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APPENDIX B

**Committee on Standard Jury Instructions in Criminal Cases
The Honorable Jerri L. Collins, Chair
Report 2014-05**

Bart Schneider

From: diana johnson <diana@johnsonandlufrano.com>
Sent: Tuesday, April 1, 2014 3:14 PM
To: Criminal Jury Instructions
Subject: Comment on new 1.2 Pro Se Defendant Instruction
Attachments: jury instruction comment- pro se defendant.docx

Attached, please find a copy of my proposed change for the amended instruction on pro se defendants. I submit this comment/proposal because the language "*has decided instead to exercise his right*" can be read and understood as if the pro se defendant made the incorrect choice in representing him/herself rather than choosing the right to be represented by an attorney.

A criminal defendant is already disadvantaged, a pro se defendant, even more so. As such, there should not be a suggestion (from the trial court, nonetheless) that he/she has made a bad/wrong choice in representing him/herself.

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2:14 1.2 PRO SE DEFENDANT

(Defendant) has both the right to be represented by an attorney or represent him/herself in this trial, as do all criminal defendants in this country. [He] [She] has ~~decided instead to~~ exercised [his] [her] constitutional right to act as [his] [her] own attorney in this case. This election You should not ~~allow that decision to~~ affect your ~~verdict~~consideration decision in of this case.

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTION
IN CRIMINAL CASES

COMMENT ON PROPOSED JURY INSTRUCTION 2.1(a),
NOTE-TAKING BY JURORS

The Florida Supreme Court Committee on Standard Jury Instructions in Criminal Cases proposed a new jury instruction entitled: NOTE-TAKING BY JURORS. The proposed instruction was published in April 1, 2014, edition of the Florida Bar News. The undersigned submits the following comments on the proposed instruction.

The proposed instruction states, in pertinent part:

Your notes should be used only as aids to your memory. Whether or not you take notes, you should rely on your memory of the evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than each juror's memory of the evidence.

The portion of the proposed instruction quoted above should be omitted entirely. This quoted excerpt operates to infringe on the jury's prerogative as the fact finding body and, further, serves as an impermissible comment on the weight of the evidence by the trial court.

For example, suppose the issue is which of two defendants actually possessed a gun during the course of a robbery. Witness Jones testified that

Defendant “A” possessed the firearm. Witness Smith testified that Defendant “B” possessed the firearm. Juror “X” took notes which correctly reflect the witnesses’ testimony. In deliberations, Juror “Y” recalls (incorrectly) that both witnesses testified that Defendant “B” possessed the firearm. A discussion ensues. In deliberations, Juror “X” says she does not recall the specific testimony of Smith and Jones, but “X” believes she is a good note taker, believes her notes are accurate, and wishes to rely on her notes. Moreover, X says Jones was the more credible witness, Smith was not credible, and would conclude, based upon her notes, that “A” possessed the gun.

In this example, the proposed instruction robs juror “X” of her prerogative to find facts and unduly intrudes on the deliberations of the jury. Under the proposed instruction, “X” cannot not rely on her notes because they may be used only as an aid to her memory, and “X” has no actual memory. Additionally, her notes are not entitled to “greater weight” than juror Y’s memory. Juror “X” is thus forced to agree with juror “Y” even though X believes Smith was generally not credible. Juror “X” may not even rely on her notes as a basis for “reasonable doubt” as to whether “B” possessed the firearm. The trial court’s instructions have, in this manner, intruded into and directly affected the jury’s consideration of a pertinent disputed fact.

In more general terms, the quoted instructions contradict the reasons for permitting note taking in the first place. Why do we take notes in school and at work? We take notes because our contemporaneous notes are generally more reliable than our memories which may falter with the passage of time. It is true that some are better at note taking than others, but the quality of one's notes is a factor to be considered by the individual juror, as well as scrutinized by the note taker's fellow jurors. The proposed instructions defeat the underlying purpose for taking notes.

In summary, the above quoted language should be stricken because it defeats the purpose of note-taking, constitutes an intrusion on the fact-finding prerogative of the jury and, in application, results in impermissible comments on the weight of the evidence by the trial court.

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