IDENTIFICATION: IN-COURT IDENTIFICATION ONLY

(Defendant), as part of his/her general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that he/she is the person who committed the alleged offense. The burden of proving the identity of the person who committed the crime is upon the State. For you to find defendant guilty, the State must prove beyond a reasonable doubt that this person is the person who committed the crime. (Defendant) has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person. You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that (this defendant) is the person who committed it.

The State has presented testimony of [insert name of witness who identified defendant]. You will recall that this witness identified the defendant as the person who committed [insert the offense(s) charged]. According to the witness, [his/her] identification of the defendant was based upon the observations and perceptions that [he/she] made of the perpetrator at the time the offense was being committed. It is your function to determine whether the witness's identification of (defendant) is reliable and believable, or whether it is based on a mistake or for any reason is not worthy of belief.[1] You must decide whether it is sufficiently reliable evidence upon which to conclude that (this defendant) is the person who committed the offense[s] charged.

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[1]   United States v. Wade, 388 U.S. 218, 228, 87 S. Ct. 1926, 1933, 18 L. Ed. 2d 1149, 1158 (1967); State v. Green, 86 N.J. 281, 291-93 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-19 (App. Div. 1996).

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Eyewitness identification evidence must be scrutinized carefully. Human beings have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.

Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex.[2] The process of remembering consists of three stages: acquisition -- the perception of the original event; retention -- the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval -- the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.[3]

Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. In evaluating this identification, you should consider the observations and perceptions on which the identification was based, the witness's ability to make those observations and perceive events, and the circumstances under which the identification was made. Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore,

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[2]   State v. Henderson, 208 N.J. 208, 245 (2011).
[3]   Id. at 245-46.

when analyzing such testimony, be advised that a witness's level of confidence, standing

alone, may not be an indication of the reliability of the identification.[4]

In deciding what weight, if any, to give to the identification testimony, you should

consider the following factors that are related to the witness, the alleged perpetrator, and

the criminal incident itself.[5] **[choose appropriate factors]**:

(1) **The Witness's Opportunity to View and Degree of Attention**: In evaluating
the reliability of the identification, you should assess the witness's opportunity
to view the person who committed the offense at the time of the offense and the
witness's degree of attention to the perpetrator at the time of the offense. In
making this assessment you should consider the following **[choose appropriate
factors from (a) through (g) below]**:

(a) Stress: Even under the best viewing conditions, high levels of stress can
reduce an eyewitness's ability to recall and make an accurate identification.
Therefore, you should consider a witness's level of stress and whether that
stress, if any**,** distracted the witness or made it harder for him or her to
identify the perpetrator.[6]

(b) Duration: The amount of time an eyewitness has to observe an event may
affect the reliability of an identification. Although there is no minimum
time required to make an accurate identification, a brief or fleeting contact is
less likely to produce an accurate identification than a more prolonged
exposure to the perpetrator. In addition, time estimates given by witnesses
may not always be accurate because witnesses tend to think events lasted
longer than they actually did.[7]

(c) Weapon Focus: You should consider whether the witness saw a weapon
during the incident and the duration of the crime. The presence of a weapon
can distract the witness and take the witness's attention away from the
perpetrator's face. As a result, the presence of a visible weapon may reduce
the reliability of a subsequent identification if the crime is of short duration.
In considering this factor, you should take into account the duration of the
crime because the longer the event, the more time the witness may have to
adapt to the presence of the weapon and focus on other details.[8]

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[4]   State v. Romero, 191 N.J. 59, 76 (2007).
[5]   Henderson, supra, 208 N.J. at 247.
[6]   Id. at 261-62.
[7]   Id. at 264.
[8]   Id. at 262-63.

(d) Distance: A person is easier to identify when close by. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.[9]

(e) Lighting: Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case.[10]

(f) Intoxication: The influence of alcohol can affect the reliability of an identification.[11] An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who drank a small amount of alcohol.[12]

(g) Disguises/Changed Appearance: The perpetrator's use of a disguise can affect a witness's ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification.[13] Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.[14]

(2) Prior Description of Perpetrator: Another factor for your consideration is the accuracy of any description the witness gave after observing the incident and before identifying the perpetrator. Facts that may be relevant to this factor include whether the prior description matched the person picked out later, whether the prior description provided details or was just general in nature, and whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. [**Charge if appropriate**: You may also consider whether the witness did not identify the defendant at a prior identification procedure or chose a different suspect or filler.]

(3) Confidence and Accuracy: You heard testimony that (insert name of witness) expressed his/her level of certainty that the person he/she selected is in fact the person who committed the crime. As I explained earlier, a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.[15] Although some research has found that highly confident

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9   Id.at 264.

10   Ibid.

11   If there is evidence of impairment by drugs or other substances, the charge can be modified accordingly.

12   Henderson, supra, 208 N.J. at 265.

13   Id. at 266.

14   Ibid.

15   Id. at 254 (quoting Romero, supra, 191 N.J. at 76).

witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.[16]

(4) Time Elapsed: Memories fade with time. As a result, delays between the commission of a crime and the time an identification is made can affect the reliability of the identification. In other words, the more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken.[17]

(5) Cross-Racial Effects: Research has shown that people may have greater difficulty in accurately identifying members of a different race.[18] 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.

[The jury should also be charged on any other relevant factors in the case.]

You may consider whether the witness was exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence, that may have affected the independence of his/her identification.[19] Such information can affect the independent nature and reliability of a witness's identification and inflate the witness's confidence in the identification.

You are also free to consider any other factor based on the evidence or lack of evidence in the case that you consider relevant to your determination whether the identification was reliable. Keep in mind that the presence of any single factor or combination of factor(s), however, is not an indication that a particular witness is incorrect. Instead, you may consider the factors that I have discussed as you assess all of the circumstances of the case, including all of the testimony and documentary evidence, in determining whether a particular identification made by a witness is accurate and thus

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[16]   Id. at 253-55.
[17]   Id. at 267.
[18]   This instruction must be given whenever there is a cross-racial identification. Id. at 299 (modifying State v. Cromedy, 158 N.J. 112, 132 (1999)).
[19]   State v. Chen, 208 N.J. 307 (2011).

worthy of your consideration as you decide whether the State has met its burden to prove identification beyond a reasonable doubt. If you determine that the in-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, you may consider that evidence and decide how much weight to give it. If you instead decide that the identification is the product of an impression gained at the in-court identification procedure, the identification should be afforded no weight. The ultimate issue of the trustworthiness of the identification is for you to decide.

If, after considering all of the evidence, you determine that the State has not proven beyond a reasonable doubt that (defendant) was the person who committed this offense [these offenses], then you must find him/her not guilty. If, on the other hand, after considering all of the evidence, you are convinced beyond a reasonable doubt that (defendant) was correctly identified, you will then consider whether the State has proven each and every element of the offense[s] charged beyond a reasonable doubt.