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DEFENDING EYEWITNESS IDENTIFICATION

WHY DO YOU THINK EYEWITNESS TESTIMONY IS SO POWERFUL FOR THE STATE?

This is the part where you have to respond! And yes I will use the Socratic method if forced.

A dimly lit courtroom scene. In the background, a jury of six people is seated in wooden benches, looking towards the front of the room. In the foreground, a woman with dark hair tied back is seated at a table, pointing her right index finger towards the jury. The scene is overlaid with a semi-transparent dark grey box containing text.

UNITED STATES
V. BROWNLEE,
454 F.3D 131, 142
(3D CIRC. 2006)

- “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!’”

THE PROSECUTOR'S OPENING STATEMENT

Ladies and Gentlemen, you don't have to take my word for it. The evidence will show that on December 2, 2022 at 2:15 am in the dark of night, a man went in to the home of Betty and Bob Smith and stole their tv. Yes, it was dark. Yes, they are both in their 90s. Yes, they both wear corrective lenses and had taken their glasses off to go to bed. No, there weren't any lights on. Sure, it happened in about 1 second. No, we don't have a single shred of physical evidence to show to you. But, ignore all of that, because you don't have to take my word for it.

When Betty Smith takes that witness stand, she will tell you that she is 100% confident that the man who poked his head in their bedroom and pointed a gun at her for that split second was the defendant, John Doe. She saw him with her own eyes. She is a sweet, old, church going lady. She wouldn't lie to you. She will tell you she could never forget the scariest moment of her life. You don't have to take my word for it. She will tell you herself!

WHY DO JURORS BELIEVE EYEWITNESSES?

- He **MUST** remember the most stressful moment of his life!
- If he says he saw it, then he had to have seen it! He is sworn to tell the truth.
- He is so confident, so he must know for sure!
- He wouldn't put a person in prison if he doesn't believe that he is telling the truth.
- He doesn't seem like a racist.





NEXT
QUESTION...

YES, THIS IS A TRICK QUESTION.

UNITED STATES
V. BROWNLEE,
454 F.3D 131, 142
(3D CIRC. 2006)

“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!’”

A person in a dark suit is seated at a table, holding a silver pen over a photograph of a man. The photograph is placed on a white sheet of paper. The person's hands are visible, and they are wearing a watch on their left wrist. The background is dark and out of focus.

LET'S TEST YOUR MEMORY

- https://youtube.com/clip/Ugkx85pFgIXnosK_sPE8OcvyCDu5fCzXqL4j?si=JYhI_ZNwLpPIMqZI

QUESTION # 1

WHAT COLOR
WAS THE CAR
THAT GOT
HIT?

ANSWER..... BLUE

HOW FAST WAS THE CAR
GOING WHEN IT SMASHED
INTO THE OTHER CAR?

- A) 20 MPH
- B) 30 MPH
- C) 40 MPH
- D) 50 MPH

QUESTION # 2

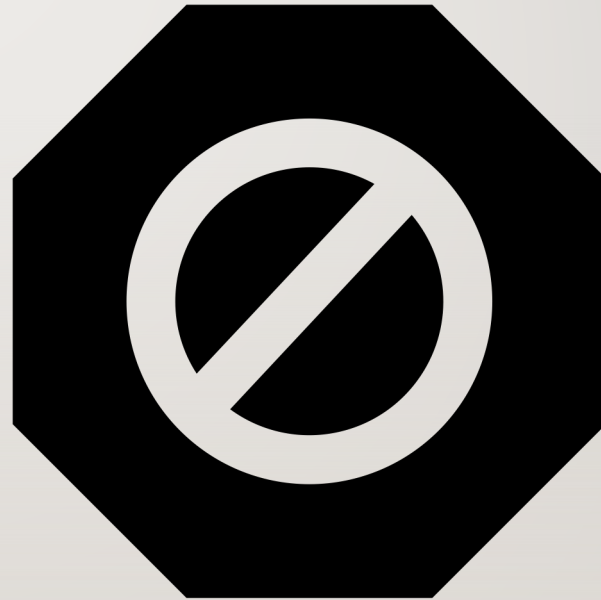


ANSWER...

20 MPH

YOU SAW THE DRIVER
BLOW PAST THE STOP
SIGN AFTER THE
ACCIDENT...YES OR
NO?

QUESTION # 3





ANSWER...

NO...IT WAS ACTUALLY A
YIELD SIGN!



FALSE MEMORIES

TED TALK: ELIZABETH LOFTUS

OK, MEMORY SUCKS AND JURIES GET IT WRONG... WHERE DO WE GO FROM HERE?

Ronald Cotton will remind you why this is important!



What counts as an Eyewitness Identification and what is the law?

Constitutional Arguments

NC Eyewitness Identification Reform Act



How about some fact scenarios?



How do I challenge Eyewitness Identifications?

Motions to Suppress

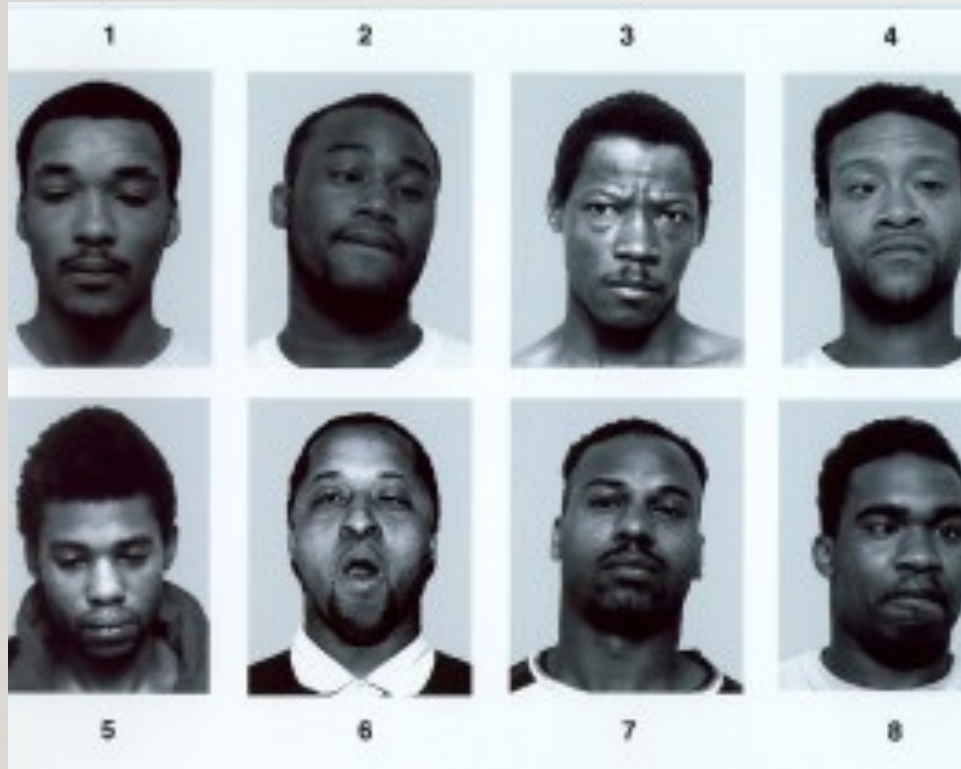
Voir Dire

Cross-Examination

Expert Testimony

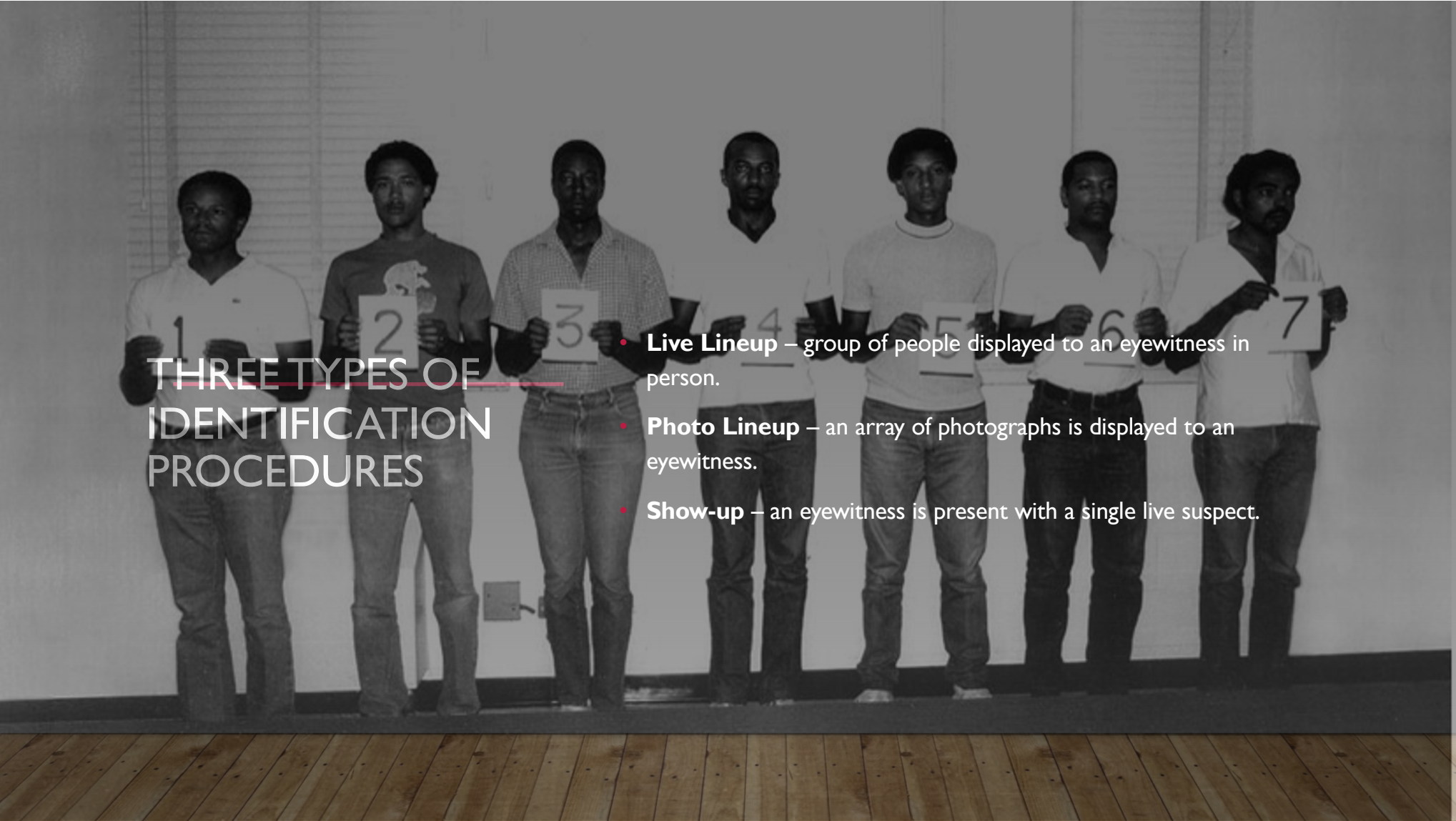
Closing

Jury Instructions



WHY IS EYEWITNESS IDENTIFICATION SO IMPORTANT?

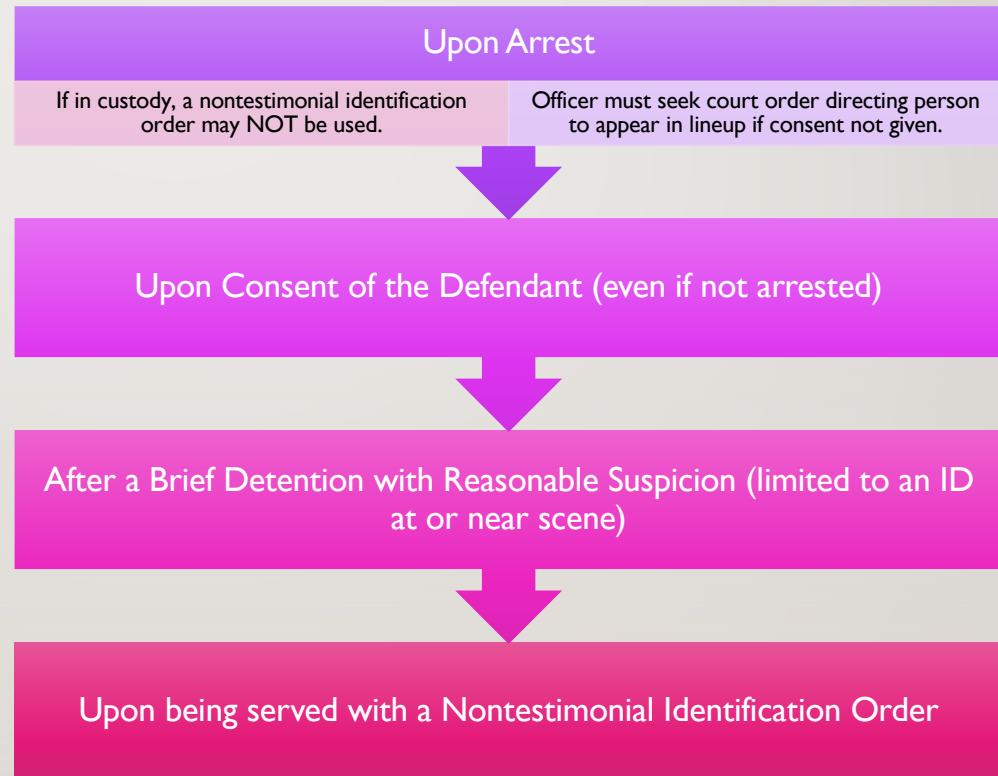
- Eyewitness misidentification is the greatest contributing factor to wrongful convictions proven by DNA testing, playing a role in more than 75% of convictions overturned through DNA testing nationwide.
- 41% of overturned cases involved cross-racial eyewitness identifications.
- [Innocence Project](#)

A black and white photograph showing a live lineup of seven men standing in a row against a light-colored wall. Each man is holding a white sign with a black number. From left to right, the numbers are 1, 2, 3, 4, 5, 6, and 7. The men are dressed in casual clothing like t-shirts and jeans. The floor in the foreground is made of wooden planks.

THREE TYPES OF IDENTIFICATION PROCEDURES

- **Live Lineup** – group of people displayed to an eyewitness in person.
- **Photo Lineup** – an array of photographs is displayed to an eyewitness.
- **Show-up** – an eyewitness is present with a single live suspect.

**WHEN IS IT PROPER
FOR YOUR CLIENT TO BE
REQUIRED TO
PARTICIPATE IN AN
IDENTIFICATION
PROCEDURE?**



EYEWITNESS IDENTIFICATIONS MUST
COMPLY WITH CONSTITUTIONAL AND
STATUTORY REQUIREMENTS:

- Due Process Clause under the Fourteenth Amendment
- Right to Counsel under the Sixth Amendment
- NC Eyewitness Identification Reform Act under N.C.G.S. 15A-284.50 through 15A-283.53

**EYEWITNESS IDENTIFICATION REFORM
ACT**



North Carolina Department of Justice
Criminal Justice Standards Division

UPDATE MATERIAL

March 1, 2008
(Subject to periodic changes)



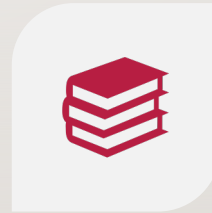
COMPLYING WITH THE DUE PROCESS CLAUSE



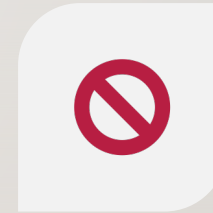
THE TEST FOR ADMISSIBILITY FOR AN OUT-OF-COURT IDENTIFICATION IS THAT THE PROCEDURE MUST NOT BE SO **UNNECESSARILY SUGGESTIVE** THAT IT CREATES A SUBSTANTIAL RISK OF MISIDENTIFICATION. *NEIL V. BIGGERS*



BIG ISSUE: WHETHER CONSIDERING THE TOTC, THE ID WAS RELIABLE EVEN THOUGH THE CONFRONTATION PROCEDURE MAY HAVE BEEN SUGGESTIVE.



PRIMARY CASE → *NEIL V. BIGGERS*, 409 U.S. 188 (1972).



REMEDY FOR VIOLATION → EXCLUSION

**BIGGERS FIVE
FACTORS TO
EVALUATE
LIKELIHOOD OF
MISIDENTIFICATION:**

The Witness's Opportunity to View the Suspect During the Crime

The Degree of Attention

The Accuracy of a Prior Description of the Suspect

The Degree of Certainty at the Identification Procedure

The Length of Time Between the Crime and the Identification Procedure

SIXTH AMENDMENT RIGHT TO COUNSEL

The right begins at the initial appearance after arrest that is conducted by a judicial official (usually a magistrate) or when an indictment or information has been filed, whichever occurs first.
Rothgery v. Gillespie Cty.



Remedy for Violation of Right to Counsel → EXCLUSION



Right to Counsel can be knowingly and voluntarily waived.

SIXTH AMENDMENT RIGHT TO COUNSEL

ATTACHED

- In-Court show-up at a preliminary hearing.
Moore v. IL
- Post-Indictment lineup. *U.S. v. Wade*, 388 U.S. 218 (1967).

NOT ATTACHED

- Show-up identification after arrest but before indictment, PC hearing or other proceeding. *Kirby v. IL*
- Photo Lineup. *U.S. v. Ash*
- Victim encountering suspect in jail as long as no state action was taken to procure the interaction. *Thompson v. Mississippi*

IN-COURT IDENTIFICATIONS

- An impermissibly suggestive pretrial identification procedure may taint an in-court identification. *State v. Flowers*, 318 N.C. 208 (1986).
- Independent Origin Standard: A witness's in-court identification is also inadmissible unless the State proves by clear and convincing evidence that the identification originated independent of the unconstitutional lineup (that the identification is based on the witness's observations of the defendant during the crime and not tainted by the illegal out-of-court identification). *U.S. v. Wade*, 388 U.S. 218 (1967).
- Several factors should be reviewed that are similar to those of *Biggers*.

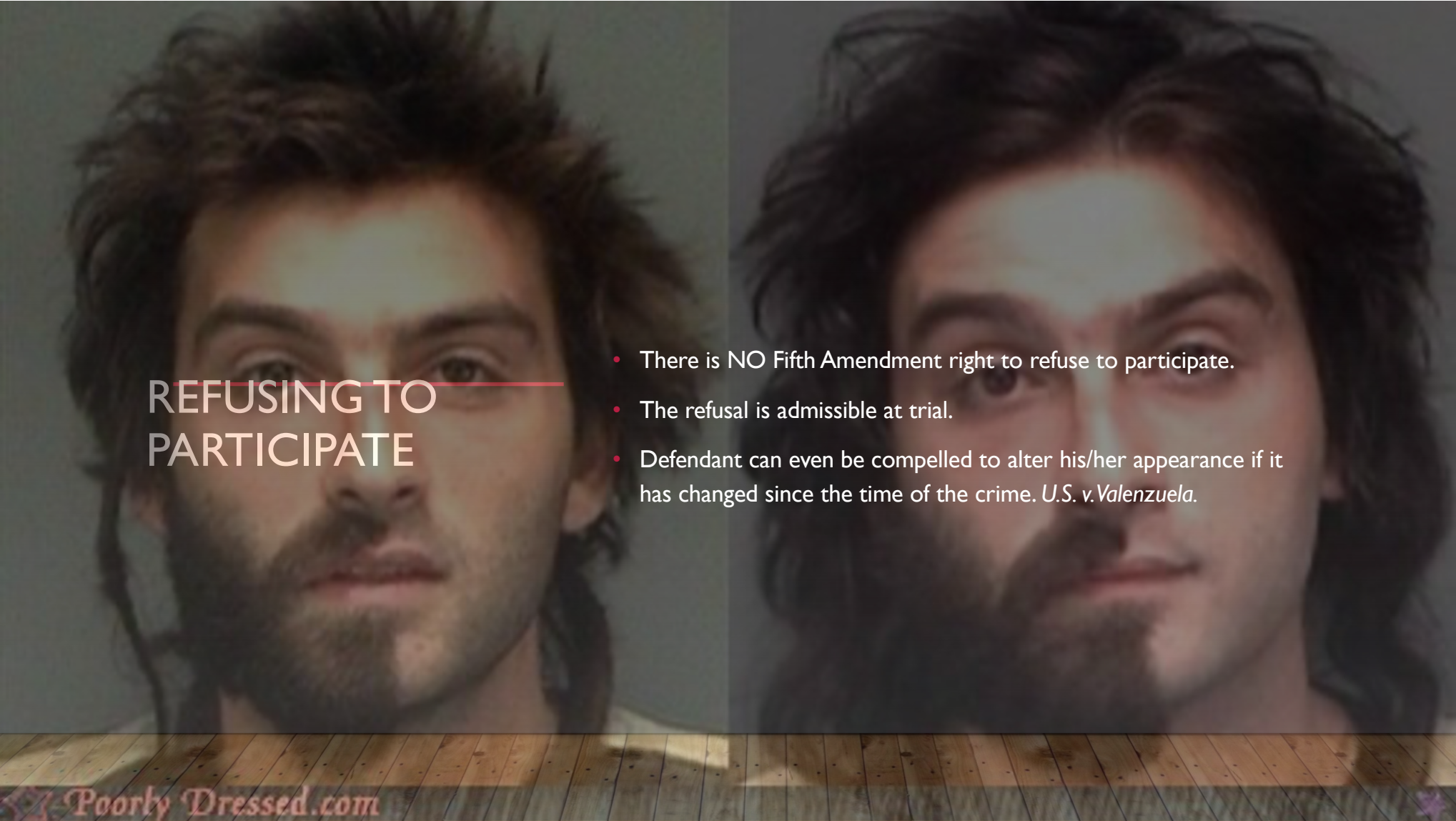
WADE FACTORS TO DETERMINE INDEPENDENT ORIGIN

- Prior Opportunity to Observe the Offense
- Any Discrepancy Between the Pre-Lineup Description and the Defendant's Actual Description
- Any Identification of Another Person or of the Defendant by a Picture Before the Lineup Takes Place
- Failure to Identify the Defendant on a Prior Occasion
- Time Elapsed Between the Offense and the Lineup
- Facts Concerning the Conduct of the Illegal Lineup



FACT SCENARIO:

- “Local” cab driver is called by victim to pick man up from his home.
- Driver picks man up and drops him off at another location.
- Later that evening, man calls driver back and asks him to take him back to victim’s home.
- Driver drops man off at victim’s home and sees victim let man in.
- Victim is found the next morning stabbed to death.
- The next day, a photo line-up was given to driver and driver failed to identify anyone when defendant was in line-up.
- Driver attended a pre-trial hearing with victim’s sister and was still not able to positively identify defendant, but was told by sister it was the guy who murdered her brother.
- Multiple news articles were written and media coverage included the picture of the defendant who was a VERY EASILY identified person with tattoos covering his face.
- State sought to have driver testify and we sought to keep out any in-court identification.



REFUSING TO PARTICIPATE

- There is NO Fifth Amendment right to refuse to participate.
- The refusal is admissible at trial.
- Defendant can even be compelled to alter his/her appearance if it has changed since the time of the crime. *U.S. v. Valenzuela*.

EYEWITNESS IDENTIFICATION REFORM ACT

Eyewitness Identification Reform Act: 15A-284.50 through 15A-284.53 were codified and imposed requirements for how live and photo lineups were to be conducted.

2008

additional language in same statute codified to impose requirements when conducting show-ups

2015

PRINCIPAL PROVISIONS FOR LINEUPS NCGS 15A-284.52

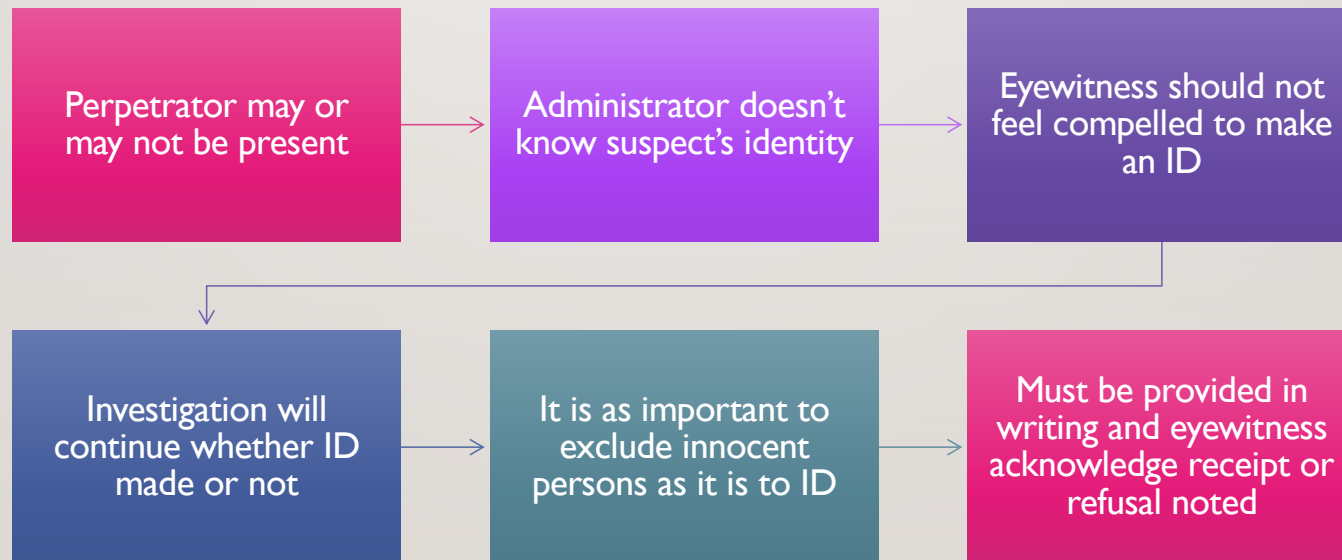
INDEPENDENT ADMINISTRATOR

- Double Blind Lineup
 - Not investigating the crime
 - Unaware of who is suspect is
- Alternative Methods allow for photo lineups (i.e. computer or folder method)

METHOD OF PRESENTATION

- Double Blind Sequential Lineup
 - Sequentially
 - Each presented separately and then removed before next presented

INSTRUCTIONS FOR LINEUPS NCGS 15A-284.52



PRINCIPAL PROVISIONS FOR LINEUPS NCGS 15A-284.52

General Lineup

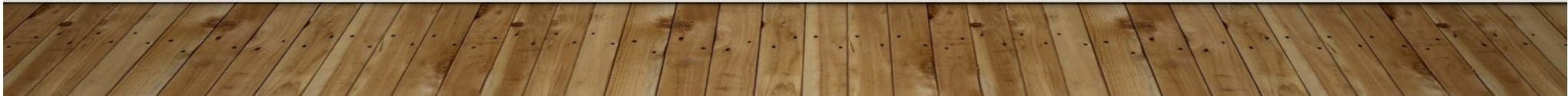
- Suspect's photo should be contemporary and appearance shall resemble that at the time of the offense (to extent practical).
- Only one suspect per lineup.
- Multiple eyewitnesses requires shuffling of suspect

Fillers

- Generally resemble eyewitness's description of perpetrator
- Ensure suspect does not unduly stand out
- At least 5 fillers for photo or live lineup
- Fillers in prior lineup of another suspect shall not be shown to same eyewitness with new suspect

Statement of Confidence

- Administrator shall seek and document a clear statement from the eyewitness in their own words as to the confidence level.
- Eyewitness shall not be provided any information concerning the person before the confidence statement.



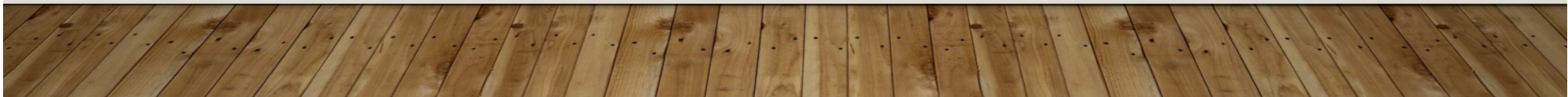
PRINCIPAL PROVISIONS FOR LINEUPS NCGS 15A-284.52

RECORDING OF ID

- Video record of live ID shall be made unless not practical.
- Audio record if not video or written record if video nor audio practical.
- Reasons documented for method

CONTENTS OF RECORD

- Identification results
- Confidence statement
- Names of those present
- Date, time, and location
- Words of Eyewitness in ID
- Type of lineup and number of fillers
- Sources of fillers
- Photos used in lineup
- Photo or other visual recording of live lineup



PROVISIONS RELATED TO SHOW-UPS IN NCGS 15A- 284.52

- May **ONLY** be conducted:
 - when a suspect matching the perpetrator's description is located in close proximity in time and place to the crime or
 - when there is a reasonable belief that the perpetrator has changed his/her appearance close in time to the crime, and
 - only if there are circumstances that require the immediate display of a suspect to an eyewitness.
- Shall **ONLY** be performed using a live suspect (NOT A PHOTO).
- Record of the show-up should be preserved with a photograph.



Failure to comply shall be considered by the court in adjudicating motions to suppress.



Failure to comply shall be admissible in support of claims of eyewitness misidentification.



The jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identification.



A violation doesn't necessarily require suppression, but Court must evaluate whether it constitutes a substantial violation or otherwise violates the Due Process Clause's TOTC test. See *State v. Stowes*, 220 N.C.App. 330 (2012).

STATUTORY REMEDIES FOR VIOLATION OF NCGS 15A- 284.52

FACT SCENARIO:

- Hispanic male was stabbed, doused with rubbing alcohol, set on fire, and left for dead. He crawls to a neighbor's house, law enforcement responds and the victim is transported to the hospital.
- There were no other eyewitnesses to the actual crime other than the victim, but statements were taken from neighbors that placed a black male suspect who was familiar by name to the investigating officers in the same area interacting with the victim several hours earlier.
- Non-Spanish speaking investigators respond to the hospital where they attempt to interact with the victim who speaks broken English to obtain his statement. The victim identifies the person who assaulted him as someone he knows by "nasty dog and Jimmy."
- Investigators show the victim a picture of the black male suspect they were familiar with and tell the victim the individual's actual name. The victim identifies that person in the single photo as the person who assaulted him.

EVALUATING THE FACT SCENARIO IN LIGHT OF EIRA:



- Doesn't follow line-up requirements → not live/photo/single person
- Doesn't follow photo line-up requirements → single photo
- Doesn't follow show up requirements → not live/photo

THE HOLE LEFT BY NC EIRA

- What about Photo Show-ups?
 - An officer shows one photo to the witness of an individual believed to match the description of the perpetrator.
 - Clearly violates the EIRA procedures with regard to photo lineups (i.e. fillers, double-blind, non-sequential, etc.)
 - Clearly violates the EIRA procedures with regard to showups → statute requires a showup to be live



PRACTICE TIP:
BE ON THE LOOK-OUT FOR SOCIAL MEDIA IDENTIFICATIONS

Minnesota Innocence Project



MOTIONS TO SUPPRESS: IDENTIFY ISSUES

Does the case involve a cross-racial ID?

Did a “suggestive” pretrial ID procedure take place?

If so, did the suggestive procedure create a substantial risk of misidentification?

Did the pre-trial ID procedure comply with EIRA?

Is there a right to counsel issue?

Will the illegal out-of-court ID impact an In-Court ID?

Raising Issues of Race in NC Criminal Cases by
Alyson Grine and
Emily Coward

ARGUING THE MOTION TO SUPPRESS

Motion

Sample Motions to Suppress and Motion to Exclude Testimony – provided in the manuscript

Request

Request a Hearing to Voir Dire the eyewitness

- State v. Flowers, 318 N.C. 208, 216 (1986)
- Use information you have gathered for cross-examination if you are unsuccessful

Object

If unsuccessful, you **MUST** object during the trial to the admission of the pretrial identification procedure and tainted in-court identification. State v. Hunt, 324 N.C. 343 (1989)

JURY SELECTION

EDUCATION

- Common misconception → victim's never forget the face of his/her offender.
- Jurors overestimate the reliability of eyewitness testimony.
- Educate on the confidence conundrum.

SELECTING OPEN MINDS

- If you are arguing have a cross-racial identification, try to have a broad racial composition to your jury and explore issues of race with the potential jury members.
- Are any of the jurors overconfident about the accuracy of eyewitness IDs? Will they form independent opinions?

CROSS EXAMINATION

- Lay out your argument through the witness.
- Avoid villainizing the witness.
- Avoid discussion of confidence.
- Establish the facts you need for your expert to testify.
- Familiarize yourself with department procedure for eyewitness ID and question officer about it.



EXPERT TESTIMONY

Goal of an expert witness → dispel the “confidence conundrum”

Memory Factors

Estimator and System Variables

State v. Locklear – “expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified.” 349 N.C. 118, 147 (1998) → helpfulness standard

Rule 702 and 403 Compliance

Important especially for cross-racial identifications.

If expert testimony denied → judicial notice of research on IDs

CLOSING ARGUMENT

Opportunity to wrap it up with a bow and drive home the statistics if you have been able to get them in.

You must remind the jury of what you mentioned in voir dire with regards to having an open mind and about the common misconceptions.

You must paint a very clear picture of why you believe the identification to be faulty based on all the testimony presented from the officers and the eyewitness.

Lastly, incorporate expert testimony if presented or anything of which the court took judicial notice.

Drive it home with jury instructions.

JURY INSTRUCTIONS

GENERALLY

- 101.15 – Credibility
- 104.90 – Identification of the defendant as perpetrator of the crime
- 104.94 – testimony of expert witness

EIRA INSTRUCTIONS

Evidence of non-compliance with the EIRA is permitted to be considered credible evidence.

- 105.65 – Photo Lineup Requirements
- 105.70 – Live Lineup Requirements



REMINDER OF WHY THIS IS IMPORTANT?

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