidence

There are three main ways in which defense attorneys can seek to mitigate the problems associated with cross-racial identifications: by ensuring that identification practices are not suggestive, by suppressing unreliable eyewitness identifications, and by educating triers of fact about the hazards of cross-racial identifications. Sample motions to suppress eyewitness identifications can be found in the Race Materials Bank at www.ncids.org (select "Training & Resources").

A. Motions to Suppress Pretrial Identifications and Prevent In-Court Identifications

General considerations. In determining whether your client has a viable motion to suppress evidence of pretrial identification procedures and prevent in-court identifications, you should focus on the following questions:

- Does the case involve a cross-racial identification?
- Did a "suggestive" pretrial identification procedure take place?
- If so, did the suggestive procedure create a substantial risk of misidentification?
- Did the pretrial identification procedure comply with EIRA?
- Was there a lineup conducted outside of the presence of counsel after the initiation of adversary proceedings (the holding of initial appearance or issuance of indictment, whichever came first)?
- Would any improper pretrial identification procedure taint an in-court identification of the defendant?

Voir dire of the eyewitness. In challenging the admissibility of an eyewitness identification, you should request a hearing involving voir dire of the challenged witness. *See State v. Flowers*, 318 N.C. 208, 216 (1986) ("Before admitting challenged in-court identification testimony, the trial court should conduct a voir dire, find facts, and determine the admissibility of the testimony.").

Practice note: Even if you are ultimately unsuccessful with your pretrial motion to suppress an eyewitness identification, litigating the suppression motion may uncover useful information that will help you to prepare your cross-examination of the eyewitness. The ultimate issue concerning such a motion is whether, under the totality of the circumstances, the eyewitness identification is reliable. For this reason, the scope of

the inquiry is broad. Moving to suppress an eyewitness identification may lead to useful discovery and allow you to avoid surprises when you cross-examine the eyewitness.

Implication of cross-racial impairment on lineup construction. In support of your motion to suppress an identification made by a witness who is of a different race than your client, consider whether the pretrial identification procedures may have exacerbated problems associated with cross-racial identifications. Lineups should include the suspect and several fillers who resemble the suspect and are consistent with the witness's description of the perpetrator. EIRA provides that lineups "shall be composed so that the fillers generally resemble the eyewitness's description of the perpetrator, while ensuring that the suspect does not unduly stand out from the fillers"; and that "[a]ll fillers selected shall resemble, as much as practicable, the eyewitness's description of the perpetrator in significant features, including any unique or unusual features." G.S. 15A-284.52(b)(5). Violations of EIRA must be considered by the court in ruling on motions to suppress evidence of eyewitness identification. G.S. 15A-284.52(d)(1).

To ensure that the fillers resemble the description of the perpetrator and the suspect reasonably resembles the fillers, it is important that the person selecting fillers for lineups is capable of identifying people who adequately resemble the suspect and witness's description of the perpetrator. Three studies found that lineup constructors are "more selective about which photos [go] into their own-race lineups than their other-race lineups. As a result, the fairness of other-race lineups [is] negatively affected." EYEWITNESS TESTIMONY § 4-13 (citing John C. Brigham & David J. Ready, *Own-Race Bias in Lineup Construction*, 9 LAW & HUM. BEHAV. 415 (1985); R. C. L. Lindsay et al., *Does Race Influence Measures of Lineup Fairness?*, 13 APPLIED COGNITIVE PSYCHOL. S109 (1999); John C. Brigham et al., *Standards for Evaluating the Fairness of Photograph Lineups*, 11 BASIC & APPLIED SOC. PSYCHOL. 149 (1990). Accordingly, experts recommend that lineups be created by law enforcement officers of the same race as the subjects pictured in the lineup whenever possible. *See, e.g.,* EYEWITNESS TESTIMONY at § 4-13; June E. Chance & Alvin G. Goldstein, *The Other-Race Effect and Eyewitness Identification*, *in* PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 153, 173 (1996).

Illustration: Defense motions to suppress in two North Carolina cases at the trial level illustrate the ways in which race may affect pretrial eyewitness identification procedures. The descriptions below are drawn from those motions, which are available in the Race Materials Bank at www.ncids.org (select "Training & Resources").

In a Cleveland County case involving cross-racial identification, a Black defendant was placed in a lineup after a robbery and kidnapping in which a witness identified the perpetrator as a Black male with short hair, parted down the middle. *See* Motion to Suppress, 2003 Cross-Racial ID Case in the Race Materials Bank at www.ncids.org (select "Training & Resources"). In the photo lineup shown to the White witnesses, only the suspect had his hair parted down the middle; the fillers did not. One witness identified the defendant by explicit reference to his middle part. The defendant filed a motion to suppress the pretrial identification and preclude in-court identification as irreparably

tainted. In anticipation of the objection that it would have been difficult to find a photograph of a Black man with a middle part, counsel's affidavit in support of his motion to suppress the pretrial eyewitness identification procedures included information from an investigator who interviewed Cleveland County barbers reflecting that the middle part was a common hair style for Black men in Cleveland County. Right before jury selection, the eyewitnesses told the prosecutor they were unable to identify the defendant if asked to point him out in the courtroom, and the charges were dismissed. *See* Motion to Suppress, 2003 Cross-Racial ID Case; Motion to Prevent In-Court ID of Defendant, 2003 Cross-Racial ID Case; Suppression Affidavit, 2003 Cross-Racial ID Case; and Motion to Hire Eyewitness ID Expert, 2003 Cross Racial ID Case; all in the Race Materials Bank at www.ncids.org (select "Training & Resources").

In another case involving cross-racial eyewitness identification, a Black defendant was charged with robbery after a White witness identified him in a photo lineup in which he was the only subject with corn-rows or braids, while all the other subjects had hairstyles resembling one another. *See* Motion to Suppress, 2002 Cross-Racial ID Case in the Race Materials Bank at www.ncids.org (select "Training & Resources"). Further, the defendant was the only person in the lineup with a black hat, and witnesses had indicated that the robber was wearing a black hat. Before hearing the motion, the same White eyewitness who had identified him from the photo lineup saw the defendant in open court, observed that he was far shorter than the perpetrator, and said, "That's not him." The case was then dismissed.

These cases illustrate that officers constructing lineups may fail to take unique or unusual features into account, resulting in suggestive identification procedures.

Attorneys concerned that the filler photos in a lineup do not adequately resemble their client may want to determine the race of the police officer responsible for assembling the lineup. If the officer is of a different race than the subjects pictured in the lineup, defense counsel should consider using the above studies as part of a motion to suppress the pretrial identification procedure and prevent any subsequent in-court identification. If the motion to suppress is denied, counsel should consider presenting expert testimony about cross-racial lineup construction to educate the jury about the risk that the police officer's race may have affected his or her ability to construct a non-suggestive identification procedure. *See infra* § 3.6D, Expert Testimony.

Suppressing showups. A showup is a pretrial identification procedure in which a "suspect is shown singularly to a witness or witnesses for the purposes of identification." *State v. Harrison*, 169 N.C. App. 257, 262 (2005). Showups usually occur shortly after a crime's commission, when an officer arrests a suspect and seeks confirmation from a witness that he or she has apprehended the correct person.

The U.S. Supreme Court and North Carolina appellate courts disfavor showups. *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."); *State v. Lee*, 154 N.C. App. 410, 414 (2002) (showups are "strongly

disfavored methods of identification"). Our Supreme Court has observed that "the use of a showup where other methods of identification are feasible has been widely condemned." *State v. Matthews,* 295 N.C. 265, 285–86 (1978) (noting that showups "may [be] inherently suggestive for the witnesses would likely assume that the police had brought them to view persons whom they suspected might be the guilty parties"). However, not all showups will violate a defendant's due process rights. *See State v. Lee*, 154 N.C. App. at 414 (noting that "this Court has approved the use of show-ups on numerous occasions"). As in the evaluation of any pretrial identification procedure, "[t]he trial court must employ the totality of the circumstances test to evaluate the reliability of a show-up identification and determine whether the procedures created a substantial likelihood of irreparable misidentification." *Id.* (quoting *State v. Fowler*, 353 N.C. 599, 617 (2001)) (internal quotations omitted); *see also* ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 558–59 (UNC School of Government, 4th ed. 2011) (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).

While confirming that showups are "sometimes troubling," the North Carolina Court of Appeals has held that EIRA does not apply to showups. *State v. Rawls*, 207 N.C. App. 415, 423 (2010). (The *Rawls* court did not address the question of whether EIRA applies to "photo showups," in which an eyewitness is shown a single photograph of a suspect during a pretrial identification procedure.) *Rawls* should not be read to mean that officers may avoid EIRA lineup requirements by conducting showups when not warranted by legitimate law enforcement objectives. *Rawls* involved a 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. Whether or not EIRA applies to a showup in a particular case, the statutory provisions may assist defenders in framing an argument that the showup was unconstitutionally suggestive. For example, the provision in EIRA mandating at least five fillers in all lineups reflects legislative concerns that, the fewer persons included in a lineup, the more likely it is to result in mistaken identification. G.S. 15A-284.52(b)(5).

Importance of raising issue pretrial in motion to suppress rather than in motion to dismiss. North Carolina appellate courts have held that an eyewitness's identification of the defendant as the perpetrator is generally sufficient to defeat a motion to dismiss on the basis of identity. *See State v. Carpenter*, __ N.C. App. __, 754 S.E.2d 478 (2014); *State v. Mobley*, 86 N.C. App. 528, 532 (1987). This standard underscores the importance of challenging identification evidence pretrial.

Practice note: While you must make a motion to suppress evidence of pretrial identifications and tainted in-court identifications before trial (subject to certain exceptions), if your motion is denied you also must object to the evidence of the pretrial

identification procedure when it is introduced and to the in-court identification of the defendant when it is made to preserve those issues for appeal. *See State v. Hunt*, 324 N.C. 343, 355 (1989) ("Assuming 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 object, you will waive the objections and will have to meet the higher standard of plain error on appeal. *See State v. Hammond*, 307 N.C. 662, 666 (1983); *State v. Stowes*, ___ N.C. App. ___, 727 S.E.2d 351, 355 (2012).

B. Voir Dire

Voir dire is the defense's first opportunity to question the jurors about the eyewitness identification issues central to the defendant's theory of the case. It provides an important opportunity for eliciting information from prospective jurors about their experiences and views on cross-racial identification. Defense attorneys should consider integrating cross-racial eyewitness identification issues into their voir dire questions when it is at issue. For example, if your case involves a cross-racial identification, you may want to inform the potential jurors of this fact and explore their opinions and experiences regarding cross-racial identification. If your theory of the case involves cross-racial impairment, your goal in voir dire is to weed out jurors who may not be receptive to evidence of this phenomenon. For example, you may want to ask potential jurors:

- Tell me about the most memorable time when someone mistook you or someone you know for someone else. In your opinion, what factors played into that mistake?
- Tell me about your most memorable experience where you or someone you know jumped to a conclusion about a person because of that person's race.
- Do you have an opinion about whether White people find it more difficult to identify Black people than to identify other White people? Tell me about that opinion. Tell me your most memorable experience where you or someone you know had trouble identifying a person of another race.
- Do you think that only people who are racially biased find it difficult to identify people of other races? Tell me how you formed that opinion.
- Do you think that if a White person has a family member or a close friend who is Black, then that White person will have no difficulty in identifying a Black person? Tell me about that opinion.

Voir dire allows defenders to explore whether any of the potential jurors appear overly confident about the accuracy of cross-racial identifications. In general, whenever cross-racial misidentification forms part of the defense theory, attorneys should use voir dire to determine whether potential jurors believe that witnesses can be honest and confident, but nevertheless wrong in their identification of a perpetrator; whether they understand the concept of cross-racial impairment; and whether they believe that cross-racial impairment may affect even non-prejudiced witnesses. *See* Kathryn M. Kase, *Eyewitness Identification: Tools for Litigating the Identification Case* in the Race Materials Bank at www.ncids.org (select "Training & Resources").

You may also consider petitioning the court for use of a questionnaire in cases involving eyewitness identifications issues in general and cross-racial identification issues in particular. Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, THE ADVOCATE, May 2008, at 57, 61. Potential jurors "may be more likely to reflect honestly and independently when answers are given in writing . . . versus in the public and intimidating environs of a criminal court." *Id.* For examples of questionnaire questions, see Kathryn M. Kase, *Eyewitness Identification: Tools for Litigating the Identification Case* in the Race Materials Bank at www.ncids.org (select "Training & Resources").

On potentially sensitive issues such as the impact of race on eyewitness identifications, attorneys may want to request permission to voir dire prospective jurors individually. There is little North Carolina law addressing individual voir dire in non-capital cases, but the trial judge's discretion over the conducting of voir dire implies the authority to order individual voir dire concerning sensitive matters. *See* 2 NORTH CAROLINA DEFENDER MANUAL Ch. 25 (Selection of Jury) (2d ed. 2012).

Avoiding "stake out" questions while exploring cross-racial impairment. Lawyers are prohibited from asking questions that attempt to indoctrinate potential jurors as to their theory of the case. *See State v. Parks*, 324 N.C. 420, 423 (1989). For this reason, lawyers may not "stake out" jurors by asking questions that attempt to commit prospective jurors to a specific course of action in the case. *See State v. Chapman*, 359 N.C. 328, 345–46 (2005). It is possible, however, to determine whether jurors will be open to expert testimony on eyewitness identification without running afoul of the prohibition on staking out jurors. For example, the North Carolina Supreme Court found that the following question did not constitute an attempt to stake out jurors: "If someone is offered as an expert in a particular field such as psychiatry, could you accept him as an expert, his testimony as an expert in that particular field." *State v Smith*, 328 N.C. 99, 131 (1991). These types of questions may allow you to determine whether potential jurors will bring an open mind to testimony from an expert witness on subjects such as cross-racial impairment.

In conducting voir dire in a cross-racial identification case, the following points should be kept in mind:

- Language matters. During voir dire, and throughout the case, eyewitness testimony should "be referred to as the eyewitness's 'belief' or 'opinion.'" EYEWITNESS TESTIMONY at § 9-7[b].
- Jurors in eyewitness identification cases should be willing to form conclusions that are independent of an eyewitness's opinion when presented with evidence or information that calls reliability into doubt.
- Lawyers should build trust with potential jurors before diving into issues of race. Addressing less sensitive issues first will help you maintain a comfortable and honest conversation when the subject turns to race.

- Recommended approaches for discussing race include discussions of historical racial prejudice and clarification that cross-racial impairment phenomenon is not indicative of racial prejudice or animus.
- When panelists describe incidents in which they or others were involved, inquire into possible cross-racial issues. For example, "What was the race of the perpetrator?" And, if the perpetrator was of a different race, "Did you have difficulty describing him or her?" Overly confident answers may suggest that the juror would not be receptive to evidence about the cross-racial impairment phenomenon.

Seek racially diverse and representative juries. Research suggests that racial diversity alters jury deliberations. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006). A study by Samuel R. Sommers concluded that racially diverse juries "had longer deliberations, greater focus on the actual evidence, greater discussion of missing evidence, fewer inaccurate statements . . . and greater discussion of race-related topics." Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1180–81 (2012) (summarizing findings of Sommers' study). Sommers' study also revealed pre-deliberation effects: "Simply by knowing that they would be serving on diverse juries (as compared to all-White ones), White jurors were less likely to believe, at the conclusion of evidence but before deliberations, that the Black defendant was guilty." *Id*. at 1181. For further discussion of the value of diverse juries, see *infra* Ch. 8, Addressing Race at Trial.

C. Cross-Examination

Do not suggest an eyewitness is racially prejudiced where not supported by evidence. In a criminal case where the defense theory is mistaken cross-racial identification, the defense attorney's cross-examination of an eyewitness can be a delicate matter. Eyewitnesses often arouse jury sympathy, and villainizing an eyewitness may alienate jurors. When there is no evidence suggesting that an eyewitness harbors explicit racial biases, an aggressive cross-examination designed to demonstrate that an eyewitness is unable to recognize and identify members of other races may be seen as offensive and runs the risk of alienating the jury. "Counsel opposing an eyewitness wants to communicate the impression that he or she is confident that the eyewitness is wrong and that he or she does not ask the jurors to blame the witness for it." EYEWITNESS TESTIMONY at § 10-12.

However, when there is evidence that the eyewitness is racially biased, eliciting such testimony may lead jurors to distance themselves emotionally from the eyewitness and may bolster the defendant's theory of the case. *See Simmons v. Collins,* 655 So. 2d 330 (La. 1995) (evidence of eyewitness's use of racial epithets to demonstrate eyewitness's bias against Black people ruled admissible by Louisiana Supreme Court). In the O.J. Simpson murder trial, for example, commentators viewed evidence of racist remarks by Detective Mark Fuhrman as a key factor that caused the jury to be critical of his testimony and ultimately return a not-guilty verdict. *See, e.g.,* Leonard M. Baynes,

A Time to Kill, the O.J. Simpson Trials, and Storytelling to Juries, 17 LOY. L.A. ENT. L.J. 549, 563 (1997) ("The clincher for the jury was the Mark Fuhrman tapes.").

Where an expert witness will testify for the defense on the subject of eyewitness identification, and where the defense attorney knows that the eyewitness has had limited exposure to members of the defendant's race, it may be useful to cross-examine the eyewitness in a non-accusatory manner concerning the nature and extent of his or her interactions with members of the defendant's race. *See* June E. Chance & Alvin G. Goldstein, *The Other-Race Effect and Eyewitness Identification*, *in* PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 153, 170–72 (1996).

Eyewitness confidence should not be the focus of the cross-examination. Historically, cross-examination of eyewitnesses tended to focus on witness confidence, but research shows that confidence is an unreliable indicator of accuracy. Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCH. PUB. POL. & L. 817 (1995). Defense attorneys should avoid a line of questioning that focuses too heavily on witness confidence so as not to suggest that jurors should associate confidence with accuracy, and may want to file a motion in limine prohibiting the prosecutor from implying that confidence is correlated with accuracy. *See* Lisa Steele, *Trying Identification Cases: An Outline For Raising Eyewitness Id Issues*, THE CHAMPION, Nov. 2004, at 8.

Lay the foundation for expert testimony during cross-examination. Cross-examination can help lay the foundation for expert testimony (when admitted) by establishing facts such as poor lighting, the presence of a weapon, the witness's experience with members of the defendant's race, or the difference between the race of the perpetrator and the race of the witness. *See supra* § 3.2B, Factors Affecting Eyewitness Identifications. Even where expert testimony will not be offered or has not been admitted, cross-examination presents an opportunity to elicit the factors that make eyewitness opinions less reliable. *See id.*

Cross-examination of officers. When cross-examining police officers, attorneys should be familiar with department policies and procedures, and the requirements of the Eyewitness Identification Reform Act. A key goal in cross-examining officers involved in pretrial identification procedures is to point out any differences between the procedures used and the legislatively mandated procedures and departmental policies. In a case involving a pretrial lineup constructed by an officer of a different race than the suspect, counsel may want to question the officer about department policies or practices concerning cross-racial lineup construction. *See supra* § 3.6A, Motions to Suppress Pretrial Identifications and Prevent In-Court Identifications.

Cross-examination alone may not convince jurors of eyewitness unreliability. Some research suggests that cross-examination alone may not drive home for jurors the distinction between accurate and inaccurate eyewitness identification. R. C. L. Lindsay et al., *Mock-juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension,* 13 LAW & HUM. BEHAVIOR 333 (1989). In eyewitness identification cases,

defense attorneys should consider the cross-examination of an eyewitness as one piece of a multi-pronged strategy to address unreliable identifications. Suppression of eyewitness identifications, expert witnesses on eyewitness identification, and jury instructions on eyewitness identifications should also be pursued in order to prevent jurors from unduly relying on eyewitness identification evidence.

D. Expert Testimony

Purpose. One goal of introducing expert testimony on the hazards of eyewitness identification is to dispel potential misconceptions about the reliability of eyewitness identification testimony. One study found that jurors who heard expert psychological testimony in eyewitness identification cases "rated the defense's case to be significantly stronger than did jurors who heard no expert testimony." MISTAKEN IDENTIFICATION at 227. Another study found that such testimony assists jurors in grasping the complex factors that influence eyewitness identification accuracy. *Id.* at 240–41.

General standard. The North Carolina Supreme Court has held that "expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified." *State v. Locklear*, 349 N.C. 118, 147 (1998) (quotation omitted). Expert testimony will be admitted when it is helpful to the jury, and "North Carolina case law requires only that the expert be better qualified than the jury as to the subject at hand." *State v. Martin*, __ N.C. App. __, 729 S.E.2d 717, 720 (2012) (quoting *State v. Davis*, 106 N.C. App. 596, 601 (1992)). "The trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140 (1984).

Rule 702. In addition to meeting the general standard of helpfulness, expert testimony concerning eyewitness identification generally, and cross-racial eyewitness identification in particular, must satisfy the requirements of North Carolina Rule of Evidence 702, Testimony by experts. That rule provides that

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
> (2) The testimony is the product of reliable principles and methods.
> (3) The witness has applied the principles and methods reliably to the facts of the case.

Rule 702(a) was amended in 2011 to require that the expert's testimony be "based upon sufficient facts or data" and the expert have "applied the principles and methods reliably to the facts of the case." These amendments essentially codified the principles in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *State v. McGrady*, ___ N.C. App. ___, 753 S.E.2d 361 (2014) (so holding). In essence, Rule 702(a) requires the judge

to serve a gatekeeping function, ensuring that expert testimony is relevant and reliable. *See also* Alyson Grine, *Legislative Change Regarding Expert Testimony*, IDS FORENSIC RESOURCES BLOG (Aug. 17, 2011). Scientific research supports that the study of eyewitness identification is a valid and empirically based area of expertise beyond the understanding of most jurors, and defenders should be prepared with studies to this effect when offering expert testimony about eyewitness identification. *See supra* § 3.2, Overview of Risks of Misidentification; § 3.3, Cross-Racial Impairment.

Rule 403. Expert testimony on eyewitness identification also must satisfy North Carolina Rule of Evidence 403, Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. In North Carolina, "the admission of expert testimony regarding memory factors is within the trial court's discretion, and the appellate court will not intervene where the trial court properly appraises probative and prejudicial value of the evidence under Rule 403 and the Rules of Evidence." *State v. Cole*, 147 N.C. App. 637, 642–43 (2001) (quoting *State v. Cotton*, 99 N.C. App. 615, 621 (1990), *aff'd*, 329 N.C. 764 (1991)) (holding that the trial court did not abuse its discretion by refusing to admit expert testimony from a psychology professor on factors complicating eyewitness identifications where the probative value of the proposed testimony "was outweighed by the risk of confusing the jury").

Rejection of expert testimony on eyewitness identification may constitute abuse of discretion. In states that review the exclusion of expert testimony on eyewitness memory for abuse of discretion, the rejection of such testimony has been held reversible error in some cases. *See, e.g., State v. Chapple,* 660 P.2d 1208 (Ariz. 1983); *People v. McDonald*, 690 P.2d 709 (Cal. 1984) (holding that exclusion of such testimony will ordinarily constitute an abuse of discretion where eyewitness identification is a key element of the prosecution's case, not corroborated by evidence of independent reliability, and defendant offers a qualified expert on eyewitness issues not likely to be fully known or understood by jury), *overruled on other grounds by* People v. Mendoza, 4 P.3d 265 (Cal. 2000). *See also United States v. Brownlee*, 454 F.3d 131 (3d Cir. 2006) (reversal for failure to allow expert to testify about effect of showup identifications, the lack of correlation between confidence and accuracy, confirming feedback, and time delay, even where trial court had allowed testimony on cross-racial impairment and other identification variables); *People v. Legrand,* 867 N.E.2d 374 (N.Y. 2007) (where there is little or no corroborating evidence supporting an eyewitness identification, it is an abuse of discretion to exclude expert testimony).

Failure to offer expert witness testimony on eyewitness identification may amount to ineffective assistance of counsel. In a federal habeas petition, a U.S. District Judge ruled that a North Carolina defense attorney rendered ineffective assistance of counsel by failing to consult with and call as a witness an expert on the reliability of eyewitness testimony generally and on cross-racial identifications specifically. *Moore v. Keller*, 917 F. Supp. 2d 471 (E.D.N.C. 2012), *rev'd sub nom*, *Moore v. Hardee*, 723 F.3d 488 (4th Cir. 2013). This ruling was reversed on appeal because the Fourth Circuit determined that counsel was not so ineffective as to meet the "doubly deferential" standard mandated by *Strickland v. Washington,* 466 U.S. 668 (1984) (holding that ineffective assistance of

counsel requires a demonstration that counsel's representation fell below an objective standard of reasonableness and, but for counsel's unreasonable errors, the case outcome probably would have been different), and the Antiterrorism and Effective Death Penalty Act of 1996 (providing that, when state petitioners raise ineffective assistance of counsel claims in federal habeas actions, the reviewing court must determine whether the state court's interpretation of *Strickland* was reasonable). Despite its reversal, the district court's ruling underscores the need for defense attorneys to consider challenging the reliability of eyewitness identification in appropriate cases. *See also People v. Kindle*, 2002 WL 1554118 (Cal. Ct. App. 2002) (unpublished) (failure to consult with an eyewitness identification expert constituted ineffective assistance of counsel given the weakness of the evidence against defendant, lack of explanation for the failure to consult an expert, and reasonable probability of a different result had defense counsel presented expert testimony).

Expert testimony on cross-racial identification. Some courts have excluded expert testimony on cross-racial identification, reasoning that such testimony was within the common knowledge of the jury. *See, e.g.*, *United States v. Hudson*, 884 F.2d 1016, 1024 (7th Cir. 1989) (expert testimony regarding, among other things, the difficulty of cross-racial identification would "not aid the jury because it addresses an issue of which the jury already generally is aware, and it will not contribute to their understanding of the particular dispute"). Defenders should be prepared to counter the argument that cross-racial impairment is common sense by presenting the judge with cross-racial impairment studies and research showing that many jurors do not understand the phenomenon. *See State v. Henderson*, 27 A.3d 872 (N.J. 2011) (referencing the Report of the Special Master, *available at* www.eyeID.org, and noting that while 90% of experts recognize the problem of cross-racial impairment, only 47% of jurors do). Without expert witness testimony (and instruction from a judge on cross-racial impairment), deliberations may be inhibited because jurors may "not want to appear to harbor racist views" by suggesting that White people have difficulty distinguishing Black people. *Id.*

Practice note: If the court denies your motion to present expert testimony on eyewitness identification on the basis that the testimony is within the "common knowledge" of the jury, you may ask the judge to: take judicial notice of scientific findings about eyewitness identification generally and cross-racial identification in particular; inform the jury that it has taken judicial notice of the findings; and allow you to publish them to the jury. You may then incorporate the findings into your closing argument and request an appropriate jury instruction. *See* Lisa Steele, *Trying Identification Cases: An Outline For Raising Eyewitness Id Issues*, THE CHAMPION, Nov. 2004, at 8; Lisa Steele, *Public Knowledge, Popular Wisdom and Urban Legend: Educating the Jury About Memory on Closing Argument*, 36 CRIM. L. BULL. 316 (2000).

Judges' views on this subject may be shifting. In some cases, courts have recognized that expert testimony on eyewitness identification unreliability may be necessary, observing that "other means of attacking eyewitness identifications do not effectively substitute for expert testimony on their inherent unreliability." *Ferensic v. Birkett*, 501 F.3d 469, 481 (6th Cir. 2007). It is hard to estimate how frequently trial judges are admitting expert

testimony on eyewitness identification since "when expert testimony is admitted, there is no appeal on the admissibility issue, and no opinion is issued. Similarly, when the defendant is acquitted there is no appeal of a decision to exclude expert testimony." MISTAKEN IDENTIFICATION at 20.

The Fourth Circuit has recognized that cross-racial impairment falls into a narrow category of circumstances in which expert testimony on the reliability of eyewitness identifications may be appropriate in order to complement effective cross-examination of eyewitnesses. *United States v. Harris*, 995 F.2d 532, 535 (4th Cir. 1993). A number of courts have acknowledged that experts have found that cross-racial identifications are "particularly unreliable." *Gonzales v. Thaler*, 643 F.3d 425, 432 (5th Cir. 2011); *see also United States v. Jernigan*, 492 F.3d 1050, 1054 (9th Cir. 2007) ("Cross-racial identifications . . . are particularly suspect.").

It does not appear that North Carolina appellate courts have specifically addressed the admissibility of expert testimony on cross-racial impairment. In 2002, the North Carolina Court of Appeals recognized that "expert testimony concerning eyewitness identification may be appropriate in some cases," while reaffirming that the admissibility of expert testimony on eyewitness identification is generally a matter for the trial court's discretion. *State v. Lee*, 154 N.C. App. 410, 417 (2002). In an earlier case, the North Carolina Court of Appeals, in upholding the rejection of expert testimony on eyewitness identification, cautioned against interpreting the ruling as prohibiting such testimony across the board: "Criminal defendants have increasingly presented expert testimony on the reliability of eyewitness identification, and some courts have held its exclusion reversible error." *State v. Knox*, 78 N.C. App. 493, 496–97 (1985). The door is therefore open in North Carolina to arguments that expert testimony on cross-racial impairment is necessary and appropriate in a given case.

Practice note: In seeking the admission of expert testimony on cross-racial eyewitness identification, defendants should highlight consequences that may result from exclusion. For example, two North Carolina defendants who were denied the opportunity to present expert testimony on the unreliability of cross-racial identification, were convicted, served time in prison, and have since been exonerated.

The first was Ronald Junior Cotton. *See State v. Cotton,* 99 N.C. App. 615, 621–22 (1990) (affirming exclusion of expert witness on ground that the effects of stress, cross-racial factors, priming of memory, and confidence malleability were commonly known to jurors), *aff'd*, 329 N.C. 764 (1991); *DNA Test Frees Innocent Man*, NEWS & RECORD (Greensboro), July 1, 1995, at A1. *See supra* "Illustration" in § 3.2B, Factors Affecting Eyewitness Identifications.

The second was Terence Levonne Garner. *See State v. Garner,* 136 N.C. App. 1, 7–10 (1999); *FRONTLINE: An Ordinary Crime* (PBS television broadcast, Jan. 10, 2002); *Garner's Conviction Thrown Out*, NEWS AND OBSERVER (Raleigh), February 6, 2002, at A1. *See supra* "Case study: *State v. Terence Garner*" in § 3.3B, Impact of Cross-Racial Impairment.

Role of the expert in eyewitness identification cases. Eyewitness experts typically provide background information about factors influencing eyewitness accuracy. *See, e.g.*, MISTAKEN IDENTIFICATION at 19. An expert witness may not offer testimony as to the credibility of a witness. *See generally State v. Ryan*, __ N.C. App. __, 734 S.E.2d 598, 603 (2012) (in the absence of a proper foundation, an expert may not testify as to whether sexual abuse in fact occurred, as such testimony amounts to opinion on credibility of victim); *see also State v. Stancil*, 355 N.C. 266 (2002) (same). In the context of cross-racial identifications, experts cannot testify as to the accuracy of a particular cross-racial identification, since "the evidence . . . suggests that once a suspect has been selected from a lineup by an eyewitness, there is no known way to make a useful judgment about the likelihood that the eyewitness is correct." Steven M. Smith et al., *Postdictors of Eyewitness Errors: Can False Identifications be Diagnosed in the Cross-Race Situation?*, 7 PSYCHOL. PUB. POL'Y & L. 153, 166 (2001). Nevertheless, the context provided by an expert would assist jurors in evaluating the accuracy of the eyewitness's identification.

Case specific expert testimony. North Carolina courts may be more receptive to expert testimony on eyewitness identification when it is "case specific." In three cases, the North Carolina Court of Appeals upheld the exclusion of expert testimony on eyewitness identification where the trial court found that the proffered testimony was insufficiently tied to the facts of the case. *See State v. Lee*, 154 N.C. App. 410, 417 (2002); *State v. Suddreth,* 105 N.C. App. 122, 134 (1992); *State v. Knox*, 78 N.C. App. 493, 495–96 (1985). Thus, the court in *Lee* observed that although expert testimony "may be appropriate in some cases," it was not warranted in this case where the expert had "not interviewed the victims, did not visit the crime scene, and did not observe any of the eyewitnesses' testimony at trial." *Lee*, 154 N.C. App. 410, 417 (also discussing other factors that supported trial judge's ruling). Similarly, when reviewing the admissibility of expert testimony on eyewitness identification, courts in other jurisdictions have examined the "fit" between the testimony offered and the facts of the case. *See, e.g.*, *United States v. Dowling*, 855 F.2d 114, 118 (1988), *aff'd*, 493 U.S. 342 (1990); *United States v. Harris*, 995 F.2d 532, 535 (4th Cir. 1993). For example, testimony regarding weapon focus may properly be excluded where it is not linked to evidence about the presence of weapons at the time the eyewitness observed the perpetrator and, therefore, would not assist the jury. *Dowling,* 855 F.2d 114, 119. Defenders should ensure that the proposed expert testimony bears a close relationship to the facts of the case and that the expert has familiarized him or herself with the facts of the case before testifying. Although the defense does not have a right to have an expert interview the victim, our expanded discovery statutes ensure that the defense will be able to obtain, and an expert will be able to review, any statements of the victim or notes or other materials reflecting the victim's observations.

Indigent defendants entitled to appointment of experts. Indigent defendants are entitled to the assistance of counsel and other necessary expenses, including expert assistance. G.S. 7A-450(b); G.S. 7A-454; *State v. Tatum*, 291 N.C. 73 (1976). Defenders in cases involving cross-racial identifications may file motions for funds for an expert witness in the field of eyewitness identification, as such experts may be necessary to guarantee the defendant's fundamental right to a fair trial and to effective assistance of

counsel, including the effective cross-examination of the State's witnesses. In certain circumstances, the refusal to grant funds for an expert witness on issues concerning eyewitness identification may deprive the defendant of an opportunity to present a defense of mistaken identity and violate the defendant's constitutional right to due process under the North Carolina Constitution and United States Constitution. *See generally Tatum*, 291 N.C. 73; *State v. Ballard*, 333 N.C. 515 (1993)*; Ake v. Oklahoma*, 470 U.S. 68 (1985).

For a discussion of obtaining funds for an expert witness, including applying ex parte for funds, see 1 NORTH CAROLINA DEFENDER MANUAL Ch. 5 (Experts and Other Assistance) (2d ed. 2013). *See also* Motion for Funds for Defense Expert in Eyewitness Identification and for Ex Parte Hearing in the Race Materials Bank at www.ncids.org (select "Training & Resources").

Further resources. A sample motion for appropriate relief and petition for habeas corpus challenging the rejection of expert testimony on cross-racial identification may be found in the Race Materials Bank at www.ncids.org (select "Training & Resources"). A list of local experts in the field of eyewitness identification can be accessed on the North Carolina Indigent Defense Services Forensic Resources website. Additional resources, including a sample direct examination of an expert on cross-racial identification by Innocence Project Attorney Barry C. Scheck, can be accessed at www.eyeID.org.

E. Jury Instructions

Another way of addressing cross-racial impairment is to educate jurors about the problem through the use of jury instructions. "The purpose of a specific jury instruction on cross-racial identification is to permit juries to consider the increased possibility of misidentification in determining whether or not there is sufficient evidence of guilt." American Bar Association, *American Bar Association Policy 104D: Cross-Racial Identification*, 37 SW. U. L. REV. 917, 925 (2008).

General instructions. Jury instructions relevant to eyewitness identification cases include N.C.P.I. 101.15, credibility, including opportunity to see and hear; N.C.P.I. 104.90, identification of defendant as perpetrator of a crime; and N.C.P.I. 104.94, testimony of expert witness. In North Carolina, there is not a pattern jury instruction on cross-racial impairment. Proposed instructions are discussed below in this section.

EIRA Instruction. EIRA provides that the Court shall instruct the jurors that they may consider credible evidence of non-compliance with EIRA in evaluating the reliability of eyewitness identification. In any case in which compliance with EIRA is at issue, the defendant should tender in writing a jury instruction as governed by the statute and reflected in pattern jury instruction N.C.P.I. 105.70, live lineup requirements, and/or N.C.P.I. 105.65, photo lineup requirements.

Cross-racial impairment jury instructions in other jurisdictions. Some courts have granted jury instructions advising jurors of the empirical findings about cross-racial

impairment. In *State v. Cromedy*, 727 A.2d 457, 467 (N.J. 1999), the New Jersey Supreme Court considered forty years of empirical studies concerning the psychological factors affecting eyewitness identifications in holding that a cross-racial identification "requires a special jury instruction in an appropriate case." The court noted that most, although not all, experts agreed that people experience more difficulty identifying people of other races. The court found that, "notwithstanding those differences [in expert opinions], there is an impressive consistency in results showing that problems exist with cross-racial eyewitness identification." *Cromedy*, 727 A.2d 457, 467.

Thereafter, in *State v. Henderson*, 27 A.3d 872 (N.J. 2011), the New Jersey Supreme Court revisited and updated the state's jury instructions concerning cross-racial impairment on the basis of research conducted after *Cromedy*. The court noted that one "meta-analysis conducted after *Cromedy*, involving thirty-nine studies and nearly 5,000 identifications, confirmed the Court's prior finding" that witnesses may have more difficulty making a cross-racial identification. *Henderson*, 27 A.3d 872, 907 (citing Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3, 21 (2001)). That meta-analysis concluded that a mistaken identification is 1.56 times more likely in cross-race conditions; in other words, an innocent Black suspect has a 56% greater chance of being misidentified by a White eyewitness than by a Black eyewitness. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3, 15 (2001). The court recognized that most potential jurors were not aware of this issue: a 2006 study found that while 90% of experts recognize the problem of own-race bias, only 47% of jurors do. *Henderson*, 27 A.3d 872, 910 (referencing the Report of the Special Master, *available at* www.eyeID.org). As a result of these findings, the Court expanded its holding in *Cromedy* and concluded that an instruction cautioning jurors about the problems of cross-racial identification should be given whenever cross-racial identification is an issue at trial. *Henderson*, 27 A.3d 872, 926.

Other states in which cross-racial identification jury instructions must be given in these circumstances include Utah, *see State v. Long*, 721 P.2d 483, 494 n.8 (Utah 1986) (instruction that would satisfy the court's concerns instructs jurors to "consider whether the witness is of a different race than the criminal actor. Identification by a person of a different race may be less reliable than identification by a person of the same race."); *State v. Brink*, 173 P.3d 183, 185 n.1 (Utah 2007) (discussing with approval an instruction providing in part that "a witness identification of a person of a different race may be less reliable"); and California, *see People v. Palmer*, 203 Cal. Rptr. 474, 475 n.2 (Cal. Ct. App. 1984) (reversible error to reject defendant's proposed jury instruction that would have instructed jurors to "consider whether or not the witness is the same race as the individual he is attempting to identify. If they are not, you should consider the effect this would have on an accurate identification.").

Cross-racial jury instructions in North Carolina. The rejection of proposed jury instructions on cross-racial impairment was upheld by the North Carolina Supreme Court in 1980 and by the North Carolina Court of Appeals in 1984. *State v. Allen,* 301 N.C. 489

(1980); *State v. Miller*, 69 N.C. App. 392 (1984). Since that time, scientific evidence of cross-racial impairment has grown.

In *Allen,* the Court upheld the rejection of jury instructions on cross-racial identification because there was "no indication that race in any way affected the identification of defendant by the witnesses." *Allen*, 301 N.C. 489, 495. When requesting an instruction on cross-racial identification, counsel should argue that the reasoning of *Allen* does not account for later scientific findings concerning cross-racial impairment. *See, e.g.*, Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3, 21 (2001); *see supra* § 3.3A, Empirical Evidence of Cross-Racial Impairment. Further, defense attorneys should argue that *Allen* does not require that the defendant show that the cross-racial identification was erroneous, only that a reasonable jury could find that the identification was affected by cross-racial factors. As appropriate, defense attorneys should also distinguish the facts of their client's case from those in *Allen*, which involved an eyewitness identification occurring during the daytime in close quarters.

Recently, in *State v. Watlington*, ___ N.C. App. ___, 759 S.E.2d 116, 127 (2014), the North Carolina Court of Appeals upheld the rejection of proposed jury instructions concerning eyewitness identification that "bore a strong resemblance to the New Jersey instruction developed as a result of the *Henderson* decision." Among other things, the defendant requested that the court instruct the jury that, "since research has shown that people may have greater difficulty in accurately identifying members of a different race, [the jurors should consider] whether the witness and the alleged perpetrator are of the same or different races." *Id.* (internal quotations omitted). The court concluded that the defendant failed to offer evidentiary support for the facts embedded in the proposed instructions and that it would be improper for an appellate court to make the factual findings necessary to reverse the trial court's failure to deliver the proposed instructions. *Id.* at 129–30. The *Watlington* opinion indicates that, when proposing jury instructions concerning eyewitness identification generally and cross-racial impairment specifically, defendants should support the proposed instructions with empirical research supporting the factual assertions contained in the proposed instructions. *See supra* § 3.3A, Empirical Evidence of Cross-Racial Impairment.

Content of cross-racial impairment jury instructions. Chief Judge Bazelon of the D.C. Circuit Court of Appeals proposed a jury instruction on the issue of cross-racial identification in his concurring opinion in *United States v. Telfaire,* which has served as a model in many jurisdictions. *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972) (Bazelon, C.J., concurring). *But see State v. Allen,* 301 N.C. 489 (1980) (citing majority opinion in *Telfaire* as support for its conclusion that a cross-racial jury instruction was not mandated). This instruction, though still widely cited, contains a potentially misleading suggestion that, despite possible risks of cross-racial misidentification, jurors may "conclude that the witness has had sufficient contacts with members of the defendant's race that he would not have greater difficulty in making a reliable identification." *Telfaire*, 469 F.2d 552, 561 (Bazelon, C.J., concurring). Scientific research indicates that exposure to members of the defendant's racial group alone does

not necessarily improve the accuracy of cross-racial identifications. *See supra* "Practice note" in § 3.3C, Causes of Cross-Racial Impairment. For this reason, defense attorneys should not include this language in proposed jury instructions on cross-racial impairment.

An alternative instruction that incorporates both everyday experience and evidence from psychological studies was proposed by Professor Sherri Lynn Johnson:

> In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than members of one's own. Psychological studies support this impression. In addition, laboratory studies reveal that even people with no prejudice against other races and substantial contact with persons of other races still experience difficulty in accurately identifying members of a different race. Quite often people do not recognize this difficulty in themselves. You should consider these facts in evaluating the witness's testimony, but you must also consider whether there are other factors present in this case that overcome any such difficulty of identification.

Sherri Lynn Johnson, *Cross-Racial Identification Errors In Criminal Cases*. 69 CORNELL L. REV. 934, 976 (1984).

You may want to be prepared to propose alternative wording if the court refuses the above instruction, such as:

> Research has shown that people may have greater difficulty in accurately identifying members of a different race. You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness's identification.

New Jersey Identification Instruction: In-Court and Out-of-Court Identifications at 5, New Jersey Criminal Model Jury Charges, revised February 2014.

Further resources. For a discussion of strategies for seeking a jury instruction on cross-racial impairment and examples of jury instructions considered in other jurisdictions, see *A New Legal Architecture: Litigating Eyewitness ID Cases in the 21st Century* 323–66, PowerPoint presentation, NYU School of Law (March 14, 2008). *available at* www.eyeID.org.