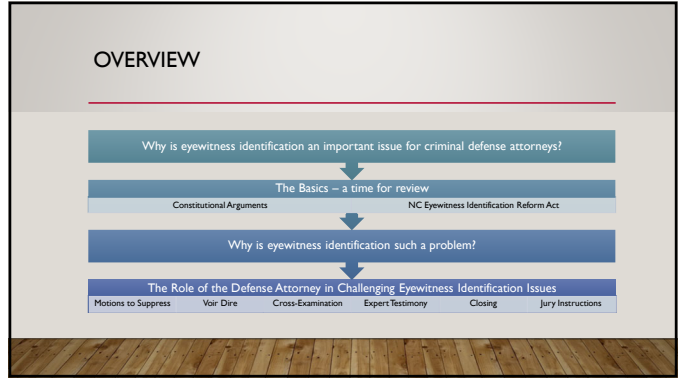
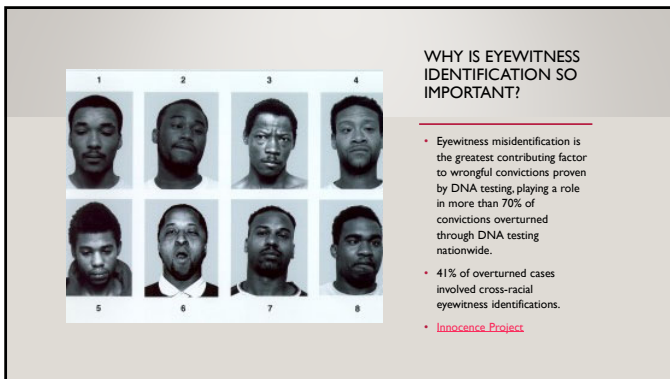


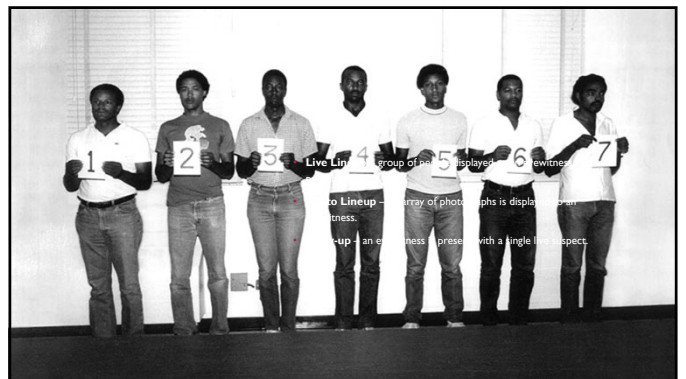
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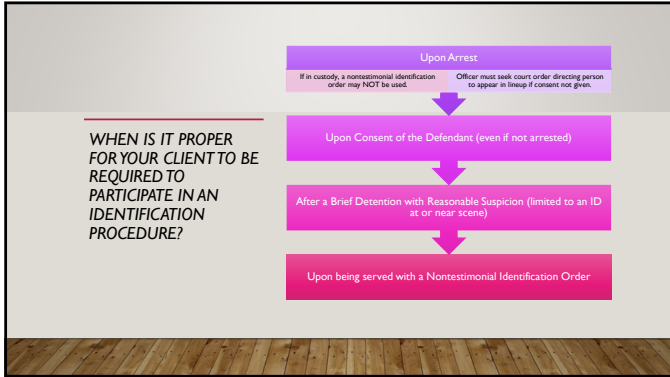
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5

**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

6

**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.

7

**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. NEL V. BIGGERS**

**BIG ISSUE: WHETHER CONSIDERING THE FOIC, THE ID WAS RELIABLE EVEN THOUGH THE CONFRONTATION PROCEDURE HAD NOT BEEN SUGGESTIVE.**

**PRIMARY CASE -> NEL V. BIGGERS, 409 U.S. 188 (1972).**

**REMEDY FOR VIOLATION -> EXCLUSION**

8

**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

9

**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.

10

**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*

11


**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 deft 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*.

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### 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




13

### 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.

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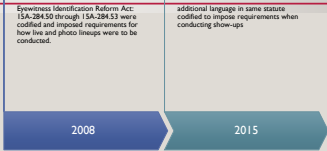


- There is NO Fifth Amendment right to refuse to participate.
- The refusal is admissible at trial.
- Defendant can even be compelled to alter his appearance if it has changed since the time of the crime. *U.S. v. Valenzuela*

*Poorly Dressed.com*

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### EYEWITNESS IDENTIFICATION REFORM ACT



Eyewitness Identification Reform Act: 13A-281.50 through 13A-281.53 were codified and imposed requirements for how line and photo lineups were to be conducted.

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

2008 → 2015

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### PRINCIPAL PROVISIONS FOR LINEUPS NCGS 15A-284.52

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<p><b>INDEPENDENT ADMINISTRATOR</b></p> <ul style="list-style-type: none"> <li>• Double Blind Lineup             <ul style="list-style-type: none"> <li>• Not investigating the crime</li> <li>• Unaware of who is suspect is</li> </ul> </li> <li>• Alternative Methods allow for photo lineups (i.e. computer or folder method)</li> </ul>	<p><b>METHOD OF PRESENTATION</b></p> <ul style="list-style-type: none"> <li>• Double Blind Sequential Lineup             <ul style="list-style-type: none"> <li>• Sequentially</li> <li>• Each presented separately and then removed before next presented</li> </ul> </li> </ul>
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### INSTRUCTIONS FOR LINEUPS NCGS 15A-284.52

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    graph LR
      A[Perpetrator may or may not be present] --> B[Administrator doesn't know suspect's identity]
      B --> C[Eyewitness should not feel compelled to make an ID]
      C --> D[Investigation will continue whether ID made or not]
      D --> E[It is as important to exclude innocent persons as it is to ID]
      E --> F[Must be provided in writing and eyewitness acknowledges receipt or refusal noted]
    
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### PRINCIPAL PROVISIONS FOR LINEUPS NCGS 15A-284.52

<p><b>General Lineup</b></p> <ul style="list-style-type: none"> <li>• Suspect's photo should be contemporary and appearance shall resemble that at the time of the offense (to extent practical).</li> <li>• Only one suspect per lineup.</li> <li>• Multiple eyewitnesses requires shuffling of suspect</li> </ul>	<p><b>Fillers</b></p> <ul style="list-style-type: none"> <li>• Generally resemble eyewitness's description of perpetrator</li> <li>• Ensure suspect does not unduly stand out</li> <li>• At least 5 fillers for photo or live lineup</li> <li>• Fillers in prior lineup of another suspect shall not be shown to same eyewitness with new suspect</li> </ul>	<p><b>Statement of Confidence</b></p> <ul style="list-style-type: none"> <li>• Administrator shall seek and document a clear statement from the eyewitness in their own words as to the confidence level.</li> <li>• Eyewitness shall not be provided any information concerning the person before the confidence statement.</li> </ul>
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### PRINCIPAL PROVISIONS FOR LINEUPS NCGS 15A-284.52

<p><b>RECORDING OF ID</b></p> <ul style="list-style-type: none"> <li>• Video record of live ID shall be made unless not practical.</li> <li>• Audio record if not video or written record if video nor audio practical.</li> <li>• Reasons documented for method</li> </ul>	<p><b>CONTENTS OF RECORD</b></p> <ul style="list-style-type: none"> <li>• Identification results</li> <li>• Confidence statement</li> <li>• Names of those present</li> <li>• Date, time, and location</li> <li>• Words of Eyewitness in ID</li> <li>• Type of lineup and number of fillers</li> <li>• Sources of fillers</li> <li>• Photos used in lineup</li> <li>• Photo or other visual recording of live lineup</li> </ul>
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20

**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.

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**STATUTORY REMEDIES FOR VIOLATION OF NCGS 15A-284.52**

- 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. Stoves*, 220 N.C. App. 330 (2012).

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**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

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**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

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### WHY ARE THERE SUCH PROBLEMS WITH EYEWITNESS IDENTIFICATION?

Three Stages of Memory   Estimator v. System Variables   Confidence v. Accuracy

<ol style="list-style-type: none"> <li>1. Acquisition Stage</li> <li>2. Retention Stage</li> <li>3. Retrieval Stage</li> </ol>	<p>Before the case enters the criminal justice system v. after</p>	<p>"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!'"</p> <p><small>United States v. Brownlee, 454 F.3d 131, 142 (3d Cir. 2006)</small></p>
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### 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

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## ARGUING THE MOTION TO SUPPRESS

<b>Motion</b>	Sample Motions to Suppress and Motion to Exclude Testimony – provided in the manuscript
<b>Request</b>	Request a Hearing to Voir Dire the eyewitness <small>*State v. Flowers, 318 N.C. 208, 216 (1986)                  *Use information you have gathered for cross-examination if you are unsuccessful</small>
<b>Object</b>	If unsuccessful, you <b>MUST</b> 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)

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## 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?

Link for sample jury selection questions provided in the manuscript.

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## CROSS EXAMINATION

- Magic Grits
- 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.



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## EXPERT TESTIMONY

Goal of an expert witness → dispel the "confidence conundrum"

Memory Factors
Estimator and System Variables

↓

State v. Luskier – "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, 127 (1996) → helpfulness standard

Rule 702 and 403 Compliance

↓

Important especially for cross-racial identifications

↓

If expert testimony denied → judicial notice of research on IDs

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### CLOSING ARGUMENT

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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.

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### JURY INSTRUCTIONS

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**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

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**REMINDER OF WHY THIS IS IMPORTANT?**

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