

**REPORT OF THE SUPREME COURT
COMMITTEE ON MODEL CRIMINAL JURY
CHARGES ON THE REVISIONS TO THE
IDENTIFICATION MODEL CHARGES**

**Approved by Supreme Court Committee on Model Criminal Jury Charges
January 9, 2012**

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APPENDIX A

Proposed Charges

1. Identification: In-Court and Out-of-Court Identifications
2. Identification: In-Court Identification Only
3. Identification: Out-of-Court Identification Only

APPENDIX B

Current Charges

1. Identification: In-Court and Out-of-Court Identifications
2. Identification: In-Court Identification Only
3. Identification: Out-of-Court Identification Only

I. OVERVIEW

In State v. Henderson, 208 N.J. 208, 298 (2011), the Court asked the Criminal Practice Committee and the Model Criminal Jury Charge Committee to draft proposed revisions to the current charges on eyewitness identification and submit them to the Court for approval.

Based upon the scientific evidence in the record the Court was convinced:

[M]emory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications. Those factors include system variables like lineup procedures, which are within the control of the criminal justice system, and estimator variables like lighting conditions or the presence of a weapon, over which the legal system has no control.

[Id. at 218.]

Therefore, the Court concluded:

[T]he current standard for assessing eyewitness identification evidence does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate.

[Ibid.]

In order to remedy its concerns regarding the jury charges, the Court requested that:

[T]he court system ... develop enhanced jury charges on eyewitness identification for trial judges to use. We anticipate that identification evidence will continue to be admitted in the vast majority of cases. To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability...With the use of more focused jury charges on those issues, there will be less need to call expert witnesses at trial. Trial courts will still have discretion to admit expert testimony when warranted.

[Id. at 218-19.]

II. REVISION OF IDENTIFICATION MODEL JURY CHARGES

Scientific literature divides the variables that can affect and dilute memory and lead to misidentification into two categories: System and Estimator variables. See Henderson, supra, 208 N.J. at 247. In calling for a revision of the Identification model jury charges, the Court charged the Committees “to consider all of the system and estimator variables in section VI for which we have found scientific support that is generally accepted by experts....” Id. at 298-99. In response to this charge, the Model Criminal Jury Charge Committee formed a subcommittee to draft revisions of the Identification charges for the full Committee’s review.

The Committee reviewed and modified the subcommittee’s proposed revision, using the “In-Court and Out-of-Court Identifications” charge as a template. The charge was unanimously approved by the Committee. The Committee decided that the language approved in that charge could then be incorporated into the other two Identification charges: “In-Court Identification Only” and “Out-of-Court Identification Only.” The Committee’s discussion regarding each section of the proposed “In-Court and Out-of-Court Identifications” charge, and the Court’s findings on the factors have been incorporated into the following summary. Comparisons to the current charge have also been included where applicable. See Appendix A for the proposed charges and Appendix B for the current charges.

III. IN-COURT AND OUT-OF-COURT IDENTIFICATIONS CHARGE

A. First Two Paragraphs

1. Committee's Discussion

Because the first two paragraphs conform to the current "In-Court and Out-of Court Identifications" charge, the only objection raised by the Committee concerned the inclusion of the phrase "beyond a reasonable doubt" in the last sentence of the second paragraph on page 2. That sentence in the original version stated:

You must decide whether it is sufficiently reliable evidence upon which to conclude beyond a reasonable doubt that this defendant is the person who committed the offense[s] charged. [Emphasis added.]

The Committee was divided on this issue. Some members asserted that this language is not included in the current charge, and therefore it should not be included in this charge either. They were of the view that since the first paragraph includes "beyond a reasonable doubt" it may be confusing to jurors to again include the burden in this paragraph.

Additionally, those members pointed out that this burden was stated again in the first sentence of the paragraph on page 3. That sentence stated:

To decide whether the identification testimony is sufficiently reliable evidence upon which to conclude beyond a reasonable doubt that this defendant is the person who committed the offense[s] charged, you should evaluate the testimony of the witness in light of the factors for considering credibility that I have already explained to you. [Emphasis added.]

Ultimately, the Committee agreed to delete the phrase “upon which to conclude beyond a reasonable doubt” in both of these sentences.

2. Recommended Language

The following was approved for the first two paragraphs:

(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 this defendant guilty, the State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. The 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 proven each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proven beyond a reasonable doubt that this defendant is the person who committed it.

The State has presented the testimony of [insert name of witness who identified defendant]. You will recall that this witness identified the defendant in court as the person who committed [insert the offense(s) charged]. The State also presented testimony that on a prior occasion before this trial, this witness identified the defendant as the person who committed this offense [these offenses]. 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 the 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 that this defendant is the person who committed the offense[s] charged.

¹ United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933 (1967); State v. Green, 86 N.J. 281, 291-293 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-119 (App. Div. 1996).

B. Inclusion of References to Scientific Studies and Research

1. Committee's Discussion

The subcommittee could not reach a consensus on whether specific references to the social science studies and scientific research included in Henderson should be noted in the third paragraph and in some of the factors, such as stress.

For example the third paragraph originally proposed by the subcommittee members in support of including these references stated:

Scientific research has amply demonstrated the dangers of mistake in human perception and identification. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identification evidence.

Those members stressed the importance of including the detailed description of the scientific findings and research found by the Court in Henderson. They were of the view that the jury should not only be told about the variables but also understand the science on how such variables can effect a witness's memory.

On the other hand, the opposing members of the subcommittee stressed that the Committee needs to be aware that the social science research is probabilistic in that it cannot determine that a witness is right or wrong in his or her identification. However, those members acknowledged that certain factors may exist that should be explained to the jurors to help them determine the accuracy of the identification, and whether the State proved the identification beyond a reasonable doubt. Further, those members recognized that the jury

needs to know that the presence of certain factors may increase the chance of misidentification.

The Committee had a lengthy discussion on this issue. It was recognized that the cross-racial identification charge required in State v. Cromedy, 158 N.J. 112 (1999), does not reference the social science studies although the charge is based upon those findings.

Most members agreed that the charge should not reference the social science studies or use the term “scientific research.” It was the general consensus that the charge should focus on the Court’s findings as it relates to the jury’s consideration of the reliability of the identification, and that the presence of certain factors may increase the chance of misidentification. For example, if the lighting is bad the charge does not need to state that the “science shows...”

Those members who initially opposed deleting these references ultimately withdrew their objections. Therefore, the Committee agreed to delete all references to the social science studies and scientific research in the charge.

C. Inclusion of Detailed Description on Memory and its Stages

1. Committee's Discussion

The third and fifth paragraphs originally proposed by some members of the subcommittee included a detailed description on memory and its stages as set forth in Henderson, supra, 208 N.J. at 245-48. However, the subcommittee could not reach a consensus on including this language.

In particular, the original language in the third paragraph proposed by the supporting subcommittee members stated:

Eyewitness identification evidence must be scrutinized carefully. Scientific research has amply demonstrated the dangers of mistake in human perception and identification. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identification evidence. I will instruct you on the specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable.

Their fifth paragraph originally stated:

In evaluating the reliability of the identification, you should understand what science has demonstrated about how human memory works. Human memory is not at all like a video recording that a witness need only replay to remember what happened. Human memory is far more complex. Memory or 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, information that ultimately forms the memory can be distorted, contaminated, and even falsely imagined. Unlike a videotape, the witness does not perceive everything that occurs; rather, the witness constructs a memory based on pieces of information perceived at the time of the incident. In other words, the witness does not encode or "record" all the information in the same way that a videotape does. Additionally, whereas a

videotape remains intact, memory is malleable and can unknowingly be contaminated by a variety of factors.

The subcommittee members who proposed that language asserted that since the Court adopted the scientific research on memory, it should be included in the charge. Further those members were of the view that the first two sentences in the third paragraph go to the heart of the Henderson case. Additionally, those members asserted that the language in the fifth paragraph on “how memory works” was, in their view, the core of the scientific research in this area. They emphasized the importance of the jury understanding the sentence that “memory is not like a video recording.”

The opposing members of the subcommittee asserted that the fifth paragraph purported to instruct the jury on “how memory works,” which in their view was a subject beyond the scope of a jury instruction. They considered that paragraph essentially a lecture comparing human memory to videotape and filled with loaded words such as “distorted,” “contaminated,” “false,” and “malleable.” They were strongly opposed to including this language.

Those members suggested that the charge instead state:

Human beings do have the ability to recognize other people from past experiences and to identify them at a later time. But human memory is not foolproof.”

One Committee member did not like the term “foolproof.” Other options were raised for this term but ultimately the Committee decided to keep “foolproof.”

The Committee held a lengthy discussion on whether to include the detailed description on memory and its stages. It was expressed that there is a

difference in including language in a court opinion and a charge. Overall, the general consensus was that the charge did not need to include a dissertation on memory and its stages. Further, the Committee was of the view that the charge should refrain from using too much description on memory.

Those members who initially supported including this language withdrew their objections.

Therefore, the Committee agreed for the effectiveness of the charge that there should be some preliminary information on memory. The Committee decided to include that “memory is not like a video recording” and that “human memory is far more complex.”

However, the Committee agreed to delete the remaining portion of the fifth paragraph concerning the detailed description on memory and its stages.

2. Recommended Third Paragraph

The Committee approved the following:

Eyewitness identification evidence must be scrutinized carefully. Human beings do have the ability to recognize other people from past experiences and to identify them at a later time. But human memory is not foolproof. Research has shown that human memory is not at all like a video recording that a witness need only replay to remember what happened. Human memory is far more complex.² I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable.

² State v. Henderson, 208 N.J. 208, 245 (2011).

D. Fourth and Fifth Paragraphs on “Evaluating the Identification”

1. Committee’s Discussion

There were no objections to the language in these two paragraphs, which except for some minor changes is from the second and third paragraphs of the current charge.

2. Recommended Language

The Committee approved the following for these paragraphs:

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 perceptions, 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, 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.³

In evaluating the identifications, you should consider the observations and perceptions on which the identification were based, and the witness’s ability to make those observations and perceptions. If you determine that the out-of-court identification is not reliable, you may still consider the witness’s in-court identification of the defendant if you find it to be reliable. Unless the in-court identification resulted from the witness’s observations or perceptions of the perpetrator during the commission of the offense, rather than being the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight. The ultimate issues of the reliability of both the in-court and out-of-court identifications is for you to decide.⁴

³ State v. Romero, 191 N.J. 59, 76 (2007).

⁴ United States v. Wade, 388 U.S. at 229-232, 241, 87 S.Ct. at 1933-1935, 1940 (manner in which lineup or other identification procedure conducted relevant to reliability of out-of-court identification and in-court identification following out-of-court identification, and jury’s credibility determinations).

E. Introductory Paragraph for the Estimator Factors

The charge first addresses the Estimator variables. These are the factors beyond the control of the criminal justice system. See Henderson, supra, 208 N.J. at 261.

Moreover, the Court explained:

They can include factors related to the incident, the witness, or the perpetrator. Estimator variables are equally capable of affecting an eyewitness' ability to perceive and remember an event. Although the factors can be isolated and tested in lab experiments, they occur at random in the real world.

[Ibid.]

It should be noted that like the current charge the term “factors” is used rather than “variables.” In addition, except where noted below the paragraphs describing the factors are new to the charge.

1. Committee’s Discussion

This paragraph is the same as the current charge, except for the addition of the third sentence, which states, “In addition you should consider the following factors that are related to the witness, the alleged perpetrator of the crime, and the criminal incident itself.”

One area of disagreement among the subcommittee members was the use of “may” versus “should” in regards to the jury’s consideration of the factors in this paragraph. The subcommittee members supporting the use of “should” argued that in their opinion the research based variables that affect reliability as discussed in Henderson require the fact finder to consider the factors that science has demonstrated affect reliability because they are based on research.

The subcommittee members who preferred the use of “may” explained that the use of “should” risks directing jury deliberations, while the use of “may” draws attention to the findings but permits the jury to decide whether they should be applied. Those subcommittee members emphasized that there is a danger of channeling the juror’s discretion by the use of “should” rather than “may.”

The Committee was divided on this issue. It was expressed that the current charge uses “should,” and the Court did not recommend changing that language. By a close vote, the Committee agreed to use “should.”

2. Recommended Paragraph

The Committee approved the following:

To decide whether the identification testimony is sufficiently reliable evidence that this defendant is the person who committed the offense[s] charged, you should evaluate the testimony of the witness in light of the factors for considering credibility that I have already explained to you. In addition, you should consider the following factors that are related to the witness, the alleged perpetrator of the crime, and the criminal incident itself.⁵ In particular, you should consider **[choose appropriate factors from one through six below]**:

⁵ Henderson, supra, 208 N.J. at 247.

F. The Witness's Opportunity to View and Degree of Attention Factor

1. Committee's Discussion

This language, except for some minor changes, is from the first two factors of the current charge on page 3.

2. Recommended Paragraph

The Committee approved the following for this factor:

- (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 (i) below]**:

G. Stress Factor

1. Court's Findings

In Henderson, the Court found that “high levels of stress are likely to affect the reliability of eyewitness identifications.” Id. at 262. However, the Court noted that “There is no precise measure for what constitutes “high” stress, which must be assessed based on the facts presented in individual cases.” Ibid.

2. Committee's Discussion

The original version reviewed by the Committee stated:

Stress: Scientific research has proven that even under the best viewing conditions, highly stressful events can have a negative effect on memory and increase the risk of a mistaken identification. Therefore, you should consider the level of the witness' stress and whether the stressful nature of the event distracted the witness or made it harder for him or her to identify the perpetrator.

The Committee first deleted the phrase “Scientific research has proven” in the first sentence.

The Committee then recognized the importance of the statement in Henderson that “[e]ven under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification.” Id. at 261. Therefore, the Committee agreed to revise the first sentence to conform to that statement.

The Committee next agreed to delete the phrase in the last sentence concerning the “stressful nature of the event.”

3. Recommended Paragraph

The paragraph approved by the Committee is as follows:

- (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 the level of the witness's stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.⁶

⁶ Henderson, supra, 208 N.J. at 261-62.

H. Weapons Focus Factor

1. Court's Findings

For this factor, the Court explained that “When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit.” See Henderson, supra, 208 N.J. at 262.

Further, the Court stated:

- (1) Weapon focus" can thus impair a witness' ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration.
- (2) Weapon focus can also affect a witness' ability to describe a perpetrator.
- (3) The duration of the crime is also an important consideration.

[Id. at 262-63.]

2. Committee's Discussion

The original version reviewed by the Committee stated:

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

The Committee was mindful of the Court's findings in Henderson that “when the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness' description of the perpetrator.” Id. at 263.

Further, the Committee agreed that this factor will not apply in every case where there is a visible weapon, i.e. it will only apply “if the crime is of short duration.” Therefore, the Committee decided to add that phrase at the end of the third sentence.

3. Recommended Paragraph

The Committee approved the following paragraph:

(b) Weapons Focus: You should consider whether the witness saw the weapon during the incident. 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 a short duration. In considering this factor, you should take into account the duration of the crime because the longer the duration of the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.⁷

⁷ Henderson, supra, 208 N.J. at 262-63.

I. Duration Factor

1. Court's Findings

The Court found that “Not surprisingly, the amount of time an eyewitness has to observe an event may affect the reliability of an identification.” Id. at 264.

Further, the Court noted that “Whatever the threshold, studies have shown, and the Special Master found, ‘that witnesses consistently tend to overestimate short durations, particularly where much was going on or the event was particularly stressful.’” Ibid.

2. Committee's Discussion

The original language reviewed by the Committee for this factor stated:

Duration: The amount of time an eyewitness has to observe an event may affect the reliability of an identification. A brief or fleeting observation is less likely to produce an accurate identification than a more prolonged exposure. In addition, scientific research has shown that the time estimate given by a witness may not always be accurate because witnesses tend to think events lasted longer than they actually did.

The Committee was mindful of the importance of including the statement in Henderson that “There is no measure to determine exactly how long a view is needed to be able to make a reliable identification.” Ibid. Therefore, the Committee agreed to add “Although there is no minimum time required to make an accurate identification” at the beginning of the second sentence. In addition, the phrase “to the perpetrator” was added at the end of that sentence.

3. Recommended Paragraph

The Committee approved the following paragraph:

(c) 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, the time estimate given by a witness may not always be accurate because witnesses tend to think events lasted longer than they actually did.⁸

⁸ Henderson, supra, 208 N.J. at 264.

J. Distance and Lighting Factors

1. Court's Findings

The Henderson Court found:

It is obvious that a person is easier to recognize when close by, and that clarity decreases with distance. We also know that poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification."

[Id. at 264.]

The Court also noted "Research has shown that people have difficulty estimating distances." Ibid.

2. Committee's Discussion

The third sentence in the original version for the Distance factor stated "In addition, scientific research has shown that a witness' estimate of how far he was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances." The only change made by the Committee to this paragraph was to delete the phrase "scientific research has shown" in that sentence.

With regards to the Lighting factor, the original language stated:

Lighting: Poor lighting makes it harder to see well, and therefore, poor lighting conditions can diminish the reliability of an identification."

The Committee considered the Court's findings that "poor lighting conditions can diminish the reliability of an identification." Various alternatives were discussed for the term "poor," but the Committee ultimately agreed on "inadequate."

The Committee also decided to add “You should consider the lighting conditions that were present at the time of the alleged crime in this case.”

3. Recommended Paragraphs

The approved language states:

- (d) Distance:** A person is easier to recognize 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 that were present at the time of the alleged crime in this case.¹⁰

⁹ Henderson, supra, 208 N.J. at 264.

¹⁰ Ibid.

K. Intoxication Factor

1. Court's Findings

The Court found that the “level of intoxication can affect the reliability of an identification.” See Henderson, *supra*, 208 N.J. at 265.

In support of this conclusion the Court noted the findings of the Special Master that “the effects of alcohol on identification accuracy show that high levels of alcohol promote false identifications” and that “low alcohol intake produces fewer misidentifications than high alcohol intake.” *Ibid*.

2. Committee's Discussion

In crafting the language for this factor, the subcommittee could not reach a consensus. The version proposed by some members of the subcommittee stated:

Intoxication: An identification given by a witness who was highly impaired or intoxicated at the time of the incident tends to be more unreliable than an identification given by a sober witness.

The opposing members of the subcommittee pointed out that Henderson only referenced alcohol and not narcotics or prescription drugs. Those members noted that the description of this factor in Henderson does not include any findings or discussion on whether prescription drugs or narcotics have an effect on the identification and whether the jury should be advised on them. Moreover, they asserted that Henderson is not just tied to intoxication; rather the opinion ties the reliability of the identification to the “level of intoxication.”

The Committee first considered whether jurors would understand the term “intoxication” and whether to instead reference “under the influence.” The Committee could not reach a consensus on which term was better.

The Committee then noted the importance of the findings of the Special Master that “high levels of alcohol promote false identifications,” whereas “low alcohol intake produces fewer misidentifications than high alcohol intake.” Therefore, the Committee agreed to include that phrase rather than “highly impaired or intoxicated.”

Some Committee members asserted that the charge should include references to any evidence, including drugs that might have an effect on a witness such as alcohol or drugs. After a lengthy discussion, a majority of the Committee approved adding a sentence to the footnote, which would state that “Although Henderson only addressed alcohol if there is evidence of impairment by drugs or other substances the parties may want to have the jury consider this issue.”

After the Committee meeting, some members indicated that they were going to raise an issue at the next meeting that the “Intoxication” factor should be revisited because one of the Estimator variables that should be evaluated during a pre-trial hearing after suggestiveness has been shown is, “[w]as the witness under the influence of alcohol or drugs.” Therefore, they planned to suggest that this factor be revised to state “a witness who is highly intoxicated” and/or whether the witness was “under the influence of alcohol or drugs.” However, those members did not raise this issue at the next meeting, nor were there any

additional objections raised concerning this language in the final approved charge.

3. Recommended Paragraph

The language approved by the Committee states:

(f) Intoxication: An identification given by a witness with a high level of alcohol at the time of the incident tends to be more unreliable than an identification given by a witness who did not have a high level of alcohol.¹¹

¹¹ Henderson, supra, 208 N.J. at 265. Although Henderson only addressed alcohol if there is evidence of impairment by drugs or other substances the parties may want to have the jury consider this issue.

L. Disguises/Changed Appearance Factor

1. Court's Findings

The Court stated, "Disguises and changes in facial features can affect a witness' ability to remember and identify a perpetrator." See Henderson, supra, 208 N.J. at 266. Further the Court recognized the Special Master's findings that "[d]isguises (e.g., hats, sunglasses, masks) are confounding to witnesses and reduce the accuracy of identifications." Ibid.

Additionally, the Court found that "disguises as simple as hats have been shown to reduce identification accuracy." Ibid. Moreover, the Court noted "If facial features are altered between the time of the event and the identification procedure – if for example, the culprit grows a beard—the accuracy of an identification may decrease." Ibid.

2. Committee's Discussion

The Committee approved the language as proposed by the subcommittee.

3. Recommended Paragraph

The approved language states:

(g) Disguises/Changed Appearance: The perpetrator's use of a disguise can affect a witness's ability to both remember and identify the perpetrator. Disguises can be as simple as hats or sunglasses, as well as masks, and can reduce the accuracy of an identification.¹² Similarly, if facial features are altered between the time of the event and a subsequent identification procedure, the accuracy of the identification may decrease.¹³

¹² Henderson, supra, 208 N.J. at 266.

¹³ Ibid.

M. Prior Description of Perpetrator Factor

1. Committee's Discussion

The subcommittee could not reach a consensus on the language for this factor. The paragraph proposed by some members of the subcommittee stated:

Prior Description of Perpetrator: Another important factor for your consideration is the accuracy of any description of the perpetrator that the witness gave prior to the identification procedure. Consider whether any description given prior to the identification procedure accurately matches the photo or person picked out during the procedure. Additionally, you should give careful consideration to whether the witness' testimony at trial was consistent with, or different from, his or her prior description of the perpetrator. Finally, you should consider whether the prior description provided details or was just general in nature because a witness' inability to provide a detailed description of the perpetrator may call into question the reliability of the witness' identification

The opposing members of the subcommittee asserted that the sentence "whether any description given prior to the identification procedure accurately matches the photo or person picked out during the procedure" was not in Henderson.

The Committee discussed this issue and ultimately agreed to use the language in the current charge on page 3, which advises the jury that they may consider "the accuracy of any description the witness gave prior to identifying the perpetrator." In addition, the Committee decided that the first sentence of the footnote in the current charge should be included in this paragraph, and to delete the rest of the footnote.

2. Recommended Paragraph

The language approved by the Committee states:

(2) Prior Description of Perpetrator: Another factor for your consideration is the accuracy of any description the witness gave before identifying the perpetrator. Facts that may be relevant to this factor include whether any description the witness gave of the perpetrator after observing the incident but before making the identification was accurate or inaccurate, 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.

N. Confidence and Accuracy Factor

1. Court's Findings

With regards to highly confident witnesses, the Court recognized its conclusion in State v. Romero, 191 N.J. 59, 76 (2007), “that a witness’s level of confidence, standing alone, may not be an indication of the reliability of the identification.” See Henderson, *supra*, 208 N.J. at 254.

Further, the Henderson Court noted the Special Master’s findings that “eyewitness confidence is generally an unreliable indicator of accuracy, but he acknowledged research showing that highly confident witnesses can make accurate identifications 90% of the time.” *Ibid*.

2. Committee’s Discussion

The subcommittee could not reach a consensus on this paragraph. The version proposed by some members of the subcommittee stated:

Confidence and Accuracy: You heard testimony that (insert name of witness) made a statement at the time of his/her identification of defendant from the photo array/line-up concerning his/her level of certainty that the photograph he/she selected is in fact the person who committed the crime. A witness’s level of confidence, standing alone, may not be an indication of the reliability of the identification. Although some scientific research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.

One Committee member expressed concerns with the sentence that “Although some scientific research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.” That member was concerned that this

statement bolsters the testimony of the State’s witness. The Committee initially considered deleting that sentence.

However, the subcommittee member who proposed that sentence explained that it was drafted to balance the language in Henderson that a confidence statement taken at the time of the out-of-court identification without confirmatory feedback and recorded would be relevant at the trial. In his view, if the statement was not recorded it could not be used at trial. However, it was expressed that a confidence statement is only relevant if it was made at the time of the identification.

After a lengthy discussion, the Committee decided to delete the phrase “scientific” in that sentence. In addition, the Committee agreed to delete the sentence that “A witness’s level of confidence, standing alone, may not be an indication of the reliability of the identification.”

3. Recommended Paragraph

The language approved by the Committee states:

(3) Confidence and Accuracy: You heard testimony that (insert name of witness) made a statement at the time of his/her identification of defendant from the photo array/line-up concerning his/her level of certainty that the photograph he/she selected is in fact the person who committed the crime. Although some research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.¹⁴

¹⁴ Henderson, supra, 208 N.J. at 253-55.

O. Time Elapsed Factor

1. Court's Findings

With regards to memory decay, the Court stated:

Memories fade with time. And as the Special Master observed, memory decay “is irreversible”; memories never improve. As a result, delays between the commission of a crime and the time an identification is made can affect reliability. That basic principle is not in dispute.

[See Henderson, supra, 208 N.J. at 267.]

Further, the Court stated, “In other words, the more time that passes, the greater the possibility that a witness’ memory of a perpetrator will weaken.” Ibid.

2. Committee's Discussion

The first three sentences proposed by some members of the subcommittee stated:

Scientific evidence has proven that memories fade with time. This process is not reversible. Once a memory fades or decays it can never be recovered.

However, the subcommittee could not reach a consensus on including these sentences. The subcommittee members opposed to this language asserted that memory can be recalled.

In reviewing this paragraph, the Committee first deleted the reference to “scientific evidence has proven that” in the first sentence. The Committee then considered the statement in Henderson that “researchers cannot pinpoint precisely when a person’s recall becomes unreliable.” Id. at 267.

After a lengthy discussion, the Committee agreed to retain the “Memories fade with time” sentence and delete the second and third sentences.

3. Recommended Paragraph

The language approved by the Committee states:

(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.¹⁵

¹⁵ Henderson, supra, 208 N.J. at 267.

P. Cross-Racial Effects Factor

1. Court's Findings

With regards to cross-racial identification the Henderson Court citing to State v. Cromedy, 158 N.J. 112, 120 (1999) explained:

A cross-racial identification occurs when an eyewitness is asked to identify a person of another race." *Cromedy, supra*, 158 N.J. at 120. In *Cromedy*, after citing multiple social science sources, this Court recognized that a witness may have more difficulty making a cross-racial identification. [citation omitted].

[Id. at 267.]

Further, the Court stated that "[c]ross-racial recognition continues to be a factor that can affect the reliability of an identification." Ibid.

As to the charge for cross-racial identification, the Court advised:

In 1999, the Court in *Cromedy* directed that the charge be given "only when . . . identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." *Cromedy, supra*, 158 N.J. at 132. Since then, the additional research on own-race bias discussed in section VI.B.8, and the more complete record about eye-witness identification in general, justify giving the charge whenever cross-racial identification is in issue at trial.

[Id. at 299.]

2. Committee's Discussion

The original paragraph reviewed by the Committee stated:

Cross-Racial Effects: The fact that an identifying witness is not of the same race as the perpetrator and/or defendant is a significant factor that may influence the accuracy of the witness' identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race. In fact,

cross-racial identifications have been proven to be more unreliable than same-race identifications.

The Committee first turned to the language in the current charge on page 6, and compared it to the proposed paragraph. The Committee agreed to use the language in the current charge, and to add in the footnote that this instruction “must” rather than “should” be given whenever “there is a cross-racial identification.”

3. Recommended Paragraph

The language approved by the Committee states:

(5) Cross-Racial Effects: The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness’s original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.¹⁶

¹⁶ This instruction must be given whenever there is a cross-racial identification. Henderson, supra, 208 N.J. at 299 (modifying State v. Cromedy, 158 N.J. 112, 132 (1999)).

Q. Catch-all Factor

1. Original Factors on “Child Witnesses” and “Own-Age Bias”

Some members of the subcommittee proposed including separate factors on “Child Witnesses” and “Own-Age Bias,” which stated the following:

Child Witnesses: Identifications made by young children must be scrutinized carefully. Child eyewitnesses under the age of thirteen are more likely to make incorrect identifications than adults.

Own-Age Bias: Scientific evidence has shown that witnesses are better at recognizing people of their own age than people of other ages.

However, the subcommittee could not reach a consensus on whether the Court made specific findings on these factors, and whether they should be included in the charge.

In particular, the subcommittee members opposed to including these factors asserted that Henderson did not find that identifications made by young children must be scrutinized carefully. Further, those members asserted that the Special Master’s finding was that “[a] witness’s age ... bears on the reliability of an identification.” See Henderson, supra, 208 N.J. at 265. Moreover, they pointed out that the research showed that children under thirteen were more likely to make incorrect identifications than adults when they view target-absent line-ups. Ibid.

As to the “Own-Age Bias” factor, the Committee considered the testimony of Dr. Penrod that “witnesses are better at recognizing people of [their] own age than... people of other ages” and that this “may appear in studies that use college-age students as targets.” Id. at 265-66. Additionally, it was asserted that

Henderson also referenced that “Perhaps people should only use age as a factor in deciding whether to believe an eyewitness if there is a large age difference between the witness and the suspect.” Id. at 266.

The Committee initially agreed to delete the first sentence in the “Child Witnesses” factor that “Identifications made by young children must be scrutinized carefully.” However, it was then expressed that the second sentence was not an accurate statement.

After further discussion, the Committee considered whether to have a “Catch-all factor” at the end of the section on Estimator variables, similar to factor 9 in the current charge, to incorporate the Court’s findings that “characteristics like a witness’ age...can affect the reliability of an identification.” Id. at 265. Factor 9 in the current charge states that the “Jury should be charged on any other relevant factor present in the case.”

Most members agreed to include the Catch-all factor, and delete the Child Witnesses and Own-Age Bias factors. Those members that were opposed to deleting these factors did not renew their objections when the charges were ultimately approved.

2. Recommended Paragraph

The language approved by the Committee states:

(6) Catch-all Factor: You may also consider the age of the identifying witness and any other relevant characteristics of the witness.

R. Inconsistent Statements Factor

1. Committee's Discussion

The original draft included an "Inconsistent Statements" factor, which stated:

Inconsistent Statements: In evaluating the identification, you should consider any discrepancies or inconsistencies between the witness' trial testimony and the out-of-court identification(s).

(The footnote at the end of this paragraph cited to State v. Edmonds, 293 N.J. Super. 113, 118 (App. Div. 2000)).

Initially, the Committee approved the language in this factor, which is from factor 6 of the current charge.

However, upon reviewing the final version of the charge, the Committee decided that this factor was too repetitive with the "Prior Description of Perpetrator" factor. Therefore, the Committee agreed to delete the "Inconsistent Statements" factor.

S. Introductory Paragraph for the Systems Factors

These are factors such as lineup procedures, which are within the control of the criminal justice system. See Henderson, supra, 208 N.J. at 247.

1. Committee's Discussion

There were no changes made by the Committee to the language proposed by the subcommittee.

2. Recommended Paragraph

The approved language states:

In evaluating the reliability of a witness's identification, you should also consider the circumstances under which any out-of-court identification was made, and whether or not it was the result of a suggestive procedure, including everything done or said by law enforcement to the witness during the identification process. You should consider the following factors: **[Charge if appropriate]**.¹⁷

¹⁷ The following factors consist of "the system ... variables ... for which [the Court] found scientific support that is generally accepted by experts." Henderson, supra, 208 N.J. at 298-99.

T. Lineup Composition and Fillers Factors

1. Court's Findings

The Court found:

The way that a live or photo lineup is constructed can also affect the reliability of an identification. Properly constructed lineups test a witness' memory and decrease the chance that a witness is simply guessing.

[See Henderson, supra, 208 N.J. at 251.]

The Court listed the following features that can affect the construction of a fair lineup:

- (1) First, the Special Master found that "mistaken identifications are more likely to occur when the suspect stands out from other members of a live or photo lineup"... As a result, a suspect should be included in a lineup comprised of look-alikes. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness' confidence in the identification because the selection process seemed easy.
- (2) Second, lineups should include a minimum number of fillers. The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness' ability to distinguish the culprit from an innocent person. As Dr. Wells testified, no magic number exists, but there appears to be general agreement that a minimum of five fillers should be used.
- (3) Third, based on the same reasoning, lineups should not feature more than one suspect. As the Special Master found, "if multiple suspects are in the lineup, the reliability of a positive identification is difficult to assess, for the possibility of 'lucky' guesses is magnified."

[Id. at 251-52.]

The Court then stated, “The record is unclear as to whether the use of fillers that match a witness’ pre-lineup description is more reliable than fillers that resemble an actual suspect (to the extent there is a difference between the two).” Id. at 252.

The Court advised that:

[C]ourts should consider whether a lineup is poorly constructed when evaluating the admissibility of an identification. When appropriate, jurors should be told that poorly constructed or biased lineups can affect the reliability of an identification and enhance a witness’ confidence.”

[Ibid.]

2. Committee’s Discussion

The Committee did not make any changes to the language proposed by the subcommittee for these factors.

3. Recommended Paragraphs

The approved language states:

(1) Lineup Composition: A suspect should not stand out from other members of the lineup. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness’s confidence in the identification because the selection process seemed so easy to the witness.¹⁸ It is, of course, for you to determine whether the lineup was biased or not and whether the composition of the lineup had any affect on the reliability of the identification.

(2) Fillers: Lineups should include a number of possible choices for the witness, commonly referred to as “fillers.” The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness’s memory. A minimum of six persons or photos should be included in the lineup.¹⁹

¹⁸ Henderson, supra, 208 N.J. at 251.

¹⁹ Ibid.

U. Multiple Viewings Factor

1. Court's Findings

The Court stated:

Viewing a suspect more than once during an investigation can affect the reliability of the later identification. The problem, as the Special Master found, is that successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure.

[See Henderson, supra, 208 N.J. at 255.]

Additionally, the Court noted:

It is typical for eyewitnesses to look through mugshot books in search of a suspect. Investigations may also involve multiple identification procedures. Based on the record, there is no impact on the reliability of the second identification procedure "when a picture of the suspect was not present in photographs examined earlier."

[Ibid.]

The Court further explained that "Multiple identification procedures that involve more than one viewing of the same suspect, though, can create a risk of "mugshot exposure" and "mug-shot commitment." Ibid.

- (1) Mugshot exposure is when a witness initially views a set of photos and makes no identification, but then selects someone -- who had been depicted in the earlier photos -- at a later identification procedure.
- (2) Mugshot commitment occurs when a witness identifies a photo that is then included in a later lineup procedure. Studies have shown that once witnesses identify an innocent person from a mug-shot, "a significant number" then "reaffirm[] their false identification" in a later lineup -- even if the actual target is present.

[Id. at 255-56.]

The Court concluded, “Both mugshot exposure and mugshot commitment can affect the reliability of the witness’ ultimate identification and create a greater risk of misidentification. [Id. at 256.]

2. Committee’s Discussion

It was recognized by the Committee that while there is language in Henderson advising that “mugshot exposure” and “mugshot commitment” can affect the reliability of the identification, the word “mugshot” should not be stated to the jury. Therefore, the Committee revised the end of the footnote to state that “the jury should be instructed on the concepts implicated by those terms without using the word “mugshot.” In addition, the Committee agreed to include a reference to the model jury charge, “Identity-Police Photos.”

3. Recommended Paragraph

The approved language states:

- (3) Multiple Viewing:** When a witness views a person in multiple identification procedures, the witness’s memory of the actual perpetrator can be replaced by the witness’s memory of the person seen in the multiple procedures. In this way, when a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased. You may consider whether the witness viewed the suspect multiple times and, if so, whether viewing the suspect in multiple procedures affected the reliability of the identification.²⁰

²⁰ Henderson, supra, 208 N.J. at 255-56. If either “mugshot exposure” (no identification in first lineup/photo array, later identification of someone in first procedure in second lineup/photo array) or “mugshot commitment” (selection of person in lineup who was identified in previous photo array) are part of the evidence, the jury should be instructed on the concepts implicated by those terms without using the word “mugshot.” See model charge on “Identity-Police Photos.”

V. Showups Factor

1. Court's Findings

The Henderson Court explained:

"Showups are essentially single-person lineups: a single suspect is presented to a witness to make an identification. Showups often occur at the scene of a crime soon after its commission."

[Id. at 259.]

Further, the Court stated:

By their nature, showups are suggestive and cannot be performed blind or double-blind. Nonetheless, as the Special Master found, "the risk of misidentification is not heightened if a showup is conducted immediately after the witnessed event, ideally within two hours" because "the benefits of a fresh memory seem to balance the risks of undue suggestion."

[Ibid.]

The Court recognized that "We have previously found showups to be "inherently suggestive," see *Herrera, supra*, 187 N.J. at 504, 902 A.2d 177, and other states have limited the admissibility of showup identifications." Ibid.

Therefore, the Court concluded:

Thus, the record casts doubt on the reliability of showups conducted more than two hours after an event, which present a heightened risk of misidentification. As with lineups, showup administrators should instruct witnesses that the person they are about to view may or may not be the culprit and that they should not feel compelled to make an identification. That said, lineups are a preferred identification procedure because we continue to believe that showups, while sometimes necessary, are inherently suggestive. See *Herrera, supra*, 187 N.J. at 504, 902 A.2d 177.

[Id. at 261.]

2. Committee's Discussion

The original paragraph reviewed by the Committee stated:

Showups: In this case, the witness identified the defendant during a "showup," that is, defendant was the only person shown to the witness at that time. Sometimes it is necessary for the police to conduct a "showup," or one-on-one identification procedure, even though such a procedure is suggestive in nature. Although with immediate showups the benefits of a fresh memory may balance the risks of undue suggestion, showups conducted more than two hours after an event present a heightened risk of misidentification. Also, police officers should instruct witnesses that the person they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification. If you find that the showup in this case was conducted more than two hours after the perpetrator was last seen by the witness, and/or if you find that the person conducting the lineup failed to instruct the witness that the person he/she was about to view may or may not be the person who committed the crime, and that they should not feel compelled to make an identification, you may consider whether this/these factor(s) affected the accuracy of the identification.

The subcommittee members explained that in crafting this paragraph they strived to balance the language in Henderson that showups are "inherently suggestive" and that there is a "heightened risk of misidentification." They also pointed out that this paragraph should be charged in every case in which there is a showup procedure.

The Committee had a lengthy discussion on this factor. One member was concerned with the proposed language, which in his opinion did not leave any room for whether the suggestiveness of the procedure should be considered within the first two hours. That member said that if the showup is outside two hours the jury can consider whether these factors weigh against the accuracy of

the identification, and not just that it “affected the accuracy of the identification.” Therefore, that member suggested that the end of this paragraph state that “You may consider whether these factors weigh against the accuracy of the identification.”

The Committee considered the Special Master’s findings that “the risk of misidentification is not heightened if a showup is conducted immediately after the witnessed event, ideally within two hours” because “the benefits of a fresh memory seem to balance the risks of undue suggestion.” Id. at 259. Further, the Committee noted the statement in Henderson that the reliability of showups conducted more than two hours after an event “present a heightened risk of misidentification.” Id. at 261.

The Committee then expressed the importance of explaining the two hours difference to the jury: (1) if the showup is done within the first two hours and the witness is given the appropriate instructions this may balance the risks of an increased level of suggestiveness; (2) if the showup is done after two hours then there is a heightened risk of misidentification; and (3) that they must consider whether the identification was reliable or the result of an unduly suggestive procedure.

A discussion then ensued on the use of “immediate” in the third sentence that “Although with immediate showups the benefits of a fresh memory may balance the risks of undue suggestion, showups conducted more than two hours after an event present a heightened risk of misidentification.” It was expressed that Henderson does not define “immediately” but instead the Special Master referred to “within two hours.” The Committee could not reach a consensus on

this issue. Therefore, the Committee agreed to delete “with immediate showups” in that sentence.

The Committee also revised the next sentence stating “Also, police officers should instruct witnesses that the person they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification” to state “must instruct” and not “should instruct.”

It was then asserted that the charge does not include any language on what the jury should consider when the identification is done properly. For example, the jury is not told how to consider a showup that was conducted within ten minutes, and the appropriate instructions were given. Some members were strongly opposed to including such an instruction in the charge. They argued that Henderson states, “by their nature, showups are suggestive.” Id. at 259. Further, those member noted the Special Master’s statement that the “benefits of fresh memory seem to balance the risks of undue suggestion” was hardly a positive statement on this procedure.

It was then expressed by one of the subcommittee members the importance of including the phrase “Even though such a procedure is suggestive in nature” to maintain the paragraph’s balance. The Committee agreed to begin the second sentence with that phrase.

The Committee then agreed to delete the last sentence and revise it to the following:

In determining whether the identification is reliable or the result of undue suggestiveness procedure, you should consider how much time elapsed after the perpetrator was last seen by the

witness, and whether the appropriate instructions were given to the witness.

3. Recommended Paragraph

The Committee approved the following:

[CHARGE IN EVERY CASE IN WHICH THERE IS A SHOWUP PROCEDURE]

(4) Showups: In this case, the witness identified the defendant during a “showup,” that is, defendant was the only person shown to the witness at that time. Even though such a procedure is suggestive in nature, sometimes it is necessary for the police to conduct a “showup,” or one-on-one identification procedure. Although the benefits of a fresh memory may balance the risk of undue suggestion, showups conducted more than two hours after an event present a heightened risk of misidentification. Also, police officers must instruct witnesses that the person they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification. In determining whether the identification is reliable or the result of undue suggestive procedure, you should consider how much time elapsed after the perpetrator was last seen by the witness, and whether the appropriate instructions were given to the witness.²¹

²¹ Henderson, supra, 208 N.J. at 259-61

W. Identification Lineup Procedure

1. Lineup Administrator Factor

a. Court's Findings

With regards to the lineup procedure, the Court stated, "An identification may be unreliable if the lineup procedure is not administered in double-blind or blind fashion." See Henderson, supra, 208 N.J. at 248.

Further, the Court distinguished the two methods of conducting the lineup:

(1) Double-blind administrators do not know who the actual suspect is. Its purpose is to prevent an administrator from intentionally or unintentionally influencing a witness' identification decision;

(2) Blind administrators are aware of that information but shield themselves from knowing where the suspect is located in the lineup or photo array.

[Ibid.]

The Court further pointed out that "Research has shown that lineup administrators familiar with the suspect may leak that information by consciously or unconsciously communicating to witnesses which lineup member is the suspect." Ibid.

Moreover, the Court added:

The consequences are clear: a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect. An ideal lineup administrator, therefore, is someone who is not investigating the particular case and does not know who the suspect is.

[Id. at 249.]

The Court further stated:

The State understandably notes that police departments, no matter their size, have limited resources, and those limits can make it impractical to administer lineups double-blind in all cases. An alternative technique, which Dr. Wells referred to as the "envelope method," helps address that challenge. It relies on single-blind administration: an officer who knows the suspect's identity places single lineup photographs into different envelopes, shuffles them, and presents them to the witness. The officer/administrator then refrains from looking at the envelopes or pictures while the witness makes an identification. This "blinding" technique is cost-effective and can be used when resource constraints make it impractical to perform double-blind administration.

[Id. at 249-50.]

The Court concluded that the "failure to perform blind lineup procedures can increase the likelihood of misidentification." Id. at 250.

b. Committee's Discussion

The subcommittee in crafting this paragraph agreed that this factor should be charged in every case where the police conduct an identification lineup procedure. In addition, they included an optional paragraph to address circumstances where the police do not use a blind administrator.

The Committee approved the language as proposed by the subcommittee.

c. Recommended Paragraph

The approved language states:

[CHARGE (a) and (b) IN EVERY CASE IN WHICH THE POLICE CONDUCT AN IDENTIFICATION LINEUP PROCEDURE]²²

In determining the reliability of the identification, you should also consider whether the identification procedure was properly conducted.

- (a) Double-blind:** A lineup administrator who knows which lineup member is the suspect may intentionally or unintentionally convey this knowledge to the witness, thereby increasing the chance that the witness will identify the suspect even if the suspect is innocent. For this reason, whenever feasible, lineups and photo-spreads should be conducted by an officer who does not know the identity of the suspect.²³

[CHARGE IF BLIND ADMINISTRATOR IS NOT USED]

If a police officer who does not know the suspect's identity is not available, then the officer should use a method that does not allow him/her to see the photos as the witness looks at them. In this case, it is alleged that the person who presented the lineup [did/did not] know the identity of the suspect.

[In this case, it is alleged that a police officer who did not know the suspect's identity was not available, and the police did/did not compensate for that by conducting a procedure where the officer did not see the photos as the witness looked at them.]

²² “To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability.” Henderson, supra, 208 N.J. at 219 (asking the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to this charge “and address various system and estimator variables.”)

²³ Id. at 248-50.

2. Instructions Factor

a. Court's Findings

With regards to Pre-identification Instructions, the Court stated:

Identification procedures should begin with instructions to the witness that the suspect may or may not be in the lineup or array and that the witness should not feel compelled to make an identification. There is a broad consensus for that conclusion.

[Id. at 250.]

The Court found that the “failure to give proper pre-lineup instructions can increase the risk of misidentification.” Ibid.

b. Committee's Discussion

Like the Lineup Administrator factor, the Committee agreed that this factor should also be charged in every case where the police conduct an identification lineup procedure.

The Committee approved the language as proposed by the subcommittee.

c. Recommended Paragraph

The approved language states:

You may consider this factor when you consider the circumstances under which the identification was made, and when you evaluate the overall reliability of the identification.²⁴

(b) Instructions: You should consider what was or what was not said to the witness prior to viewing a photo array.²⁵ Identification procedures should begin with instructions to the witness that the perpetrator may or may not be in the array and that the witness should not feel compelled to make an identification. The failure to give this instruction can increase the risk of misidentification. If you find that the police [did/did

²⁴ Henderson, supra, 208 N.J. at 248-50.

²⁵ See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

not] give this instruction to the witness, you may take this factor into account when evaluating the identification evidence.²⁶

²⁶ Henderson, supra, 208 N.J. at 250.

3. Feedback Factor

a. Court's Findings

The Court stated, "Information received by witnesses both before and after an identification can affect their memory." Id. at 253.

The Court explained:

Confirmatory or post-identification feedback presents the same risks. It occurs when police signal to eyewitnesses that they correctly identified the suspect. That confirmation can reduce doubt and engender a false sense of confidence in a witness. Feedback can also falsely enhance a witness' recollection of the quality of his or her view of an event.

[Ibid.]

Therefore, the Court concluded, "feedback affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness' report of how he or she viewed an event." Id. at 255.

Moreover, based upon the record, the Court found:

[N]on-State actors like co-witnesses and other sources of information can affect the independent nature and reliability of identification evidence and inflate witness confidence -- in the same way that law enforcement feedback can. As a result, law enforcement officers should instruct witnesses not to discuss the identification process with fellow witnesses or obtain information from other sources.

[Id. at 271.]

b. Committee's Discussion

The only change the Committee made to the paragraph on Feedback proposed by the subcommittee was to revise the bracketed text above this factor to state "[CHARGE IF FEEDBACK IS AN ISSUE IN THE CASE]" rather than stating "[CHARGE IF SUPPORTED BY THE EVIDENCE]."

c. Recommended Paragraph

The following was approved:

[CHARGE IF FEEDBACK IS AN ISSUE IN THE CASE]

(c) Feedback: Feedback occurs when police or other witnesses to an event signal to eyewitnesses that they correctly identified the suspect. That confirmation poses a risk of endangering a false sense of confidence in a witness. Feedback can also present a risk of falsely enhancing a witness's recollection of the quality of his or her view of an event. It is for you to determine whether or not the recollection of the witness was affected by feedback or whether the recollection instead reflects the accurate perceptions of the witness during the event.²⁷

²⁷ Henderson, *supra*, 208 N.J. at 253-55; *see also* Herrera, 187 N.J. 493, 509 (quoting Ramirez, 817 P.2d at 781 n.2 (citing State v. Long, 721 P.2d 483, 494 n.8 (Utah 1986))).

X. Concluding Paragraphs

1. Committee's Discussion

The Committee approved the final three paragraphs as proposed by the subcommittee.

The first paragraph includes the language in the current charge in the last identification procedure factor on page 5. However, the last sentence was added to state "Such information can affect the independent nature and reliability of a witness's identification and inflate witness confidence in that identification." In addition the footnote now cites to State v. Chen, 208 N.J. 307(2011), instead of State v. Herrera, 187 N.J. 493, 509 (2006).

The first sentence of the next paragraph, except for some minor changes, is from factor 8 of the current charge. The next two sentences are new:

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 factor or factor(s) which 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 worthy of your consideration as you determine whether the State has met its burden to prove identification beyond a reasonable doubt.

The subsequent sentences beginning with "Unless the in-court and out-of-court identifications..." to the end of the charge are from the current charge.

2. Recommended Paragraphs

The Committee approved the following:

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.²⁸ Such information can affect the independent nature and reliability of a witness's identification and inflate witness confidence in that 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 identifications were 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 factor or factor(s) which 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 worthy of your consideration as you determine whether the State has met its burden to prove identification beyond a reasonable doubt. Unless the in-court and out-of-court identifications resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, rather than being the product of an impression gained at the in-court and/or out-of-court identification procedures, they should be afforded no weight. The ultimate issue of the trustworthiness of an identification is for you to decide.

If, after consideration of 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 consideration of 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.

²⁸ State v. Chen, 208 N.J. 307 (2011).

Respectfully Submitted,

Honorable Samuel D. Natal, Chair
Honorable Greta Gooden-Brown, Vice-Chair
Honorable Robert C. Billmeier
Honorable Joseph C. Cassini, III
Honorable Liliana S. DeAvila-Silebi
Honorable Marianne Espinosa
Honorable Thomas M. Moore
Honorable Ronald L. Reisner
Honorable Lisa Rose
Honorable Francis B. Schultz
Honorable Michael A. Toto
Joseph E. Krakora, Public Defender
Deborah Bartolomey, Esq.
Robert J. Brass, Esq.
Annmarie Cozzi, Esq.
Catherine A. Foddai, Esq.
Mark H. Friedman, Esq.
Christine H. Kim, Esq.
Richard S. Lehigh, Esq.
John K. McNamara, Esq.
Alison S. Perrone, Esq.
Kevin G. Walsh, Esq.
Jack L. Weinberg, Esq.
Gwendolyn J. Williams, Esq.
Michael J. Williams, Esq.

Staff: Maria Pogue, Esq.

**APPENDIX A
PROPOSED CHARGES**

IDENTIFICATION: IN-COURT AND OUT-OF-COURT IDENTIFICATIONS

(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 this defendant guilty, the State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. The 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 proven each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proven beyond a reasonable doubt that this defendant is the person who committed it.

The State has presented the testimony of [insert name of witness who identified defendant]. You will recall that this witness identified the defendant in court as the person who committed [insert the offense(s) charged]. The State also presented testimony that on a prior occasion before this trial, this witness identified the defendant as the person who committed this offense [these offenses]. 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 the defendant is reliable and

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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 that this defendant is the person who committed the offense[s] charged.

Eyewitness identification evidence must be scrutinized carefully. Human beings do have the ability to recognize other people from past experiences and to identify them at a later time. But human memory is not foolproof. Research has shown that human memory is not at all like a video recording that a witness need only replay to remember what happened. Human memory is far more complex.² 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 perceptions, 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, 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.³

In evaluating the identifications, you should consider the observations and perceptions on which the identification were based, and the witness's ability to make

¹ United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933 (1967); State v. Green, 86 N.J. 281, 291-293 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-119 (App. Div. 1996).

² State v. Henderson, 208 N.J. 208, 245 (2011).

³ State v. Romero, 191 N.J. 59, 76 (2007).

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those observations and perceptions. If you determine that the out-of-court identification is not reliable, you may still consider the witness's in-court identification of the defendant if you find it to be reliable. Unless the in-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, rather than being the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight. The ultimate issues of the reliability of both the in-court and out-of-court identifications is for you to decide.⁴

To decide whether the identification testimony is sufficiently reliable evidence that this defendant is the person who committed the offense[s] charged, you should evaluate the testimony of the witness in light of the factors for considering credibility that I have already explained to you. In addition, you should consider the following factors that are related to the witness, the alleged perpetrator of the crime, and the criminal incident itself.⁵ In particular, you should consider **[choose appropriate factors from one through six below]**:

(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 (i) 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 the level of the witness's stress and whether

⁴ United States v. Wade, 388 U.S. at 229-232, 241, 87 S.Ct. at 1933-1935, 1940 (manner in which lineup or other identification procedure conducted relevant to reliability of out-of-court identification and in-court identification following out-of-court identification, and jury's credibility determinations).

⁵ Henderson, *supra*, 208 N.J. at 247.

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that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.⁶

- (b) **Weapons Focus:** You should consider whether the witness saw the weapon during the incident. 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 a short duration. In considering this factor, you should take into account the duration of the crime because the longer the duration of the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.⁷
- (c) **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, the time estimate given by a witness may not always be accurate because witnesses tend to think events lasted longer than they actually did.⁸
- (d) **Distance:** A person is easier to recognize 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 that were present at the time of the alleged crime in this case.¹⁰
- (f) **Intoxication:** An identification given by a witness with a high level of alcohol at the time of the incident tends to be more unreliable than an identification given by a witness who did not have a high level of alcohol.¹¹
- (g) **Disguises/Changed Appearance:** The perpetrator's use of a disguise can affect a witness's ability to both remember and identify the perpetrator.

⁶ Henderson, *supra*, 208 N.J. at 261-62.

⁷ Id. at 262-63.

⁸ Id. at 264.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Id. at 265. Although Henderson only addressed alcohol if there is evidence of impairment by drugs or other substances the parties may want to have the jury consider this issue.

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Disguises can be as simple as hats or sunglasses, as well as masks, and can reduce the accuracy of an identification.¹² Similarly, if facial features are altered between the time of the event and a subsequent identification procedure, the accuracy of the identification may decrease.¹³

- (2) **Prior Description of Perpetrator:** Another factor for your consideration is the accuracy of any description the witness gave before identifying the perpetrator. Facts that may be relevant to this factor include whether any description the witness gave of the perpetrator after observing the incident but before making the identification was accurate or inaccurate, 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.
- (3) **Confidence and Accuracy:** You heard testimony that (insert name of witness) made a statement at the time of his/her identification of defendant from the photo array/line-up concerning his/her level of certainty that the photograph he/she selected is in fact the person who committed the crime. Although some research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.¹⁴
- (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.¹⁵
- (5) **Cross-Racial Effects:** The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness's original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.¹⁶
- (6) **Catch-all Factor:** You may also consider the age of the identifying witness and any other relevant characteristics of the witness.

¹² Henderson, *supra*, 208 N.J. at 266.

¹³ *Ibid.*

¹⁴ *Id.* at 253-55.

¹⁵ *Id.* at 267.

¹⁶ 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)).

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In evaluating the reliability of a witness's identification, you should also consider the circumstances under which any out-of-court identification was made, and whether or not it was the result of a suggestive procedure, including everything done or said by law enforcement to the witness during the identification process. You should consider the following factors: **[Charge if appropriate]:**¹⁷

- (1) Lineup Composition:** A suspect should not stand out from other members of the lineup. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness's confidence in the identification because the selection process seemed so easy to the witness.¹⁸ It is, of course, for you to determine whether the lineup was biased or not and whether the composition of the lineup had any affect on the reliability of the identification.
- (2) Fillers:** Lineups should include a number of possible choices for the witness, commonly referred to as "fillers." The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness's memory. A minimum of six persons or photos should be included in the lineup.¹⁹
- (3) Multiple Viewing:** When a witness views a person in multiple identification procedures, the witness's memory of the actual perpetrator can be replaced by the witness's memory of the person seen in the multiple procedures. In this way, when a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased. You may consider whether the witness viewed the suspect multiple times and, if so, whether viewing the suspect in multiple procedures affected the reliability of the identification.²⁰

¹⁷ The following factors consist of "the system ... variables ... for which [the Court] found scientific support that is generally accepted by experts." Henderson, supra, 208 N.J. at 298-99.

¹⁸ Id. at 251

¹⁹ Ibid.

²⁰ Id. at 255-56. If either "mugshot exposure" (no identification in first lineup/photo array, later identification of someone in first procedure in second lineup/photo array) or "mugshot commitment" (selection of person in lineup who was identified in previous photo array) are part of the evidence, the jury should be instructed on the concepts implicated by those terms without using the word "mugshot." See model charge on "Identity-Police Photos."

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[CHARGE IN EVERY CASE IN WHICH THERE IS A SHOWUP PROCEDURE]

(4) **Showups:** In this case, the witness identified the defendant during a “showup,” that is, defendant was the only person shown to the witness at that time. Even though such a procedure is suggestive in nature, sometimes it is necessary for the police to conduct a “showup,” or one-on-one identification procedure. Although the benefits of a fresh memory may balance the risk of undue suggestion, showups conducted more than two hours after an event present a heightened risk of misidentification. Also, police officers must instruct witnesses that the person they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification. In determining whether the identification is reliable or the result of undue suggestive procedure, you should consider how much time elapsed after the perpetrator was last seen by the witness, and whether the appropriate instructions were given to the witness.²¹

**[CHARGE (a) and (b) IN EVERY CASE IN WHICH THE POLICE CONDUCT
AN IDENTIFICATION LINEUP PROCEDURE]²²**

In determining the reliability of the identification, you should also consider whether the identification procedure was properly conducted.

(a) **Double-blind:** A lineup administrator who knows which lineup member is the suspect may intentionally or unintentionally convey this knowledge to the witness, thereby increasing the chance that the witness will identify the suspect even if the suspect is innocent. For this reason, whenever feasible, lineups and photo-spreads should be conducted by an officer who does not know the identity of the suspect.²³

[CHARGE IF BLIND ADMINISTRATOR IS NOT USED]

If a police officer who does not know the suspect’s identity is not available, then the officer should use a method that does not allow him/her to see the photos as the witness looks at them. In this case, it is alleged that the person who presented the lineup [did/did not] know the identity of the suspect.

²¹ Henderson, supra, 208 N.J. at 259-61.

²² “To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability.” Id. at 219 (asking the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to this charge “and address various system and estimator variables.”)

²³ Id. at 248-50.

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[In this case, it is alleged that a police officer who did not know the suspect's identity was not available, and the police did/did not compensate for that by conducting a procedure where the officer did not see the photos as the witness looked at them.]

[RESUME MAIN CHARGE]

You may consider this factor when you consider the circumstances under which the identification was made, and when you evaluate the overall reliability of the identification.²⁴

- (b) Instructions:** You should consider what was or what was not said to the witness prior to viewing a photo array.²⁵ Identification procedures should begin with instructions to the witness that the perpetrator may or may not be in the array and that the witness should not feel compelled to make an identification. The failure to give this instruction can increase the risk of misidentification. If you find that the police [did/did not] give this instruction to the witness, you may take this factor into account when evaluating the identification evidence.²⁶

[CHARGE IF FEEDBACK IS AN ISSUE IN THE CASE]

- (c) Feedback:** Feedback occurs when police or other witnesses to an event signal to eyewitnesses that they correctly identified the suspect. That confirmation poses a risk of endangering a false sense of confidence in a witness. Feedback can also present a risk of falsely enhancing a witness's recollection of the quality of his or her view of an event. It is for you to determine whether or not the recollection of the witness was affected by feedback or whether the recollection instead reflects the accurate perceptions of the witness during the event.²⁷

[RESUME MAIN CHARGE]

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

²⁴ Henderson, supra, 208 N.J. at 248-50.

²⁵ See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

²⁶ Henderson, supra, 208 N.J. at 250.

²⁷ Id. at 253-55; see also Herrera, 187 N.J. 493, 509 (quoting Ramirez, 817 P.2d at 781 n.2 (citing State v. Long, 721 P.2d 483, 494 n.8 (Utah 1986))).

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other information or influence, that may have affected the independence of his/her identification.²⁸ Such information can affect the independent nature and reliability of a witness's identification and inflate witness confidence in that 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 identifications were 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 factor or factor(s) which 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 worthy of your consideration as you determine whether the State has met its burden to prove identification beyond a reasonable doubt. Unless the in-court and out-of-court identifications resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, rather than being the product of an impression gained at the in-court and/or out-of-court identification procedures, they should be afforded no weight. The ultimate issue of the trustworthiness of an identification is for you to decide.

If, after consideration of 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 consideration of all of the evidence, you are convinced beyond a reasonable doubt

²⁸ State v. Chen, 208 N.J. 307 (2011).

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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.

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(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 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.

¹ United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933 (1967); State v. Green, 86 N.J. 281, 291-293 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-119 (App. Div. 1996).

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Eyewitness identification evidence must be scrutinized carefully. Human beings do have the ability to recognize other people from past experiences and to identify them at a later time. But human memory is not foolproof. Research has shown that human memory is not at all like a video recording that a witness need only replay to remember what happened. Human memory is far more complex.²

You should consider the observations and perceptions on which the identification was based 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, 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.³

In deciding what weight, if any, to give to the identification testimony, you should consider the following factors [**cite 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 (i) 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 the level of the witness's stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.⁴

² State v. Henderson, 208 N.J. 208, 245 (2011).

³ State v. Romero, 191 N.J. 59, 76 (2007).

⁴ Henderson, supra, 208 N.J. at 261-62.

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- (b) **Weapons Focus:** You should consider whether the witness saw the weapon during the incident. 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 a short duration. In considering this factor, you should take into account the duration of the crime because the longer the duration of the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.⁵
- (c) **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, the time estimate given by a witness may not always be accurate because witnesses tend to think events lasted longer than they actually did.⁶
- (d) **Distance:** A person is easier to recognize 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.⁷
- (e) **Lighting:** Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions that were present at the time of the alleged crime in this case.⁸
- (f) **Intoxication:** An identification given by a witness with a high level of alcohol at the time of the incident tends to be more unreliable than an identification given by a witness who did not have a high level of alcohol.⁹
- (g) **Disguises/Changed Appearance:** The perpetrator's use of a disguise can affect a witness's ability to both remember and identify the perpetrator. Disguises can be as simple as hats or sunglasses, as well as masks, and can reduce the accuracy of an identification.¹⁰ Similarly, if facial features are

⁵ Henderson, *supra*, 208 N.J. at 262-63.

⁶ Id. at 264.

⁷ Ibid.

⁸ Ibid.

⁹ Id. at 265. Although Henderson only addressed alcohol, if there is evidence of impairment by drugs or other substances the parties may want to have the jury consider this issue.

¹⁰ Id. at 266.

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altered between the time of the event and a subsequent identification procedure, the accuracy of the identification may decrease.¹¹

- (2) **Prior Description of Perpetrator:** Another factor for your consideration is the accuracy of any description the witness gave before identifying the perpetrator. Facts that may be relevant to this factor include whether any description the witness gave of the perpetrator after observing the incident but before making the identification was accurate or inaccurate, 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.
- (3) **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.¹²
- (4) **Cross-Racial Effects:** The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness's original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.¹³
- (5) **Catch-all Factor:** You may also consider the age of the identifying witness and any other relevant characteristics of the witness.

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.¹⁴ Such information can affect the independent nature and reliability of a witness's identification and inflate witness confidence in that 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

¹¹ Henderson, supra, 208 N.J. at 266.

¹² Id. at 267.

¹³ 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)).

¹⁴ State v. Chen, 208 N.J. 307 (2011).

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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 factor or factor(s) which 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 worthy of your consideration as you determine whether the State has met its burden to prove identification beyond a reasonable doubt.

Unless the in-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, it 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.

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(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 that on a prior occasion before this trial, [insert name of witness who identified defendant] identified (defendant) as the person who committed [insert the offenses 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 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 that (this defendant) is the person who committed the offense[s] charged.

¹ United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933 (1967); State v. Green, 86 N.J. 281, 291-293 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-119 (App. Div. 1996).

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Eyewitness identification evidence must be scrutinized carefully. Human beings do have the ability to recognize other people from past experiences and to identify them at a later time. But human memory is not foolproof. Research has shown that human memory is not at all like a video recording that a witness need only replay to remember what happened. Human memory is far more complex.²

You should consider the observations and perceptions on which the identification was based, and the circumstances under which the identification was made. Although nothing may appear more convincing than a witness's categorical identification of perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, 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.³ In deciding what weight, if any, to give to the identification testimony, you should consider the following factors [**cite 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 (i) 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 the level of the witness's stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.⁴

² State v. Henderson, 208 N.J. 208, 245 (2011).

³ State v. Romero, 191 N.J. 59, 76 (2007).

⁴ Henderson, supra, 208 N.J. at 261-62.

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- (b) **Weapons Focus:** You should consider whether the witness saw the weapon during the incident. 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 a short duration. In considering this factor, you should take into account the duration of the crime because the longer the duration of the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.⁵
- (c) **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, the time estimate given by a witness may not always be accurate because witnesses tend to think events lasted longer than they actually did.⁶
- (d) **Distance:** A person is easier to recognize 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.⁷
- (e) **Lighting:** Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions that were present at the time of the alleged crime in this case.⁸
- (f) **Intoxication:** An identification given by a witness with a high level of alcohol at the time of the incident tends to be more unreliable than an identification given by a witness who did not have a high level of alcohol.⁹
- (g) **Disguises/Changed Appearance:** The perpetrator's use of a disguise can affect a witness's ability to both remember and identify the perpetrator. Disguises can be as simple as hats or sunglasses, as well as masks, and can reduce the accuracy of an identification.¹⁰ Similarly, if facial features are

⁵ Henderson, *supra*, 208 N.J. at 262-63.

⁶ Id. at 264.

⁷ Ibid.

⁸ Ibid.

⁹ Id. at 265. Although Henderson only addressed alcohol, if there is evidence of impairment by drugs or other substances the parties may want to have the jury consider this issue.

¹⁰ Id. at 266.

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altered between the time of the event and a subsequent identification procedure, the accuracy of the identification may decrease.¹¹

- (2) **Prior Description of Perpetrator:** Another factor for your consideration is the accuracy of any description the witness gave before identifying the perpetrator. Facts that may be relevant to this factor include whether any description the witness gave of the perpetrator after observing the incident but before making the identification was accurate or inaccurate, 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.
- (3) **Confidence and Accuracy:** You heard testimony that (insert name of witness) made a statement at the time of his/her identification of defendant from the photo array/line-up concerning his/her level of certainty that the photograph he/she selected is in fact the person who committed the crime. Although some research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.¹²
- (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.¹³
- (5) **Cross-Racial Effects:** The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness's original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.¹⁴
- (6) **Catch-all Factor:** You may also consider the age of the identifying witness and any other relevant characteristics of the witness.

In evaluating the reliability of a witness's identification, you should also consider the circumstances under which the out-of-court identification was made, and whether or not it was the result of a suggestive procedure, including everything done or said by law

¹¹ Henderson, *supra*, 208 N.J. at 266.

¹² Id. at 253-55.

¹³ Id. at 267.

¹⁴ 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)).

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enforcement to the witness during the identification process. You should consider the following factors: **[Charge if appropriate]:**¹⁵

- (1) **Lineup Composition:** A suspect should not stand out from other members of the lineup. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness's confidence in the identification because the selection process seemed so easy to the witness.¹⁶ It is, of course, for you to determine whether the lineup was biased or not and whether the composition of the lineup had any affect on the reliability of the identification.
- (2) **Fillers:** Lineups should include a number of possible choices for the witness, commonly referred to as "fillers." The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness's memory. A minimum of six persons or photos should be included in the lineup.¹⁷
- (3) **Multiple Viewing:** When a witness views a person in multiple identification procedures, the witness's memory of the actual perpetrator can be replaced by the witness's memory of the person seen in the multiple procedures. In this way, when a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased. You may consider whether the witness viewed the suspect multiple times and, if so, whether viewing the suspect in multiple procedures affected the reliability of the identification.¹⁸

[CHARGE IN EVERY CASE IN WHICH THERE IS A SHOWUP PROCEDURE]

- (4) **Showups:** In this case, the witness identified the defendant during a "showup," that is, defendant was the only person shown to the witness at that time. Even though such a procedure is suggestive in nature, sometimes it is necessary for the police to conduct a "showup," or one-on-one, identification procedure. Although the benefits of a fresh memory may balance the risks of undue suggestion, showups conducted more than two hours after an event present a heightened risk

¹⁵ The following factors consist of "the system ... variables ... for which [the Court] found scientific support that is generally accepted by experts." Henderson, supra, 208 N.J. at 298-99.

¹⁶ Id. at 251.

¹⁷ Ibid.

¹⁸ Id. at 255-56. If either "mugshot exposure" (no identification in first lineup/photo array, later identification of someone in first procedure in second lineup/photo array) or "mugshot commitment" (selection of person in lineup who was identified in previous photo array) are part of the evidence, the jury should be instructed on the concepts implicated by those terms without using the word "mugshot." See model charge on "Identity-Police Photos."

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of misidentification. Also, police officers must instruct witnesses that the person they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification. In determining whether the identification is reliable or the result of undue suggestive procedure, you should consider how much time elapsed after the perpetrator was last seen by the witness, and whether the appropriate instructions were given to the witness.¹⁹

[CHARGE (a) AND (b) IN EVERY CASE IN WHICH THE POLICE CONDUCT AN IDENTIFICATION LINEUP PROCEDURE]²⁰

In determining the reliability of the identification, you should also consider whether the identification procedure was properly conducted.

- (a) **Double-blind:** A lineup administrator who knows which lineup member is the suspect may intentionally or unintentionally convey this knowledge to the witness, thereby increasing the chance that the witness will identify the suspect even if the suspect is innocent. For this reason, whenever feasible, lineups and photo-spreads should be conducted by an officer who does not know the identity of the suspect.²¹

[CHARGE IF BLIND ADMINISTRATOR IS NOT USED]

If a police officer who does not know the suspect's identity is not available, then the officer should use a method that does not allow him/her to see the photos as the witness looks at them. In this case, it is alleged that the person who presented the lineup [did/did not] know the identity of the suspect.

[In this case, it is alleged that a police officer who did not know the suspect's identity was not available, and the police did/did not compensate for that by conducting a procedure where the officer did not see the photos as the witness looked at them.]

[RESUME MAIN CHARGE]

¹⁹ Henderson, supra, 208 N.J. at 259-61.

²⁰ “To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability.” Id. at 219 (asking the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to this charge “and address various system and estimator variables.”)

²¹ Id. at 248-50.

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You may consider this factor when you consider the circumstances under which the identification was made, and when you evaluate the overall reliability of the identification.²²

- (b) **Instructions:** You should consider what was or what was not said to the witness prior to viewing a photo array.²³ Identification procedures should begin with instructions to the witness that the perpetrator may or may not be in the array and that the witness should not feel compelled to make an identification. The failure to give this instruction can increase the risk of misidentification. If you find that the police [did/did not] give this instruction to the witness, you may take this factor into account when evaluating the identification evidence.²⁴

[CHARGE IF FEEDBACK IS AN ISSUE IN THE CASE]

- (c) **Feedback:** Feedback occurs when police or other witnesses to an event signal to eyewitnesses that they correctly identified the suspect. That confirmation poses a risk of endangering a false sense of confidence in a witness. Feedback can also present a risk of falsely enhancing a witness's recollection of the quality of his or her view of an event. It is for you to determine whether or not the recollection of the witness was affected by feedback or whether the recollection instead reflects the accurate perceptions of the witness during the event.²⁵

[RESUME MAIN CHARGE]

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

²² Henderson, supra, 208 N.J. at 248-50.

²³ See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

²⁴ Henderson, supra, 208 N.J. at 250.

²⁵ Id. at 253-55; see also Herrera, 187 N.J. 493, 509 (quoting Ramirez, 817 P.2d at 781 n.2 (citing State v. Long, 721 P.2d 483, 494 n.8 (Utah 1986))).

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identification.²⁶ Such information can affect the independent nature and reliability of a witness's identification and inflate witness confidence in that 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 factor or factor(s) which 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 worthy of your consideration as you determine whether the State has met its burden to prove identification beyond a reasonable doubt.

Unless the out-of-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, rather than being the product of an impression gained at the out-of-court identification procedure, it 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 consideration of 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.

²⁶ State v. Chen, 208 N.J. 307 (2011).

**APPENDIX B
CURRENT CHARGES**

IDENTIFICATION: IN-COURT AND OUT-OF-COURT IDENTIFICATIONS

(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 this defendant guilty, the State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. The 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 the testimony of [insert name of witness who identified defendant]. You will recall that this witness identified the defendant in court as the person who committed [insert the offense(s) charged]. The State also presented testimony that on a prior occasion before this trial, this witness identified the defendant as the person who committed this offense [these offenses]. 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' identification of the 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

¹ United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933 (1967); State v. Green, 86 N.J. 281, 291-293 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-119 (App. Div. 1996).

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to conclude that this defendant is the person who committed the offense[s] charged. You should consider the observations and perceptions on which the identification was based, 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, 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.²

In evaluating the identifications, you should consider the observations and perceptions on which the identifications were based, and the witness' ability to make those observations and perceptions. If you determine that the out-of-court identification is not reliable, you may still consider the witness' in-court identification of the defendant if you find it to be reliable. Unless the in-court identification resulted from the witness' observations or perceptions of the perpetrator during the commission of the offense, rather than being the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight. The ultimate issues of the trustworthiness of both the in-court and out-of-court identifications are for you to decide.³

To decide whether the identification testimony is sufficiently reliable evidence upon which to conclude that this defendant is the person who committed the offense[s] charged, you should evaluate the testimony of the witness in light of the factors for considering credibility that I have already explained to you. In addition, you may consider the following factors [cite appropriate factors]:⁴

² State v. Romero, 191 N.J. 59, 76 (2007).

³ United States v. Wade, 388 U.S. at 229-232, 241, 87 S.Ct. at 1933-1935, 1940 (manner in which lineup or other identification procedure conducted relevant to reliability of out-of-court identification and in-court identification following out-of-court identification, and jury's credibility determinations).

⁴ The first five factors listed below were enumerated in Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382 (1972), and United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940, as the factors to be considered in evaluating the likelihood of misidentification. New Jersey courts employ the same analysis. State v. Madison, 109 N.J. 223, 239-240 (1988). See also State v. Cherry, 289 N.J. Super. 503, 520 (App. Div. 1995).

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[If necessary or appropriate for purposes of clarity, the judge may comment on any evidence relevant to any of the following factors]⁵

- (1) The witness' opportunity to view the person who committed the offense at the time of the offense.⁶
- (2) The witness' degree of attention to the perpetrator at the time of the offense.⁷
- (3) The accuracy of any description the witness gave prior to identifying the perpetrator.⁸
- (4) The degree of certainty expressed by the witness in making any identification.⁹

⁵ See State v. Cromedy, 158 N.J. 112, 128 (1999) ("when identification is a critical issue in the case, the trial court is obligated to give the jury discrete and specific instruction that provides appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification"); State v. Green, 86 N.J. at 292, 293 (noting that model charge could have been used as a guide, court holds that "the defendant had a right to expect that the appropriate guidelines would be given, focusing the jury's attention on how to analyze and consider the factual issues with regard to the trustworthiness of [the witness's] in-court identification"); but see State v. Robinson, 165 N.J. 32, 42-45 (2000) (reaffirming obligation under Green to explain abstract identification factors in factual context of case, but holding that court need not necessarily summarize weaknesses of State's evidence); see generally, State v. Gartland, 149 N.J. 456, 475 (1997) (holding that jury charges must relate the law to the specific facts in a case); State v. A. Gross, 121 N.J. 1 (1990) (same); State v. Concepcion, 111 N.J. 373 (1988) (same).

⁶ Facts that may be relevant to this factor include the witness's ability to observe what he/she said he/she saw, the amount of time during which the witness saw the perpetrator, the distance from which the witness saw the perpetrator, and the lighting conditions at the time. See Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253 (1977); Neil v. Biggers, 409 U.S. at 200-201, 93 S.Ct. at 382; State v. Madison, 109 N.J. at 239.

Where supported by evidence that the victim might have difficulty perceiving, recalling, or relating the events, it may be appropriate to add the following to factor (1): ". . . including the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly." State v. Herrera, 187 N.J. 493, 509 (2006) (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991)).

⁷ Facts that may be relevant to this factor include whether the witness was merely a passing or casual observer or one who would be expected to pay scrupulous attention to detail, whether the witness was involved in a direct confrontation with the perpetrator, whether the witness was nervous, shocked or scared as a result of any confrontation with the perpetrator, and whether the witness's attention was focused on or away from the perpetrator's features. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 200, 93 S.Ct. at 382-383; State v. Madison, 109 N.J. at 240.

⁸ Facts that may be relevant to this factor include whether any description the witness gave of the perpetrator after observing the incident but before making the identification was accurate or inaccurate, whether the prior description provided details or was just general in nature, whether the witness' testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 200, 93 S.Ct. at 383; United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940; State v. Madison, 109 N.J. at 240-241; State v. Edmonds, 293 N.J. Super. 113 (App. Div. 1996).

⁹ Facts that may be relevant to this factor include whether witnesses making the identification received inadvertent or intentional confirmation, whether certainty was expressed at the time of the identification or some time later, whether intervening events following the identification affected the witness's certainty, and whether the identification was made spontaneously and remained consistent thereafter. See N.J. Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures, April 18, 2001, at 2 (quoted in Herrera, 187 N.J. at 190); National Institute of Justice, Convicted by Juries, Exonerated by Science, June 1996, at 24 (available at <https://www.ndjrs.gov/pdffiles/dnaevid.pdf>); Gary Wells & Amy Bradfield, "Good, You Identified the Suspect," 83 J. Applied Psychol. 360 (1998); Ramirez, 817 P.2d at 781. Whether the witness made an identification quickly upon viewing the suspect, or whether the witness hesitated, may also be a relevant fact. See S. Sporer, Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups, 78 J. Applied Psychol. 22, 23 (1993).

Other relevant facts include whether, at a time prior to making the identification of this defendant, the witness either failed to identify the defendant or identified another person as the perpetrator. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 201, 93 S.Ct. at 383; Foster v. California, 394 U.S. 440, 442-443 & n.2, 89 S.Ct. 1127,

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- (5) The length of time between the witness' observation of the offense and the first identification.¹⁰
- (6) Discrepancies or inconsistencies between identifications, if any.¹¹
- (7) The circumstances under which any out-of-court identification was made, and whether or not it was the product of a suggestive procedure¹², including everything done or said by law enforcement to the witness before, during, or after the identification process.¹³ In making this determination you may consider the following circumstances:

[REFER TO CIRCUMSTANCES OF THE IDENTIFICATION PROCEDURE AS NECESSARY FOR CLARITY, CHOOSING AS APPROPRIATE ANY OF THE FOLLOWING FACTORS, OR ANY OTHER FACTORS RELATING TO SUGGESTIVENESS, THAT ARE SUPPORTED BY THE EVIDENCE:]

- whether anything was said to the witness prior to viewing a photo array, line-up or showup;¹⁴
- whether a photo array shown to the witness contained multiple photographs of the defendant;¹⁵
- whether “all in the lineup but the [defendant] were known to the identifying witness”;¹⁶

1128-1129 & n.2 (1969); United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940; State v. Madison, 109 N.J. at 241. Madison cautions, with respect to an identification witness's "demonstrated certainty in his testimony," that "a witness's feeling of confidence in the details of memory generally do not validly measure the accuracy of the recollection," and that "[i]n fact, witnesses 'frequently become more confident of the correctness of their memory over time while the actual memory trace is probably decaying.'" Id. at 241-242 (quoting W.LaFave and J.Israel, Criminal Procedure).

¹⁰ See Manson v. Brathwaite, 432 U.S. at 115-116, 97 S.Ct. at 2253-2254; Neil v. Biggers, 409 U.S. at 201, 93 S.Ct. at 383; State v. Madison, 109 N.J. at 242.

¹¹ Facts that may be relevant to this factor include whether the witness' identification at trial was different from, or the same as, any prior identification that took place out-of-court. See State v. Edmonds, 293 N.J. Super. at 118.

¹² Refer to the New Jersey Attorney General Guidelines, footnote 8 supra. The court should focus on any allegations of suggestive words or conduct by law enforcement or other persons that may effect the suggestiveness of the identification procedures.

¹³ See State v. Herrera, 187 N.J. 493 (2006), in which the New Jersey Supreme Court addressed the propriety of a “show-up” identification; the majority opinion concluded that, while such a procedure is inherently suggestive, the identification procedure employed there was reliable and did not result in a substantial likelihood of misidentification.

¹⁴ See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

¹⁵ Id.

¹⁶ United States v. Wade, 388 U.S. at 233, 87 S.Ct. at 1935.

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- whether “the other participants in a lineup were grossly dissimilar in appearance to the [defendant]”;¹⁷
- whether “only the [defendant] was required to wear distinctive clothing which the culprit allegedly wore”;¹⁸
- whether "the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail";¹⁹
- whether “the [defendant] is pointed out before or during a lineup”;²⁰
- whether the witness’s identification was made spontaneously and remained consistent thereafter;²¹
- whether the individual conducting the lineup either indicated to the witness that a suspect was present or failed to warn the witness that the perpetrator may or may not be in the procedure;²²
- 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.²³

[CHARGE IN ALL CASES:]

- (8) Any other factor based on the evidence or lack of evidence in the case which you consider relevant to your determination whether the identifications were reliable.
- [(9) Jury should be charged on any other relevant factor present in the case²⁴]

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id., 87 S.Ct. at 1935-1936.

²¹ See Herrera, 187 N.J. at 509 (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991)).

²² See N.J. Attorney General Guidelines, supra, Guideline I.B. (requiring administrator to instruct witness that perpetrator may not be present); State v. Ledbetter, 881 A.2d 290 (Ct. 2005) (requiring jury instruction to that effect).

²³ See Herrera, 187 N.J. at 509 (quoting Ramirez, 817 P.2d at 781 n. 2 (citing State v. Long, 721 P.2d 483, 494 n. 8 (Utah 1986)).

²⁴ The list of factors enumerated in Biggers and Madison is not exhaustive. See State v. White, 158 N.J. 230, (1999) (in declining to find plain error in identification charge, court notes that instruction went beyond model charge, "noting the discrepancy ... between identifications made by different witnesses"). Additional relevant factors that should be brought to jury's attention include the witness's inability to make an in-court identification if asked to do so while on the witness stand, any failure on the part of the State to record a line-up or preserve a photo array, as bearing upon the probative value of the out-of-court identification, see State v. Delgado, 188 N.J. 48, 63 (2006); State v. Earle, 60 N.J. 550, 552 (1972); State v. Peterkin, 226 N.J. Super. 25, 46 (App. Div. 1988), and any discrepancies between identifications made by different witnesses, State v. White, 158 N.J. 230, 248.

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[IN THE APPROPRIATE CASE,²⁵ CHARGE THE FOLLOWING FACTOR:]

- (10) The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness's original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.²⁶

[CHARGE IN ALL CASES:]

Unless the in-court and out-of-court identifications resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, rather than being the product of an impression gained at the in-court and/or out-of-court identification procedures, it should be afforded no weight. The ultimate issue of the trustworthiness of the identification is for you to decide.

If, after consideration of 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 consideration of 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.

²⁵ An instruction that cross-racial identification is a factor to be considered "should be given only when ... identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." State v. Cromedy, 158 N.J. at 132; see also State v. Romero, 191 N.J. 59 (2007)

²⁶ Cromedy holds that in order for the jury to determine the reliability of a cross-racial identification not corroborated by independent evidence, the jury must be informed "of the potential risks associated with such identifications," that the jury must be instructed "about the possible significance of the cross-racial identification factor..." 158 N.J. at 132-133. In State v. Romero, 191 N.J. 59 (2007), the New Jersey Supreme Court refused to rule that cross-ethnic charges were required in cases involving an individual's identification of a person of another ethnic background.

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(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 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. You should consider the observations and perceptions on which the identification was based, 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, when analyzing such testimony, be advised that a witness's level of confidence,

¹ United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933 (1967); State v. Green, 86 N.J. 281, 291-293 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-119 (App. Div. 1996).

standing alone, may not be an indication of the reliability of the identification.² In deciding what weight, if any, to give to the identification testimony, you may consider the following factors [cite appropriate factors].³

[If necessary or appropriate for purposes of clarity, the judge may comment on any evidence relevant to any of the following factors]⁴

- (1) The witness's opportunity to view the person who committed the offense at the time of the offense.⁵
- (2) The witness's degree of attention to the perpetrator at the time of the offense.⁶
- (3) The accuracy of any description the witness gave prior to identifying the perpetrator.⁷
- (4) The degree of certainty expressed by the witness in making the identification.⁸

² State v. Romero, 191 N.J. 59, 76 (2007).

³ The first five factors listed below were enumerated in Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382 (1972), and United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940, as the factors to be considered in evaluating the likelihood of misidentification. New Jersey courts employ the same analysis. State v. Madison, 109 N.J. 223, 239-240 (1988). See also State v. Cherry, 289 N.J. Super. 503, 520 (App. Div. 1995).

⁴ See State v. Cromedy, 158 N.J. 112, 128 (1999) ("when identification is a critical issue in the case, the trial court is obligated to give the jury discrete and specific instruction that provides appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification"); State v. Green, 86 N.J. at 292, 293 (noting that model charge could have been used as a guide, court holds that "the defendant had a right to expect that the appropriate guidelines would be given, focusing the jury's attention on how to analyze and consider the factual issues with regard to the trustworthiness of [the witness's] in-court identification"); but see State v. Robinson, 165 N.J. 32, 42-45 (2000) (reaffirming obligation under Green to explain abstract identification factors in factual context of case, but holding that court need not necessarily summarize weaknesses of State's evidence); see generally, State v. Gartland, 149 N.J. 456, 475 (1997) (holding that jury charges must relate the law to the specific facts in a case); State v. A. Gross, 121 N.J. 1 (1990) (same); State v. Concepcion, 111 N.J. 373 (1988) (same).

⁵ Facts that may be relevant to this factor include the witness's ability to observe what he/she said he/she saw, the amount of time during which the witness saw the perpetrator, the distance from which the witness saw the perpetrator, and the lighting conditions at the time. See Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253 (1977); Neil v. Biggers, 409 U.S. at 200-201, 93 S.Ct. at 382; State v. Madison, 109 N.J. at 239.

Where supported by evidence that the victim might have difficulty perceiving, recalling, or relating the events, it may be appropriate to add the following to factor (1): ". . . including the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly." State v. Herrera, 187 N.J. 493, 509 (2006) (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991)).

⁶ Facts that may be relevant to this factor include whether the witness was merely a passing or casual observer or one who would be expected to pay scrupulous attention to detail, whether the witness was involved in a direct confrontation with the perpetrator, whether the witness was nervous, shocked or scared as a result of any confrontation with the perpetrator, and whether the witness's attention was focused on or away from the perpetrator's features. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 200, 93 S.Ct. at 382-383; State v. Madison, 109 N.J. at 240.

⁷ Facts that may be relevant to this factor include whether any description the witness gave of the perpetrator after observing the incident but before making the identification was accurate or inaccurate, whether the prior description provided details or was just general in nature, whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 200, 93 S.Ct. at 383; United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940; State v. Madison, 109 N.J. at 240-241; State v. Edmonds, 293 N.J. Super. 113 (App. Div. 1996).

⁸ Facts that may be relevant to this factor include whether witnesses making the identification received inadvertent or intentional confirmation, whether certainty was expressed at the time of the identification or some time later, whether intervening events following the identification affected the witness's certainty, and whether the identification was made spontaneously and

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- (5) The length of time between the witness's observation of the perpetrator during the offense and the identification.⁹
- (6) The circumstances under which the identification was made, and whether or not it was the product of a suggestive procedure¹⁰, including everything done or said by law enforcement to the witness before, during, or after the identification process.¹¹ In making this determination you may consider the following circumstances:

[REFER TO CIRCUMSTANCES OF THE IDENTIFICATION PROCEDURE AS NECESSARY FOR CLARITY, CHOOSING AS APPROPRIATE ANY OF THE FOLLOWING FACTORS, OR ANY OTHER FACTORS RELATING TO SUGGESTIVENESS, THAT ARE SUPPORTED BY THE EVIDENCE:]

- whether anything was said to the witness prior to viewing a photo array, line-up or showup;¹²
- whether a photo array shown to the witness contained multiple photographs of the defendant;¹³

remained consistent thereafter. See N.J. Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures, April 18, 2001, at 2 (quoted in Herrera, 187 N.J. at 190); National Institute of Justice, Convicted by Juries, Exonerated by Science, June 1996, at 24 (available at <https://www.ndjrs.gov/pdffiles/dnaevid.pdf>); Gary Wells & Amy Bradfield, "Good, You Identified the Suspect," 83 J. Applied Psychol. 360 (1998); Ramirez, 817 P.2d at 781. Whether the witness made an identification quickly upon viewing the suspect, or whether the witness hesitated, may also be a relevant fact. See S. Sporer, Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups, 78 J. Applied Psychol. 22, 23 (1993).

Other relevant facts include whether, at a time prior to making the identification of this defendant, the witness either failed to identify the defendant or identified another person as the perpetrator. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 201, 93 S.Ct. at 383; Foster v. California, 394 U.S. 440, 442-443 & n.2, 89 S.Ct. 1127, 1128-1129 & n.2 (1969); United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940; State v. Madison, 109 N.J. at 241. Madison cautions, with respect to an identification witness's "demonstrated certainty in his testimony," that "a witness's feeling of confidence in the details of memory generally do not validly measure the accuracy of the recollection," and that "[i]n fact, witnesses 'frequently become more confident of the correctness of their memory over time while the actual memory trace is probably decaying.'" Id. at 241-242 (quoting W.LaFave and J.Israel, Criminal Procedure).

⁹ See Manson v. Brathwaite, 432 U.S. at 115-116, 97 S.Ct. at 2253-2254; Neil v. Biggers, 409 U.S. at 201, 93 S.Ct. at 383; State v. Madison, 109 N.J. at 242.

¹⁰ Refer to the New Jersey Attorney General Guidelines, footnote 8 supra. The court should focus on any allegations of suggestive words or conduct by law enforcement or other persons that may effect the suggestiveness of the identification procedures.

¹¹ See State v. Herrera, 187 N.J. 493 (2006), in which the New Jersey Supreme Court addressed the propriety of a "show-up" identification; the majority opinion concluded that, while such a procedure is inherently suggestive, the identification procedure employed there was reliable and did not result in a substantial likelihood of misidentification.

¹² See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

¹³ Id.

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- whether “all in the lineup but the [defendant] were known to the identifying witness”;¹⁴
- whether “the other participants in a lineup were grossly dissimilar in appearance to the [defendant]”;¹⁵
- whether “only the [defendant] was required to wear distinctive clothing which the culprit allegedly wore”;¹⁶
- whether “the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail”;¹⁷
- whether “the [defendant] is pointed out before or during a lineup”;¹⁸
- whether the witness’s identification was made spontaneously and remained consistent thereafter;¹⁹
- whether the individual conducting the lineup either indicated to the witness that a suspect was present or failed to warn the witness that the perpetrator may or may not be in the procedure;²⁰
- 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.²¹

[CHARGE IN ALL CASES:]

(7) Any other factor based on the evidence or lack of evidence in the case which you consider relevant to your determination of whether the out-of-court identification was reliable.

[(8) Jury should be charged on any other relevant factor present in the case²²]

¹⁴ United States v. Wade, 388 U.S. at 233, 87 S.Ct. at 1935.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id., 87 S.Ct. at 1935-1936.

¹⁹ See Herrera, 187 N.J. at 509 (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991)).

²⁰ See N.J. Attorney General Guidelines, *supra*, Guideline I.B. (requiring administrator to instruct witness that perpetrator may not be present); State v. Ledbetter, 881 A.2d 290 (Ct. 2005) (requiring jury instruction to that effect).

²¹ See Herrera, 187 N.J. at 509 (quoting Ramirez, 817 P.2d at 781 n. 2 (citing State v. Long, 721 P.2d 483, 494 n. 8 (Utah 1986)).

²² The list of factors enumerated in Biggers and Madison is not exhaustive. See State v. White, 158 N.J. 230, (1999) (in declining to find plain error in identification charge, court notes that instruction went beyond model charge, “noting the discrepancy ... between identifications made by different witnesses”). Additional relevant factors that should be brought to jury’s attention include the witness’s inability to make an in-court identification if asked to do so while on the witness stand, any failure on the part of the State to record a line-up or preserve a photo array, as bearing upon the probative value of the out-of-court identification, see State v. Delgado, 188 N.J. 48, 63 (2006); State v. Earle, 60 N.J. 550, 552 (1972); State v. Peterkin, 226 N.J. Super. 25, 46 (App. Div. 1988), and any discrepancies between identifications made by different witnesses, State v. White, 158

[IN THE APPROPRIATE CASE,²³ CHARGE THE FOLLOWING FACTOR:]

(9) The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness's original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.²⁴

[CHARGE IN ALL CASES:]

Unless the in-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, it should be afforded no weight. The ultimate issue of the trustworthiness of the identification is for you to decide.

If, after considering all 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.

²³ N.J. 230, 248.

An instruction that cross-racial identification is a factor to be considered "should be given only when ... identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." State v. Cromedy, 158 N.J. at 132; see also State v. Romero, 191 N.J. 59 (2007).

²⁴ Cromedy holds that in order for the jury to determine the reliability of a cross-racial identification not corroborated by independent evidence, the jury must be informed "of the potential risks associated with such identifications," that the jury must be instructed "about the possible significance of the cross-racial identification factor...." 158 N.J. at 132-33. In State v. Romero, 191 N.J. 59 (2007), the New Jersey Supreme Court refused to rule that cross-ethnic charges were required in cases involving an individual's identification of a person of another ethnic background.

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(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 that on a prior occasion before this trial, [insert name of witness who identified defendant] identified (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 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. You should consider the observations and perceptions on which the identification was based, 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, when analyzing such testimony, be advised that a witness's level of confidence,

¹ United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933 (1967); State v. Green, 86 N.J. 281, 291-293 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-119 (App. Div. 1996).

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standing alone, may not be an indication of the reliability of the identification.² In deciding what weight, if any, to give to the identification testimony, you may consider the following factors [cite appropriate factors].³

[If necessary or appropriate for purposes of clarity, the judge may comment on any evidence relevant to any of the following factors]⁴

- (1) The witness's opportunity to view the person who committed the offense at the time of the offense.⁵
- (2) The witness's degree of attention to the perpetrator at the time of the offense.⁶
- (3) The accuracy of any description the witness gave prior to identifying the perpetrator.⁷
- (4) The degree of certainty expressed by the witness in making the identification.⁸

² State v. Romero, 191 N.J. 59, 76 (2007).

³ The first five factors listed below were enumerated in Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382 (1972), and United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940, as the factors to be considered in evaluating the likelihood of misidentification. New Jersey courts employ the same analysis. State v. Madison, 109 N.J. 223, 239-240 (1988). See also State v. Cherry, 289 N.J. Super. 503, 520 (App. Div. 1995).

⁴ See State v. Cromedy, 158 N.J. 112, 128 (1999) ("when identification is a critical issue in the case, the trial court is obligated to give the jury discrete and specific instruction that provides appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification"); State v. Green, 86 N.J. at 292, 293 (noting that model charge could have been used as a guide, court holds that "the defendant had a right to expect that the appropriate guidelines would be given, focusing the jury's attention on how to analyze and consider the factual issues with regard to the trustworthiness of [the witness's] in-court identification"); but see State v. Robinson, 165 N.J. 32, 42-45 (2000) (reaffirming obligation under Green to explain abstract identification factors in factual context of case, but holding that court need not necessarily summarize weaknesses of State's evidence); see generally, State v. Gartland, 149 N.J. 456, 475 (1997) (holding that jury charges must relate the law to the specific facts in a case); State v. A. Gross, 121 N.J. 1 (1990) (same); State v. Concepcion, 111 N.J. 373 (1988) (same).

⁵ Facts that may be relevant to this factor include the witness's ability to observe what he/she said he/she saw, the amount of time during which the witness saw the perpetrator, the distance from which the witness saw the perpetrator, and the lighting conditions at the time. See Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253 (1977); Neil v. Biggers, 409 U.S. at 200-201, 93 S.Ct. at 382; State v. Madison, 109 N.J. at 239.

Where supported by evidence that the victim might have difficulty perceiving, recalling, or relating the events, it may be appropriate to add the following to factor (1): ". . . including the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly." State v. Herrera, 187 N.J. 493, 509 (2006) (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991)).

⁶ Facts that may be relevant to this factor include whether the witness was merely a passing or casual observer or one who would be expected to pay scrupulous attention to detail, whether the witness was involved in a direct confrontation with the perpetrator, whether the witness was nervous, shocked or scared as a result of any confrontation with the perpetrator, and whether the witness's attention was focused on or away from the perpetrator's features. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 200, 93 S.Ct. at 382-383; State v. Madison, 109 N.J. at 240.

⁷ Facts that may be relevant to this factor include whether any description the witness gave of the perpetrator after observing the incident but before making the identification was accurate or inaccurate, whether the prior description provided details or was just general in nature, whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 200, 93 S.Ct. at 383; United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940; State v. Madison, 109 N.J. at 240-241; State v. Edmonds, 293 N.J. Super. 113 (App. Div. 1996).

⁸ Facts that may be relevant to this factor include whether witnesses making the identification received inadvertent or intentional confirmation, whether certainty was expressed at the time of the identification or some time later, whether intervening events following the identification affected the witness's certainty, and whether the identification was made spontaneously and remained consistent thereafter. See N.J. Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup

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- (5) The length of time between the witness's observation of the perpetrator during the offense and the identification.⁹
- (6) The circumstances under which the identification was made, and whether or not it was the product of a suggestive procedure¹⁰, including everything done or said by law enforcement to the witness before, during, or after the identification process.¹¹ In making this determination you may consider the following circumstances:

[REFER TO CIRCUMSTANCES OF THE IDENTIFICATION PROCEDURE AS NECESSARY FOR CLARITY, CHOOSING AS APPROPRIATE ANY OF THE FOLLOWING FACTORS, OR ANY OTHER FACTORS RELATING TO SUGGESTIVENESS, THAT ARE SUPPORTED BY THE EVIDENCE:]

- whether anything was said to the witness prior to viewing a photo array, line-up or showup;¹²
- whether a photo array shown to the witness contained multiple photographs of the defendant;¹³
- whether “all in the lineup but the [defendant] were known to the identifying witness”;¹⁴

Identification Procedures, April 18, 2001, at 2 (quoted in Herrera, 187 N.J. at 190); National Institute of Justice, Convicted by Juries, Exonerated by Science, June 1996, at 24 (available at <https://www.ndjrs.gov/pdf/ndjrs/dnaevid.pdf>); Gary Wells & Amy Bradfield, “Good, You Identified the Suspect,” 83 J. Applied Psychol. 360 (1998); Ramirez, 817 P.2d at 781. Whether the witness made an identification quickly upon viewing the suspect, or whether the witness hesitated, may also be a relevant fact. See S. Sporer, Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups, 78 J. Applied Psychol. 22, 23 (1993).

Other relevant facts include whether, at a time prior to making the identification of this defendant, the witness either failed to identify the defendant or identified another person as the perpetrator. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 201, 93 S.Ct. at 383; Foster v. California, 394 U.S. 440, 442-443 & n.2, 89 S.Ct. 1127, 1128-1129 & n.2 (1969); United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940; State v. Madison, 109 N.J. at 241. Madison cautions, with respect to an identification witness's "demonstrated certainty in his testimony," that "a witness's feeling of confidence in the details of memory generally do not validly measure the accuracy of the recollection," and that "[i]n fact, witnesses 'frequently become more confident of the correctness of their memory over time while the actual memory trace is probably decaying.'" Id. at 241-242 (quoting W.LaFave and J.Israel, Criminal Procedure).

⁹ See Manson v. Brathwaite, 432 U.S. at 115-116, 97 S.Ct. at 2253-2254; Neil v. Biggers, 409 U.S. at 201, 93 S.Ct. at 383; State v. Madison, 109 N.J. at 242.

¹⁰ Refer to the New Jersey Attorney General Guidelines, footnote 8 supra. The court should focus on any allegations of suggestive words or conduct by law enforcement or other persons that may effect the suggestiveness of the identification procedures.

¹¹ See State v. Herrera, 187 N.J. 493 (2006), in which the New Jersey Supreme Court addressed the propriety of a “show-up” identification; the majority opinion concluded that, while such a procedure is inherently suggestive, the identification procedure employed there was reliable and did not result in a substantial likelihood of misidentification.

¹² See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

¹³ Id.

¹⁴ United States v. Wade, 388 U.S. at 233, 87 S.Ct. at 1935.

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- whether “the other participants in a lineup were grossly dissimilar in appearance to the [defendant]”;¹⁵
- whether “only the [defendant] was required to wear distinctive clothing which the culprit allegedly wore”;¹⁶
- whether "the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail";¹⁷
- whether “the [defendant] is pointed out before or during a lineup”;¹⁸
- whether the witness’s identification was made spontaneously and remained consistent thereafter;¹⁹
- whether the individual conducting the lineup either indicated to the witness that a suspect was present or failed to warn the witness that the perpetrator may or may not be in the procedure;²⁰
- 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.²¹

[CHARGE IN ALL CASES:]

(7) Any other factor based on the evidence or lack of evidence in the case which you consider relevant to your determination of whether the out-of-court identification was reliable.

[(8) Jury should be charged on any other relevant factor present in the case²²]

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id., 87 S.Ct. at 1935-1936.

¹⁹ See Herrera, 187 N.J. at 509 (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991)).

²⁰ See N.J. Attorney General’s Guidelines, *supra*, Guideline I.B. (requiring administrator to instruct witness that perpetrator may not be present); State v. Ledbetter, 881 A.2d 290 (Ct. 2005) (requiring jury instruction to that effect).

²¹ See Herrera, 187 N.J. at 509 (quoting Ramirez, 817 P.2d at 781 n. 2 (citing State v. Long, 721 P.2d 483, 494 n. 8 (Utah 1986)).

²² The list of factors enumerated in Biggers and Madison is not exhaustive. See State v. White, 158 N.J. 230, (1999) (in declining to find plain error in identification charge, court notes that instruction went beyond model charge, "noting the discrepancy ... between identifications made by different witnesses"). Additional relevant factors that should be brought to jury's attention include the witness's inability to make an in-court identification if asked to do so while on the witness stand, any failure on the part of the State to record a line-up or preserve a photo array, as bearing upon the probative value of the out-of-court identification, see State v. Delgado, 188 N.J. 48, 63 (2006); State v. Earle, 60 N.J. 550, 552 (1972); State v. Peterkin, 226 N.J. Super. 25, 46 (App. Div. 1988), and any discrepancies between identifications made by different witnesses, State v. White, 158

[IN THE APPROPRIATE CASE,²³ CHARGE THE FOLLOWING FACTOR:]

(9) The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness's original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.²⁴

[CHARGE IN ALL CASES:]

Unless the out-of-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, rather than being the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight. The ultimate issue of the trustworthiness of the identification is for you to decide.

If, after considering all 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.

²³ N.J. 230, 248.

An instruction that cross-racial identification is a factor to be considered "should be given only when ... identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." State v. Cromedy, 158 N.J. at 132; see also State v. Romero, 191 N.J. 59 (2007).

²⁴ Cromedy holds that in order for the jury to determine the reliability of a cross-racial identification not corroborated by independent evidence, the jury must be informed "of the potential risks associated with such identifications," that the jury must be instructed "about the possible significance of the cross-racial identification factor...." 158 N.J. at 132-33. In State v. Romero, 191 N.J. 59 (2007), the New Jersey Supreme Court refused to rule that cross-ethnic charges were required in cases involving an individual's identification of a person of another ethnic background.