IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS CRIMINAL CASES **CASE NO.: SC11-2517**

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STANDARD JURY INSTRUCTION COMMITTEE'S RESPONSE TO COMMENTS AND REQUESTS FOR ORAL ARGUMENT

The Standard Jury Instruction Committee – Criminal files the following Response to Comments and Requests for Oral Argument. The comments and requests for oral argument were received after the March 1, 2012 publication in *The Florida Bar News* of four jury instruction proposals. After further review, the Committee has not changed its proposals for 3.9(f) – Eyewitness Identification and 3.13 – Submitting Case to the Jury. The Committee has slightly altered its proposals for 3.6(m) – Affirmative Defense: Temporary Possession of a Controlled Substance for Legal Disposal and 3.6(n) – Affirmative Defense: Controlled Substance was Lawfully-Obtained from a Practitioner or Pursuant to a Valid Prescription. These two new proposals are contained in attached Appendix F.

Oral argument

According to the on-line docket, there were two requests for oral argument. One was from the Innocence Project and the other was from Rick Combs, a member of the Committee who filed a minority report. Both requestors would like to argue about the Eyewitness Identification proposal. The Committee is not requesting an oral argument and does not believe an oral argument will be more illuminating than all of the written materials that are being provided to the Court. The Committee will, of course, be glad to participate if the Court determines an oral argument would be helpful.

Proposal #1 – 3.9(f) – Eyewitness Identification

The committee received three comments on its Eyewitness Identification proposal. One from the Florida Public Defender Association (FPDA); one from a prosecutor, Mr. Rich Mantei; and one from the Innocence Project of Florida.

The FPDA contends that the instruction should be more detailed. The Committee disagreed. The Committee believed that its proposal sufficiently covered the same topics proposed by Atty. Haughwout. There was a vote to include the three introductory paragraphs proposed by Atty. Haughwout but to take out the reference to "Assistant State Attorney" and just to refer to "the State."That motion was defeated by a vote of 8-2.

Assistant State Attorney Mantei argued that there should be no eyewitness identification instruction, that the instruction applies only to state witnesses, and that the proposal conflicts with Standard Instruction 3.11 (Cautionary Instruction). The Committee disagreed. The Committee concluded that this Court directed the Committee to provide a standard instruction and the Committee complied. The Committee also thought that the proposal could be used in cases where the defense provides an eyewitness to the crime and that a special instruction could be requested if necessary. The Committee also concluded that its proposal was neutral and did not inform jurors that eyewitness testimony is to be disfavored.

The Innocence Project of Florida filed a comment with many of the same ideas that it had filed in a prior comment. The consensus of the Committee was that these ideas had already been discussed. The Committee requests that the Court consider the proposal that it previously provided to the Court.

Proposal #2 – 3.6(m) - Affirmative Defense: Temporary Possession of Controlled Substance for Legal Disposal

The committee received one comment from the FPDA. Unless the Court is willing to depart from its usual practice of not deciding a legal issue in a jury instruction case, the Committee agrees that the question of who bears the burden of persuasion of an affirmative defense should be settled by appellate decision. The Committee disagrees with the FPDA, however, that the standard instruction should inform the parties only that the law is unsettled. The Committee refined its standard affirmative defense format from the one used for Child Abuse because it believes it would be helpful to give trial judges more guidance than what was given in the Child Abuse instruction. (In fact, the Committee will review the standard Child Abuse instruction in light of recent legislation.) The Committee decided to maintain the proposal that was previously sent to the Court, with a minor change. In the prior proposal, the Committee used the word "disposition" in four places in the "burden of persuasion" sections. The Committee unanimously voted to replace the word "disposition" with the word "disposal." The Committee asks the Court to consider the new proposal that is provided in the attached Appendix F.

Note: A large part of the Committee's discussion concerned whether the term "throw away" should be included in the definition of "legal disposal." Some members thought "throw away" was too vague and that the language supporting the use of "throw away" in *Stanton v. State*, 746 So. 2d 1229 (Fla. 3rd DCA 1999) was dicta. Others thought the term "throw away" should be in the instruction because it is supported by *Stanton* and because one who throws drugs away is negating his or her intent to possess. Ultimately, the Committee voted 6-4 to retain the term "throw away" in the definition of "legal disposal."

Proposal #3 – 3.6(n) -Affirmative Defense: Lawfully-obtained Controlled Substance

The Committee received two comments for this proposal. The FPDA raised the same objection about the burden of persuasion that it made for Instruction 3.6(m). The Committee's response is the same.

The Committee also received a comment from Ms. Charmaine Millsaps. Atty. Millsaps had two suggestions: 1) The standard instruction should allocate the burden of persuasion of the affirmative defense to the defendant because of Florida's common law reception statutes and because the defendant is the party with the easiest access to the relevant information; and 2) the jury should be instructed that the defendant's possession and use of the controlled substance was in accordance with the terms of the prescription.

The Committee did not accept Atty. Millsaps' suggestion about allocating the burden of persuasion to the defendant under the preponderance standard because there are many silent affirmative defense statutes (e.g., duress, consent to enter in burglary cases, premises open to the public in burglary cases, self-defense) where the courts have not adhered to the common law reception statutes. Also, even though there are cases from other jurisdictions, the Committee is unaware of any Florida case that holds the burden of persuasion should be allocated to the party with the easiest access to the relevant information. In sum, the Committee concluded that the allocation should be made by the judiciary, not by the Committee.

The Committee also unanimously agreed to not adopt Ms. Millsaps' suggestion about telling jurors that the use of the controlled substance had to be in accordance with the terms of the prescription. The Committee concluded that it had no discretion to decide whether the Fourth District's opinion in *Wagner v. State*, 37 Fla. L. Weekly D119, (Fla. 4th DCA January 11, 2012) is correct. Because Atty. Millsaps' suggestion is contrary to *Wagner*, the Committee did not adopt it. Note: The Fourth District's on-line docket information shows that the Attorney General's Office is attempting to get *Wagner* to the Florida Supreme Court.

Final note: After reviewing the statute and the case law, the Committee is unsure whether the prescription defense is available to those charged with Possession with Intent. To help trial judges a bit, the Committee altered its proposal slightly and added citations to *Celeste v. State*, 79 So. 3d 898 (Fla. 5th DCA 2012); *Ayotte v. State*, 67 So. 3d 330 (Fla. 1st DCA 2011); and *Wagner v. State*, 37 Fla. L. Weekly D119 (Fla. 4th DCA Jan. 11, 2012) in the Comment section. Although these cases do not answer the question definitively, the Committee thought it would be helpful to provide the citations. The Committee asks the Court to consider the new proposal that is provided in the attached

Appendix F.

Proposal 4 – 3.13 – Submitting Case to Jury

No comments were received and the Committee maintains the proposal that was previously sent to the Court.

Respectfully submitted this _____day of April, 2012.

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The Honorable Jacqueline Hogan Scola
Eleventh Judicial Circuit
Chair, Supreme Court Committee on
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CERTIFICATE OF SERVICE AND FONT SIZE

I hereby certify that this Response to Comments and Requests for Oral Argument has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and that a true and correct copy has been sent by U.S. Mail to Atty. Charmaine Millsaps, Office of the Attorney General, 400 S. Monroe Street, PL-01, Tallahassee, Florida, 32399; Atty. Carey Haughwout, Public Defender, 15th Judicial Circuit, 421 3rd Street, West Palm Beach, Florida, 33401; Atty. Richard Mantei, Office of the State Attorney, 220 E. Bay Street, Jacksonville, Florida, 32202; and Mr. Richard Combs, Office of the State Attorney, 2nd Judicial Circuit, 1-A East Jefferson Street, Quincy, Florida, 32351, this _____ day of April, 2012..

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HONORABLE JACQUELINE HOGAN SCOLA
Chair, Committee on Standard Jury
Instructions in Criminal Cases
Florida Bar Number 350869