

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”).