

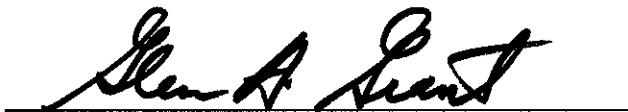
NOTICE TO THE BAR

EYEWITNESS IDENTIFICATION (STATE V. HENDERSON) – SUPREME COURT ADOPTION OF RULE AMENDMENTS AND REVISIONS TO MODEL JURY CHARGES

In State v. Henderson, 208 N.J. 208 (2011), State v. Chen, 208 N.J. 307 (2011) and State v. Delgado, 188 N.J. 48 (2006), the Supreme Court provided guidance on the process for law enforcement to record an out-of-court eyewitness identification procedure, the standard for judges to assess the admissibility of such evidence, and the provision of detailed instructions for the jury to analyze eyewitness identification evidence.

The Model Criminal Jury Charge Committee and the Criminal Practice Committee submitted reports to the Court with recommendations for revisions to the court rules and the model criminal jury charges. The Court reviewed the reports and recommendations made by the Committees and has adopted new Rule 3:11, "Record of an Out-of-Court Identification Procedure," and amendments to Rule 3:13-3(c) governing discovery by the defendant. Additionally, the Court has revised three Model Criminal Jury Charges: (1) In-Court Identification Only; (2) Out-of-Court Identification Only, and (3) In-Court and Out-of-Court Identifications.

New Rule 3:11, the amendments to Rule 3:13, and the three revised jury charges, as published with this notice, will be effective September 4, 2012.



Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: July 19, 2012

SUPREME COURT OF NEW JERSEY

It is ORDERED that the attached new Rule 3:11 and the attached amendments to Rule 3:13-3 of the Rules Governing the Courts of the State of New Jersey are adopted to be effective September 4, 2012.

For the Court,

A handwritten signature in blue ink, appearing to read "Stuart Rabner".

Chief Justice

Dated: July 19, 2012

Rule 3:11. Record of an Out-of-Court Identification Procedure

(a) Recordation. An out-of-court identification resulting from a photo array, live lineup, or showup identification procedure conducted by a law enforcement officer shall not be admissible unless a record of the identification procedure is made.

(b) Method and nature of recording. A law enforcement officer shall contemporaneously record the identification procedure in writing, or, if feasible, electronically. If a contemporaneous record cannot be made, the officer shall prepare a record of the identification procedure as soon as practicable and without undue delay. Whenever a written record is prepared, it shall include, if feasible, a verbatim account of any exchange between the law enforcement officer involved in the identification procedure and the witness. When a written verbatim account cannot be made, a detailed summary of the identification should be prepared.

(c) Contents. The record of an out-of-court identification procedure is to include details of what occurred at the out-of court identification, including the following:

(1) the place where the procedure was conducted;
(2) the dialogue between the witness and the officer who administered the procedure;

(3) the results of the identification procedure, including any identifications that the witness made or attempted to make;

(4) if a live lineup, a picture of the lineup;

(5) if a photo lineup, the photographic array, mug books or digital photographs used;

(6) the identity of persons who witnessed the live lineup, photo lineup, or showup;

(7) a witness' statement of confidence, in the witness' own words, once an identification has been made; and

(8) the identity of any individuals with whom the witness has spoken about the identification, at any time before, during, or after the official identification procedure, and a detailed summary of what was said. This includes the identification of both law enforcement officials and private actors who are not associated with law enforcement.

(d) Remedy. If the record that is prepared is lacking in important details as to what occurred at the out-of-court identification procedure, and if it was feasible to obtain and preserve those details, the court may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of the identification testimony, and/or fashion an appropriate jury charge to be used in evaluating the reliability of the identification.

Note: Adopted July 19, 2012 to be effective September 4, 2012.

Rule 3:13-3. Discovery and Inspection.

(a) Pre-Indictment Discovery. . . . no change.

(b) Post Indictment Discovery. . . . no change.

(c) Discovery by the Defendant. The prosecutor shall permit defendant to inspect and copy or photograph the following relevant material if not given as part of the discovery package under section (b):

(1) books, tangible objects, papers or documents obtained from or belonging to the defendant;

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded;

(3) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of the prosecutor;

(4) reports or records of prior convictions of the defendant;

(5) books, papers, documents, or copies thereof, or tangible objects, buildings or places which are within the possession, custody or control of the prosecutor;

(6) names, addresses, and birthdates of any persons whom the prosecutor knows to have relevant evidence or information including a designation by the prosecutor as to which of those persons may be called as witnesses;

(7) record of statements, signed or unsigned, by such persons or by co-defendants which are within the possession, custody or control of the prosecutor and any relevant record of prior conviction of such persons;

(8) police reports which are within the possession, custody, or control of the prosecutor;

(9) names and addresses of each person whom the prosecutor expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Except in the penalty phase of a capital case if this information is requested and not furnished 30 days in advance of trial, the expert witness may, upon application by the defendant, be barred from testifying at trial[.]; and

(10) All records, including notes, reports and electronic recordings relating to an identification procedure, as well as identifications made or attempted to be made.

(d) Discovery by the State. . . . no change.

(e) Documents Not Subject to Discovery. . . . no change.

(f) Protective Orders. . . . no change.

(g) Continuing Duty to Disclose; Failure to Comply. . . . no change.

Source-R.R. 3:5-11(a)(b)(c)(d)(e)(f)(g)(h). Paragraphs (b)(c)(f) and (h) deleted; paragraph (a) amended and paragraphs (d)(e)(g) and (i) amended and redesignated June 29, 1973 to be effective September 10, 1973. Paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraphs (a) and (b) amended July 22, 1983 to be effective September 12, 1983; new paragraphs (a) and (b) added, former paragraphs (a), (b), (c), (d) and (f) amended and redesignated paragraphs (c), (d), (e), (f) and (g) respectively and former paragraph (e) deleted July 13, 1994 to be effective January 1, 1995; Rule redesignation of July 13, 1994 eliminated December 9, 1994, to be effective January 1, 1995; paragraphs (c)(6) and (d)(3) amended June 15, 2007 to be effective September 1, 2007; subparagraph (f)(1) amended July 21, 2011 to be effective September 1, 2011; new subparagraph (c)(10) adopted July 19, 2012 to be effective September 4, 2012.

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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 witness's identification of (defendant) is reliable and believable, or whether it is based on a mistake or for any reason is not worthy of belief.¹ You must decide whether it is sufficiently reliable evidence upon which to conclude that (this defendant) is the person who committed the offense[s] charged.

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

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

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

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

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

³ *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.⁴

In deciding what weight, if any, to give to the identification testimony, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself.⁵ **[choose appropriate factors]:**

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

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

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

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

⁴ *State v. Romero*, 191 N.J. 59, 76 (2007).

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

⁶ *Id.* at 261-62.

⁷ *Id.* at 264.

⁸ *Id.* at 262-63.

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

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

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

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

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

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

⁹ Id. at 264.

¹⁰ Ibid.

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

¹² Henderson, supra, 208 N.J. at 265.

¹³ Id. at 266.

¹⁴ Ibid.

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

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

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

(5) Cross-Racial Effects: Research has shown that people may have greater difficulty in accurately identifying members of a different race.¹⁸ You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness's identification.

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

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

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

¹⁶ Id. at 253-55.

¹⁷ Id. at 267.

¹⁸ This instruction must be given whenever there is a cross-racial identification. Id. at 299 (modifying State v. Cromedy, 158 N.J. 112, 132 (1999)).

¹⁹ State v. Chen, 208 N.J. 307 (2011).

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

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

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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 witness's identification of (defendant) is reliable and believable or whether it is based on a mistake or for any reason is not worthy of belief.¹ You must decide whether it is sufficiently reliable evidence 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, 18 L.Ed. 2d 1149, 1158 (1967); State v. Green, 86 N.J. 281, 291-93 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-19 (App. Div. 1996).

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

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

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

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

³ *Id.* at 245-46.

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alone, may not be an indication of the reliability of the identification.⁴ In deciding what weight, if any, to give to the identification testimony, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself.⁵ [choose appropriate factors from one through five 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 (g) below]:

- (a) Stress:** Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification. Therefore, you should consider a witness's level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.⁶
- (b) Duration:** The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did.⁷
- (c) Weapon Focus:** You should consider whether the witness saw a weapon during the incident and the duration of the crime. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.⁸
- (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

⁴ *State v. Romero*, 191 N.J. 59, 76 (2007).

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

⁶ *Id.* at 261-62.

⁷ *Id.* at 264.

⁸ *Id.* at 262-63.

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mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.⁹

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

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

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

(2) Prior Description of Perpetrator: Another factor for your consideration is the accuracy of any description the witness gave after observing the incident and before identifying the perpetrator. Facts that may be relevant to this factor include whether the prior description matched the 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.¹⁵ Although some research has found that

⁹ Id. at 264.

¹⁰ Ibid.

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

¹² Henderson, supra, 208 N.J. at 265.

¹³ Id. at 266.

¹⁴ Ibid.

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

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

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

(5) Cross-Racial Effects: Research has shown that people may have greater difficulty in accurately identifying members of a different race.¹⁸ You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness's identification.

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

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 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]:¹⁹**

(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.²⁰ It is, of course, for you to determine whether the composition of the lineup had any effect on the reliability of the identification.

¹⁶ *Id.* at 253-55.

¹⁷ *Id.* at 267.

¹⁸ This instruction must be given whenever there is a cross-racial identification. *Id.* at 299 (modifying *State v. Cromedy*, 158 N.J. 112, 132 (1999)).

¹⁹ 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.

²⁰ *Id.* at 251.

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(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.²¹

(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.²²

[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 risks 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.²³

²¹ *Ibid.*

²² *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 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.”

²³ Henderson, supra, 208 N.J. at 259-61.

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[CHARGE (a) AND (b) IN EVERY CASE IN WHICH THE POLICE CONDUCT AN IDENTIFICATION LINEUP PROCEDURE]²⁴

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.²⁵

[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 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.²⁶

(b) Instructions: You should consider what was or what was not said to the witness prior to viewing a photo array.²⁷ 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

²⁴ “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”).

²⁵ Id. at 248-50.

²⁶ Ibid.

²⁷ See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

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instruction to the witness, you may take this factor into account when evaluating the identification evidence.²⁸

[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.²⁹

[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 identification.³⁰ Such information can affect the independent nature and reliability of a witness's identification and inflate the witness's confidence in the identification.

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

²⁸ Henderson, supra, 208 N.J. at 250.

²⁹ 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)).

³⁰ State v. Chen, 208 N.J. 307 (2011).

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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 out-of-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, you may consider that evidence and decide how much weight to give it. If you instead decide that the identification is the product of an impression gained at the out-of-court identification procedure, the identification should be afforded no weight. The ultimate issue of the trustworthiness of the identification is for you to decide.

If, after considering all of the evidence, you determine that the State has not proven beyond a reasonable doubt that (defendant) was the person who committed this offense [these offenses], then you must find him/her not guilty. If, on the other hand, after 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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(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

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

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

Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. In evaluating this identification, you should consider the observations and perceptions on which the identification was based, the witness's ability to make those observations and perceive events, and the circumstances under which the identification was made. Although nothing may appear more convincing than

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

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

³ Id. at 245-46.

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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.⁴

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.⁵

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.⁶ In particular, you should consider **[choose appropriate factors from one through five 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

⁴ *State v. Romero*, 191 N.J. 59, 76 (2007).

⁵ *Wade*, *supra*, 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).

⁶ *Henderson*, *supra*, 208 N.J. at 247.

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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.⁷
- (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.⁸
- (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.⁹
- (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.¹⁰
- (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.¹¹

⁷ Id. at 261-62.

⁸ Id. at 264.

⁹ Id. at 262-63.

¹⁰ Id. at 264.

¹¹ Ibid.

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(f) **Intoxication:** The influence of alcohol can affect the reliability of an identification.¹² 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.¹³

(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.¹⁴ Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.¹⁵

(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.¹⁶ 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.¹⁷

(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.¹⁸

¹² If there is evidence of impairment by drugs or other substances, the charge can be modified accordingly.

¹³ Henderson, supra, 208 N.J. at 265.

¹⁴ Id. at 266.

¹⁵ Ibid.

¹⁶ Id. at 254 (quoting Romero, supra, 191 N.J. at 76).

¹⁷ Id. at 253-55.

¹⁸ 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.¹⁹ 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]:²⁰**

(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.²¹ 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.²²

(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

¹⁹ 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)).

²⁰ 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.

²¹ Id. at 251.

²² Ibid.

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the identification process and, if so, whether that affected the reliability of the identification.²³

[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.²⁴

**[CHARGE (a) and (b) IN EVERY CASE IN WHICH THE POLICE CONDUCT
AN IDENTIFICATION LINEUP PROCEDURE]²⁵**

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

²³ *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 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.”

²⁴ *Henderson, supra*, 208 N.J. at 259-61.

²⁵ “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”).

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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.²⁶

[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 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.²⁷

(b) Instructions: You should consider what was or what was not said to the witness prior to viewing a photo array.²⁸ 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.²⁹

[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

²⁶ *Id.* at 248-50.

²⁷ *Ibid.*

²⁸ See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

²⁹ Henderson, supra, 208 N.J. at 250.

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recollection in this case was affected by feedback or whether the recollection instead reflects the witness's accurate perception of the event.³⁰

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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.³¹ 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

³⁰ 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)).

³¹ State v. Chen, 208 N.J. 307 (2011).

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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.