POSITION PAPER ON PROPOSED MAI 310.02 RELATING TO EYEWITNESS IDENTIFICATION

For more than 150 years, the law has prohibited trial judges from commenting on the evidence in criminal jury trials. A state statute, court rule, and case law all bar judges from inserting themselves into a case in a way that could tilt the scales of justice toward one party or another. However, if this Court allows proposed MAI 310.02 to take effect on January 1, 2016, all of that will change.

The proposal is a sweeping change to Missouri law and is not well-received by Missouri's trial bench, law enforcement community and victim advocates. In addition to our objections, we are aware that judges from the 22nd Circuit and 16th Circuits have objected to this surprising overreach, as well as others who are concerned.

The new instruction actually reads more like a closing argument, sowing seeds of doubt before the attorneys even have a chance to argue the case. Instead of merely instructing the jury on the law, it requires trial judges to wade into the social science debate on whether eyewitnesses should be trusted. It even goes so far as to suggest that witnesses are not reliable when it comes to identifying a criminal of another race, and that elderly people are less reliable and capable of remembering what they saw.

Chief Justice John Roberts famously said it was a judge's job to "call balls and strikes and not to pitch or bat." The new instruction moves the judge out from behind home plate and puts the judge on the criminal defense lawyer's team. In the final inning of a trial—when the court instructs the jury the judge will become a second defense lawyer, even while still wearing a black robe.

Anecdotally, if an average person were to speak to a group of people, and then step out of the room, the group would likely have widely varying recollections of the person's height, weight, eye-color, hair-color, clothing or other specific features. However, almost every single member of that group would recognize the speaker if they saw that person again.

This is the essence of a criminal jury trial. We don't receive or expect perfection from our witnesses, because human beings are not perfect. Neither are the jurors. And they don't expect perfection either. But what they do expect, and what our system is based on is common sense. This is the reality of crime and the human mind. Consider the following examples:

- The proposed portion of the instruction relating to Environmental Viewing Conditions does not take into account that the majority of people are not witnesses or victims of crime, and that witnessing a crime is often a once in a lifetime event. The proposed language lacks any consideration that should be given to the ability of the average person to recall with uncanny specificity the details surrounding such a unique and life-changing event.

- The proposed portion relating to Duration indicates that the jury is to be instructed that it should consider the length of time that a witness observes a suspect. However, the truth of the matter is that perpetrators rarely stick around to chat and make sure that the witness takes notes about the details of their physique. Yet, there is no acknowledgement of this obvious fact.

- The proposed portion relating to Witness Attention specifically seeks to draw the jurors' attention to whether objects obstructed the view of the criminal committing a crime. But it

does not draw attention to the reality that defense attorneys will do everything they can to draw attention to any obstruction within the witness' eyesight during cross-examination and closing argument.

- The portion of the instruction relating to Presence of a Weapon seeks to instruct the juror that the witness could not remember what they saw because they were scared of a weapon. However, it is a more convincing argument that most people do not experience having a weapon stuck in their face and that they are likely to have the details of that experience, including the description of the criminal who threatened their life, seared in their memory and haunting them every night when they close their eyes.

- The portion relating to Level of Certainty does not give consideration to the fact that when the defense attorney asks a witness "how certain are you?" it is similar to a doctor asking a patient to place a numeric number on the level of their pain. The number or level is subjective to the witness or patient. At the end of the day, the doctor does not doubt that the patient is in pain, so why would the Court ask jurors to doubt that the witness identified the defendant.

- The portion relating to Length of Time Between the Event and Identification could just as easily read that the juror should consider that as a witness calms down and is able to articulate details, they will likely provide a more accurate identification of the criminal. There is no more scientific basis for this statement than for the statement currently in the draft. Yet, the proposed instruction seeks to guide the juror into thinking that if a witness does not identify a suspect immediately that they cannot be relied upon to do so later.

While we presume that the intent of the proposed instruction is to prevent wrongful convictions, it is important to note that in reality there are only a fraction of cases nationwide that amount to actual innocence. Most cases that are characterized as "exonerations" or "wrongful convictions" are actually cases that were reversed on appeal for technical reasons, but were unable to be re-tried due to factors in the passage of time such as the death of key witnesses.

Of course, even one case of actual innocence is not good enough for us. We want to do everything reasonably possible to ensure that not a single innocent person is convicted. However, we must be careful to approach this issue which affects such a small portion of cases in a way that does not uproot well-settled principles of law that have withstood judicial review over the course of time, that would not inadvertently result in a decrease in convictions of truly guilty criminals, and that does not run contrary to the public policy of the state as it relates to promoting the rights of crime victims.

The proposed instruction would have unintended ramifications that would allow guilty individuals to escape justice. Investigations and subsequent convictions rarely hinge on any one piece of evidence. While certain pieces of evidence carry more weight than others in individual cases, it is usually a composite of several pieces of evidence that complete the picture of a guilty defendant. Often eyewitness identification merely leads to the discovery of another piece of incriminating evidence.

With respect to the area of human memory recall, it is important to note that scientific research is still evolving. It has been argued that sequential line-ups reduce the number of wrongful identifications at no cost to the criminal justice system. However, recent research suggests that sequential line-ups end up reducing overall identifications, including accurate identifications of the guilty. Obviously, we cannot support a procedure that most likely will result in reducing public safety.

One of the basic functions of a judge is to act as a gatekeeper on the admissibility of evidence. Our system is built on the tenet that we trust judges to make the right decisions. The United States Supreme Court has held that "[t]he Due Process Clause does not require a preliminary judicial inquiry into the reliability of eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement."

This proposed instruction will only result in an explosion of frivolous litigation in each and every criminal case. Despite the best of intentions, defense attorneys will inevitably now seek to inject the issue into the case in order to obtain the instruction, and cross-examine the investigating officer in excruciating detail about each and every aspect of the procedures in attempts to discredit the officer in front of the jury. When faced with the daunting task of defending a guilty client, it is a common defense tactic to attempt to discredit the law enforcement officer and investigation in hopes that the jury will be redirected from the truth of the matter – which of course is the defendant's guilt. This instruction will also result in countless depositions – all in an attempt to inject the issue and obtain the instruction. This will result in skyrocketing deposition costs and the use of precious time by prosecutors and law enforcement officers.

Since at least the mid-nineteenth century, Missouri judges have not been allowed comment on the evidence:

> Courts always err, when they attempt to lay down rules by which a jury should be governed in estimating the weight to be given to the evidence of witnesses examined before them. That is a matter to be determined exclusively by them. They hear the witness and see his deportment, and from these circumstances, they determine, for themselves and by themselves, the confidence they will repose in his testimony. Where courts are permitted to sum up or comment upon the evidence, it is usual to express an opinion as to the weight to be given to the testimony of a witness; but as that is not allowed here, in criminal proceedings, the court should not attempt, by an instruction, to determine for a jury the weight to be given to the evidence. They should only direct the jury that, viewing all the testimony before them, and the conduct of the witnesses, they are the sole judges of the credibility of all those who testify before them.[1]

[1] *State v. Upton*, 20 Mo. 397, 399-400 (1855) (internal citation omitted). This rule of law has been reaffirmed by the courts over the years. *See State v. Everett*, 448 S.W.2d 873, 878 (Mo. 1970) ("The general rule is that an instruction which unduly directs attention to the credibility of a witness or classes of witnesses or the manner in

The Missouri legislature has also forbidden judges from commenting on the evidence.[2]

And existing court rules make the same point: "In the trial of any criminal case the court shall not, in the presence of the jury, sum up or comment on the evidence."[3]

Contrary to existing law, the proposed eyewitness instruction argues supposed facts not in evidence—the very kind of evidence the Supreme Court has affirmed trial courts in excluding.[4]

Of course, trial judges already instruct juries about evaluating witnesses:

> In determining the believability of a witness and the weight to be given to testimony of the witness, you may take into consideration the witness' manner while testifying; the ability and opportunity of the witness to observe and remember any matter about which testimony is given; any interest, bias, or prejudice the witness may have; the reasonableness of the witness' testimony considered in the light of all of the evidence in the case; and any other matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness.[5]

If this Court believes it must do more to instruct juries about eyewitnesses, then we propose limiting its instructions to the factors handed down by the U.S. Supreme Court for the evaluation the reliability of eye witness in-court identifications: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."[6]

Unfortunately, the myriad factors included in the new eyewitness instruction go well beyond this mandate.

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which the testimony should be received is erroneous. Instructions on credibility of witnesses should be couched in general terms applying alike to all witnesses.") (internal citation omitted).

[2] Section 546.380, RSMo. ("The court shall not, on the trial of the issue in any criminal case, sum up or comment upon the evidence, or charge the jury as to matter of fact, unless requested to so do by the prosecuting attorney and the defendant or his counsel; but the court may instruct the jury in writing on any point of law arising in the cause.")

[3] Mo. R. Crim. P. 27.06.

[4] *See, e.g., State v. Lawhorn,* 762 S.W.2d 820, 823 (Mo. 1988) ("Appellant argues, however, that he should have been permitted to explain that research indicates the existence of 'the other race effect,' which causes persons to have difficulty identifying individuals of a different race, and that the effects of the passage of time, stress at the time of the crime, and the retrieval level in facial recognition memory of the human brain, all combine to diminish a witness' ability to make an accurate identification. We believe, however, that such matters are within the general realm of common experience of members of a jury and can be evaluated without an expert's assistance."); *State v. Whitmill,* 780 S.W.2d 45, 47 (Mo. 1989).

[5] MAI-CR 302.01.

[6] *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

Judges should never even hint that a particular class of witnesses is suspect. Unfortunately, the proposed eyewitness instruction would substitute the judge's role as neutral magistrate for that of advocate by requiring judges to make arguments better left to criminal defense lawyers' closing arguments and social science professors' debates. We urge this Court to avoid placing a thumb on the scales of justice and steer clear of the ongoing debate over the reliability of eyewitnesses.