<u>In re: PROPOSED CRIMINAL JURY INSTRUCTION 3.6(m)</u>

I am an Assistant State Attorney, so I expect this comment to be viewed with a certain amount of skepticism by some. However, for the first six years of my legal career I was a clerk for judges in different states at different levels. I learned there the importance of the courts remaining, and appearing to remain, neutral when it comes to treatment of evidence before juries. This proposed instruction goes entirely too far in having the Court place its figurative thumb heavily on one side of the justice scale.

The instruction is a classic "solution in search of a problem." Standard Jury Instruction 3.9 already tells jurors the obvious things to consider. What this new proposed instruction does is essentially tell jurors that eyewitness testimony– the very bedrock of jury trials since this nation's founding and before– is all of a sudden second-class evidence. It tells them, contrary to every other instruction they receive, to distrust one piece of evidence over another.

And it does so for no good reason at all, and when the current standard instruction is more than adequate to address these concerns. I assume the goal is to improve the accuracy of the process. While laudable, it needs to be recognized that as long as this is a human endeavor there will not be absolute perfection achieved. It should be of at least equal concern that the practical effect of this misguided proposal will be to produce "wrongful acquittals." Yet I do not see that concern being addressed.

Further, in what scenario does the supposed involvement of this eyewitness phenomenon in some percentage of less than a dozen (according to the Florida Supreme Court's own establishment of the "Innocence Commission") established cases of wrongful Florida convictions over the entire state's history justify such a sweeping, fundamental change in ALL future cases? Florida has tens of thousands of criminal trials every year. This instruction then extrapolates from less than .0001% of cases, a rule to bind them all.

We're not talking here even about the old adage of "better that ten guilty go free than one innocent be convicted." We are talking, instead, about several powers of ten, and the citizens of Florida deserve better than nods to old proverbs to justify it. There are better ways to improve the system.

It seems incongruous that the instruction appears only to "identifications," i.e., to evidence offered by the state. However, it has been my experience that sometimes defendants will present witnesses who claim that they saw the crime and that Defendant was *not* the perpetrator, or that Defendant was seen somewhere else at the time of the crime. The instruction does not seem to cover such scenarios which, if it were to be fair, it clearly should.

It does not appear that there is a corresponding proposed amended CIVIL jury instruction. Are people who witness crimes somehow less reliable than people who witness, say, a traffic crash? Of course, it may be that those who propose and favor it aren't truly interested in consistency– instead they simply seek a tactical advantage in trial.

I note that the proposed instruction also appears to be contrary to several positions of the Florida courts, which have repeatedly upheld exclusion of such "eyewitness expertise" (which appears to be the purported basis for this proposal) in even the most serious criminal cases:

> First, the record conclusively shows that Green is not entitled to relief based on his claim that counsel was ineffective for failing to retain an expert witness on cross-race identification. It is unlikely that such testimony would have been admitted. See Johnson v. State, 438 So.2d 774, 777 (1983) (holding that trial court did not abuse its discretion in refusing to allow a professor of psychology to testify as an expert witness in the field of eyewitness identification); see also McMullen v. State 714 So.2d 368, 372 (Fla.1998) ("Johnson could be interpreted as ***a per se rule of inadmissibility of this type of testimony***.").

Green v. State, 975 So.2d 1090, (Fla. 2008).

> Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. Additionally, it is not proper to allow an expert to vouch for the truthfulness or credibility of a witness.

Frances v. State, 970 So.2d 806 (Fla. 2007) (citations omitted).

> We hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony. We find no abuse of discretion in the trial court's refusal to allow this witness to testify about the reliability of eyewitness identification.

Johnson v. State, 438 So.2d 774, 777 (Fla. 1983), noting "Several other courts have reached the same conclusion about expert testimony in eyewitness identification: United States v. Thevis, 665 F.2d 616 (5th Cir.), cert. denied, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982); United States v. Fosher, 590 F.2d 381 (1st Cir.1979); Caldwell v. State, 267 Ark. 1053, 594 S.W.2d 24 (App.1980); People v. Dixon, 87 Ill.App.3d 814, 43 Ill.Dec. 252, 410 N.E.2d 252 (1980); State v. Helterbridle, 301 N.W.2d 545 (Minn.1980); Nelson v. State, 362 So.2d 1017 (Fla. 3d DCA 1978).

Jurors take the instructions from the bench seriously. Yet how can they legitimately believe Standard Criminal Jury Instruction 3.11, "Deciding a Verdict is exclusively your job. . . please disregard anything I may have said or done that made you think I preferred one verdict over another" when, if they were to hear the proposed instruction, they would clearly be being told that the Court DISfavors eyewitness testimony and they should be skeptical of it, thus favoring a verdict of not guilty?

I hope the Court takes seriously the notion that gerrymandering the jury instructions in this way is not justified and is a bad idea. Thank you for the opportunity to comment.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was furnished to Committee Chair, Hon. Jaqueline Hogan Scola, 1351 NW 12th St. Suite #603 Miami, FL 33125-1628, by MAIL this ___day of March, 2012.

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