

IDENTIFICATION: IN-COURT IDENTIFICATION ONLY

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

The State has presented testimony of [insert name of witness who identified defendant]. You will recall that this witness identified the defendant as the person who committed [insert the offense(s) charged]. According to the witness, [his/her] identification of the defendant was based upon the observations and perceptions that [he/she] made of the perpetrator at the time the offense was being committed. It is your function to determine whether the 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

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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.

IDENTIFICATION: OUT-OF-COURT IDENTIFICATION ONLY

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

The State has presented testimony 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,

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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)).

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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/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.

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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.

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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).

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[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).

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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.