



Fox Rothschild LLP
ATTORNEYS AT LAW

Fox Rothschild Podcast

Featuring Litigator Jana Volante in Pittsburgh

We are talking today with Jana Volante on Fox Rothschild Podcast. Our topic is strategies for defense attorneys dealing with incriminating eyewitness identifications of their clients. Jana is a litigator with Fox Rothschild in Pittsburgh. She represents clients in a range of litigation matters, including white-collar criminal defense, environmental and civil litigation. Jana, good morning.

Jana Volante: Good morning. Thank you.

Question: *Jana, you and your colleague Alain Leibman in Princeton recently co-authored an article in Bloomberg BNA's Criminal Law Reporter publication on the subject of "Attacking Eyewitness Identification Testimony." Jana, tell us why you wrote this article, and whom you hope to reach.*

Jana Volante: Some sources say that eyewitness misidentifications are the leading cause of wrongful convictions in the United States. As many as half of all wrongful convictions result from false identifications. We hope the article will help defense attorneys better understand that, other than evidence of a confession, eyewitness identification testimony is often the most influential proof faced by their clients at trial. Because it may be so difficult to shake an eyewitness through cross-examination alone, defense lawyers need to consider the full range of remedies available.

Question: *Jana, what is the best way to minimize the issue?*

Jana Volante: Suppression of the eyewitness testimony and its resulting exclusion from trial is the best strategy for the defense, when possible. Recently, however, the United States Supreme Court raised the bar for the suppression of eyewitness testimony. In *Perry vs. New Hampshire*, the court held that the trial judge is not obligated to make a preliminary determination of the reliability of the identification unless the defense first establishes that government misconduct brought about the suggestive identification of the defendant.

Question: *Jana, on its face, does the Perry decision freeze the development of federal measures to overcome the unreliability of eyewitness identifications?*

Jana Volante: In light of *Perry*, a range of remedies and approaches are available to defense counsel to limit or blunt the impact of eyewitness identification evidence. This includes a promising analysis put forth recently by the New Jersey Supreme Court.

Copyright © 2012. Fox Rothschild LLP. All Rights Reserved.

All content of this podcast is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact marketing@foxrothschild.com for more information or to seek permission to reproduce content.



Fox Rothschild LLP
ATTORNEYS AT LAW

Question: So, Jana, the starting point for a defense attorney is suppression of testimony?

Jana Volante: The Due Process Clause protects against a conviction based on evidence that is so questionable as to violate fundamental concepts of justice. Federal courts use a “totality of the circumstances” standard to determine whether a confrontation between an eyewitness and a suspect is so unnecessarily suggestive or conducive to an irreparably mistaken identification that it violates due process of law and warrants suppression of the resulting eyewitness identification testimony. Suppression may be ordered, however, only if a defendant establishes both that the procedure used was unnecessarily suggestive and that the resulting identification was unreliable. Thus, the standard for suppression can be difficult to meet.

Question: What about expert testimony?

Jana Volante: The defense should consider introducing expert testimony regarding the factors which can cause eyewitness testimony to be unreliable. This can be an extremely effective strategy for persuading the jury to question and rely less heavily upon the government’s eyewitness identification testimony. The *Perry* decision supports introducing this kind of expert testimony. The *Perry* opinion noted that “[i]n appropriate cases” there may be admitted “expert testimony on the hazards of [unreliable] eyewitness identification evidence.” The United States Circuit Court of Appeals for the Sixth Circuit has described what it calls as a “jurisprudential movement” toward admitting expert testimony reporting on psychological studies of unreliable eyewitness identifications.

Question: So, Jana, how does the Perry case impact jury instructions?

Jana Volante: In *Perry*, the court acknowledged that “jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt” should be used to test the reliability of eyewitness identification testimony even “[w]hen no improper law enforcement activity is involved[.]” Arguably, trial courts should provide enhanced jury instructions to guide juries regarding the factors that may affect the reliability of an identification in a particular case. Jury instructions involving eyewitness identification testimony should be developed to be consistent with scientific findings on eyewitness identification.

Question: Jana, you write about the State vs. Henderson case in the New Jersey Supreme Court in 2011. Why is Henderson such an important case for courts to follow?

Jana Volante: In *Henderson*, the court revised the state’s approach to the admission of eyewitness identification testimony. On an appeal from a murder conviction, the court remanded the matter for an extended evidentiary hearing held by a special master, involving the testimony and submissions of numerous experts in the field. The court eventually adopted much of the special master’s report on the efficacy and pitfalls of such testimony.

Copyright © 2012. Fox Rothschild LLP. All Rights Reserved.

All content of this podcast is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact marketing@foxrothschild.com for more information or to seek permission to reproduce content.



Fox Rothschild LLP
ATTORNEYS AT LAW

As the *Henderson* court observed at the outset, in the several decades since the Supreme Court handed down its landmark decisions on eyewitness identification evidence, “a vast body of scientific research about human memory has emerged.” This “casts doubt on some commonly held views relating to memory [and] calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications.”

Question: *Jana, what are the advantages of a court following the Henderson methodology?*

Jana Volante: There are three advances established by *Henderson*. First, more frequent pretrial hearings -- to be held upon “some” evidence of suggestiveness, not necessarily rising to the level of impermissible suggestiveness. Second, expansion of such hearings to include evaluation of both “estimator” and “system” variables. Third, “enhanced” jury instructions, informing jurors about relevant factors and their effect on reliability -- the use of “more focused” jury instructions would likely result in less need to call expert witnesses at trial.

Question: *Jana, what do you recommend based on the rulings in Henderson?*

Jana Volante: Counsel might well consider urging their respective courts to adopt a broader approach to testing the reliability of identification evidence, as outlined in *Henderson*. *Perry* may not require hearings in the absence of police misconduct, but the court did not preclude hearings on a lesser showing. Decisions from lower courts such as *Henderson* may prove persuasive in either more readily securing a hearing at the discretion of the trial court or expanding the breadth of the reliability hearing, or at least in allowing defense expert testimony on the provision of tougher jury instructions.

Narrator: *Well, thank you Jana. Listeners, to receive a reprint of Jana’s Bloomberg BNA Criminal Law Reporter article on the topic of “Attacking Eyewitness Identification Testimony,” please contact Jana Volante at 412-394-5523 or at jvolante – that’s J-V-O-L-A-N-T-E – at foxrothschild.com.*

Fox Rothschild LLP is a full service law firm built to serve business leaders. Over the past 100 years we have grown to more than 500 lawyers in more than 16 offices coast to coast. Our clients come to us because we understand their issues, their priorities and the way they think. We help clients manage risk, and make better decisions by offering practical advice. Visit us on the web at www.foxrothschild.com.