

**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 believable, or whether it is based on a mistake or for any reason is not worthy of belief.<sup>1</sup>

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

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

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

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

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<sup>2</sup> State v. Henderson, 208 N.J. 208, 245 (2011).

<sup>3</sup> Id. at 245-46.

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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.<sup>4</sup>

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 that it resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, and that the identification is reliable. If you find that the in-court identification is the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight. The ultimate question of the reliability of both the in-court and out-of-court identifications is for you to decide.<sup>5</sup>

**[CHARGE IN EVERY CASE WHERE POLICE DID NOT ELECTRONICALLY  
RECORD OUT-OF-COURT IDENTIFICATION PROCEDURE AND IT WAS  
NOT FEASIBLE TO DO SO.]**

Among the factors that you may consider in assessing the reliability of the identification is the failure of law enforcement officials to make an electronic recording of the identification procedure.<sup>6</sup> Our Rules require the electronic recording of identification procedures, preferably by video, if feasible, so as to ensure that you will have before you a complete picture of all circumstances under which an identification is made, the precise details of the identification procedure, and whether it was accurately reported by State's witnesses.<sup>7</sup>

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<sup>4</sup> State v. Romero, 191 N.J. 59, 76 (2007).

<sup>5</sup> Wade, 388 U.S. at 229-32, 241, 87 S. Ct. at 1933-35, 1940, 18 L. Ed. 2d at 1158-60, 1165 (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).

<sup>6</sup> State v. Anthony, 237 N.J. 213, 234-235 (2019); see State v. Green, 239 N.J. 88, 100 (2019).

<sup>7</sup> Rule 3:11; Anthony, 237 N.J. at 218, 230-231, 232; see Henderson, 208 N.J. at 249 ("Even seemingly innocuous words and subtle cues—pauses, gestures, hesitations, or smiles -- can influence a witness' behavior.... Yet the witness is often unaware that any cues have been given.") (citations omitted).

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Where there is a failure to electronically record an identification procedure, you have not been provided with a complete picture. By way of example, without a recording of the identification procedure, you cannot hear the tone or inflection of the witness or police officer's voices. Audio captures not only the words spoken between an administrator and an eyewitness but also tone, and video preserves expressions or gestures as well.<sup>8</sup> That type of information can help the jury accurately assess witness confidence, any feedback the witness may have received, and the overall reliability of an identification -- and thus help guard against mistaken identifications.<sup>9</sup> You should weigh later testimony or statements about tone, gestures and demeanor with great caution and care, as later recollections may be less accurate than an electronic record.<sup>10</sup>

**[Charge the following paragraph if police did not make a contemporaneous, verbatim written account of the identification procedure:]**

In cases where electronic recording was not feasible, police officers are required to prepare a contemporaneous, verbatim written account of the identification procedure.<sup>11</sup> This way, there would be a record of the exact words exchanged between the eyewitness and law enforcement, written down during the identification procedure itself.<sup>12</sup> Instead, you have been presented with a summary based upon the recollections of law

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<sup>8</sup> Anthony, 237 N.J. at 231.; see also State v. P.S., 202 N.J. 232, 253 (2010) (noting that a videotape “conveys not only the exact words ... but their finer shades of meaning through facial expressions, body movements and inflections of voice.”) (Brackets, quotation marks, and citation omitted).

<sup>9</sup> Ibid.

<sup>10</sup> See State v. Cook, 179 N.J. 533, 555-56 (2004) (noting that among the benefits of electronic recording are a more accurate picture of the surrounding circumstances, an objective, reviewable record, and an enhanced ability of the trier of fact to assess credibility and weigh evidence); P.S., 202 N.J. at 253 (“[V]ideo recording creates an objective, reviewable record[.]”).

<sup>11</sup> Rule 3:11; Anthony, 237 N.J. at 218, 230-231.

<sup>12</sup> See Anthony, 237 N.J. at 230 (explaining that “electronic recording and verbatim written recordings ... [are] both ... superior to detailed written summaries.” See also State v. Delgado, 188 N.J. 48, 63 (2006) (“Preserving the words exchanged between the witness and the officer conducting the identification procedure may be as important as preserving either a picture of a live lineup or a photographic array.”).

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enforcement personnel. You should receive, weigh, and consider this evidence with caution as well, based on the generally recognized risk of misunderstanding by the hearer, or the ability of the hearer to recall accurately the words used.<sup>13</sup> The specific words used and the ability to remember them are important to the correct understanding of any oral communication because the presence, or absence, or change of a single word may substantially change the true meaning of even the shortest sentence.<sup>14</sup> You should weigh later testimony or statements about the actual words used with great caution and care, as later recollections may be less accurate than an electronic or contemporaneous written record of the exact words exchanged.<sup>15</sup>

**[Charge in ALL cases where police did not electronically record the identification procedure]**

You may take into account the police failure to preserve a record of the identification procedure when you evaluate the identification evidence in this case.<sup>16</sup> The absence of either an electronic recording or contemporaneous written record permits but does not compel you to conclude that the State has failed to prove that the identification was in fact made and, if so, accurately reported by the State's witnesses.

**[CHARGE IN EVERY CASE IN WHICH A DATABASE OF DIGITAL PHOTOS OR AN ELECTRONIC MUG BOOK WAS UTILIZED<sup>17</sup>]**

In this case, [a database of digital photos] [an electronic mug book] was used during the identification procedure. The administrators of the identification procedure should have preserved (1) the photo of the suspect the witness selected, along with all other

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<sup>13</sup> State v. Kociolek, 23 N.J. 400, 421-22 (1957).

<sup>14</sup> Ibid.

<sup>15</sup> See Cook, 179 N.J. at 555-56; P.S., 202 N.J. at 253.

<sup>16</sup> See Anthony, 237 N.J. at 235.

<sup>17</sup> The Supreme Court in Green delayed implementation of its ruling for 30 days from when the Court approves revisions to Rule 3:11. 239 N.J. at 108. So, this part of the charge should not be given in cases where the identification occurred before that rule, as revised, took effect.

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photos on the same screen or page, and (2) any photo that the witness said depicted a person who looked similar to the suspect, along with all other photos on that screen or page.<sup>18</sup> The mandatory preservation of these photographs establishes a record of the photos viewed at pivotal moments: when the witness meaningfully narrows the field of images and ultimately makes a final selection.<sup>19</sup>

You may take into account the police failure to preserve all the photos on the same screen or page as the photo selected by the witness. You may take into account the police failure to preserve any photos the witness said depicted a person who looked similar to the suspect, along with all other photographs on that screen or page. The absence of these photos permits but does not compel you to conclude that the State has failed to prove that the identification was in fact made and, if so, was accurately reported by the State's witness.

**[RESUME MAIN CHARGE]**

To decide whether the identification testimony is sufficiently reliable evidence 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 should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself.<sup>20</sup> In particular, you should consider **[choose appropriate factors from one through five below]:**

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<sup>18</sup> Green, 239 N.J. at 107.

<sup>19</sup> Id.

<sup>20</sup> Henderson, 208 N.J. at 247.

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- (1) **The Witness's Opportunity to View and Degree of Attention:** In evaluating the reliability of the identification, you should assess the witness's opportunity to view the person who committed the offense at the time of the offense and the witness's degree of attention to the perpetrator at the time of the offense. In making this assessment you should consider the following **[choose appropriate factors from (a) through (g) below]**:
- (a) **Stress:** Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification. Therefore, you should consider a witness's level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.<sup>21</sup>
- (b) **Duration:** The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did.<sup>22</sup>
- (c) **Weapon Focus:** You should consider whether the witness saw a weapon during the incident and the duration of the crime. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.<sup>23</sup>
- (d) **Distance:** A person is easier to identify when close by. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.<sup>24</sup>
- (e) **Lighting:** Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case.<sup>25</sup>

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<sup>21</sup> Id. at 261-62.

<sup>22</sup> Id. at 264.

<sup>23</sup> Id. at 262-63.

<sup>24</sup> Id. at 264.

<sup>25</sup> Ibid.

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- (f) **Intoxication:** The influence of alcohol can affect the reliability of an identification.<sup>26</sup> An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who drank a small amount of alcohol.<sup>27</sup>
- (g) **Disguises/Changed Appearance:** The perpetrator's use of a disguise can affect a witness's ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification.<sup>28</sup> Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.<sup>29</sup>
- (2) **Prior Description of Perpetrator:** Another factor for your consideration is the accuracy of any description the witness gave after observing the incident and before identifying the perpetrator. Facts that may be relevant to this factor include whether the prior description matched the photo or person picked out later, whether the prior description provided details or was just general in nature, and whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. [**Charge if appropriate:** You may also consider whether the witness did not identify the defendant at a prior identification procedure or chose a different suspect or filler.]
- (3) **Confidence and Accuracy:** You heard testimony that (insert name of witness) made a statement at the time he/she identified the defendant from a photo array/line-up concerning his/her level of certainty that the person/photograph he/she selected is in fact the person who committed the crime. As I explained earlier, a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.<sup>30</sup> 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.<sup>31</sup>
- (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.<sup>32</sup>

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<sup>26</sup> If there is evidence of impairment by drugs or other substances, the charge can be modified accordingly.

<sup>27</sup> Henderson, 208 N.J. at 265.

<sup>28</sup> Id. at 266.

<sup>29</sup> Ibid.

<sup>30</sup> Id. at 254 (quoting Romero, 191 N.J. at 76).

<sup>31</sup> Id. at 253-55.

<sup>32</sup> Id. at 267.

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- (5) **Cross-Racial Effects:** Research has shown that people may have greater difficulty in accurately identifying members of a different race.<sup>33</sup> You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness’s identification.

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

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 it was the result of a suggestive procedure. In that regard, you may consider everything that was done or said by law enforcement to the witness during the identification process.

You should consider the following factors: **[Charge if appropriate]:**<sup>34</sup>

- (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.<sup>35</sup> It is, of course, for you to determine whether the composition of the lineup had any effect 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.<sup>36</sup>
- (3) **Multiple Viewings:** When a witness views the same person in more than one identification procedure, it can be difficult to know whether a later identification comes from the witness’s memory of the actual, original event or of an earlier identification procedure. As a result, if 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 during the identification process and, if so, whether that affected the reliability of the identification.<sup>37</sup>

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<sup>33</sup> 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)).

<sup>34</sup> The following factors consist of “the system ... variables ... for which [the Court] found scientific support that is generally accepted by experts.” *Henderson*, 208 N.J. at 298-99.

<sup>35</sup> *Id.* at 251.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Id.* at 255-56. If either “mugshot exposure” (no identification in first lineup/photo array, but later identification of someone from the first array in second lineup/photo array) or “mugshot commitment” (selection of person in lineup who was identified in previous photo array) are part

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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, the defendant was the only person shown to the witness at that time. Even though such a procedure is suggestive in nature, it is sometimes 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 an unduly suggestive procedure, you should consider how much time elapsed after the witness last saw the perpetrator, whether the appropriate instructions were given to the witness, and all other circumstances surrounding the showup.<sup>38</sup>

**[CHARGE (a) and (b) IN EVERY CASE IN WHICH THE POLICE CONDUCT  
AN IDENTIFICATION LINEUP PROCEDURE]<sup>39</sup>**

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 person or photo in the lineup is the suspect may intentionally or unintentionally convey that knowledge to the witness. That increases the chance that the witness will identify the suspect, even if the suspect is innocent. For that reason, whenever feasible, live lineups and photo arrays should be conducted by an officer who does not know the identity of the suspect.<sup>40</sup>

**[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 not see the photos as the witness looks at them. In this case, it is alleged that the person who presented the lineup knew the identity of the suspect. It is also alleged that the police did/did not

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of the evidence, the jury should be instructed on the concepts implicated by those terms without using the word “mugshot.” See Model Jury Charge (Criminal) on “Identity-Police Photos.”

<sup>38</sup> Henderson, 208 N.J. at 259-61.

<sup>39</sup> “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”).

<sup>40</sup> Id. at 248-50.

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compensate for that by conducting a procedure in which 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.<sup>41</sup>

- (b) Instructions:** You should consider what was or what was not said to the witness prior to viewing a photo array.<sup>42</sup> 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.<sup>43</sup>

**[CHARGE IF FEEDBACK IS AN ISSUE IN THE CASE]**

- (c) Feedback:** Feedback occurs when police officers, or witnesses to an event who are not law enforcement officials, signal to eyewitnesses that they correctly identified the suspect. That confirmation may reduce doubt and engender or produce a false sense of confidence in a witness. Feedback may also falsely enhance a witness's recollection of the quality of his or her view of an event. It is for you to determine whether or not a witness's recollection in this case was affected by feedback or whether the recollection instead reflects the witness's accurate perception of the event.<sup>44</sup>

**[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

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<sup>41</sup> Ibid.

<sup>42</sup> See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

<sup>43</sup> Henderson, 208 N.J. at 250.

<sup>44</sup> Id. at 253-55; see also State v. Herrera, 187 N.J. 493, 509 (2006) (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991) (citing State v. Long, 721 P.2d 483, 493 (Utah 1986))).

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identification.<sup>45</sup> Such information can affect the independent nature and reliability of a witness's identification and inflate the witness's confidence in the identification.

You are also free to consider any other factor based on the evidence or lack of evidence in the case that you consider relevant to your determination whether the 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 factors that I have discussed as you assess all of the circumstances of the case, including all of the testimony and documentary evidence, in determining whether a particular identification made by a witness is accurate and thus worthy of your consideration as you decide whether the State has met its burden to prove identification beyond a reasonable doubt. If you determine that the in-court or out-of-court identifications resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, you may consider that evidence and decide how much weight to give it. If you instead decide that the identification(s) is/are the product of an impression gained at the in-court and/or out-of-court identification procedures, the identifications 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.

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<sup>45</sup> State v. Chen, 208 N.J. 307 (2011).