

## IDENTIFICATION - WITNESS PLUS

Revised Jan. 2008, 2011, 2018<sup>1</sup>

*(This charge is be used when identification is in issue and is not premised solely on the testimony of one witness identifying the defendant as the person who committed the crime.*

*The charge assumes that a charge on credibility has already been given to the jury.)*

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As you know, an issue in the case is whether the defendant has been correctly identified as the person who committed the charged crime(s).<sup>2</sup>

The People have the burden of proving beyond a reasonable doubt, not only that a charged crime was committed, but that the defendant is the person who committed that crime.

Thus, even if you are convinced beyond a reasonable doubt that a charged crime was committed by someone, you cannot convict the defendant of that crime unless you are also convinced beyond a reasonable doubt that he/she is the person who committed that crime.<sup>3</sup>

In examining the testimony of any witness who identified the defendant as that person, you should determine whether that testimony is both truthful and accurate.

With respect to whether the identification is truthful, that is, not deliberately false, you must evaluate the believability of the witness who made an identification. In doing so, you may consider the various factors for evaluating the believability of a witness's testimony that I listed for you a few moments ago.

With respect to whether the identification is accurate, that is, not an honest mistake, you must evaluate the witness's intelligence, and capacity for observation, reasoning and memory,

and determine whether you are satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question.

Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person. Thus, in evaluating the accuracy of identification testimony, you should also consider such factors as<sup>4</sup>:

What were the lighting conditions under which the witness made his/her observation?

What was the distance between the witness and the perpetrator?

Did the witness have an unobstructed view of the perpetrator?

Did the witness have an opportunity to see and remember the facial features, body size, hair, skin color, and clothing of the perpetrator?

For what period of time did the witness actually observe the perpetrator? During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

Did the witness have a particular reason to look at and remember the perpetrator?

Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the defendant, as you find the defendant's appearance to have been on the day in question? <sup>5</sup>

What was the mental, physical, and emotional state of the

witness before, during, and after the observation? To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

*[NOTE: Add when applicable:*

Did the witness ever see the person identified prior to the day in question? If so, how many times did the witness see that person and under what circumstances? To what extent, if any, did those prior observations affect the witness's ability to accurately recognize and identify such person as the perpetrator?]

When and under what circumstances did the witness identify the defendant? Was the identification of the defendant as the person in question suggested in some way to the witness before the witness identified the defendant, or was the identification free of any suggestion?

*[NOTE: Add when applicable:*

You should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and if so, you should consider that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race, and therefore, you should consider whether the difference in race affected the accuracy of the witness's identification.<sup>6]</sup>

*[NOTE: Add when applicable:*

You may also consider the testimony of (*specify*), who gave an opinion about the factors bearing on the accuracy and reliability of an identification. You will consider that testimony in accordance with the [following] instruction [I have already given you as to such testimony].<sup>7</sup> *[If the CJI2d charge on Expert Witness has not already been given, read it here.]*<sup>8]</sup>

1. This charge was revised in January, 2008 to include the bracketed language applicable to an identification expert. It was also revised in January, 2011 to include the bracketed language applicable to a cross-racial identification, and that language was revised in 2018 per endnote six.

2. See *People v. Whalen*, 59 N.Y.2d 273, 279 (1983) ("New York's trial courts are encouraged to exercise their discretion by giving a more detailed identification charge when appropriate.")

3. See *People v. Knight*, 87 N.Y.2d 873, 874 (1995) ("The court's charge...sufficiently apprised the jury that the reasonable doubt standard applied to identification.")

4. See *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) ("As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."); *People v. Brown*, 203 A.D.2d 474 (2d Dept. 1994) (The court properly "elaborated on the People's burden to prove identification beyond a reasonable doubt, and urged the jury to consider the victim's credibility and her opportunity to observe the defendant during the commission of the robbery. The court also instructed the jury to consider the surrounding circumstances, e.g., the lighting conditions at the crime scene, the distance between the victim and the defendant, and how long the robbery lasted."); *People v. Ruffino*, 110 A.D.2d 198, 202 (2d Dept. 1985) ("Thus, where, as in this case, there exists an issue of identification, the jury should be instructed to examine and evaluate the many factors upon which the accuracy of such testimony turns including, among others, the witness' opportunity and capacity to observe and remember the physical characteristics of the perpetrator at the time of the crime (citations omitted). It follows logically that where there has been a lineup or other pretrial identification procedure, the trier of facts should also be permitted to consider the suggestiveness of that procedure, and the extent to which it may have influenced the witness' present identification...."); *People v. Gardner*, 59 A.D.2d 913 (2d Dept 1997) ("The trial court should have instructed the jury to consider and balance, *inter alia*, such factors as the complaining witness' opportunity for observation, the duration and distance of the viewing, the lighting and weather conditions, the witness' ability to describe the assailant's physical features and apparel, and any other relevant factors.").

5. *People v. Huertas*, 75 N.Y.2d 487, 492 (1990) ("As charged to the jury, the relevance of the complainant's description testimony was also based on the fact that the jurors could compare it to the physical characteristics of the defendant. This was a factor to be considered by the jury in assessing the

witness's ability to observe and remember the features of the perpetrator. Thus, defendant misconstrues the purpose of the description testimony here. It is not the accuracy or truth of the description that establishes its relevance. It is, rather, the comparison of the prior description and the features of the person later identified by the witness as the perpetrator that is the ground of relevance.")

6. This instruction was revised in January, 2018 to incorporate the instruction dictated by *People v. Boone*, 30 N.Y.3d 521 (2017). *Boone* held that "in a case in which a witness's identification of the defendant is at issue, and the identifying witness and defendant appear to be of different races, a trial court is required to give, upon request, during final instructions, a jury charge on the cross-race effect, instructing (1) that the jury should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and (2) that, if so, the jury should consider (a) that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race and (b) whether the difference in race affected the accuracy of the witness's identification."

On the applicability of the instruction, *Boone* requires that the instruction be given in a cross-race identification case unless "there is no dispute about the identity of the perpetrator," or "no party asks for the charge."

7. See, *People v. LeGrand*, 8 N.Y.3d 449 (2007); *People v. Lee*, 96 N.Y.2d 157 (2001); *People v. Mooney*, 76 N.Y.2d 827 (1990).

8. See, *People v. LeGrand*, 8 N.Y.3d 449, 458 (2007).