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.