

CENTER FOR APPELLATE LITIGATION

120 WALL STREET – 28TH FLOOR, NEW YORK, NY 10005 TEL. (212) 577-2523 FAX 577-2535

<http://appellate-litigation.org/>

ISSUES TO DEVELOP AT TRIAL

January 2018 - Vol. 3, Issue 1

Happy new year! This month's newsletter takes the Court of Appeals' recent decision in *People v. Boone*, briefly summarized below, as a jumping off point for requesting a jury charge that includes other factors that have been shown to affect the accuracy of eyewitness identifications. Other states, such as New Jersey and Connecticut, are far ahead of New York in recognizing the need for focused and specific jury instructions beyond cross-race. With the door opened in *Boone*, practitioners on the front lines have a new chance to push the law in New York forward to reduce the known risk of wrongful convictions based on misidentifications. With your bold advocacy, we appellate practitioners can eventually get these vitally important issues before the Court of Appeals.

People v. Boone, 2017 WL 6374286 (NY Dec. 14 2017): In *Boone*, the Court of Appeals held that in cases where identification is at issue and the defendant and identifying witness “appear to be of different races,” the trial court must, if requested, provide a jury charge on the cross-race effect. The Court cited the prevalence of mistaken identifications in wrongful convictions, and specifically noted the “general scientific acceptance of the cross-race effect,” that is, that people have significantly greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own. The charge was needed because, despite the “near consensus” in scientific acceptance of this phenomenon, uninstructed jurors might believe otherwise. Further, expert testimony was not a substitute because whether to grant a request for expert testimony is within the trial court's discretion. Nor was expert testimony a necessary predicate for the charge. Thus, if requested in an appropriate case, the charge was required to be given.

Where do we go after Boone: Immediately incorporate *Boone* into your practice. Don't forget to ask for the charge, as the court is not required to give it unless specifically requested. If you request it and the court agrees, but then fails to include it in its final instructions, remember to object or else the claim will be deemed waived for appeal. Also be prepared to show why the charge is relevant in your case, that is, that identification is at issue and the defendant and eyewitness “appear to be of different races.”

But beyond *Boone*, consider that cross-race effect isn't the only factor that has found general acceptance in the scientific community as affecting the accuracy of eyewitness identifications. A review of Court of Appeals caselaw in the related context of the admissibility of expert identification testimony reveals three factors that the Court of Appeals has recognized as generally accepted within the scientific community. This gives you a powerful argument that, under *Boone's* reasoning, these factors, no differently than cross-race, must, or at least should, be included in instructions to the jury, with or without the prior presentation of expert testimony.

Nor does it matter whether they are “outside the jury’s ken” or counterintuitive (although they are); as with the factors in the expanded ID charge, they simply tell the jury to examine and evaluate various factors upon which the accuracy of identification depends.¹ Here are the factors; proposed charges are also included in a separate section below:

- **the lack of correlation between confidence and accuracy:** that there is only a very weak relationship between a witness’s confidence in the accuracy of his or her recollection and its true accuracy – i.e., that people very confident in their recollections are often wrong. *See People v. LeGrand*, 8 N.Y.3d 449, 456-57, 458 (2007); *People v. Abney*, 13 N.Y.3d 251, 268 (2009); *People v. Santiago*, 17 N.Y.3d 661, 672 (2011). In further support for the charge, you can point out that while there is a low correlation between confidence and accuracy, studies show that “eyewitness confidence is the most powerful predictor of verdict regardless of other variables.” *State v. Henderson*, 208 N.J. 208 (2011). Note that *Boone* relied on *Henderson* as authority for its decision.
- **potential effect of post-event information:** that eyewitness testimony about an event often reflects not only what the witness actually saw but also information the witness obtained later. *See LeGrand*, 8 N.Y.3d at 458 (finding post-event information generally accepted within the scientific community); *Santiago*, 17 N.Y.3d at 672 (holding that Supreme Court abused its discretion in excluding expert testimony on the effects of postevent information on eyewitness memory);
- **confidence malleability:** that eyewitness’ confidence levels can be influenced by factors unrelated to identification accuracy. *See LeGrand*, 8 N.Y.3d at 458.

If, strategically, you want to press just one factor, we suggest putting your energies into the lack of correlation between confidence and accuracy, as witness confidence has such a disproportionate affect on jurors and can so directly influence the verdict.

Other factors: There are a host of other factors that experts overwhelmingly agree can affect the accuracy of eyewitness identifications, among them, event-stress, weapon focus, exposure time, and memory decay. New Jersey and Connecticut have both found these factors, and others, to be established within the scientific community.

However, it does not appear that our Court of Appeals has definitively recognized any factors, other than those bulleted above, to be so generally accepted within the scientific community as to not require a *Frye* hearing. If one of these other, non-bulleted, factors is particularly relevant in your case, however, there is no reason not to push for their inclusion in the jury charge, citing their general acceptance in the scientific community as set forth in such persuasive authority as

¹ As stated in *State v. Henderson*, 208 N.J. 208, 296 (2011), “we do not rely on jurors to divine rules themselves or glean them from cross-examination or summation. Even with matters that may be considered intuitive, courts provide focused jury instructions,” as when courts remind jurors to scrutinize the testimony of a cooperating witness with care. “[I]t is the court’s obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial.” *Id.*

Henderson. **But whether or not you want to push for other factors to be included in the charge, you can and should ask to present expert testimony on these factors, arguing that based on the wealth of research and authority such as *Henderson*, no *Frye* hearing is even necessary.** Of course, be prepared for a *Frye* hearing in the alternative. Such steps will not only help your client, but move the law forward in New York on these phenomena.

Proposed Charges: After the ground-breaking *Henderson* case, New Jersey developed a new, comprehensive identification charge encompassing many factors for the jury to take into account. Below, we've parsed the charge for the portions relevant to the above factors. Be sure to note the excellent provenance of these charges.

witness confidence: *Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identification, 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.*

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

The full text of the the New Jersey identification instructions can be found here:

<https://www.innocenceproject.org/wp-content/uploads/2017/06/NJ-Jury-Instruction.pdf>

The revised New Jersey identification charge linked above contains instructions referencing numerous factors beyond the three mentioned here (weapon focus, stress, etc.). Importantly, they also contain instructions to the jury for assessing the suggestiveness of out-of-court identification procedures. Such instructions will be the subject of a future newsletter, but we urge you to take a look at the NJ instructions to see how far New York still needs to go in this area and to consider opportunities for advocacy in your cases.

[continued next page]

We're starting the third year of our newsletter! Thank you for your positive feedback and input. Here is an index to prior issues, which can be found on our website at:
<https://www.appellate-litigation.org/issues-to-develop-at-trial/>

April 2016 - Flaws in Selected CJI Instructions
May 2016 - Challenging Rikers Tapes After Johnson
June 2016 - Objecting to DNA Evidence After John
July 2016 - Using Prior Bad Acts Against Victims and Non-Defendant Witnesses
August 2016 - Using the Second Amendment in Your Weapon Cases
September 2016 - Challenging First-Time In-Court Identifications
November 2016 - People v. Allard and Your Right to a Hearing on Your 30.30 Motion
December 2016 - How to Create a Good Record for Appeal at Sentencing
January 2017 - Batson Challenges Based on "Color" and the 3-Step Protocol in General
February 2017 - Special SAP Edition for Summons Court Practitioners - Debunking Myths
March 2017 - Crafting Certain Predicate Challenges at Sentencing
April 2017 - Using Constitutional Speedy Trial to Help Your Case
May 2017 - Using and Defending Against PowerPoint Presentations
June 2017 - Moving to Suppress Cell Site Location Information
July-August 2017 - Objecting to Expert Testimony Purporting to Decode Slang
September 2017 - Sentencing Part 1 (undischarged parole time and "Violent Predicate Override")
October 2017 - Sentencing Part 2 (mandatory surcharge deferrals and SHOCK incarceration)
November 2017 - A Constitutional Challenge to Second-Degree Aggravated Harassment

Please give to our Books Beyond Bars project! Any amount appreciated! To donate, visit
<https://www.crowdrise.com/o/en/campaign/books-beyond-bars-monday-team>

Thank you!