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### Effects of Judicial Warnings About Cross-Race Eyewitness Testimony On Jurors' Judgments

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RUNNING HEAD: JUDICIAL WARNINGS

Effects of Judicial Warnings About Cross-Race Eyewitness Testimony  
On Jurors' Judgments

A thesis submitted in partial fulfillment for the Bachelor's Degree in Psychology

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**Abstract**

On July 19<sup>th</sup>, 2012, the New Jersey Supreme Court released a decision requiring judges to issue a set of instructions pertaining to problems researchers have found with eyewitness identification. This was a landmark decision because New Jersey was the first state to require judges to issue warnings about biases associated with eyewitness testimony. The present study examines the effectiveness of the New Jersey judicial warnings, specifically focusing on cross-race bias in eyewitness identification. It was hypothesized that judicial warnings would reduce the likelihood that a defendant would be found guilty and that this effect would be especially strong when the trial involved cross-race eyewitness testimony. Participants (N=72) read a modified version of a trial transcript where the races of both the eyewitness and the defendant were manipulated (black or white), and judicial warnings were either present or absent. Judicial instructions did not change whether or not participants found the defendant guilty, but participants did find the judicial instructions to be clear and informative of problems pertaining to eyewitness identification. Implications of the findings for future research and for judicial proceedings are reviewed.

Rodney Harper was shot to death during the early hours of January 1, 2003. His friend, James Womble, witnessed the murder after two men forcefully entered the apartment. Womble knew one of the intruders, George Clark, but the other was a complete stranger. While Clark and Harper disputed over money in the next room, the stranger held Womble at gunpoint in the hallway. Moments later, a gunshot was fired. Harper died ten days later in the hospital, and shortly after the police began their investigation. They confronted Womble and presented him with a photographic array. He was able to identify Larry Henderson as the stranger from that night. Henderson was charged with second-degree possession of a firearm for an unlawful purpose, third-degree unlawful possession of a weapon, and possession of a weapon having been convicted of a prior offense. (State v. Henderson)

It might seem perfectly reasonable to convict Larry Henderson. After all, what better evidence is there than an eyewitness identification from Womble? However, there were several errors with Womble's identification that are important to consider. Firstly, Womble had smoked two bags of crack cocaine before the shooting; he also consumed champagne and wine. The lighting was dark, the defendant shoved Womble, and Womble admitted that he was heavily focusing on the gun that was pointed at his chest. Womble later testified that he "got a look at" but not "a real good look" at the stranger. He also smoked around two bags of crack cocaine every day from the time of the shooting, until he made the identification. His identification was not perfect either. He was struggling between two photographs when one of the officers urged him to "Do what you have to do and we'll be out of here." Womble's identification involved aspects of stress, weapon focus, drug and alcohol impairment, as well as errors in police lineup

procedures. All of these are biases in eyewitness identification. The problem is that the general public is not necessarily aware of these biases, and people are falsely convicted as a result.

These are the facts from *State v. Henderson*, a New Jersey Supreme Court case that changed the judicial system forever. The case held that “The current legal standard for assessing eyewitness identification evidence must be revised because it does not offer an adequate measure for reliability; does not sufficiently deter inappropriate police conduct; and overstates the jury’s ability to evaluate identification evidence.” (*State v. Henderson*). As a result of this case, on July 19, 2012, the New Jersey Supreme Court issued a landmark decision calling for a specific set of judicial instructions to be issued to jurors during criminal trials whenever eyewitness testimony is introduced. These warnings state that, “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” (*State v. Henderson*). The judicial warnings ask jurors to consider a number of factors that might limit a person’s ability to accurately identify someone. These factors include: stress, duration of the crime, weapon focus, distance, lighting, intoxication, disguises, and cross-race effects. These warnings are monumental because, according to Brandon L. Garrett, a law professor at the University of Virginia, “These instructions are far more detailed and careful than anything that exists anywhere in the country” (Weiser, 2012). Berry C. Scheck, co-director of the Innocence Project at Benjamin N. Cardozo School of Law called the changes “critically important,” and he predicted that the new instructions have the ability to influence future trials and change how evidence is now gathered (Weiser, 2012).

These new judicial warnings have the ability to transform the judicial system completely. Eyewitness identification research has been around for decades now, but until this decision, little has been done about the problem of faulty eyewitness testimony used at trial. Because these warnings have the potential to significantly impact the judicial system, it is important to know whether or not they actually inform jurors of the biases that exist in eyewitness identification. This study evaluates the effectiveness of these judicial warnings on jurors' judgments, with particular emphasis on the cross-race effect.

### **Types of Biases in Eyewitness Identification**

The New Jersey judicial instructions were based on decades of research on eyewitness identification. The warnings are broken down into several categories including: the witness's opportunity to view and degree of attention, prior description of the perpetrator, confidence and accuracy, time elapsed, cross-racial effects, and systematic errors that can occur during lineups.

There are several factors that can influence a person's ability to correctly identify someone from a line up. One of the most important factors is the witness's opportunity to view the suspect and the degree of attention they paid to his or her face. Factors such as stress, weapon focus and disguise can all impact one's ability to view a person's face. In a study conducted by Valentine and Mesout (2009), participants visited the London Dungeon and they were told to describe and identify somebody encountered in the Horror Labrinth. It was found that high anxiety was associated with reporting fewer correct descriptions of the target person, and people under higher anxiety had problems remembering details about the target person. As a result, they made more incorrect

identifications from a line up. These results from this experiment illustrate that stress can significantly impact one's ability to identify a person.

One of the most common biases in the eyewitness field is called "weapon focus." Weapon focus is a term coined by Loftus, Loftus, and Messo (1987). They define it as, "The concentration of a crime witness's attention on a weapon, and the resultant reduction in ability to remember other details of the crime" (Loftus, Loftus & Messo, 1987, 55). In their experiment half of the subjects saw a customer point a gun at the cashier, and the other half saw a customer hand the cashier a check. Results showed that subjects made more eye fixations on the weapon than on the check. Loftus also found that memory of subjects in the weapon condition was poorer than the memory of subjects in the check condition. This was groundbreaking research at the time and other researchers have confirmed the weapon focus bias (Hope & Wright, 2007).

People's memory for an event can be affected if the culprit is wearing a disguise. In a study conducted by Cutler, Penrod, and Martens (1987), it was found that when the culprit was wearing a disguise, subjects experienced an increase in memory for peripheral details. It was also found that subjects' memory for peripheral details was negatively correlated with identification accuracy. This is significant because it shows that people might have a desire to encode information, especially if they know they will be questioned about it at a later point in time. This study shows, however, that perpetrators who wear a disguise are less likely to be identified accurately (Cutler, et al., 1987).

It is a common myth that the more confident an eyewitness is, the more accurate the eyewitness will be. In reality, a person's confidence has little to do with his or her ability to correctly identify someone. When DNA exoneration cases began in the middle

of the twentieth century, more than three fourths of these exonerations involved mistaken eyewitness identification, and in almost every case, the eyewitnesses were extremely confident about their identifications (Wells, Olsen, & Charman, 2002). Factors such as police reinforcement by saying, “Good job, you are a good witness” might increase eyewitness confidence, but these statements do not increase eyewitness accuracy (Wells, et al., 2002).

There is no debate that the accuracy of human recall of events decreases with time. It is therefore extremely important to consider the amount of time that elapsed before a person makes his or her identification. Wells and Murray (1983) argue that faces seen only once have a shelf life of about thirty days; however, mug shot viewings can decrease the accuracy of subsequent identifications. There are other factors that can impact an eyewitness’s memory for an event. In their 1978 experiment, Loftus, Miller and Burns showed participants a series of slides depicting a car accident; half of the participants were shown a picture of a car stopping at a yield sign and the other half were shown a picture of a car stopping at a stop sign. Participants were then exposed to either consistent or misleading information about the accident. Half of the questions asked, “Did another car pass the red Datsun while it was stopped at the stop sign?” and the other half replaced the stop sign with a yield sign. When participants were later tested on what they saw, a significant portion actually “remembered” seeing the car stop at a stop sign (Loftus, Miller & Burns, 1978). This has been labeled as the “misinformation effect”, and it shows that an eyewitness’s memory can be easily influenced by outside information.

There are also problems concerning the way line-ups are constructed. Even though the culprit might not be present in the photo array, people might still feel pressure to identify somebody in order to cooperate with police forces. Cutler, Penrod and Martens (1987) found that out of the subjects who were shown offender-absent lineups, only 32 percent correctly rejected the lineup while 68 percent falsely identified a foil. These results are problematic because they indicate that the majority of people feel the need to identify somebody from a lineup, even when the person is not actually there. It was discovered that sequential presentation, as compared with simultaneous presentation could reduce the number of false identifications (Cutler & Penrod, 1988). However, line-ups are not always conducted in this manner, and several states still use simultaneous presentations.

### **Cross-Race Effect**

One of the most important biases existing in eyewitness identification is the Cross-Race Bias, also labeled as Own-Race Bias or the Cross-Race Effect (Meissner & Brigham, 2001; Abshire & Bornstein, 2003). This bias indicates that people are better able to identify members of their own race rather than members of another race. In a study of 77 known cases of mistaken identification, it was reported that 35 per cent of cases involved a white victim identifying a black culprit, whereas 28 per cent of cases involved a black victim identifying a white culprit (Scheck, Neufeld & Dwyer, 2000 as cited by Greene & Heilbrun, 2011). Malpass and Kravits (1969) took subjects from a predominantly white university and a predominantly black university and showed them each ten composite photos of black and white male faces. Findings show that white faces

were more discriminable than black faces, and subjects were better able to identify members from their own race.

Wright, Boyd, and Tredoux (2001) conducted two experiments in shopping malls in both South Africa and England. Either a black or a white confederate approached shoppers, and they were later asked to identify the confederate from both a sequential lineup and a forced-choice recognition test. In both countries, participants were better able to identify confederates who were of the same race. Overall, the odds of participants making a correct decision were 1.5 times higher if the participant and the confederate were of the same race than of different races. Both of these experiments indicate that there is strong evidence for the Cross-Race Effect.

Research about the Cross-Race Effect has been around for about forty years now. Twelve years ago, Meissner and Brigham (2001) examined thirty years of research on the Own Race Bias in memory for faces. Over thirty-nine articles were located. They concluded that the Own-Race Bias has become very prominent in false alarm responses. They suggest that it is possible that other-race faces are encoded differently than same race faces. These results were supported by Pezdek, O'Brien, and Wasson (2011) who found that participants had reduced recognition for cross-race faces when they viewed subjects in a group rather than individually. This effect did not occur with same race faces. In a second experiment, it was found that when cross-race target faces were presented in homogenous groups, the memory for the target face was reduced. One possible explanation for this is that when faces were presented in groups, less individualizing facial information was encoded. This result gives weight to the fact that cross-race faces might be more difficult to encode than same-race faces.

Psychologists have attempted to explain why memory for faces is encoded differently across races. One possible explanation is known as “physiognomic variability,” which refers to the variability in features in somebody’s face (Greene & Heilbrun, 2011). Faces of one race differ from faces of another race in terms of type of physiognomic variability. For example, white faces differ more in terms of hair color while black faces differ more in terms of skin tone. Therefore, a white person who is identifying a black person might pay more attention to the darkness of their skin because that is the aspect that is the most different from them. On the other hand, a black witness might pay more attention to a white person’s hair color because that is the feature that differs the most (Greene & Heilbrun, 2011).

Social psychologists argue that people have distinctive ways for encoding depending on in-group and out-group differences (Sporer, 2001). When someone is confronted with a person of a different race, his or her first instinct is to label and categorize that person. For example, they would first think, “That person is Hispanic” or “That person is an Asian.” People then pay attention to how features from that out-group member differ from their own features. However, when people see others that are of the same race, they will not categorize that person, and it is therefore easier to focus on features that distinguish that person from other members of the in-group (Greene & Heilbrun, 2011).

In an attempt to measure mock jurors’ sensitivity to the Cross-Race Effect, Abshire and Bornstein (2003) manipulated the race of the eyewitness in a stimulated murder trial where the defendant was black. Even though the black eyewitness was believed to be more credible than the white eyewitness, the race of the eyewitness did not

have an effect on the overall verdicts. This indicates that overall, mock jurors are generally unaware of the Cross-Race Bias. This is significant because even though there is over forty years of research about the Cross-Race Bias, if jurors are not aware of this bias, then they will continue to send innocent people to prison. It was also found that white mock jurors were more likely to find the defendant guilty. This result indicates that black mock jurors might be more lenient towards a black defendant who is charged with a violent crime. In the experiment, black individuals viewed the defense witness as more favorable and the prosecution witnesses as less favorable than white individuals did. This finding is supported by other research indicating that white people might view the criminal justice system as fairer than black people. (Abshire & Bornstein, 2003).

### **Judicial Reactions to Faulty Eyewitness Identification**

Eyewitness identification research has existed for decades, and judicial systems have responded to the research. Current solutions include expert testimony, intensified cross-examination, and judicial warnings. One of the leading responses to problems with eyewitness identification is allowing psychological experts to come and testify about biases in eyewitness identification. Devenport, Stinson, Cutler, and Kravitz (2002) found that expert testimony can enhance juror sensitivity to factors influencing eyewitness identification without increasing juror skepticism of the witness's original identification. However, other experimenters discovered that even though members of a mock jury could easily understand an expert's testimony, the expert testimony had no effect on the verdict of the case (Duckworth, Kreiner, Stark-Wroblewski & Marsh 2010). Similarly, Martire and Kemp (2011) examined sixteen studies measuring sensitivity to expert opinions. Of the sixteen, only a handful of experiments showed evidence that expert

testimony could educate jurors about eyewitness identification without also planting significant skepticism. These results are significant because while there is some evidence that expert testimony can reduce biases, the evidence is not overwhelming. There therefore must be a better way to warn jurors about biases in eyewitness identification.

Another tactic for educating jurors is intensified cross-examination. In a study conducted by Berman, Narby, and Cutler (1995), subjects viewed a simulated cross-examination and made judgments about the eyewitness and the defendant. Subjects who were exposed to inconsistent testimony perceived the eyewitness as less credible. These findings suggest that jurors are more likely to evaluate identification accuracy based on factors that appear to have questionable associations with identification accuracy. While this experiment does illustrate that jurors are sensitive to inconsistent testimony, the problem is that often people are very confident in the person they chose. Their testimony might sound very confident and be very consistent. This is a problem because, as mentioned previously, confidence is not necessarily associated with accuracy.

### **Judicial Instructions**

The recent New Jersey Supreme Court decision allows for a set of judicial warnings to be presented to jurors during criminal cases. These warnings are innovative because they are more detailed than any set of judicial instructions that existed previous to 2012. However, while they are important, they are not the first set of warnings to ever be created. One set of judicial warnings surfaced after the 1972 Supreme Court Case, *United States v. Telfaire*. Both federal and state courts adapted these warnings. These warnings asked questions such as “Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?” and “Are you satisfied that the

identification made by the witness subsequent to the offense was the product of his own recollection?” They also warned, “Finally, you must consider the credibility of each identification witness in the same ways as any other witness, consider whether the witness is truthful, and consider whether the witness had the capacity and opportunity to make a reliable observation of the matter covered in his testimony” (Greene, 1988, 254).

Even though these warnings were adapted in federal and state courts throughout the country, the effectiveness was not tested until Greene’s 1988 experiment. Greene decided to test these warnings in comparison to a simpler, more understandable set. He conducted three experiments. In the first experiment he tested the effectiveness of the *Telfaire* warnings. It was found that jurors who heard the *Telfaire* instructions were not any more sensitive to problematic factors in eyewitness identification. Greene (1988) indicates that this finding is not particularly surprising because the instruction did not mention anything about stress, or weapon focus on eyewitness memory. In the second experiment it was found that jurors who heard a revised set of judicial warnings were more likely to find the defendant not guilty. This was true for polls taken both before and after deliberation. Results indicated that because of the high percentage of not guilty verdicts, the instructions might even be biased towards the defendant. In the final experiment, Greene conducted a survey of 300 superior court judges. It was found that they believed the *Telfaire* instructions were not effective and jurors who heard the revised version were more knowledgeable about factors to consider during an eyewitness’s testimony. Overall, it was decided that, “Perhaps an instruction that is somewhat less biased but equally as clear and complete will be the next refinement. Jurors would then

know how to evaluate an eyewitness account without doubting much of what the witness says” (Green, 1988, 275).

In another experiment conducted by Katzev and Wishart (1985), participants viewed a videotaped trial and were presented with one of three conditions. In the first condition, judges gave jurors the defendant’s charge and instructions about their responsibilities, carefully explaining the crime of burglary. The second condition consisted of these standard instructions plus a review of the evidence. Finally, the third condition consisted of instructions, a review of the evidence, as well as a cautionary statement about fallibility of eyewitness identification. It was found that the third condition produced the largest amount of not guilty verdicts. The third condition also led participants to make fewer pre-deliberation guilty verdicts and to deliberate for less time (Katzev & Wishart, 1985).

Interestingly enough, even though there is research indicating that judicial warnings can be effective, only about a quarter of judges said they would give instructions about issues that jurors are not aware of (Wise & Safer, 2004). Part of the reason for this is that even though there is evidence in support of judicial instructions, there are also arguments to be made against them. For example Bartolomey (2001) argues that jury instructions merely address generalities, and they cannot tell the jury anything about the specific identification at that moment in the courtroom. She claims that this issue is better addressed by taking measures to prevent mistaken identification in the first place, such as improving lineup procedures.

There is clearly evidence both in favor of and against judicial instructions as a strategy to reduce faulty eyewitness identifications. Because of this evidence, the

purpose of the following experiment is to present participants with the New Jersey judicial instructions in order to see if they help inform jurors of biases in eyewitness identification. The *Telfaire* judicial instructions were used for years before anyone ever tested their effectiveness. It took fifteen years before Greene (1988) presented evidence suggesting them to be ineffective. The goal of this experiment is therefore to test the New Jersey judicial instructions, and particular attention will be paid to juror sensitivity to the Cross-Race Bias. This study is extremely important because if these judicial warnings are proven to be effective, it could lead to a movement to implement them in other court systems throughout the country. On the other hand, if these warnings are not effective, then the judicial system might attempt to research and develop other safeguards to compensate for eyewitness errors in identification.

It is hypothesized that the New Jersey judicial instructions will reduce the likelihood that the defendant is found guilty. This is based on the findings of Greene (1988) and of Katzev and Wishart (1985). It is also hypothesized that the New Jersey judicial instructions will enlighten mock jurors to the Cross-Race Bias, thus lowering the amount of cross-race convictions. This hypothesis is based on the Abshire and Bornstein (2003) findings that indicate that jurors might be aware of the cross-race bias. Even though their findings indicate that the race of the eyewitness was not enough to change jurors overall verdicts, perhaps if jurors were explicitly warned about errors in eyewitness identification, they will be less likely to convict someone.

## **Method**

### **Recruitment of Participants**

Participants were recruited from various psychology classes at Trinity College. Different incentives were given depending upon the particular class. For example, Psychology 101 sections require students to participate in at least one research project. Other courses offer research participation as an extra credit opportunity.

### **Characteristics of Participants**

Participants were all undergraduate students at Trinity College (overall N=72). There were 58 percent females and 42 percent males. 74 percent of students were white, 8 percent were black/ African American, 8 percent were Hispanic, 6 percent were Asian, and 4 percent did not specify. 42 percent were freshman, 31 percent were sophomores, 12 percent were juniors, and 15 percent were seniors.

### **Creation of Transcript**

The transcript was a modified version of a trial, *The People of the State of New York v. Rudolph Young*, which was a controversial trial involving eyewitness testimony. The case had been appealed several times. The original trial involved a black intruder who broke into a white couple's home. He had a scarf covering his face, and he demanded money from the victim and his wife. This case involved several problems pertaining to accurate eyewitness identification. Not only was the intruder wearing a disguise, he also threatened the victims with an ax, and the case involved cross-race eyewitness identification.

The transcript was obtained from one of the lawyers from the trial. The original transcript was over a thousand pages long, but it was edited down to about thirty pages.

Key elements of the case were altered, including the location of the crime and the names and races of key people involved. Instead of involving both the husband's and wife's testimony, only the husband's account was used. Half of the conditions received the New Jersey warnings and the other half only received basic warnings including a basic definition of the burden of proof and proof beyond reasonable doubt.

In order to make the races of the eyewitness and the defendant more evident, four images were selected from the Internet. The images had nothing to do with the actual trial and were used solely to enhance the reader's understanding of the race of both the eyewitness and the defendant. The images included a white man in his twenties wearing an orange jump suite, and a black man in his twenties wearing an orange jump suite. These images were used to depict the defendant. There was also a picture of a middle aged white man and a middle aged black man, which were used to depict the eyewitness (see Appendix A).

The transcript underwent several trial runs before it was used with experimental participants. The first time it was tested, every single pilot participant said that the defendant was not guilty beyond reasonable doubt. Because there was no variation, certain aspects of the case were altered. The scarf was taken away from the intruder's face, the eyewitness became more confident, and finally, a second eyewitness was added in, claiming that he had received the stolen property at his pawnshop near the victim's house. The transcript went through two more revisions before it was clear that there would be some variation in participants' judgments about the defendant's guilt (see Appendix B for a copy of the transcript used in the experiment).

**Procedure**

Participants were invited to a large classroom in one of the academic buildings at Trinity College. When participants arrived, they filled out and signed an informed consent form, outlining the potential benefits and risks of the study. The study involved minimal risk, and it had IRB approval. There were eight conditions in total: two levels of race of defendant (black or white); two levels of race of eyewitness (black or white); and two levels of judicial warnings related to eyewitness identification (present or absent). A block randomization schedule was created to ensure that equal numbers of participants (n=9) were randomly assigned to each condition and to control for possible time related confounds. Once randomized, participants were instructed to assume the role of a juror. They were given the trial transcript along with pictures of both the eyewitness and the defendant. They were asked to read the transcript carefully, paying close attention to the details of the case. Once they had finished reading, the transcript was taken away, and participants received a short questionnaire pertaining to the facts about the case.

After participants completed the questionnaire, they were debriefed on the design of the study. They were notified that while the transcript was taken from an original case, all the names, dates, and locations had been changed. They were also informed that the pictures they received were random images, and they were not related to the case. It was highlighted that discussion of this experiment to other students before graduation could potentially interfere with the results, so they were asked not to discuss the experiment with anyone else.

## **Measures**

After reading the case transcript, participants answered questions about the defendant's guilt (see Appendix C). The questionnaire included two items designed as manipulation checks. Participants had to correctly identify the race of the defendant and the eyewitness in order for their data to be used. In addition, participants answered whether the transcript was understandable, how clear the judicial instructions were, how informative the judicial instructions were, and whether or not the judicial instructions changed the participant's judgment about the defendant's guilt. Finally, the questionnaire included questions about the credibility of the eyewitness, and the strength of arguments presented by the prosecuting and defense attorneys.

## **Results**

### **Does Race of Participant Matter?**

Descriptive statistics for guilt judgments according to race of participant and race of defendant are shown in Table 1. Analysis of variance showed no significant effects of either independent variable on guilt judgments (see Table 2). Descriptive statistics for guilt judgments according to race of participant and race of eyewitness are shown in Table 3. Analysis of variance showed no significant effects of either independent variable on guilt judgments (see Table 4). Because race of participant was unrelated to guilt judgments in either context (race of defendant and race of eyewitness), race of participant was not included in subsequent analyses involving effects of judicial instruction.

### **Effects of Judicial Warnings, Race of Eyewitness, and Race of Defendant**

**Guilt judgments.** Descriptive statistics for guilt judgments as a function of judicial warnings, race of eyewitness, and race of defendant are shown in Table 5.

Analysis of variance showed no significant effects of any independent variable on guilt judgment (see Table 6).

**Change of opinion.** Descriptive statistics for change of opinion as a function of judicial warnings, race of eyewitness, and race of defendant are shown in Table 7.

Analysis of variance showed a significant effect for the interaction of judicial warnings and race of eyewitness,  $F(1,64) = 5.23, p = .025$ , partial eta squared = 0.076 (see Table 8 and Figure 1). When no judicial warnings about eyewitness testimony were present, race of eyewitness did not influence whether jurors thought judicial instructions had changed their opinion, but when judicial warnings were given, jurors thought the instructions had changed their opinion more when the eyewitness was white.

**Clarity of instructions.** Descriptive statistics for clarity of judicial instructions as a function of judicial warnings, race of eyewitness, and race of defendant are shown in Table 9. Analysis of variance showed that judicial instructions were perceived to be clearer when the New Jersey warnings were present ( $M = 1.58, SE = 0.14$ ) than when warnings were absent ( $M = 2.02, SE = 0.14$ ),  $F(1,63) = 4.87, p = .03$ , Partial eta squared = .072 (see Table 10). Judicial instructions were also related as clearer when the eyewitness was white ( $M = 1.60, SE = 0.14$ ) rather than black ( $M = 2.00, SE = 0.14$ ),  $F(1,63) = 4.12, p = .05$ , Partial eta squared = .061.

**Informativeness of instructions.** Descriptive statistics for informativeness of judicial instructions as a function of judicial warnings, race of eyewitness and race of

defendant are shown in Table 11. When the New Jersey judicial warnings were present, the judicial instructions were seen as more informative ( $M=4.00$ ,  $SE=0.17$ ) than when they were absent ( $M=2.64$ ,  $SE=0.17$ ),  $F(1,64)=30.68$ ,  $p<.001$ , partial eta squared=.324 (see Table 12).

**Credibility of eyewitness.** Descriptive statistics for credibility of the eyewitness as a function of judicial warnings, race of eyewitness, and race of defendant are shown in Table 13. There was a marginally significant tendency for the eyewitness to be rated as more credible when the defendant was white ( $M=1.97$ ,  $SE=.14$ ) than when the defendant was black ( $M=2.36$ ,  $SE=.14$ ),  $F(1,64)=3.61$ ,  $p=.06$ , partial eta squared=.053 (see Table 14).

**Transcript understandable.** Descriptive statistics for the understandability of the court transcript as a function of judicial warnings, race of eyewitness, and race of defendant are shown in Table 15. Analysis of variance showed no significant effects of any independent variable on guilt judgment (see Table 16). The fact that the transcript was equally understandable across all conditions is confirmation that the design was balanced, leaving little room for error.

**Strength of arguments from prosecutor.** Descriptive statistics for strength of arguments from the prosecutor as a function of judicial warnings, race of eyewitness, and race of defendant are shown in Table 17. Analysis of variance showed no significant effects of any independent variable on perceived strength of arguments from the prosecutor (see Table 18). This serves as a manipulation check for the study because it shows that one attorney is not clearly stronger than the other.

**Strength of arguments from defense attorney.** Descriptive statistics for strength of arguments from the defense attorney as a function of judicial warnings, race of eyewitness, and race of defendant are shown in Table 19. Analysis of variance showed no significant effects of any independent variable on perceived strength of arguments from the defense attorney (see Table 20). This is another manipulation check in the study because participants were not persuaded by the arguments of the defense attorney, leaving room to appropriately test the effectiveness of the judicial warnings.

## **Discussion**

### **Were primary hypotheses confirmed?**

It was hypothesized that the New Jersey judicial instructions would reduce the likelihood that the defendant was found guilty. This hypothesis was not supported. It was also hypothesized that the New Jersey judicial instructions would enlighten mock jurors to the Cross-Race Bias, thus lowering the amount of cross-race convictions. This hypothesis was also not supported. Even though the two main hypotheses were not supported, additional findings provide some insight about the potential effectiveness of the judicial warnings.

Jurors perceived the instructions pertaining to eyewitness testimony to be more clear when the full New Jersey warnings were present. This supports the belief that the instructions are useful. Similar effects for “informativeness of instructions” were observed. Participants who received the full judicial warnings found them to be more informative of errors pertaining to eyewitness identification than the group who did not receive the New Jersey warnings. These two findings highlight some important policy implications for the New Jersey warnings. Because participants found the warnings to be

both clear and informative, there is no disadvantage for using them in a court of law. In fact, they might actually increase jurors' knowledge of errors in eyewitness identification. The New Jersey warnings could therefore be adapted in other courts throughout the country.

While the two main hypotheses of this study were disconfirmed, some unexpected results occurred. There was an unexpected interaction result for "change of opinion." When no judicial warnings about eyewitness testimony were present, race of eyewitness did not influence whether jurors thought judicial instructions had changed their opinion, but when judicial warnings were given, jurors thought the instructions had changed their opinion more when the eyewitness was white. (see Figure 1). This result is difficult to interpret because there is no indication of how warnings changed jurors' thinking, only that they thought their thinking had been changed by the warnings. It is not clear why greater change would occur when the eyewitness was white.

A second unexpected finding was that participants rated an eyewitness as more credible when the defendant was white than when the defendant was black. One possible explanation for this is that people may believe that more discrimination occurs against black defendants than white defendants in the United State judicial system. Therefore, the jurors in the study may have been skeptical about the accuracy of eyewitness testimony when the defendant was black.

### **Significance of the present research**

Because the New Jersey warnings added clarity and useful information for jurors, they should be used in actual cases. A significant problem in the United States judicial system is that people are falsely incarcerated due to errors in eyewitness identification.

Because these warnings provide useful information about errors in eyewitness identification, they have the potential to lower false conviction rates. These judicial warnings are new so it is important to test whether they are actually effective. This research provides an important check on their effectiveness.

### **Limitations**

The following study contained some important limitations. Firstly, participants read a written transcript, as opposed to watching a video of a trial or experiencing a real trial. The written transcript made the court case less realistic, and this could potentially change whether or not the participant found the defendant guilty. It is also possible that participants who were weaker readers did not retain all the information presented in the trial, which might have changed their opinion of the defendant's guilt.

In an actual trial, jurors deliberate as a group in order to come up with a decision about a defendant's guilt. In this study, participants did not deliberate as a group and instead made individual judgments about the guilt of the defendant. It is possible that results might have been different if participants had the chance to meet as a group and debate over the facts of the case.

A third limitation of this trial is that the only evidence presented against the defendant was eyewitness testimony. Because the transcript was in written form, it was significantly shorter than an actual trial in order to make sure that participants paid close attention to the material presented. It is possible that if additional evidence was presented, participants might be more likely to find the defendant guilty.

A final limitation on this study is that all of the participants were college students. Generally speaking, the participants in this experiment were young, educated, relatively

liberal, and mostly white. Given the fact that students were recruited from various psychology classes, they might have been exposed to information about biases in eyewitness identification. Therefore, if the study had been conducted within another population, results might have turned out differently.

### **Implications for future research**

If this study were to be conducted again, it would be useful to make it more similar to an actual trial. The best way to conduct the study would be to hire actors to act out the case and have jurors deliberate in groups. A video would also be an effective way to portray the court case. In order to truly test whether or not the judicial warnings are effective, a more realistic study should be conducted involving a more in-depth court case, visual simulation, and jury deliberation. The present study indicates that the New Jersey judicial warnings might be helpful in warning jurors about biases in eyewitness identification. However, more research should be conducted in order to see if these warnings actually produce more “not guilty” verdicts than conditions without the instructions.

There are a few possibilities as to why the hypotheses of this study were not supported. One reason could be because of the design of the study itself. Perhaps the readers became tired as they got to the judicial instruction section and so they paid little attention to the warnings. It is also possible that they felt pressure to answer questions in a certain way because they felt as if the examiner was expecting a particular outcome. Another potential explanation is that perhaps it is difficult to reduce the likelihood of guilt through judicial instructions alone. As Bartolomey (2011) suggested, it might be better to address the problem first hand and focus more on line up procedures so mistaken

eyewitness identification is prevented in the first place. In general, it might be a combination of a number of factors that will eventually lead to a reduction of false convictions. As mentioned, a restructuring of the way lineups are conducted could reduce errors in the first place, but other factors such as strong attorneys and perhaps expert testimony could also lead to a reduction in false convictions. Overall, just because the results of this experiment were not significant, it does not mean that these instructions are ineffective or that they should not be used in court systems. Because participants found the instructions to be clear and informative about errors in eyewitness identification, using them in a court of law will not be problematic and these instructions could potentially be helpful for jurors.

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**Table 1. Guilt Judgments as a Function of Race of Defendant and Race of Participant**

<b>Race of Defendant</b>	<b>Race of Participant</b>	<b><i>M</i></b>	<b><i>SD</i></b>
White	White	1.92	0.89
White	Not White	2.30	1.25
Black	White	2.33	0.83
Black	Not White	2.56	1.01

**Table 2. Effect of Race of Defendant and Race of Participant on Rated Guilt of Defendant**

<b>Effect</b>	<b>df</b>	<b><i>F</i></b>	<b><i>p</i></b>	<b>partial eta<sup>2</sup></b>
Race of Participant (P)	1,68	1.42	.24	.020
Race of Defendant (D)	1, 68	1.75	.19	.025
P X D	1, 68	0.09	.76	.001

**Table 3. Guilt of Defendant as a Function of Race of Eyewitness and Race of Participant**

<u>Race of Eyewitness</u>	<u>Race of Participant</u>	<u><i>M</i></u>	<u><i>SD</i></u>
White	White	2.16	0.89
White	Not White	2.40	0.89
Black	White	2.09	0.87
Black	Not White	2.43	1.22

**Table 4. Effect of Race of Eyewitness and Race of Participant on Rated Guilt of Defendant**

<b>Effect</b>	<b>df</b>	<b><i>F</i></b>	<b><i>p</i></b>	<b>partial eta<sup>2</sup></b>
Race of Participant (P)	1,68	1.03	.31	.015
Race of Eyewitness (E)	1, 68	0.01	.94	.000
P X E	1, 68	0.03	.86	.000

**Table 5. Guilt Judgments as a Function of Judicial Warnings, Race of Eyewitness, and Race of Defendant**

<b>Race of Eyewitness</b>	<b>Race of Defendant</b>	<b>Judicial Warnings</b>			
		<b>Absent</b>		<b>Present</b>	
		<i>M</i>	<i>SD</i>	<i>M</i>	<i>SD</i>
White	White	1.67	0.71	2.00	1.00
White	Black	2.67	0.71	2.44	0.88
Black	White	2.00	1.00	2.44	1.23
Black	Black	2.44	0.73	2.00	1.12

Note. n=9 in each cell. Guilt judgments used the option <1> guilty, beyond a reasonable doubt; <2> guilty, but with reasonable doubt; <3> not guilty, but with reasonable doubt; <4> not guilty, beyond a reasonable doubt.

**Table 6. Effect of Judicial Warnings, Race of Eyewitness, and Race of Defendant on Guilt Judgment**

<b>Effect</b>	<b>df</b>	<b><i>F</i></b>	<b><i>p</i></b>	<b>partial eta<sup>2</sup></b>
Warnings (W)	1,64	0.02	.90	.000
Race of Eyewitness (E)	1,64	0.02	.90	.000
Race of Defendant (D)	1, 64	2.65	.11	.040
W X E	1, 64	0.02	.90	.000
W X D	1, 64	2.65	.11	.040
E X D	1, 64	2.65	.11	.040
W X E X D	1, 64	0.14	.71	.002

**Table 7. Change of Opinion as a Function of Judicial Warnings, Race of Eyewitness, and Race of Defendant**

<u>Race of</u> <u>Eyewitness</u>	<u>Race of</u> <u>Defendant</u>	<u>Judicial Warnings</u>			
		<u>Absent</u>		<u>Present</u>	
		<u><i>M</i></u>	<u><i>SD</i></u>	<u><i>M</i></u>	<u><i>SD</i></u>
White	White	1.78	0.83	2.79	1.20
White	Black	2.33	1.41	2.67	0.71
Black	White	2.67	1.32	1.78	1.09
Black	Black	1.67	1.12	1.56	0.73

**Table 8. Effect of Judicial Warnings, Race of Eyewitness, and Race of Defendant on Change of Opinion**

<b>Effect</b>	<b>df</b>	<b><i>F</i></b>	<b><i>p</i></b>	<b>partial eta<sup>2</sup></b>
Warnings (W)	1,64	0.11	.75	.002
Race of Eyewitness (E)	1,64	3.43	.07	.051
Race of Defendant (D)	1, 64	0.58	.45	.009
W X E	1, 64	5.23	.02	.076
W X D	1, 64	0.01	.91	.000
E X D	1, 64	2.67	.11	.040
W X E X D	1, 64	2.01	.16	.030

**Table 9. Clarity of Judicial Instructions as a Function of Judicial Warnings, Race of Eyewitness, and Race of Defendant**

<b>Race of Eyewitness</b>	<b>Race of Defendant</b>	<b>Judicial Warnings</b>			
		<b>Absent</b>		<b>Present</b>	
		<i>M</i>	<i>SD</i>	<i>M</i>	<i>SD</i>
White	White	1.78	0.67	1.33	0.50
White	Black	1.63	0.74	1.67	0.50
Black	White	2.22	1.09	2.00	1.00
Black	Black	2.44	1.24	1.33	0.50

**Table 10. Effect of Judicial Warnings, Race of Eyewitness, and Race of Defendant on Clarity of Judicial Instructions**

<u>Effect</u>	<u>df</u>	<u>F</u>	<u>p</u>	<u>partial eta<sup>2</sup></u>
Warnings (W)	1,63	4.87	.03	.072
Race of Eyewitness (E)	1,63	4.12	.05	.061
Race of Defendant (D)	1, 63	0.11	.74	.002
W X E	1, 63	1.40	.24	.022
W X D	1, 63	0.26	.61	.004
E X D	1, 63	0.63	.43	.010
W X E X D	1, 63	3.05	.09	.046

**Table 11. Informativeness of Judicial Instructions as a Function of Judicial Warnings, Race of Eyewitness, and Race of Defendant**

Race of Eyewitness	Race of Defendant	Judicial Warnings			
		Absent		Present	
		<i>M</i>	<i>SD</i>	<i>M</i>	<i>SD</i>
White	White	2.56	1.24	4.22	0.83
White	Black	3.00	0.87	4.11	0.60
Black	White	2.24	1.24	3.89	0.78
Black	Black	2.56	1.51	3.78	0.97

**Table 12. Effect of Judicial Warnings, Race of Eyewitness, and race of Defendant on Informativeness of Judicial Instructions**

<b>Effect</b>	<b>df</b>	<b><i>F</i></b>	<b><i>p</i></b>	<b>partial eta<sup>2</sup></b>
Warnings (W)	1,64	30.68	<.001	.324
Race of Eyewitness (E)	1,64	1.55	.22	.024
Race of Defendant (D)	1, 64	0.12	.74	.002
W X E	1, 64	0.01	.91	.000
W X D	1, 64	0.63	.43	.010
E X D	1, 64	0.12	.74	.002
W X E X D	1, 64	0.12	.74	.002

**Table 13. Credibility of Eyewitness as a Function of Judicial Warnings, Race of Eyewitness, and Race of Defendant**

<b>Race of Eyewitness</b>	<b>Race of Defendant</b>	<b>Judicial Warnings</b>			
		<b>Absent</b>		<b>Present</b>	
		<i>M</i>	<i>SD</i>	<i>M</i>	<i>SD</i>
White	White	1.89	0.60	2.22	0.97
White	Black	2.44	0.88	2.33	0.50
Black	White	2.00	0.87	1.78	0.83
Black	Black	2.67	1.12	2.00	1.00

**Table 14. Effect of Judicial Warnings, Race of Eyewitness, and Race of Defendant on Credibility of Eyewitness**

<b>Effect</b>	<b>df</b>	<b><i>F</i></b>	<b><i>p</i></b>	<b>partial eta<sup>2</sup></b>
Warnings (W)	1,64	0.66	.42	.010
Race of Eyewitness (E)	1,64	0.30	.59	.005
Race of Defendant (D)	1, 64	3.61	.06	.053
W X E	1, 64	1.84	.18	.028
W X D	1, 64	1.18	.28	.018
E X D	1, 64	0.07	.79	.001
W X E X D	1, 64	0.00	1.00	.000

**Table 15. Understandability of Transcript as a Function of Judicial Warnings, Race of Eyewitness, and Race of Defendant**

<b>Race of Eyewitness</b>	<b>Race of Defendant</b>	<b>Judicial Warnings</b>			
		<b>Absent</b>		<b>Present</b>	
		<i>M</i>	<i>SD</i>	<i>M</i>	<i>SD</i>
White	White	1.22	0.44	1.44	0.73
White	Black	1.33	0.50	1.22	0.44
Black	White	1.22	0.44	1.11	0.33
Black	Black	1.22	0.44	1.22	0.44

**Table 16. Effect of Judicial Warnings, Race of Eyewitness, and Race of Defendant on Understandability of Transcript**

<u>Effect</u>	<u>df</u>	<u>F</u>	<u>p</u>	<u>partial eta<sup>2</sup></u>
Warnings (W)	1,64	0.00	1.00	.000
Race of Eyewitness (E)	1,64	0.96	.33	.015
Race of Defendant (D)	1, 64	0.00	1.00	.000
W X E	1, 64	0.24	.63	.004
W X D	1, 64	0.24	.63	.004
E X D	1, 64	0.24	.63	.004
W X E X D	1, 64	0.96	.33	.015

**Table 17. Strength of Arguments from Prosecutor as a Function of Judicial Warnings, Race of Eyewitness, and Race of Defendant**

<b>Race of Eyewitness</b>	<b>Race of Defendant</b>	<b>Judicial Warnings</b>			
		<b>Absent</b>		<b>Present</b>	
		<i>M</i>	<i>SD</i>	<i>M</i>	<i>SD</i>
White	White	2.11	0.78	2.22	0.67
White	Black	2.22	0.83	2.22	0.67
Black	White	2.11	0.60	2.33	1.32
Black	Black	2.33	0.71	1.89	0.93

**Table 18. Effect of Judicial Warnings, Race of Eyewitness, and Race of Defendant on Strength of Arguments from Prosecutor**

<b>Effect</b>	<b>df</b>	<b><i>F</i></b>	<b><i>p</i></b>	<b>partial eta<sup>2</sup></b>
Warnings (W)	1,64	0.02	.89	.000
Race of Eyewitness (E)	1,64	0.02	.89	.000
Race of Defendant (D)	1, 64	0.02	.89	.000
W X E	1, 64	0.18	.68	.003
W X D	1, 64	0.97	.33	.015
E X D	1, 64	0.18	.68	.003
W X E X D	1, 64	0.50	.49	.008

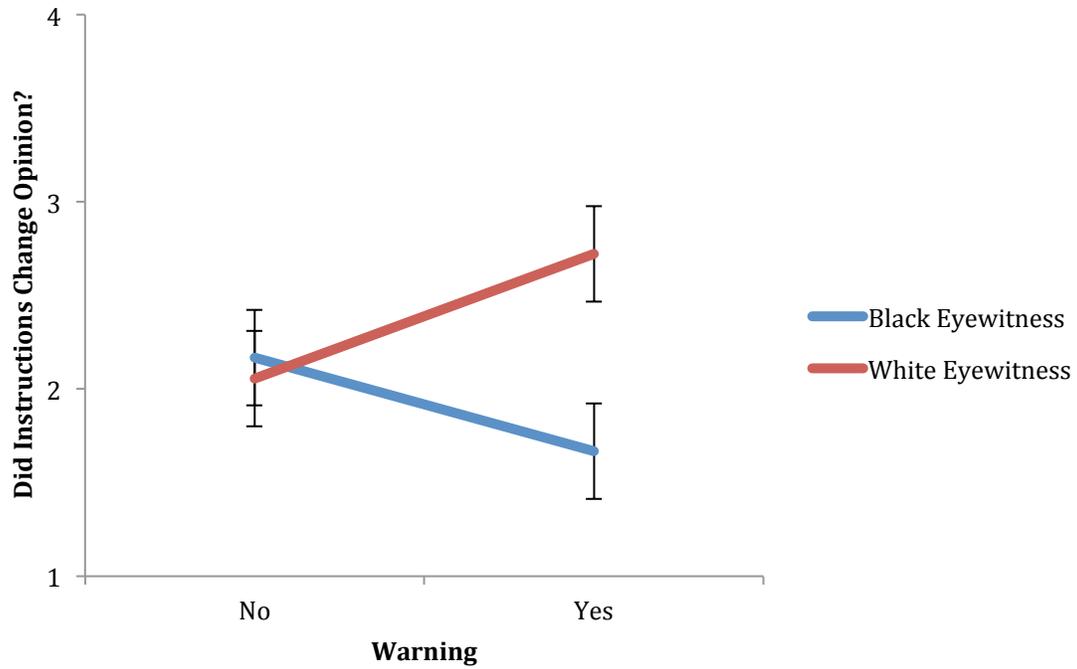
**Table 19. Strength of Arguments from the Defense Attorney as a Function of Judicial Warnings, Race of Eyewitness, and Race of Defendant**

<b>Race of Eyewitness</b>	<b>Race of Defendant</b>	<b>Judicial Warnings</b>			
		<b>Absent</b>		<b>Present</b>	
		<i>M</i>	<i>SD</i>	<i>M</i>	<i>SD</i>
White	White	2.22	1.09	3.00	1.22
White	Black	2.78	1.20	2.56	1.01
Black	White	2.56	0.88	2.89	1.27
Black	Black	3.00	0.87	3.11	0.93

**Table 20. Effect of Judicial Warnings, Race of Eyewitness, and Race of Defendant on Strength of Arguments from Defense Attorney**

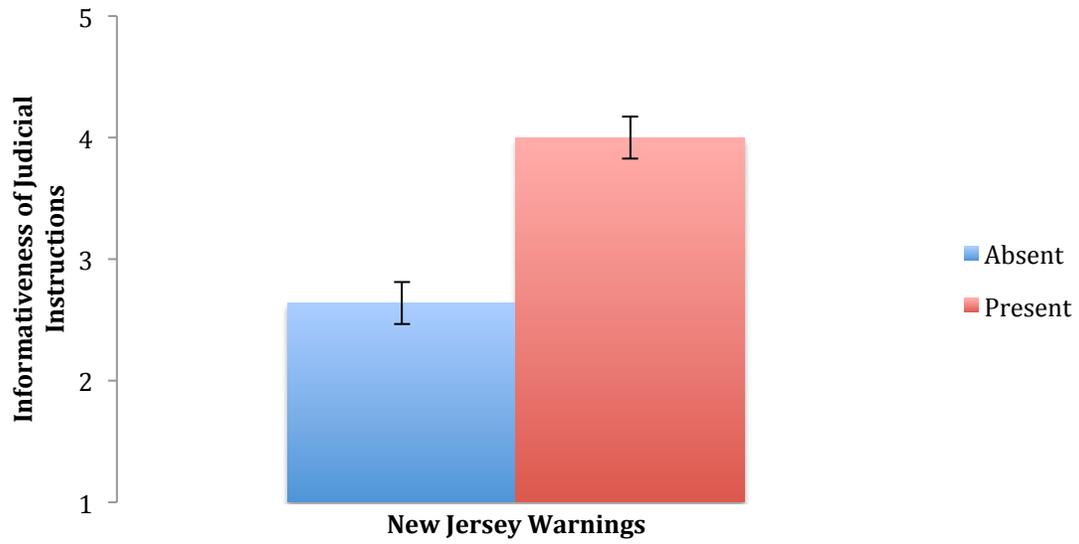
<b>Effect</b>	<b>df</b>	<b><i>F</i></b>	<b><i>p</i></b>	<b>partial eta<sup>2</sup></b>
Warnings (W)	1,64	0.98	.33	.015
Race of Eyewitness (E)	1,64	0.98	.33	.015
Race of Defendant (D)	1, 64	0.60	.44	.009
W X E	1, 64	0.01	.91	.000
W X D	1, 64	1.47	.23	.022
E X D	1, 64	0.30	.58	.005
W X E X D	1, 64	0.59	.44	.009

**Figure 1. Interaction Effect Involving Judicial Warnings, Race of Eyewitness, and Change of Opinion**



Note: Response options for the dependent variable were:  
 <1> Not at all; <5> To a significant degree

**Figure 2. Informativeness of Judicial Instructions**



Note: Response options for the dependent variable were:  
<1> Not at all; <5> To a significant degree.

**Appendix A**

**Pictures of White Defendant, Black Defendant, White Eyewitness, and Black Eyewitness**



**Appendix B**  
**Transcript Used in Experiment**

**Condition 6: White Eyewitness, Black Defendant**

6

THE PEOPLE OF THE STATE OF NEW JERSEY

VS.

MALCOLM BROWN

BEFORE: HON WILLIAM R. DAVIS

APPEARANCES: SAMUEL STEVENS, Assistant District Attorney

JAMES ROBINSON, Attorney for Defendant

MALCOLM BROWN, Defendant

THE COURT:

Now that you have been sworn, I will give you some preliminary instructions to guide you in your participation in the trial. It will be your duty to find from the evidence what the facts are. You, and you alone, are the judges of those facts. You will then have to apply those facts to the law, as the Court will give it to you. You must follow that law whether you agree with it or not.

But nothing the Court may say or do during the course of the trial should be taken by you as indication what your verdict should be.

The evidence from which you will find the facts will consist of the testimony of the witnesses, documents, and other things received into the record as exhibits, and any facts the lawyers agree or stipulate to, or that the Court may instruct you to find.

For this case, the burden of proof is on the People. The defendant has no burden to prove his innocence. The People must prove the defendant's guilt beyond a reasonable doubt.

In this case the defendant is charged with one count of robbery and one count of burglary. I will give you detailed instructions on the law at the end of the trial and those instructions will control your deliberations and decisions. It is very important that you do not form any opinion until all the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

Mr. STEVENS: Good morning, ladies and gentlemen.

April 1, 2005, Vincent Jackson, a white man in his late thirties, was in his home at 14 Manor Lane in the town of Satin Springs, New Jersey. He was alone with his dog about 10 o'clock that night watching TV minding his own business. About 10 o'clock his dog barks. Vince goes to the back door that leads to the garage, sees that it is ajar, shuts it. He will testify there is nothing unusual, the door used to pop open. Vince goes back into the living room and continues to watch TV.

20 minutes or so later he hears some loud noises coming from the garage/ kitchen area. He gets up to investigate. He barely gets out of the living room. In fact, he doesn't get out of the living room when he sees an intruder in his home. The intruder is alone and he is carrying an ax that was stolen out of Vince's garage.

The course of the events continues. The intruder threatens Vince with an ax, he holds the ax over Vince's head, demands money and threatens to kill Vince if he does not comply. Scared and concerned, Vince complies with the demands. He retrieves his wallet. He gives his money to the intruder. The intruder also takes some pocket change off the dresser and he takes three watches belonging to Vince off the dresser in his bedroom.

Vince and the intruder return back to the living room area of the home. The intruder demands to know the location of the phones. Vince tells him where two of the phones are. The intruder proceeds back to the bedroom where one of the phones is, rips it out of the wall, goes to the kitchen and rips that phone out of the wall. He then leaves the house, disappearing into the night.

Vince checks outside to see if he can see anything. He can't, and at the time he does call the police on the one phone that's working, and the police respond, and ladies and gentlemen, that gentleman that intruded that night is the defendant, Mr. Malcolm Brown.

The police asked Mr. Jackson to give a description of the intruder. Vince described the intruder as a black man, in his twenties; around 5'10" who had a medium build. Mr. Jackson will testify that he can clearly and distinctly remember the eyes of the intruder, as well as the intruder's voice. He was able to pick this man out of two lineups. The first was a photo array, and he later picked the same man out of a line up in person down at the police station. Today, I can assure you that Mr. Jackson will testify that Malcolm Brown is the individual that intruded into his home and demanded his money and threatened to kill him.

Not only will you have the word of Mr. Jackson, but some of the property that was stolen that night was related back to Malcolm Brown. Shortly after the incident, Officer Tom Jones began to investigate the Robbery. Three days after the incident, Tom Jones entered a pawnshop in the next town over. This is where he discovered three watches that accurately matched the description of the ones stolen from Mr. Jackson. When the owner of the shop was questioned about the watches, he claimed that they were sold to him on a Saturday morning, by a black man, who was about 5'10." His description of the man matches the description that Vincent gave just nights beforehand. That essentially, ladies and gentlemen, is the essence of this case.

Let me read to you from the indictment:

The 1<sup>st</sup> Count reads: The Defendant, on or about April 1, 2005, in the town of Satin Springs, State of New Jersey, forcibly stole property, to wit, a sum of the United States currency from Vincent Jackson, and in the course of the commission of the crime or immediate flight therefrom, used or threatened the use of a dangerous instrument, to wit, an ax.

The 2<sup>nd</sup> Count of the indictment reads, the Defendant, on or about April 1, 2005, in the town of Satin Springs, Sate of New Jersey, knowingly entered unlawfully in a dwelling located at 14 Manor Lane, with the intent to commit a crime therein, to wit, a robbery, and in effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the crime used or threatened the immediate use of a dangerous instrument, to wit, an ax.

That, ladies and gentlemen, is the indictment. I have told you what the proof will be. You will hear, of course, from Mr. Jackson himself and. You will also hear from another individual, I anticipate regarding the property that was stolen and the recovery of this property. It should be a very simple and straightforward trial, and ladies and gentlemen, I submit at the end of the proof, it will be quite obvious that Mr. Malcolm Brown is guilty of both counts. Thank you.

THE COURT: Mr. Robinson?

MR. ROBINSON: Thank you, your honor. Good Morning ladies and gentlemen.

Vincent Jackson was a victim of a horrific crime on April 1, 2005. I assure you that there will be no dispute about that at this trial. And Vincent Jackson I believe is an honorable person. He wouldn't intentionally identify an innocent person and condemn him as a

criminal. But like most of us he's human and he can make mistakes. I believe, as Mr. Stevens told you, that Vince will sit at the witness stand at this trial. He will point to my client. He will point to Malcolm Brown and he will say, yes, he was the intruder in my home on April 1, 2005.

And that identification, ladies and gentlemen, is what is at grave dispute here at this trial. For Mr. Brown was not the intruder who invaded Vincent Jackson's home, who robbed and terrorized him.

So first and foremost in this opening statement I want to ask you to listen carefully, very carefully to all of the objective factors—the objective facts of his encounter with this intruder. These objective facts will show you that he is simply unable to reliably make any identification whatsoever despite his apparently honest and sincere objectivity.

You will listen to Vincent Jackson as he tells you what he could observe that same night, April 1, 2005 when the police arrived in his home. The description that he was able to give was extremely general and extremely vague. It would have fit thousands and thousands of young black men in the town of Satin Springs.

Another factor is just what Mr. Stevens told you about the circumstances of the entry. This intruder had an ax. Mr. Jackson was terrified. He was petrified. I submit that he focused on his weapon and that his focus on the weapon also detracted from his ability to make an identification reliably of who that person was. Given the fact that the intruder was a black man, and the eyewitness was a white man, there is a factor of cross-racial eyewitness identification.

Then I believe you will also hear that on April 8, 2005, about a week after the incident, Mr. Jackson was shown a photo array by a police officer and within that photo array, which was a folder that had six photos—color photos: one, two, three, four, five, six and Mr. Brown’s photo was in position number five. Mr. Jackson, I believe he will acknowledge to you that at that point in time he certainly wished to cooperate with the investigation, certainly wished he could have identified the intruder if he saw him so that that person could be arrested and punished.

So at the end of the case you are going to need to evaluate all, as I said, the objective factors surrounding that horrible night and decide whether or not any weight—let alone proof beyond a reasonable doubt—can be taken from Mr. Jackson’s identification.

After you have heard all of the evidence I ask you to apply those things, your logic and you will decide that it doesn’t make sense that Malcolm Brown is the guilty person here. Therefore, simply the wrong person is sitting here at this table.

And so after the end of the case I will come back and I will mesh out some of these areas for you after we have actually heard the testimony, and I will ask you to deliberate and then come back with a resounding vote of not guilty. Thank you.

THE COURT: Mr. Stevens, You can call your first witness.

MR. STEVENS: Thank you, Judge. Vincent Jackson please.

VINCENT JACKSON,

A witness called on behalf of the people, after having been first duly sworn, took the witness stand and testified as follows

DIRECT-EXAMINATION

BY MR. STEVENS

Q. Good morning, Mr. Jackson.

A. Good morning.

Q. Mr. Jackson, I would like to direct your attention to April 1, 2005. Were you living in Satin Springs at this time?

A. Yes.

Q. Can you tell us where you lived?

A. 14 Manor Lane.

Q. Is that in the state of New Jersey?

A. Yes.

Q. Who did you live with there?

A. Just my dog, a black lab, named Charlie.

Q. Okay. Thank you. And on that date of April 1 of 2005—do you recall what day of that week it was?

A. It was Friday.

Q. And where were you about 10 o'clock that night?

A. I was home watching television in my living room.

Q. What were you doing, just watching TV?

A. I was also flipping through the sports section of the newspaper.

Q. Where were you sitting exactly?

A. At the end of the couch.

Q. What was the lighting like that night?

A. Two lamps were on. One lamp was next to me on the couch.

Q. How was the lighting? Was it bright?

A. It was good, yeah. It certainly had to be good enough so I could see what I was reading.

Q. How about any other lights in the house? Were there any on?

A. The kitchen light was on.

Q. Thank you. About 10 o'clock that night did anything unusual occur?

A. The dog was in the kitchen, and he started barking, so I went out to the kitchen to see if I could figure out what he was barking at, and the door from the garage was open maybe a foot.

Q. Was that unusual for that door to be open or pop open?

A. I assumed it hadn't gotten all the way latched shut and it kind of—the air pressure pulled it back open. So I shut the door and locked it.

Q. Is there a deadbolt on it?

A. Yes.

Q. So then you went back and resumed watching TV?

A. Yes.

Q. About 20 minutes later did something else unusual occur?

A. Yes. Then I heard the loud crash, a couple of really loud noises and I looked around, trying to imagine what the noise was.

Q. Could you tell where the noise was coming from?

A. Yeah, it came from back in the general area of the kitchen/ dining room.

Q. What happened then?

A. So I got up and turned to start walking towards the kitchen to see what it was—and then in the entranceway between the dining room and the couch all of a sudden there was this man that was there with an ax and he was yelling at me to give him my money. He was screaming, and my initial reaction was to scream—started screaming too and just some initial confusion trying to figure out what was happening, why this person was in my house.

Q. Can you give us any description of the person at this point?

A. He was a black man. He was a little taller than I am, around 5'10.”

Q. How tall are you, Mr. Jackson?

A. I am about 5'9”.

Q. Would you say that you could really look into the intruder's face?

A. Yes, he was only maybe an inch taller than I am so I could really look at him face to face.

Q. It was just one person; right?

A. Correct.

Q. Were you able to tell if the person was a male or female?

A. It was male.

Q. Could you tell the race?

A. It was a person, black in color, African American.

Q. Did you notice anything about the complexion; light, dark?

A. Not too light, not too dark, I would say an average darkness.

Q. Okay. Did you recognize the ax to be your property?

A. Yeah. I didn't recognize it at first in terms of—I just didn't. I wasn't thinking in terms of trying to recognize it, but then—I mean, the ax had tape on the handle so I recognized it later on, as I was moving out around the house, I figured out that it was my property.

Q. Then what happened, Mr. Jackson?

A. He stood there, with the ax over my head and he said, "I'll kill you," and I said, "I believe you."

Q. Let me stop you right there, you said the man had- the intruder had the ax over your head. Where was he in relation to you? Was he in front of you, to the side?

A. Right in front of me, about two or three feet away.

Q. Okay. You said, "I believe you"?

A. Yes.

Q. Then what happened?

A. Then I said I would give him my wallet but it wasn't with me. It was in the bedroom and we would have to go get it.

Q. Okay. And what happened?

A. So, then we started going down the hallway, and I went first, followed by the intruder.

Q. Let me stop you right there, did the intruder still have the ax?

A. Yes, he was still holding it over my head, he wouldn't put it down.

Q. Can you tell us what the lighting was like in the living room/ dining room area of your home?

A. There is a floor standing light with two hundred watt bulbs in it and there is also a table in the corner, next to the couch with a light on it.

Q. And so it was well lit; is that correct?

A. Yes.

Q. And how about the hallway you said you started to go down?

A. The hallway was dark. So as we started going down the hallway it was dark.

Q. Did it become un-dark?

A. Yeah, there is a light switch about mid-way down the hall and I flipped it on so I could see where I was going.

Q. What kind of light is that?

A. It's just a naked bulb in the ceiling right in the middle of the hall.

Q. When the light got flicked on in the hall, did it pretty much illuminate the whole hallway?

A. Yes, the hallway got lit up very well.

Q. You got to your bedroom?

A. Yes.

Q. Then what happened, Mr. Jackson?

A. I got my backpack and started to take my wallet out.

Q. What happened next?

A. I started to pull the wallet out, and he grabbed the wallet from me, and took the money out and then he also took the backpack.

Q. What about the wallet itself?

A. The wallet itself he left.

Q. Do you remember how much money you had in your wallet that the intruder took, Mr. Jackson?

A. About \$200.

Q. US Currency?

A. Yes.

Q. And then what happened, sir?

A. Then he took watches from me, three different watches.

Q. Let me stop you right there if I can, do you recall those three watches?

A. Yes.

Q. Can you describe them for us please?

A. One was a Seiko watch with a metal band. Another was a Seiko watch with—gold Seiko watch with a brown leather band, and that had my name engraved on the back, and the last one was a Bulova watch with a white face, Roman numerals and kind of a rubbery plastic band.

Q. Would you describe that last watch as a sporty type watch—or sport type watch?

A. Yeah, it would have looked like that. Because of the band you could take it in the water and not have to worry about it being leather and—

Q. Do you remember engraving on it?

A. Yes, the one I mentioned was a Seiko watch and gold face and a gold and brown leather strap.

Q. Where were these watches?

A. In a box on the dresser.

Q. What happened after the intruder took the watches.

A. He asked if there were any more valuables.

Q. And how did you respond?

A. I told him that I had nothing left.

Q. And then what happened?

A. He said, "OK, lets go." And we proceeded to walk back down the hallway.

Q. And then when you came down the hallway?

A. Yes, I was in front of him.

Q. What happened when you returned back to your dining/living area?

A. He asked me if I had any phones.

Q. And what was the response?

A. I told him I did.

Q. Okay.

A. And there is one in the kitchen, which he ripped out of the wall. And then he also asked about one back in the bedroom that he went back and ripped out of the wall.

Q. The bedroom that your property was taken from?

A. Right, Correct.

Q. Did you see the phones getting ripped out or did you hear it?

A. I saw it.

Q. The bedroom?

A. Well, I saw the one in the kitchen and he went back in the bedroom and was gone—and was just gone for five seconds and came back out. I didn't follow him back in the bedroom to watch him pull the phone out.

Q. Now, he's returning back to this area that you were in, correct?

A. Yes.

Q. Where were you at this point?

A. I was standing towards the front part of the dining room near the hallway.

Q. So he returns; is that correct?

A. Yes.

Q. Did you get another good look at the intruder?

A. Yes I did. The room was well lit.

Q. And then what happened, Mr. Jackson?

A. He threatened that if I called the police he would kill me. Then he left, threw the bag through the kitchen door back out into the garage.

Q. And did you see him leave your home?

A. Yes.

Q. Then what happened, Mr. Jackson?

A. So I then I went to the window to try to see if I could see if he actually left the property, and I couldn't see anything.

Q. What window were you looking out, Mr. Jackson?

A. Out the kitchen window.

Q. And that looks out to Manor Lane?

A. Right out to the cul de sac.

Q. You didn't see anything, correct?

A. Correct.

Q. What did you do then, sir?

A. I probably waited 30 seconds or so just to make sure the person didn't come back inside the house because he had—he had threatened me about calling the police and he actually thought that the phones were disabled. So I went -- I had a phone—I had a phone in the study area. So I went to that phone and called 911.

Q. Did the police respond shortly?

A. Yes.

Q. Can you give us an estimate about how much time elapsed, Mr. Jackson, from the time you first saw this intruder until he left?

A. It was probably about five to seven minutes total.

Q. And of that seven minutes—five to seven minutes or so, how long had you been looking at him?

A. Well, initially when he came in I was looking at him, then when he was threatening to kill me I was looking at him, then when we were in the hallway and I flicked on the light I saw him, and I continued to stare at him whenever I could up until the time that he left.

Q. About how far away from you was this person throughout the course of these events?

A. Close. I would say within a couple of feet.

Q. Okay, was there anything particular about this individual you focused on, Mr. Jackson?

A. I really focused on his eyes. I also recognized that he was black in color. I also remember his voice, and that helped me identify him from the line up at the police station.

Q. You say you remember the intruder's eyes; do you have a recollection of those eyes today as you sit here?

A. Yeah.

Q. Do you see the person that was in your home that night sitting in the courtroom today?

A. Yes.

Q. Could you please point him out and describe what he is wearing today?

A. He has the white shirt on and sitting over here at this table.

Q. With or without a tie?

A. He has no tie on.

MR. STEVENS: Your Honor, may the record reflect that Mr. Jackson has identified Mr. Brown?

THE COURT: So noted.

MR. STEVENS: So when the Police arrived, did you have some discussions with the officers?

A. Yes.

Q. Did the police ask you about a composite, Mr. Jackson?

A. Yes, they asked me.

Q. What did they ask you?

A. If I would come down and do a composite for them.

Q. What did you say?

A. I said that I would do a composite for them.

Q. Mr. Jackson, can you describe your level of stress when this incident first occurred?

A. Well, I would say I was pretty stressed at the moment that he came into the house. I mean, surprised and scared.

Q. Okay. At that moment did that stress level increase, decrease, or remain the same throughout this time he was in the home?

A. I would say the stress level was always there. I would say though that I screamed initially and then you know, I was able to get my wits and give him control of the situation. So I basically did what he asked at that point.

Q. Is it fair to say you calmed down some?

A. Yes.

Q. How certain are you that the defendant, Malcolm Brown, sitting here in the courtroom is the intruder?

A. I am very certain he was the intruder.

MR. STEVENS: I have nothing further for Mr. Jackson, your Honor.

CROSS- EXAMINATION BY MR. ROBINSON

MR. ROBINSON: Good morning, Mr. Jackson. Now I just want to be clear, Mr. Jackson, when you first heard the loud crashes in the kitchen and garage area, isn't it true that you started going towards the area to investigate the sound?

A. Yes.

Q. Okay. And you had been sitting facing the TV?

A. Correct.

Q. Okay. In relationship to where the door is to your bedroom, where is the light?

A. Well, it's right in the middle of the hallway. I don't know how to describe it to you. It's halfway down the hallway in the middle.

Q. So it wouldn't directly shine into the doorway of the bedroom?

A. No.

Q. Were the blinds in your bedroom open or closed?

A. They were open.

Q. So the light was coming in from—

A. Yes.

Q. – From the windows. Would it have been moonlight?

A. Yes, whatever moonlight would have been available, yeah.

Q. Okay. So, it wasn't actual artificial, just whatever ambient light was coming in?

A. Right.

Q. It was enough for you, you're saying, to navigate the bedroom.

A. Yes.

Q. What about the box on the dresser. Did the intruder head straight for the dresser when he walked in or what?

A. No, he was standing by the bedroom bed. I got my backpack and he started to pull the wallet out and then he took that and the backpack, then he asked if I had any valuables.

Q. He asked you?

A. Yes.

Q. Then he asked you if there were any valuables and so did you actually point out to him where the box was?

A. Yes.

Q. Okay. So then he went further into your room and got the box?

A. Right, yes. Yeah, he dumped the box at that point. He kept the backpack and put the stuff in the backpack.

Q. Now, is it fair to say that you then suffered the loss of your backpack?

A. Yes.

Q. Mr. Jackson, as you sit here today, can you tell us if the intruder was wearing a hat?

A. He was not.

Q. Do you remember whether the intruder had gloves on?

A. Yes, he did.

Q. What about the intruder's hair? Do you recall the color of the intruder's hair?

A. He had short, brown hair.

Q. What about clothing?

A. He was wearing blue jeans and a black, long sleeve shirt.

Q. All right. What about the hands? Could you see the intruder's hands?

A. Nothing other than they were covered by black gloves.

Q. Did the intruder have any tattoos?

A. Not that I could see.

Q. Is there anything else you have a mental image of?

A. I remember his hair, his general facial features, and I have a very vivid memory of his eyes.

Q. What type of body did the intruder have, was he overweight, underweight, or muscular?

A. I would say medium build, but I could not tell how muscular he was under his shirt.

Q. Now, do you remember seeing the weapon in the intruder's hands?

A. Yes.

Q. Now, do you recall on April 8, 2005, about a week after this incident that you met with Tom Jones from the Police Department. He actually met with you at your office?

A. Yes.

Q. All right. Now, the purpose of that meeting was that he wanted to show you a photo array book; is that right?

A. Yes.

Q. Now that photo array consisted of six photographs lined up one, two, three, four, five, six?

A. Yes.

Q. All right. You at that point in time felt like you wanted to do whatever you could to assist the police in their investigation, did you not, Mr. Jackson?

A. Sure.

Q. Sure. If you could identify someone you would have wanted to see that person arrested; right?

A. Sure.

Q. Showing what has been marked here as Defense Exhibit A. I would ask you if you recognize that?

A. That was the photo array that he showed me.

Q. Okay. Now, in your attempt to assist with the investigation you looked at the photo array, did you not?

A. Yes, I did.

Q. And you remembered the perpetrator's eyes, hair, and facial characteristics, did you not?

A. Yes.

Q. From April 1?

A. Yes.

Q. Did you look at the eyes of each one of those six photos?

A. Yes, I did.

Q. Okay. Were you able to make any identification?

A. Yes, I identified the man sitting here today.

Q. How confident would you say you were with your identification?

A. I would say that I was very confident in my decision.

A. Did Investigator Jones or any other member of the Police Department attempt to show you any other photos other than those you saw on April 8?

A. No.

Q. Is it true, that the next day you were called down to the police station to identify someone from a line up?

A. Yes.

Q. How did you make your identification Mr. Jackson?

A. I recognized his eyes, his hair, his face, and especially his voice.

MR. ROBINSON: Thank you.

THE COURT: Mr. Stevens, anything further?

MR. STEVENS: I would like to call Robert Levy to the stand.

THE COURT: So noted.

MR. STEVENS: Thank you, Judge. Robert Levy?

R O B E R T L E V Y

A witness called on behalf of the People, after having been first duly sworn, took the witness stand and testified as follows:

DIRECT-EXAMINATION

BY MR. STEVENS:

Q: Good Afternoon, Mr. Levy.

A. Good afternoon.

Q. Now, Mr. Levy, can you tell us where you are employed today?

A. I am the sole proprietor of Bob's Pawnshop, which is located on 59 Lovely Street in Mowbray, New Jersey.

Q. How far away would you say that is from the town of Satin Springs?

A. Its about twenty minutes away, give or take.

Q. Now Mr. Levy, do you remember the encounter you had with the police officer Tom Jones on April 4<sup>th</sup>, 2005?

A. Yes.

Q. Would you care to describe your encounter with this man?

A. Oh he was very kind. He walked in and seemed interested in the watches I had on display. He seemed very interested in the different brands of the watches. After about ten minutes of examining the watches, he picked out three of the watches that were relatively new to my display.

Q. I'm going to stop you right there. How new were these watches?

A. They came in on the Saturday before. I forget the exact date but I remember it was a Saturday morning.

Q. Do you remember who sold you these watches?

A. I don't remember the gentleman's name, but I'm pretty sure he's come into my shop before.

Q. What did the person who sold you the watches look like, Mr. Levy?

A. I would say he was about my height, maybe a little shorter, I'm about 5'11." He was black and he looked pretty young, well younger than me at least, maybe in his early twenties.

Q. Do you recall the clothes that this person was wearing?

A. He had a black shirt on but that's about all I can remember.

Q. Did you notice anything about his behavior, the way he was acting?

A. Now that you mention it, he did seem a bit on edge. He seemed as if he was in a hurry to make the transaction. He also tried to get way more money than the watches were worth.

Q. How so?

A. Well he tried to get \$100 for the gold, Seiko watch.

Q. What would you normally sell the watches for?

A. Well, I was going to give him \$60 for all the watches combined. The gold watch was nice but it was clearly beaten up.

Q. Beaten up in what way Mr. Levy?

A. Well, it looked like it had an engraving of some sort, but you couldn't really see the inscription because it had been scratched out by a knife or something.

Q. Did you explain this to the man?

A. I did, and I said that inscriptions really lower the value of the watch.

Q. And how did he respond?

A. He seemed agitated but he also looked like he was in a hurry to get out of the place so he said, "Fine just give me the \$60."

Q. What did you do then?

A. I took the watches from him, examined them further, cleaned them, and then put them on display.

Q. Did you have any more interaction with that man that day?

A. No, I did not.

Q. Just to back track a bit, what happened when Officer Tom Jones left?

A. He left for a few hours then he returned with a photo line up of six men.

Q. What did he do with that line up?

A. He asked me if any of the men looked familiar.

Q. And what did you say?

A. I immediately recognized one of the men as the guy who has been in my store before, I recognized him as the man who sold me the watches.

Q. Final Question Mr. Levy. Do you see the man who sold you the watches in court today?

A. Yes, I do.

Q. Can you please point him out for me?

A. He is sitting over there and he is wearing a white shirt.

Q. Is he wearing a tie?

A. No.

MR. STEVENS: Your Honor, may the record reflect that Mr. Levy has identified Mr. Brown?

THE COURT: So noted.

MR. STEVENS: Thank you Mr. Levy. Your Honor, I have nothing further.

CROSS- EXAMINATION BY MR. ROBINSON

Q. Good afternoon, Mr. Levy.

A. Good afternoon.

Q. Mr. Levy, it is to my understanding that you cleaned the watches after you made the business transaction?

A. That is true.

Q. Is this standard procedure for all of your customers?

A. Yes it is, I like to make sure that all the items in my shop look as close to new as possible, it really increases the market value.

Q. Mr. Levy, did the officer ask you about possibly obtaining fingerprints from the watches.

A. He did.

Q. And are you aware if he found anything.

A. I don't believe he did.

Q. Mr. Levy, did you happen to notice any unique features about the man who came into your store that Saturday morning? Did anything stand out to you?

A. Not really. He was just an average, black, male.

Q. Did the man have to sign anything, or provide his name during the transaction?

A. He did not.

Q. Mr. Levy, it is to my knowledge that the officer who came in on April 4<sup>th</sup> came in later that day with a photo array?

A. Yes, that is true.

Q. What did he ask you to do?

A. He asked if any of the photos looked familiar to me.

Q. And what did you say?

A. I said that one of the men did. He was of the same race as the man from Saturday and his face looked very familiar. I've seen him more than once in my store.

Q. Mr. Levy, how many customers would you say that you deal with on the average day?

A. Well it really depends on the season. Since it was April, I don't see that many people, maybe ten to twenty costumers throughout the day.

Q. Is it fair to say that there is a chance that you mistook the picture that you saw for another customer who you have had relations with in the past?

A. I don't think so. First of all, I distinctly remember that he was the only customer who tried to sell me watches that day. I try my best to remember all my costumers, its better for business that way.

Q. Did you feel pressure at all to identify one of the men from the lineup?

A. Not really to be honest. The officer did not try to influence my decision in any way.

Q. Would you say that you wanted to please the officer?

A. I never felt that way, I was more concerned with helping him get to the bottom of his case, I would never want to get someone in trouble who didn't deserve it.

MR. ROBINSON: Thank you Mr. Levy. I have nothing further, your Honor.

CLOSING ARGUMENTS

MR. ROBINSON: The prosecution's case has two parts, but neither of them can stand alone in finding Malcolm Brown guilty today. If Mr. Jackson's identification were solid enough, if it were reliable and trustworthy enough, then it could perhaps stand all on its own and it could perhaps be that foundation that the prosecution wants you to be able to use to base a finding of guilt. But as I averted to in my opening statement, I don't believe it is so.

The Judge, when both Mr. Stevens and myself are through with our closing statements, will instruct you on the law, and he will instruct you on how deeply concerned you and all of us must be that there is no mistake in an identification that should result in a conviction and a punishment of the wrong man. And as I mentioned in my opening statement, there are a number of very key and important circumstances that simply show you the contrary.

Number one, consider what Vince Jackson was able to tell the police when they came to his home that night, April 1, what he had observed. He had observed a black male, medium build, about 5'10", with an ax, who entered and demanded his money.

He admitted to Mr. Stevens that the intruder was a man, with an ax, who was yelling at him to give him his money. That I think shows you the importance of the circumstances of any traumatic event like this in which the weapons themselves, the terror, the stress drew Mr. Jackson into a focus on the weapons and an inability to even record in his memory any important facial features or other features about this man that could have allowed him to make an identification.

Mr. Levy also described a black man who entered his shop trying to sell watches. However, he has no evidence that these watches actually came from Malcolm Brown. No fingerprints were obtained, and there is no physical proof that it was Malcolm Brown who sold him the watches. Again, the description that Mr. Levy was able to provide could have fit thousands of black males in either Satin Springs or the town of Mowbray. The two occurrences might seem to line up, however I argue that their occurrence is merely a coincidence.

My final request is that you do not let the man who terrorized and robbed Vincent Jackson on April 1, 2005, do not let him take his third victim here today. Do not let him rob Malcolm Brown today. I ask for a verdict of not guilty.

MR. STEVENS: Mr. Robinson has just said don't let that person get away. I am asking you do the same thing. The person that robbed Vince Jackson should be and must be held accountable for his crimes. I don't need to go into each and every element that there was a forcible stealing with a dangerous instrument. That there was an unlawful entry with a dangerous instrument. That US Currency was stolen from Vince. That conceded. It is not apparently anything that you need to consider in the jury room.

Mr. Jackson said he was in his home with this perpetrator for five to seven minutes. He testified that the lighting was good in the living room and he was essentially face to face with the person when he was holding the ax over his head. He also testified that he remembered the intruder's voice, and that this memory aided to his identification. Recall his testimony. He couldn't fathom someone was in his locked home. Just concentrating very intently, I submit, on this individual, to try to figure out who he was

and who would invade his home on a Friday night at 10 or 10:30. He couldn't understand who it was or what was going on. Sure, he was scared, but his testimony was that he calmed down to a certain extent. He let the perpetrator take control of the situation. He was calm, as calm as one could be. He was looking at this individual holding the ax over his head trying to figure out who he was and concentrating on the eyes and facial characteristics.

He gives a description, a male, in his twenties, of a certain height, about 5'10", dark skinned, medium build. Look at Mr. Brown. He not only fits this description perfectly, but Malcolm Brown is of the same age that Vince described. Perhaps Vince's description is not as detailed as Mr. Robinson would like it or expects or argues to you that it should be, but ask yourselves, use your own experience, when you are called upon to describe someone and you try to give the details, how detailed would your description be versus your ability to recognize someone. The fact that Vince could distinctly remember the intruder's voice, his eyes, hair and facial characteristics shows us that Vincent's memory is solid and can therefore be used to incriminate Malcolm Brown.

Mr. Jackson says that he comes into this courtroom with a vivid memory of the intruder. Above everything else, he says he will never forget those eyes. He has a clear recollection of those eyes today. And I asked him, do you see the man that was in your home that night in the courtroom today? And he said yes. Can you point him out and describe what he is wearing? He was able to point to Mr. Brown, describe him, what he was wearing, say that's the man that was in my house that night that stole my property and threatened to kill me. He had the opportunity to see him in a number of times over a period of time in good lighting conditions and to look at him and he knows who it is. He

identified him to you. He heard him speak, saw his general body dimensions and recognized his hair, his face, his eyes and his voice.

It is also impossible to ignore the so-called “coincidence” that Mr. Robinson referred to. Not only were three watches sold to “Bob’s Pawnshop”, but they were sold the very next morning. It is almost as if Malcolm Brown was desperate to get rid of the stolen property in order to make some money. It is difficult to argue that Mr. Brown could have sold the property to another individual because the property was in his possession for less than twelve hours as it is. One of Mr. Jackson’s watches was a gold watch with a brown band. He testified that this watch had an inscription on it. Might I remind you that Mr. Levy testified that one of the watches he received was gold and had an inscription that was scratched out. This should tell you that not only was Mr. Brown nervous about getting caught, but he attempted to cover all his bases by eliminating the inscription.

Mr. Levy also testified that this was not the first encounter he had with Malcolm Brown, he claimed that he recognized him from before, therefore when he was shown a line up with Malcolm Brown’s picture in it, he was able to quickly and accurately identify him. Mr. Levy claimed that Mr. Brown appeared nervous, on edge. This would seem not out of the ordinary for someone who just committed a crime and was trying to rid himself of the evidence. All of these factors; Mr. Jackson’s testimony, the two identifications, and the stolen property, should lead you to decide that the defendant is guilty, beyond reasonable doubt.

You as the jury have the benefit of the entire story. And that entire story tells you beyond a reasonable doubt that Malcolm Brown on April 1, 2005 entered the home of Mr. Jackson and terrorized him with an ax, and forcibly stole his property. Thank you.

THE COURT:

Ladies and gentlemen, it is now my duty to instruct you on the law. First of all, I want to thank you for your concentration and obvious attention you have given to this case throughout the course of the trial. You have been selected for one of the most important duties of citizenship; to pass judgment on the conduct of one of your fellow men. To determine the guilt or the non-guilt of the Defendant, Malcolm Brown, it's a duty that requires the utmost fairness, honesty and courage. The laws of our state have allegedly been violated, but if you are satisfied from the evidence that this Defendant committed the acts attributed to him by the People, then the safety and security of our community commands that the Defendant be held accountable for those acts. On the other hand, if the evidence produced by the People fails to convince you beyond a reasonable doubt that this Defendant committed the acts attributed to him by the People, then the sanctity of our laws and the welfare of our community demands that the Defendant be exonerated on those charges.

A fundamental legal principle which is applicable to every criminal case is known as the presumption of innocence. The law provides that the Defendant states the trial with the presumption in his favor, that he is innocent of the crime charged. This presumption of innocence follows him throughout the entire trial and remains with him

only until it is overcome by proof of guilt beyond a reasonable doubt, such time as you by your verdict find him guilty, if that should be your verdict.

The Defendant in this case has entered a plea of not guilty to the crimes alleged in the indictment. A plea of not guilty is a denial of every material allegation in the indictment. Under our system of laws the People have the burden of proving to your satisfaction beyond a reasonable doubt every material allegation of the Indictment and the essential elements required to prove them.

This completes my instructions on the constitutional safeguards of the presumption of innocence and burden of proof. I will now discuss with you the constitutionally mandated standard of proof in all criminal cases, that of proof of guilt beyond a reasonable doubt. What does the law mean when it requires proof of guilt beyond a reasonable doubt? The doubt to be a reasonable doubt should be one which a reasonable person acting in a matter of this importance would be likely to entertain because of the evidence or because of the lack or insufficiency of the evidence in the case.

I will now charge you as to the specific elements of the crimes the Defendant is accused of committing. The 1<sup>st</sup> Count is Robbery in the First Degree. Under our law a person is guilty of Robbery in the First Degree when that person forcibly steals property and when in the course of the commission of the crime or immediate flight therefrom, that person or another participant in the crime uses or threatens the immediate use of a dangerous instrument.

The 2<sup>nd</sup> Count is Burglary in the First Degree. Under our law a person is guilty of Burglary in the First Degree when that person knowingly and unlawfully enters any

dwelling with the intent to commit a crime therein, and when in effecting entry or while in the dwelling or immediate flight therefrom, that person or another participant in the crime uses or threatens the immediate use of a dangerous instrument.

Malcolm Brown, as part of his general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that he 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 Vincent Jackson. You will recall that this eyewitness identified the defendant in court as the person who committed two counts of robbery and one count of burglary. 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. According to the witness, his identification of the defendant was based upon the observations and perceptions that he 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 mistake

or for any reason is not worthy of belief. You must decide whether it is sufficiently reliable evidence that this defendant is the person who committed the offenses 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. 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.

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 alone, may not be an indication of the reliability of the identification.

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.

To decide whether the identification testimony is sufficiently reliable evidence to conclude that this defendant is the person who committed the offenses 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. In particular you should consider

- (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
  - (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, of any, distracted the witness or made it harder for him to identify the perpetrator.

**(b) 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 the focus on other details.

**(c) 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.

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

**(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 prior description of the perpetrator. 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) Cross-Race Effects:** Research has shown that people may have greater difficulty in accurately identifying members of a different race. 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.

Ladies and gentlemen, take this case, give it your careful consideration, consider every part of the evidence, and then determine whether the Defendant has been proven guilty or whether he is not guilty, and return your verdict accordingly.

## Appendix C

### Data Collection Sheet

Do you find the Defendant...

- (1) Guilty, beyond reasonable doubt
- (2) Guilty, but with reasonable doubt
- (3) Not guilty, but with reasonable doubt
- (4) Not guilty, beyond reasonable doubt

Please take a moment to briefly explain why you are finding the Defendant guilty or not guilty today.

Did you find the transcript understandable/ easy to read?

- (1) Totally understandable
- (2) Mostly understandable
- (3) Moderately understandable
- (4) Not very understandable
- (5) Not at all understandable

In this court case, what was the race/ ethnicity of the eyewitness, Vincent Jackson?

- (1) White
- (2) Black
- (3) Hispanic
- (4) Asian
- (5) Not sure

In this court case, what was the race/ ethnicity of the defendant, Malcolm Brown?

- (1) White
- (2) Black
- (3) Hispanic
- (4) Asian
- (5) Not sure

How credible was the eyewitness?

- (1) Highly credible
- (2) Mostly credible
- (3) Moderately credible
- (4) Slightly credible
- (5) Not credible at all

How strong were the arguments of the Attorney for the People, Mr. Stevens?

- (1) Highly convincing arguments
- (2) Mostly convincing arguments
- (3) Moderately convincing arguments
- (4) Slightly convincing arguments
- (5) Not convincing arguments

How strong were the arguments of the Attorney for the Defendant, Mr. Robinson?

- (1) Highly convincing arguments
- (2) Mostly convincing arguments
- (3) Moderately convincing arguments
- (4) Slightly convincing arguments
- (5) Not convincing arguments

How clear were the Judicial Instructions pertaining to Eyewitness Identification?

- (1) Extremely clear
- (2) Mostly clear
- (3) Moderately clear
- (4) Slightly clear
- (5) Not clear at all

On a scale from 1-5, did the judicial instructions inform you about errors pertaining to eyewitness identification?

- (1) Not at all
- (2)
- (3)
- (4)
- (5) To a significant degree

Did the judicial instructions change your opinion on whether the defendant was guilty or not guilty?

- (1) Not at all
- (2)
- (3)
- (4)
- (5) To a significant degree

What is your class standing?

- (1) Freshman
- (2) Sophomore
- (3) Junior
- (4) Senior

What is your race/ ethnicity?

- (1) Black/ African American
- (2) Caucasian
- (3) Asian
- (4) Hispanic/ Latino
- (5) Other (Please indicate) \_\_\_\_\_

What is your gender?

- (1) Female
- (2) Male