FINAL JURY INSTRUCTIONS

Table of Contents

Introductory Note to the Judge 4
Pre-Summation Instructions 4
Post-Summation Instructions 6
Introduction 6
Role of Court and Jury 7
Reminder: Fairness 8
Evidence 10
Evidentiary Inferences 11
[Multiple Defendants] 12
Presumption of Innocence 13
[Defendant Did Not Testify] 13
Burden of Proof 14
Burden of Proof 14
Reasonable Doubt 15
Credibility of Witnesses 17
[Expert Witness] 25
Identification 26
The Name of Each Submitted Count 31
[Accessorial Liability] 33
The Definition of Each Submitted Count 35
[Uncharged Counts] 36
[Motive When Not Element of Crime] 37
Deliberations 38
Jury Note Taking 39
Exhibits, Readback & Law Questions 40
Foreperson's Role 41
Verdict Sheet 42
Jury Deliberation Rules 43

Introductory Note to the Judge

The following is designed to set forth a template for the composition of final instructions to a jury.

The Criminal Procedure Law sets forth the following requirements with respect to a trial court's final instructions to a jury:

> *"In its charge, the court must state the fundamental legal principles applicable to criminal cases in general. Such principles include, but are not limited to, the presumption of the defendant's innocence, the requirement that guilt be proved beyond a reasonable doubt and that the jury may not, in determining the issue of guilt or innocence, consider or speculate concerning matters relating to sentence or punishment. Upon request of a defendant who did not testify in his own behalf, but not otherwise, the court must state that the fact that he did not testify is not a factor from which any inference unfavorable to the defendant may be drawn. The court must also state the material legal principles applicable to the particular case, and, so far as practicable, explain the application of the law to the facts, but it need not marshal or refer to the evidence to any greater extent than is necessary for such explanation." [CPL 300.10(2)].*

Thus, final instructions to the jury should include an explanation of "general principles" of law applicable to all criminal cases, the definition and explanation of the "crimes charged," and an explanation of the "process of deliberations.

The order in which these charges may be delivered to a jury may vary in the discretion of the judge. In making that decision, however, the court should be mindful of the statutory requirements and in particular, be vigilant to convey to the jury the burden of proof, presumption of innocence, reasonable doubt, and the definition and elements of the crime(s) charged.

The "general principles" should include explanations of the role of the jury and the court, what constitutes evidence (and circumstantial evidence if applicable), the presumption of innocence, burden of proof and proof beyond a reasonable doubt, the admonition not to consider the sentence in reaching a verdict, the admonition on the defendant not testifying if applicable and requested, the credibility of witnesses (and expert witness if applicable), and the rules on the consideration of identification if applicable.

The "crimes charged" instructions should include the definition of an applicable defense, the definition of accomplice liability, if applicable, the definition and elements of the crime charged, and, if necessary, the manner in which the counts are considered.

The "process of deliberations" charges should include an explanation of what it means to deliberate, the role of the foreperson, the jury's right to view the exhibits, read-back of testimony, and review of the applicable law.

The trial judge may, and should, tailor and arrange these instructions to fit his/her personal style and manner of speech in order that he/she may communicate clearly and succinctly with the jurors. Of course, except for charges required by law, the Court may elect to give or not give one or more of the charges.

Pre-Summation Instructions

Members of the jury, you will now hear the summations of the lawyers. Following the summations, I will instruct you on the law, and then you will begin your deliberations.[1]

Under our law, defense counsel must sum up first, and the prosecutor must follow. The lawyers may not speak to you after that.

Summations provide each lawyer an opportunity to review the evidence and submit for your consideration the facts, inferences, and conclusions that they contend may properly be drawn from the evidence.[2]

If you find that a lawyer has accurately summarized and analyzed the evidence, and if you find that the inferences and conclusions the lawyer asks you to draw from that evidence are reasonable, logical and consistent with the evidence, then you may adopt those inferences and conclusions.

Members of the jury, bear in mind the following points:

First, you are the finders of fact and it is for you and you alone to determine the facts from the evidence that you find to be truthful and accurate. Thus, you should remember that whatever the lawyers say, and however they say it, is simply argument submitted for your consideration.

Second, remember the lawyers are not witnesses in this case. So, if a lawyer asserts as fact something that is not based on the evidence, you must disregard it. Remember, nothing the lawyers say at any time is evidence.[3] So, nothing the lawyers say in their summations is evidence.[4] You have heard the

evidence and must decide this case on the evidence as you find it and the law as I explain it.

Third, during the summations, one lawyer's recollection of the evidence may in good faith differ from the recollection of the other lawyer(s) or from your own recollection, and the lawyers will undoubtedly differ with each other on the conclusions to be drawn from the evidence.[5] It is your own recollection, understanding and evaluation of the evidence, however, that controls, regardless of what the lawyers have said or will say about the evidence.[6] You, and you alone, are the judges of the facts in this case. If during your deliberations you need to have your recollection of the testimony refreshed, you may have all or any portion of the testimony read back to you.[7]

Fourth, remember, under our law, I am responsible for explaining the law, not the lawyers.

[Now, prior to the summations, the lawyers were permitted to read the instructions on the law that I will deliver to you after their summations; and the lawyers are permitted to refer briefly to portions of those instructions in their summations if they wish. However, even though a lawyer may refer to portions of those instructions, you must listen carefully to all the instructions that I will give you after the summations.]

If you think there is any difference between what the lawyers may have said, and what I say the law is, your sworn duty as jurors is to follow my instructions on the law, [as you have promised me that you would].[8]

Fifth, if during the summations, I sustain an objection to a comment of a lawyer, that comment will be stricken from the record, and you must disregard it as if it were never said. If I overrule an objection, the comment will stand. Whether I

sustain or overrule an objection, or on my own indicate that a comment must be disregarded, my ruling indicates only that the comment does, or does not, violate one of the rules of law set down for lawyers to follow during a summation.[9] It is not an attempt to indicate that I have an opinion on what is said, or of the facts of the case, or of whether the defendant is guilty or not guilty. Remember, under our law, you and you alone judge what facts, if any, are proven, and whether the defendant is guilty or not guilty; not I, and not the lawyers.

We turn now to the summations.

Post-Summation Instructions

Introduction

Members of the jury, I will now instruct you on the law. I will first review the general principles of law that apply to this case and all criminal cases.

[You have heard me explain some of those principles at the beginning of the trial. I am sure you appreciate the benefits of repeating those instructions at this stage of the proceedings.]

Next, I will define the crime(s) charged in this case, explain the law that applies to those definitions, and spell out the elements of each charged crime.

Finally, I will outline the process of jury deliberations.

Role of Court and Jury

During these instructions, I will not summarize the evidence. If necessary, I may refer to portions of the evidence to explain the law that relates to it. My reference to evidence, or my failure to refer to evidence, expresses no opinion about the truthfulness, accuracy, or importance of any particular evidence. In fact, nothing I have said [and no questions I have asked] in the course of this trial (was/were) meant to suggest that I have an opinion about this case. If you have formed an impression that I do have an opinion, you must put it out of your mind and disregard it.

[The level of my voice or intonation may vary during these instructions. If I do that, it is done to help you understand these instructions. It is not done to communicate any opinion about the law or the facts of the case or of whether the defendant is guilty or not guilty.]

It is not my responsibility to judge the evidence here. It is yours. You and you alone are the judges of the facts, and you and you alone are responsible for deciding whether the defendant is guilty or not guilty.

Reminder: Fairness

Remember, you have promised to be a fair juror. A fair juror is a person who will keep their promise to be fair and impartial and who will not permit the verdict to be influenced by a bias or prejudice in favor of or against a person who appeared in this trial on account of that person s race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability or sexual orientation, and further, a fair juror must be mindful of any stereotypes or attitudes about people or about groups of people that the juror may have, and must not allow those stereotypes or attitudes to affect their verdict.

[As I have explained] We all develop and hold unconscious views on many subjects. Some of those unconscious views may come from stereotypes and attitudes about people or groups of people that may impact on a person's thinking and decision-making without that person even knowing it. As a juror, you are asked to make a very important decision about another member of the community. I know you would not want to make that decision based on such stereotypes or attitudes, that is, on implicit biases, and it would be wrong for you to do so. A fair juror must guard against the impact of such stereotypes or attitudes. You can do this by asking yourself during your deliberations whether your views and conclusions would be different if the defendant, witnesses or others that you have heard about or seen in court were of a different race, color, national origin, ancestry, gender, gender identity or expression, religious practice, age or sexual orientation, or did not have a disability. If the answer is yes, then, in keeping with your promise to be fair, reconsider your views and conclusions along with the other jurors, and make sure your verdict is based on the evidence and not on stereotypes or attitudes. Justice requires no less.[10]

Sentence: Not Consider

[Remember also] in your deliberations, you may not consider or speculate about matters relating to sentence or punishment. If there is a verdict of guilty, it will be my responsibility to impose an appropriate sentence.[11]

Evidence

When you judge the facts, you are to consider only the evidence.

The evidence in the case includes:
the testimony of the witnesses,
the exhibits that were received in evidence, [and]

[the stipulation(s) by the parties. (A stipulation is information the parties agree to present to the jury as evidence, without calling a witness to testify.)]

Testimony which was stricken from the record or to which an objection was sustained must be disregarded by you.

Exhibits that were received in evidence are available, upon your request, for your inspection and consideration.

Exhibits that were just seen during the trial, or marked for identification but not received in evidence, are not evidence, and are thus not available for your inspection and consideration.

But testimony based on exhibits that were not received in evidence may be considered by you. It is just that the exhibit itself is not available for your inspection and consideration.

Evidentiary Inferences

(*If a circumstantial evidence charge is to be given, the following should be omitted*)

In evaluating the evidence, you may consider any fact that is proven and any inference which may be drawn from such fact. [12]

To draw an inference means to infer, find, conclude that a fact exists or does not exist based upon proof of some other fact or facts.

For example, you go to bed one night when it is not raining; when you wake up in the morning, you look out your window; you do not see rain, but you see that the street and sidewalk are wet, and that people are wearing raincoats and carrying umbrellas. Under those circumstances, it may be reasonable to infer, conclude, that it had rained. In other words, the fact of it having rained while you were asleep is an inference that might be drawn from the proven facts of the presence of the water on the street and sidewalk, and people in raincoats and carrying umbrellas.[13]

An inference must only be drawn from a proven fact or facts and then only if the inference flows naturally, reasonably, and logically from the proven fact or facts, not if it is speculative.[14] Therefore, in deciding whether to draw an inference, you must look at and consider all the facts in the light of reason, common sense, and experience.

[Multiple Defendants] [15]

NOTE: Add If applicable:

There are (*specify the number*) defendants before you and we are thus conducting (*specify the number*) trials in one.

It is your obligation to evaluate the evidence as it applies, or fails to apply, to each defendant separately.

Each instruction on the law must be considered by you as referring to each defendant separately.

You must return a separate verdict for each defendant. And those verdicts may be, but need not be, the same.

It is your sworn duty to give separate consideration to the case of each individual defendant.

Presumption of Innocence

We now turn to the fundamental principles of our law that apply in all criminal trials–the presumption of innocence, the burden of proof, and the requirement of proof beyond a reasonable doubt.[16]

Throughout these proceedings, the defendant is presumed to be innocent.[17] As a result, you must find the defendant not guilty, unless, on the evidence presented at this trial, you conclude that the People have proven the defendant guilty beyond a reasonable doubt.[18]

[*NOTE: Add if the defendant introduced evidence:*

In determining whether the People have satisfied their burden of proving the defendant's guilt beyond a reasonable doubt, you may consider all the evidence presented, whether by the People or by the defendant.[19] In doing so, however, remember that, even though the defendant introduced evidence, the burden of proof remains on the People.[20]]

[Defendant Did Not Testify]

The fact that the defendant did not testify is not a factor from which any inference unfavorable to the defendant may be drawn.[21]]

Burden of Proof

(*in cases without an affirmative defense*)

The defendant is not required to prove that he/she is not guilty.[22] In fact, the defendant is not required to prove or disprove anything.[23] To the contrary, the People have the burden of proving the defendant guilty beyond a reasonable doubt.[24] That means, before you can find the defendant guilty of a crime, the People must prove beyond a reasonable doubt every element of the crime including that the defendant is the person who committed that crime.[25] The burden of proof never shifts from the People to the defendant.[26] If the People fail to satisfy their burden of proof, you must find the defendant not guilty.[27] If the People satisfy their burden of proof, you must find the defendant guilty.[28]

Burden of Proof

(*in cases <u>with</u> an affirmative defense*)

The defendant is not required to prove or disprove any element of a charged crime.[29] To the contrary, the People have the burden of proving every element of a charged crime beyond a reasonable doubt.[30] That means, before you can find the defendant guilty of a crime, the People must prove beyond a reasonable doubt every element of the crime including that the defendant is the person who committed that crime.[31] The burden of proof never shifts from the People to the defendant.[32] If the People fail to satisfy their burden of proof, you must find the defendant not guilty.[33] If the People satisfy their burden of proof of all of the elements of a crime, you[34] will then consider an affirmative defense, which I will explain shortly. First,

Reasonable Doubt

What does our law mean when it requires proof of guilt "beyond a reasonable doubt"?[35]

The law uses the term, "proof beyond a reasonable doubt," to tell you how convincing the evidence of guilt must be to permit a verdict of guilty.[36] The law recognizes that, in dealing with human affairs, there are very few things in this world that we know with absolute certainty. Therefore, the law does not require the People to prove a defendant guilty beyond all possible doubt.[37] On the other hand, it is not sufficient to prove that the defendant is probably guilty.[38] In a criminal case, the proof of guilt must be stronger than that.[39] It must be beyond a reasonable doubt.[40]

A reasonable doubt is an honest doubt of the defendant's guilt for which a reason exists based upon the nature and quality of the evidence.[41] It is an actual doubt, not an imaginary doubt.[42] It is a doubt that a reasonable person, acting in a matter of this importance, would be likely to entertain because of the evidence that was presented or because of the lack of convincing evidence.[43]

Proof of guilt beyond a reasonable doubt is proof that leaves you so firmly convinced [44] of the defendant's guilt that you have no reasonable doubt of the existence of any element of the crime or of the defendant's identity as the person who committed the crime.[45]

In determining whether or not the People have proven the defendant's guilt beyond a reasonable doubt, you should be guided solely by a full and fair evaluation of the evidence. After carefully evaluating the evidence, each of you must decide whether or not that evidence convinces you beyond a reasonable doubt of the defendant's guilt.

Whatever your verdict may be, it must not rest upon baseless speculations.[46] Nor may it be influenced in any way by bias, prejudice, sympathy, or by a desire to bring an end to your deliberations or to avoid an unpleasant duty.[47]

If you are not convinced beyond a reasonable doubt that the defendant is guilty of a charged crime, you must find the defendant not guilty of that crime. If you are convinced beyond a reasonable doubt that the defendant is guilty of a charged crime, you must find the defendant guilty of that crime.[48]

Credibility of Witnesses

Introduction

As judges of the facts, you alone determine the truthfulness and accuracy of the testimony of each witness.

[*Note: Add if appropriate:*

And you should evaluate the testimony of the defendant in the same way as you would any other witness.] [49]

You must decide whether a witness told the truth and was accurate, or instead, testified falsely or was mistaken. You must also decide what importance to give to the testimony you accept as truthful and accurate. It is the quality of the testimony that is controlling, not the number of witnesses who testify.[50]

Accept in Whole or in Part (Falsus in Uno)

If you find that any witness has intentionally testified falsely as to any material fact, you may disregard that witness's entire testimony. Or, you may disregard so much of it as you find was untruthful, and accept so much of it as you find to have been truthful and accurate.[51]

Credibility factors

There is no particular formula for evaluating the truthfulness and accuracy of another person's statements or testimony. You bring to this process all of your varied experiences. In life, you frequently decide the truthfulness and accuracy of statements made to you by other people. The same factors used to make those decisions, should be used in this case when evaluating the testimony.

In General

Some of the factors that you may wish to consider in evaluating the testimony of a witness are as follows:

Did the witness have an opportunity to see or hear the events about which he or she testified?

Did the witness have the ability to recall those events accurately?

Was the testimony of the witness plausible and likely to be true, or was it implausible and not likely to be true?

Was the testimony of the witness consistent or inconsistent with other testimony or evidence in the case?

Did the manner in which the witness testified reflect upon the truthfulness of that witness's testimony?

To what extent, if any, did the witness's background, training, education, or experience affect the believability of that witness's testimony?

Did the witness have a conscious bias, hostility or some other attitude that affected the truthfulness of the witness's testimony?[52]

Did the witness show an "unconscious bias," that is, a bias that the witness may have even unknowingly acquired from stereotypes and attitudes about people or groups of people, and if so, did that unconscious bias impact that witness's ability to be truthful and accurate.[53]

Motive

You may consider whether a witness had, or did not have, a motive to lie.

If a witness had a motive to lie, you may consider whether and to what extent, if any, that motive affected the truthfulness of that witness's testimony.

If a witness did not have a motive to lie, you may consider that as well in evaluating the witness's truthfulness.[54]

[Add if appropriate:
Benefit

You may consider whether a witness hopes for or expects to receive a benefit for testifying. If so, you may consider whether and to what extent it affected the truthfulness of the witness's testimony.[55]]

Interest/Lack of Interest [56]

You may consider whether a witness has any interest in the outcome of the case, or instead, whether the witness has no such interest.

[Note: Add if appropriate:
A defendant who testifies is a person who has an interest in the outcome of the case.]

You are not required to reject the testimony of an interested witness, or to accept the testimony of a witness who has no interest in the outcome of the case.

You may, however, consider whether an interest in the outcome, or the lack of such interest, affected the truthfulness of the witness's testimony.

Previous Criminal Conduct[57]

You may consider whether a witness has been convicted of a crime or has engaged in criminal conduct, and if so, whether and to what extent it affects your evaluation of[58] the truthfulness of that witness's testimony.

You are not required to reject the testimony of a witness who has been convicted of a crime or has engaged in criminal conduct, or to accept the testimony of a witness who has not.

You may, however, consider whether a witness's criminal conviction or conduct has affected the truthfulness of the witness's testimony.

[Note: Add if appropriate:

With respect to the defendant, such prior convictions or criminal conduct are not evidence of defendant's guilt in this case, or evidence that defendant is a person who is disposed to commit crimes. You are permitted to consider such convictions or conduct only to evaluate the defendant's truthfulness.]

Inconsistent Statements[59]

You may consider whether a witness made statements at this trial that are inconsistent with each other.

You may also consider whether a witness made previous statements that are inconsistent with his or her testimony at trial.

[Add if appropriate:

You may consider whether a witness testified to a fact here at trial that the witness omitted to state, at a prior time, when it would have been reasonable and logical for the witness to have stated the fact. In determining whether it would have been reasonable and logical for the witness to have stated the omitted fact, you may consider whether the witness' attention was called to the matter and whether the witness was specifically asked about it.[60]]

If a witness has made such inconsistent statements [or omissions], you may consider whether and to what extent they affect the truthfulness or accuracy of that witness's testimony here at this trial.

The contents of a prior inconsistent statement are not proof of what happened. You may use evidence of a prior inconsistent statement only to evaluate the truthfulness or accuracy of the witness's testimony here at trial.[61]

Consistency

You may consider whether a witness's testimony is consistent with the testimony of other witnesses or with other evidence in the case.

If there were inconsistencies by or among witnesses, you may consider whether they were significant inconsistencies related to important facts, or instead were the kind of minor inconsistencies that one might expect from multiple witnesses to the same event?

Police Testimony

In this case you have heard the testimony of (a) police officer(s). The testimony of a witness should not be believed solely and simply because the witness is a police officer. At the same time, a witness's testimony should not be disbelieved solely and simply because the witness is a police officer. You must evaluate a police officer's testimony in the same way you would evaluate the testimony of any other witness.[62]

[*Note: Add if appropriate:*

Judge Found Witness Testified Falsely

You have heard testimony that a judge found that (*specify*) testified falsely in an unrelated proceeding. That judge's determination is not binding on your determination of (*specify*)'s credibility in this case. You may, however, consider that determination, along with the other evidence in the case, in evaluating the truthfulness and accuracy of (*specify*)'s testimony before you.[63]

[Note: Add if appropriate:
Witness Pre-trial Preparation [64]

You have heard testimony about (*specify: the prosecutor, defense lawyer, and/or investigator*) speaking to a witness about the case before the witness testified at this trial. The law permits a (*specify*) to speak to a witness about the case before the witness testifies, and permits a (*specify*) to review with the witness the questions that will or may be asked at trial, including the questions that may be asked on cross-examination.[65]

[You have also heard testimony that a witness read or reviewed certain materials pertaining to this case before the witness testified at trial. The law permits a witness to do so.]

Speaking to a witness about his or her testimony and permitting the witness to review materials pertaining to the case before the witness testifies is a normal part of preparing for trial. It is not improper as long as it is not suggested that the witness depart from the truth.

[Expert Witness] [66]

NOTE: Add if appropriate:

You will recall that *(specify)* testified [about certain (scientific), (medical), (technical) matters] [*or specify the field(s)*] and gave an opinion on such matters.

Ordinarily, a witness is limited to testifying about facts and is not permitted to give an opinion. Where, however, scientific, medical, technical, or other specialized knowledge will help the jury understand the evidence or to determine a fact in issue, a witness with expertise in a specialized field may render opinions about such matters.

You should evaluate the testimony of any such witness just as you would the testimony of any other witness. You may accept or reject such testimony, in whole or in part, just as you may with respect to the testimony of any other witness.

In deciding whether or not to accept such testimony, you should consider the following:

- the qualifications and believability of the witness;
- the facts and other circumstances upon which the witness's opinion was based;
- [the accuracy or inaccuracy of any assumed or hypothetical fact upon which the opinion was based;]
- the reasons given for the witness's opinion; and
- whether the witness's opinion is consistent or inconsistent with other evidence in the case.]

Identification

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

As you know, an issue in the case is whether the defendant has been correctly identified as the person who committed the charged crime(s).[67]

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

Thus, even if you are convinced beyond a reasonable doubt that a charged crime was committed by someone, you cannot convict the defendant of that crime unless you are also convinced beyond a reasonable doubt that he/she is the person who committed that crime.[68]

[For identification evidence by only one witness:

Our system of justice is deeply concerned that no person who is innocent of a crime be convicted of it. In order to avoid that, a jury must consider identification testimony with great care, especially when the only evidence identifying the defendant as the perpetrator comes from one witness. Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the defendant as the person who committed the charged crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince you beyond a reasonable doubt that all the

elements of the charged crime have been proven and that the identification of the defendant is both truthful and accurate.[69]]

[*For identification evidence from more than one eyewitness:*

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

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

With respect to whether the identification is accurate, that is, not an honest mistake, you must evaluate the witness's intelligence, and capacity for observation, reasoning, and memory, and determine whether you are satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question.

Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person. Thus, in evaluating the accuracy of identification testimony, you should also consider such factors as[70]:

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

What was the distance between the witness and the perpetrator?

Did the witness have an unobstructed view of the perpetrator?

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

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

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

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

Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the defendant, as you find the defendant's appearance to have been on the day in question? [71]

What was the mental, physical, and emotional state of the witness before, during, and after the observation? To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

[NOTE: Add if applicable:

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

accurately recognize and identify such person as the perpetrator?]

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

[*NOTE: Add when applicable:*

You should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and if so, you should consider that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race, and therefore, you should consider whether the difference in race affected the accuracy of the witness's identification.[72]

[*NOTE: Add if applicable:*

You may also consider the testimony of *(specify)*, who gave an opinion about the factors bearing on the accuracy and reliability of an identification. You will consider that testimony in accordance with the [following] instruction [I have already given you as to such testimony].[73] [*NOTE: If the CJI2d charge on expert witness testimony has not already been given, read it here.*[74]]

[For identification evidence by only one witness:

If, after careful consideration of the evidence, you are not satisfied that the identity of the defendant as the person who committed a charged crime has been proven beyond a reasonable doubt, then you must find the defendant not guilty of that charged crime.]

Add if applicable:

Identification via Video or Photo by Non-eyewitness

The witness's identification of the defendant in the (*specify: e.g. video / photograph)* is the opinion of that witness and you may choose to accept or reject that opinion. In deciding whether to accept or reject the opinion you may consider whether the witness had a sufficient familiarity with the defendant to be able to make an identification and whether the (*specify: e.g. video / photograph)* presented a sufficient image that would enable an identification by a person who had sufficient familiarity with the defendant. Remember, you are the finders of fact and it is your opinion as to whether the defendant is depicted in the (*specify: e.g. video / photograph)* that matters.[75]

The Name of Each Submitted Count

I will now instruct you on the law applicable to the charged offenses.

Those offenses are: (*specify each count and name of offense being submitted to the jury*).

Note: If applicable, insert here an instruction on Accomplice Liability or a defense, e.g. justification.

[Accessorial Liability] [76]

NOTE: Add if appropriate:

Our law recognizes that two or more individuals can act jointly to commit a crime, and that in certain circumstances, each can be held criminally liable for the acts of the other(s). In that situation, those persons can be said to be "acting in concert" with each other.[77]

Our law defines the circumstances under which one person may be criminally liable for the conduct of another. That definition is as follows:

> When one person engages in conduct which constitutes an offense, another is criminally liable for such conduct when, acting with the state of mind required for the commission of that offense, he or she solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.[78]

[NOTE: Add as appropriate [79]:

Under that definition, mere presence at the scene of a crime, even with knowledge that the crime is taking place, (or mere association with a perpetrator of a crime,) does not by itself make a defendant criminally liable for that crime.]

In order for the defendant to be held criminally liable for the conduct of another/others which constitutes an offense, you must find beyond a reasonable doubt:

(1) That he/she solicited, requested, commanded, importuned, or intentionally aided that person [or persons] to engage in that conduct, and

(2) That he/she did so with the state of mind required for the commission of the offense.

If it is proven beyond a reasonable doubt that the defendant is criminally liable for the conduct of another, the extent or degree of the defendant's participation in the crime does not matter. A defendant proven beyond a reasonable doubt to be criminally liable for the conduct of another in the commission of a crime is as guilty of the crime as if the defendant, personally, had committed every act constituting the crime.[80]

The People have the burden of proving beyond a reasonable doubt that the defendant acted with the state of mind required for the commission of the crime, and either personally, or by acting in concert with another person, committed each of the remaining elements of the crime.[81]

[Note: Add here and/or where the court instructs the jury on the need for a unanimous verdict:

Your verdict (on each count you consider), whether guilty or not guilty, must be unanimous. In order to find the defendant guilty, however, you need not be unanimous on whether the defendant committed the crime personally, or by acting in concert with another, or both.[82]]

[Note: Add if appropriate:

As you know, the People contend that the defendant acted in concert with a person who is not here on trial.[83] You must not speculate on the present status of that person. You must not draw any inference from his/her absence. And you must not allow his/her absence to influence your verdict. You are here to determine whether the People have proven beyond a reasonable doubt that the defendant on trial is guilty of a charged crime.

The Definition of Each Submitted Count

Note: Here insert the appropriate CJI2d instruction for each offense to be submitted to the jury.

[Uncharged Counts]

NOTE: Add if the jury has been previously told the counts in the indictment and the court is not charging one or more of those counts:

You may have noticed that I am not submitting for your consideration (one/some) of the charges mentioned at the beginning of the trial. The law permits me to do this in order to simplify matters for your consideration.[84] Thus, my decision expresses no opinion about the case and must not be considered by you.

[Motive When Not Element of Crime]

NOTE: Add if applicable:

Let me now explain motive, and in particular, the difference between motive and intent.

Intent means conscious objective or purpose. Thus, a person commits a criminal act with intent when that person's conscious objective or purpose is to engage in the act which the law forbids or to bring about an unlawful result.

Motive, on the other hand, is the reason why a person chooses to engage in criminal conduct.

If intent is an element of a charged crime, that element must be proved by the People beyond a reasonable doubt. In this case, intent is, as I have explained, an element of the crimes of: (specify).

Motive, however, is not an element of the crimes charged. Therefore, the People are not required to prove a motive for the commission of the charged crime(s).

Nevertheless, evidence of a motive, or evidence of the lack of a motive, may be considered by the jury.

For example, if you find from the evidence that the defendant had a motive to commit the crime charged, that is a circumstance you may wish to consider as tending to support a finding of guilt.

On the other hand, if the proof establishes that the defendant had no motive to commit the crime charged, that is a circumstance you may wish to consider as tending to establish that the defendant is not guilty of the crime charged.[85]

Deliberations

Your verdict [on each count you consider], whether guilty or not guilty, must be unanimous; that is, each and every juror must agree to it.

To reach a unanimous verdict you must deliberate with the other jurors. That means you should discuss the evidence and consult with each other, listen to each other, give each other's views careful consideration, and reason together when considering the evidence.[86] And when you deliberate, you should do so with a view towards reaching an agreement if that can be done without surrendering individual judgment.[87]

Each of you must decide the case for yourself, but only after a fair and impartial consideration of the evidence with the other jurors. You should not surrender an honest view of the evidence simply because you want the trial to end, or you are outvoted. At the same time, you should not hesitate to reexamine your views and change your mind if you become convinced that your position was not correct.

Jury Note Taking [88]

[NOTE: Add if a juror took notes:

(One juror /Some of the jurors) took notes.

Any notes taken are only an aid to your memory and must not take precedence over your independent recollection.

Those jurors who choose not to take notes must rely on their own independent recollection and must not be influenced by any notes that another juror may take.

Any notes you take are only for your own personal use in refreshing your recollection.

A juror's notes are not a substitute for the recorded transcript of the testimony [or for any exhibit received in evidence]. If there is a discrepancy between a juror's recollection and his or her notes regarding the evidence, you should ask to have the relevant testimony read back [or the exhibit produced in the jury room.]

[In addition, a juror's notes are not a substitute for the detailed explanation I have given you of the principles of law that govern this case. If there is a discrepancy between a juror's recollection and his or her notes regarding those principles, you should ask me to explain those principles again, and I will be happy to do so.]

Any notes taken are confidential and shall not be available for examination or review by any party or other person. After the jury has rendered its verdict, we will collect the notes and destroy them.]

Exhibits, Readback & Law Questions

You may see any or all of the exhibits that were received in evidence.[89] Simply write me a note telling me which exhibit or exhibits you want to see.

You may also have the testimony of any witness read back to you in whole or in part. Again, if you want a read back, write me a note telling me what testimony you wish to hear.

If you are interested in hearing only a portion of a witness' testimony, please specify in your note which witness and, with as much detail as possible, which part of the testimony you want to hear.

Of course, when testimony is read back, questions to which an objection was sustained and material otherwise struck from the record is not read back.

If you have a question on the law, write me a note specifying what you want me to review with you.

Foreperson’s Role

Under our law, the first juror selected is known as the foreperson. During deliberations, the foreperson's opinion and vote are not entitled to any more importance than that of any other juror.

[What we ask the foreperson to do during deliberations is to sign any written note that the jury sends to the court. The foreperson does not have to write the note or agree with its contents. The foreperson's signature indicates only that the writing comes from the jury.]

[The foreperson may also chair the jury's discussions during deliberations.]

When the jury has reached a verdict, guilty or not guilty, the entire jury will be asked to come into court. The foreperson will be asked whether the jury has reached a verdict. If the foreperson says yes, the foreperson will then be asked what the verdict is for the/each charged crime [considered in accordance with my instructions].

After that, the entire jury will be asked whether that is their verdict and will answer yes or no.

Finally, upon the request of a party, each juror will be asked individually whether the announced verdict is the verdict of that juror, and upon being asked, each juror will answer yes or no.

Verdict Sheet

[For each defendant,] I will give you a form known as a verdict sheet. The verdict sheet lists (the/each) count submitted for your consideration, [the manner in which you are to consider the counts,] and the possible verdicts. Please use the form to record your verdict with an X or a check mark in the appropriate place [for each count you consider in accordance with my instructions].

[*Add if verdict sheet will contain additional information*:

In addition to listing the counts, I have added the following information on the verdict sheet in order to distinguish (between/among) the counts:

Select as appropriate:

dates [and]
names of complainants (names of the deceased) [and]
language by which the counts may be distinguished.[90]

The sole purpose of doing so is to distinguish (between/among) those counts. It is not a substitute for my full instructions on the meaning and elements of each charge, and it should not discourage you from asking me to define a crime again if a question about it arises.]

Jury Deliberation Rules

Finally, there are a few remaining rules which you must observe during your deliberations.

1. While you are here in the courthouse, deliberating on the case, you will be kept together in the jury room. You may not leave the jury room during deliberations. [Lunch will of course be provided.] And, if you have a beeper or cell phone or other electronic device, please give it to a court officer to hold for you while you are engaged in deliberations.

2. You must deliberate about the case only when you are all gathered together in the jury room. You must not, for example, be discussing the case as you go to and from the courtroom. It is important that each juror have the opportunity to hear whatever another juror has to say about the case, and that by law must only be done when you are all gathered together in the jury room. Thus, if for any reason, all twelve of you are not gathered together in the jury room, stop deliberating until all twelve are present in the jury room.

3. During your deliberations, you must discuss the case only among yourselves; you must not discuss the case with anyone else, including a court officer, or permit anyone other than a fellow juror to discuss the case in your presence.

4. If you have a question or request, you must communicate with me by writing a note, which you will give to a court officer to give to me. The law requires that you communicate with me in writing in part to make sure there are no misunderstandings.

I should explain that, under our law, I am not permitted to have a conversation about the facts of the case, or possible verdict, or vote of the jury on any count with any one juror, or group of jurors, or even all the jurors. Thus, in any note that you send me, do not tell me what the vote of the jury is on any count.

[NOTE: The following may be inserted here, or adapted for use when an individual juror during deliberations asks to speak with the judge:

If a juror wants to speak to me during deliberations, an appropriate meeting here in the courtroom with the parties will be arranged. No juror, however, can tell me what is being said about the facts of the case, or possible verdict, or what the vote of any juror or the jury is on any count. And, while I will of course listen to whatever a juror has to say that does not involve those subjects, I may not be able to respond to that juror if the response involves instructions on the law. I may be required to call into court the entire jury and respond by speaking to the entire jury. The reason for that is that our law wants to make sure that each and every juror hears, at exactly the same time, whatever I have to say about the law, and our law wants to make sure that the jury hears those instructions from me, not another juror.

That concludes my instructions on the law.

1. See CPL § 260.30(8), (9) and (10).

2. *See People v. Galloway,* 54 N.Y.2d 396 (1981).

3. *See People v. Barnes,* 80 N.Y.2d 867 (1992); *People v. Davis,* 58 N.Y.2d 1102 (1983).

4. *See People v. Roche,* 98 N.Y.2d 70 (2002).

5. *See Galloway, supra*.

6. *See People v. Marks,* 6 N.Y.2d 67 (1959).

7. *See* CPL § 310.30; *People v. Almodovar,* 62 N.Y.2d 126 (1984).

8. *See People v. Jenman,* 296 N.Y. 269 (1947).

9. *See People v. DeJesus*, 42 N.Y.2d 519 (1977).

10. The implicit bias instruction was added in June 2019 and revised in Oct. 2021.

11. *See* CPL §300.10(2).

12. *See People v. Benzinger*, 36 N.Y.2d 29 (1974).

13. The example was added in June of 2017.

14. *See People v. Benzinger*, supra, 36 N.Y.2d at 32.

15. CPL §300.10(4).

16. CPL §300.10(2).

17. *Taylor v. Kentucky,* 436 U.S. 478 (1978).

18. *In re Winship*, 397 U.S. 358 (1970); *Taylor v. Kentucky, supra; People v Antommarchi*, 80 N.Y.2d 247, 252-253 (1992).

19. *People v. Kirkpatrick*, 32 N.Y.2d 17, *21, appeal dismissed for want of substantial federal question*, 414 U.S. 948 (1973); *People v. Jackson*, 65 N.Y.2d 265 (1985); *People v. Goldstein*, 120 A.D.2d 471, 472-473 (1st Dept. 1986).

20. *See People v. Antommarchi*, *supra*.

21. CPL 300.10(2). The statute specifies that the charge must be given "[u]pon request of a defendant who did not testify in his own behalf, but not otherwise." Appellate courts have cautioned that this statutory charge should be given only upon the defendant's request, and when given, the charge should be limited to the statutory

language. *People v. Koberstein*, 66 N.Y.2d 989 (1985); *People v. Vereen*, 45 N.Y.2d 856 (1978); *People v. Cooper*, 300 A.D.2d 4 (1st Dept. 2002); *People v. Clearwater*, 269 A.D.2d 462 (2nd Dept. 2000)*; People v. Stinson*, 186 A.D.2d 23 (1st Dept. 1992); *People v. Morton*, 174 A.D.2d 1019 (4th Dept. 1991). *See also People v. Rogers*, 48 N.Y.2d 167, 174 n 3 (1979) ("it is unnecessary and improper to qualify the charge with words indicating that it is given at defendant's request").

22. *Id.*

23. *Id.*

24. *In re Winship*, *supra*; *People v Antommarchi*, *supra*.

25. *See People v. Whalen,* 59 N.Y.2d 273, 279 (1983); *People v Beslanovics,* 57 N.Y.2d 726 (1982); *People v Newman*, 46 N.Y.2d 126 (1978).

26. *Cf. People v. Patterson*, 39 N.Y.2d 288, 296 (1976), *aff'd.* 432 U.S. 197 (1977) ("If the burden of proof was improperly placed upon the defendant, defendant was deprived of a properly conducted trial...").

27. *See Taylor v. Kentucky, supra; In re Winship, supra; People v Antommarchi*, *supra*.

28. *See People v Goetz*, 73 N.Y.2d 751, 752 (1988).

29. *Id.*

30. *In re Winship*, *supra ; People v Antommarchi*, *supra*.

31. *See People v. Whalen,* 59 N.Y.2d 273, 279 (1983); *People v Beslanovics,* 57 N.Y.2d 726 (1982); *People v Newman*, 46 N.Y.2d 126 (1978).

32. *Cf. People v. Patterson*, 39 N.Y.2d 288, 296 (1976), *aff'd.* 432 U.S. 197 (1977) ("If the burden of proof was improperly placed upon the defendant, defendant was deprived of a properly conducted trial...").

33. *See Taylor v. Kentucky, supra; In re Winship, supra; People v Antommarchi*, *supra*.

34. *See People v Goetz*, 73 N.Y.2d 751, 752 (1988).

35. *See generally, Victor v. Nebraska*, 511 U.S. 1 (1994); *People v. Antommarchi*, *supra*; *Solan*, Refocusing the Burden of Proof in Criminal Cases: Some Doubt about Reasonable Doubt, 78 Tex. L. Rev. 105 (1999); L. Sand, et. al., Modern Federal Jury Instructions, Instruction 4-2, 4-8 to 4-21 (1999); Federal Judicial Center, Pattern Criminal Jury Instructions (1988) § 21 (which recommends the following charge: "As I have said many times, the government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your

consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty."). Justice Ginsberg, in her concurrence, in *Victor v. Nebraska*, *supra,* at 26, stated that: "The Federal Judicial Center has proposed a definition of reasonable doubt that is clear, straightforward, and accurate."

36. *See Victor v. Nebraska*, *supra*; *In re Winship*, *supra*.

37. *See Victor v. Nebraska*, *supra,* 511 U.S. at 13 and 17-20 (Approving a charge that conveyed the concept that "absolute certainty is unattainable in matters relating to human affairs" when the charge said "'everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt'" ; and approving that portion of the charge that stated that "a reasonable doubt is not a mere possible doubt."); *People v. Malloy*, 55 N.Y.2d 296, 300, 303 (1982) (approving a charge that included language stating that a reasonable doubt is not "proof beyond *** all doubt or proof to a mathematical certainty, or scientific certainty."); L. Sand, *supra*, at 4-11 to 4-13 (reporting that approved charges in some federal circuits include that proof beyond a reasonable doubt does not mean proof "beyond all possible doubt."); Federal Judicial Center, Pattern Criminal Jury Instructions, *supra* at § 21, at 17-18 ("...in criminal cases the law does not require proof that overcomes every possible doubt.")

38. *See* Federal Judicial Center, Pattern Criminal Jury Instructions, *supra,* at § 12.10, at 17-18.

39. *See* Solan, *supra,* at 111-112 ("...we use the expression 'proof beyond a reasonable doubt' because we believe that the government should be required to prove its case so strongly that the evidence leaves the jury with the highest degree of certitude based on such evidence."). *Victor v. Nebraska*, *supra*, 511 U.S. at 22 (approving a jury instruction that informed the jury that the probabilities must be "strong" enough to prove the defendant's guilt beyond a reasonable doubt).

40. *In re Winship*, *supra*.

41. *See People v. Antommarchi*, *supra,* 80 N.Y.2d at 252; People *v. Barker*, 153 N.Y. 111, 115 (1897); *People v. Guidici*, 100 N.Y. 503, 509 (1885); State *v. Medina*, 147 N.J. 43, 60 (1996).

42. *See Victor v. Nebraska, supra,* 511 U.S. at 17-20 (1994) (Accepting a charge that stated that a reasonable doubt is an "*actual and substantial doubt*...as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture" (emphasis in original) and separately holding that "A fanciful doubt is not a reasonable doubt."); *People v. Guidici*, *supra; and People v. Jones*, 27 N.Y.2d 222 (1970) (Approving a charge that distinguished a reasonable doubt from a "vague and imaginary" doubt.).

43. *See People v. Cubino* 88 N.Y.2d 998, 1000 (1996); *People v. Radcliffe*, 232 N.Y. 249 (1921). *Cubino* approved language which read: "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." *Cubino,* 88 N.Y.2d at 1000. The failure, however, to include in that charge that a reasonable doubt may be founded on a "lack of evidence" is not error. *Radcliffe*, 232 N.Y. at 254. *Accord*, *People v. Reinoso*, 257 A.D.2d 484 (1st Dept. 1999); *Foran v Metz*, 463 F Supp 1088, 1091 (S.D.N.Y),

affd 603 F2d 212 (2d Cir), *cert denied* 444 U.S. 830 (1979). *See People v. Nazario,* 147 Misc.2d 934 (Supreme Court, Bronx Co., 1990). *Compare* People *v. Ostin,* 62 A.D.2d 1004 (2nd Dept.1978). In its decision, explaining why the failure to include the "lack of evidence" language was not error *Radcliffe* explained: "The jurors were instructed that it was their duty to judge the facts and to weigh the evidence and that if they had the slightest doubt of the guilt of the defendants, so long as it was a reasonable doubt, founded on the evidence, it was their duty to acquit. We may assume that they possessed sufficient intelligence to understand that the court intended to tell them that they were to consider not only the evidence that was given in the case but also whether there was an absence of material and *convincing* evidence. *Radcliffe*, 232 N.Y. at 254 (emphasis added). This portion of the charge has combined *Cubano*'s formulation with a modification from *Radcliffe's* "convincing evidence" language. (Footnote was revised December 1, 2002).

44. Federal Judicial Center, Pattern Criminal Jury Instructions, *supra,* at § 12.10, at 17-18; L. Sand, Modern Federal Jury Instructions, *supra*, at 4-12 to 4-13 to 4-15 (the terminology "firmly convinced" is used in the Ninth Circuit Pattern Instruction, and the Fifth Circuit and District of Columbia Circuit have approved the Federal Judicial Center charge, that contains such terminology.). States adopting such terminology include New Jersey, Arizona, and Indiana. *State v. Medina,* 147 N.J. at 61 (1996); *State v. Portillo,* 182 Ariz. 592, 596 (1995); *Winegeart v. State,* 665 N.E.2d 893, 902 (Ind. 1996). *See State v. Van Gundy*, 64 Ohio St. 3d 230, 232 (1992) (State statutory definition includes: "Reasonable doubt' is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge."). Solan, *supra*, at 149 ("While 'firmly convinced' is not really a definition of 'beyond a reasonable doubt,' it best reflects the idea that defendants should not be convicted unless the government has proven guilt to near certitude."). *See also Jackson v. Virginia*, 443 U.S. 307, 315 (1979) ("...by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard [of proof beyond a reasonable doubt] symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself."). *Victor v. Nebraska, supra,* 511 U.S. at 12.

45. *See* Solan, *supra,* at 145 ("Other possible instructions, such as 'proof so convincing that it leaves no reasonable doubt of the defendant's guilt,' may also accomplish the same goals [of focusing a jury on what they should consider]."); L. Sand, *supra,* at 4-12 (reporting that the pattern instructions of the Fifth and Eleventh Circuit include the language: "It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.")

46. *See Victor v. Nebraska, supra,* 511 U.S. at 19-20; *People v. Barker*, *supra,*153 N.Y. at 114-115 (approving a charge which said: "A reasonable doubt, gentlemen, is not a mere whim, guess or surmise; nor is it a mere subterfuge to which resort may be had in order to avoid doing a disagreeable thing; but it is such a doubt as reasonable men may entertain, after a careful and honest review and consideration of the evidence in the case.").

47. *Id.*

48. *People v Goetz*, *supra*, 73 N.Y.2d at 752.

49. Added in May 2021. *See* Fed. Jury Prac. & Instr. § 15:01 (6th ed.), [The testimony of a defendant should be judged in the same manner as the testimony of any other witness].

50. *See generally People v Ward*, 282 A.D.2d 819 (3d Dept. 2001); *People v Love*, 244 A.D.2d 431 (2d Dept. 1997); *People v Turton*, 221 A.D.2d 671, 671-672 (2d Dept. 1995); *People v Jansen*, 130 A.D.2d 764 (2d Dept. 1987).

51. *See People v Perry*, 277 N.Y. 460, 467-468 (1938); *People v Laudiero*, 192 N.Y. 304, 309 (1908); *Hoag v Wright*, 174 N.Y. 36, 43 (1903); *People v Petmecky*, 99 N.Y. 415, 422-423 (1885); *Moett v People*, 85 N.Y. 373 (1881); *People v Johnson*, 225 A.D.2d 464 (1st Dept. 1996).

52. *See People v Jackson*, 74 N.Y.2d 787, 789-790 (1989); *People v. Hudy*, 73 N.Y.2d 40, 56 (1988).

53 This question (and the word "conscious" in the previous question) was added in June 2021.

54. *See People v Jackson*, *supra*; *People v. Hudy*, *supra*.

55. *See People v Jackson*, *supra*.

56. *Reagan v. United States*, 157 U.S. 301, 310 [1895] (the trial court "may, and sometimes ought, to remind the jury . . . that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony"); *Portuondo v Agard*, 529 US 61, 72-73 [2000] [reaffirming *Regan* in a case where the trial court instructed the jury that "A defendant is of course an interested witness since he is interested in the outcome of the trial. You may as jurors wish to keep such interest in mind in determining the credibility and weight to be given to the defendant's testimony"]; *Compare United States v. Gaines*, 457 F3d 238, 249 [2d Cir 2006] [an interested witness charge errs when it states that the defendant has a "deep personal interest" or "a motive to lie"]; *People v. Agosto*, 73 NY2d 963, 967 [1989] ["we find no error in the court's interested witness charge. The court gave the standard instruction that the jury could consider whether *any* witness had an interest in the outcome of the case which might affect his or her testimony and that merely because a witness was interested did not mean that he or she was not telling the truth *(see,* 1 CJI[NY] 7.03). There is no question that defendant was an interested witness as a matter of law as the court appears to have charged"]; *People v. Boone*, 146 AD3d 458, 460 [1st Dept 2017] ["The court's interested witness charge, which followed the Criminal Jury Instructions, was not constitutionally deficient"]; *People v. Wilson,* 93 AD3d 483, 484 [1st Dept 2012] ["The court properly instructed the jury on defendant's status as an interested witness . . .. The charge did not undermine the presumption of innocence, suggest that defendant had a motive to lie, or intimate that defendant should not be believed. Instead, it simply referred to defendant as an interested witness and permitted the jury to consider whether any witness's interest or lack of interest in the outcome of the case affected the witness's truthfulness"]; *People v. Dixon*, 63 AD3d 854, 854-55 [2d Dept 2009] ["The defendant's contention that the County Court's charge to the jury concerning the defendant as an interested witness improperly shifted the burden of proof or undermined the presumption of innocence is without merit. The jury charge properly identified the defendant as an example of an interested witness and permitted the jury to consider whether any witness's interest or lack of interest in the outcome of the case affected the truthfulness of such witness's testimony"]; *People v. Blake*, 39 AD3d 402, 403 [1st Dept 2007] ["The court's

interested witness charge did not shift the burden of proof or undermine the presumption of innocence. The court delivered the standard charge (*see* CJI2d[NY] Credibility–Interest/Lack of Interest . . .), which simply referred to defendant as an example of an interested witness and permitted the jury to consider whether any witness's interest or lack of interest in the outcome of the case affected the truthfulness of such witness's testimony. The charge contained no language about defendant having a motive to lie or deep personal interest in the case, and nothing in the charge assumed or suggested that he was guilty"].

57. *See People v Jackson*, *supra; People v Sherman*, 156 A.D.2d 889, 891 (3d Dept. 1989); *People v Smith*, 285 A.D. 590, 591 (4th Dept. 1955). *Cf. People v Coleman*, 70 A.D.2d 600 (2d Dept. 1979).

58. The words: "your evaluation of" were added in June of 2017.

59. *See People v. Duncan,* 46 N.Y.2d 74, 80 (1978).

60. *See People v. Bornholdt,* 33 N.Y.2d 75, 88 (1973); *People v. Savage*, 50 N.Y.2d 673 (1980); *People v. Medina*, 249 A.D.2d 166 (1st Dept. 1998); People v. Byrd, 284 A.D.2d 201 (1st Dept. 2001).

61. CPL 60.35(2).

62. *See People v Freier,* 228 A.D.2d 520 (2d Dept. 1996); *People v Graham,* 196 A.D.2d 552, 552-53 (2d Dept. 1993); *People v Allan*, 192 A.D.2d 433, 435 (1st Dept. 1993); *People v McCain*, 177 A.D.2d 513, 514 (2d Dept. 1991). *Cf. People v Rawlins*, 166 A.D.2d 64, 67 [1st Dept. 1991].

63. In *People v Rouse*, 34 N.Y.3d 269 (2019), the Court of Appeals held that a police officer may be cross-examined "with respect to prior judicial determinations that addressed the credibility of their prior testimony in judicial proceedings. The Court added that: "The only countervailing prejudice articulated by the [trial] court in precluding defense counsel from this line of inquiry was concern that the jury may view the prior judicial determinations of credibility as binding. Such concern, however, could be mitigated by providing the jury with clarifying or limiting instructions."

64. Revised in February 2014 and the last sentence was revised for clarity, without substantive change, in September 2018.

55. *See People v Townsley*, 20 N.Y.3d 294, 300 (2012) ("The [prosecutor's] argument suggested to the jury that there was something improper in a lawyer's interviewing a witness in the hope of getting favorable testimony. That is not in the least improper. It is what good lawyers do."); *People v Liverpool*, 262 AD2d 425 (2d Dept 1999) ("[W]here the defense counsel argued in summation that the prosecutor improperly coached his witnesses to 'clean ... up' problematic information in a police report, it was proper for the court to instruct the jury that there is nothing wrong with a prosecutor speaking to his or her witnesses before trial."); *People v Fountain*, 170 AD2d 414, 415 (2d Dept 1991) ("This court finds no error in the trial court's charge to the jury that it is usual, and not illegal, for a prosecutor to talk to his witnesses, in light of the clear and continued suggestion by the defense

through cross-examination by defendant's counsel of the People's witnesses and summation, that the prosecutor improperly coached the People's witnesses to effect a 'cover-up' of the mistaken arrest of defendant.").

66. *See generally*, *People v. Brown*, 97 N.Y.2d 500 (2002); *People v. Lee*, 96 N.Y.2d 157 (2001); *People v. Fratello*, 92 N.Y.2d 565 (1998); *People v. Miller*, 91 N.Y.2d 372 (1998); *People v Aphaylath*, 68 NY2d 945 (1986); *People v Brown*, 67 NY2d 555 (1986); *People v Cronin*, 60 NY2d 430 (1983).

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

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

69. *See People v. Ruffino*, 110 A.D.2d 198, 202 (2d Dept. 1985) ("In order to reduce the risk of convicting a defendant as a result of an erroneous identification, trial courts are encouraged, in appropriate cases, to provide juries with expanded identification charges that direct the jurors to consider both the truthfulness and the accuracy of the eyewitness' testimony."); *People v. Daniels*, 88 A.D.2d 392, 400 (2d Dept. 1982)(the Court stated that this case illustrated "...the situation found in many, if not most, pure identification cases. The eyewitnesses are usually firmly convinced that they *are* telling the truth and neither cross-examination nor endless polygraph tests will ever shake that belief. Bitter experience tells us, however, that the real issue is whether or not the witness is mistaken -- however honest or truthful that mistake might be.... [The trial court] should have charged that in weighing the evidence on the issue of identification, the jury should focus on accuracy as well as veracity...")

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

71. *People v. Huertas*, 75 N.Y.2d 487 (1990) ("As charged to the jury, the relevance of the complainant's description testimony was also based on the fact that the jurors could compare it to the physical characteristics of the defendant. This was a factor to be considered by the jury in assessing the witness's ability to observe and remember the features of the perpetrator. Thus, defendant misconstrues the purpose of the description testimony here. It is not the accuracy or truth of the description that establishes its relevance. It is, rather, the comparison of the prior description and the features of the person later identified by the witness as the perpetrator that is the ground of relevance.")

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

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

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

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

75 *See* People v Mosley, 2024 NY Slip Op 02125; Guide to NY Evidence rule 4.35.3.

76. This charge has been revised twice. On August 3, 2004, this charge was revised by adding the paragraph to which endnote number 7 applies. On July 29, 2002, the charge was revised to reverse the sequence of the two elements listed in the paragraph beginning, "In order for the defendant to be held criminally liable ...."

77. The term "acting in concert" is included in this charge in order to create a term that can easily be used in the appropriate element of a charged crime to incorporate by reference the definition of accessorial liability. It is the term used in some counties to charge accessorial liability and its use has been accepted by the courts. *E.g., People v. Rivera*, 84 N.Y.2d 766 (1995).

For those who prefer an alternative term that can serve the same objective, we suggest, "accessory," and recommend substituting the following sentence: "In that situation, each person can be said to be an accessory in the commission of the crime."

78. Penal Law § 20.00. The charge substitutes the term "state of mind" for the statutory term: "mental culpability." The former term is a traditional usage and should be more easily understood. If applicable, the jury

should, at this point, also be charged on the provision of Penal Law § 20.15. *See People v. Castro*, 55 N.Y.2d 972 (1982).

79. *See, People v. Slacks*, 90 N.Y.2d 850, 851 (1997) (There was no error in the trial court's refusal "to instruct the jury that mere presence at the scene of the crime or association with the perpetrators is insufficient to establish criminal liability, since no reasonable view of the evidence supported such a charge.").

80. If applicable, the jury should, at this point, be charged on the "no defense" provision(s) of Penal Law § 20.05 and/or the "exemption" provision of Penal Law § 20.10.

81. If the term, "accessory," has been used in lieu of "acting in concert," then, the last paragraph of this charge should read:

"The People have the burden of proving beyond a reasonable doubt that the defendant acted with the state of mind required for the commission of the crime, and either personally, or as an accessory of another, committed each of the remaining elements of the crime."

82. The Court of Appeals has held that the jury need not be unanimous on whether the defendant's criminal liability rest upon personal action or accessorial conduct, and the jury can be so instructed where appropriate. *See People v. Mateo*, 2 N.Y.3d 383 (2004) (the Court approved the following instruction: "Your verdict, as I have mentioned before on each of these charges, has to be unanimous. That means that all twelve have to agree upon a verdict. All twelve of you deliberating on a case do not have to agree that the Defendant was the shooter nor do all twelve deliberating on the case have to find that the Defendant was the commander. It is sufficient that all twelve find the Defendant was either the shooter or the commander under Murder in the First Degree.")

83. If you have used the term "accessory," then the first sentence should read:
"As you know, the People contend that the defendant acted as an accessory of a person who is not here on trial."

84. See, CPL § 300.40.

85. *People v. Seppi*, 221 N.Y. 62 (1917).

86. *See People v. Antommarchi,* 80 N.Y.2d 247, 251-253 (1992).

87. *People v. Faber*, 199 N.Y.256 (1910).

88. This charge draws from the Uniform Rules for Juror Deliberation (*see,* 22 NYCRR §220.10 as amended effective July 20, 2001), and from *People v. Hues*, 92 N.Y.2d 413 (1998). The revision was to conform the charge to the amended rules. The Uniform Rules, inter alia, provide:

> "After the jury has been sworn and before any opening statements or addresses, the court shall determine if the jurors may take notes at any stage of the proceedings. In making this determination, the court shall consider the probable length of the trial and the nature and complexity of the evidence likely to be admitted." 22 NYCRR § 220.10(b).

Whether to authorize note taking, and when during the proceedings to authorize it is in the discretion of the court. *People v. Hues*, *supra*; *People v. DiLuca*, 85 AD2d 439 (2d Dept. 1982)

If notetaking is permitted, this instruction should be given to the jury at the beginning of the trial, and, according to the Rule, the "instructions shall be repeated at the conclusion of the case as part of the court's charge prior to the commencement of jury deliberations."

89. CPL §310.20(1).

90. CPL §310.20(2) ("Whenever the court submits two or more counts charging offenses set forth in the same article of the law, the court may set forth the dates, names of complainants or specific statutory language, without defining the terms, by which the counts may be distinguished; provided, however, that the court shall instruct the jury in its charge that the sole purpose of the notations is to distinguish between the counts.")