BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNINGA A JUDGE
THE HONORABLE VEGINA T. HAWKINS
JQC No. 2019-351
_____/

SC19-1193

RESPONSE TO JQC'S FIRST MOTION IN LIMINE

COMES NOW, THE HONORABLE VEGINA T. HAWKINS, by and through her undersigned counsel, and files this, her Response, to the JQC's First Motion in Limine. As grounds therefor, the Respondent would aver as follows:

1. This matter is currently set for final hearing for December 8, 2020;

2. On December 21, 2019, Respondent listed Robert Wyman, videographer expert, as a witness. He was subsequently deposed on January 17, 2020;

3. On November 4, 2020, the JQC filed its First Motion in Limine to exclude Mr. Wyman from testifying at the final hearing on December 8th, stating that, in essence, there is nothing about which Mr. Wyman could testify that the jury would not be able to glean on their own upon review of the video;

4. In support of that assertion, the JQC cited to a portion of Mr. Wyman's deposition where he was asked if he was able to draw conclusions as to what occurred, and to which he responded that he was, but only to some extent. Mr. Wyman would testify that what he was describing therein was his later discussion with counsel for the trial panel:

> "I was asked, really, what do I see in the video? And I could describe that to you today, what I see in the video. But I would defer to the 'court system' to come to a conclusion as to what actually is there." P.16 lines 1-6 depo of Wyman.

Mr. Wyman's testimony was to point to what is obvious in our system – he can say what he saw, he can give his expert opinion, but it is the "court system" which makes the final decision that is

in lockstep conformity with the Florida Standard Jury Instruction reference Expert Witnesses, and the weight the jury may or may not give to that testimony regardless of that opinion. It is, thus, an issue of weight, not admissibility. However, further into the deposition, Mr. Wyman was specifically asked:

> "In your training and experience, is there something that allows you to determine what occurs on a video better than anyone else?" (Wyman depo p. 16).

In response, Mr. Wyman stated:

> "I would say, yes, in terms of being able to enhance the video … videos move very quickly. They move in realtime. And our ability to perceive actions in realtime is sometimes faulty…so my assignment with all these types of cases, the way I look at it, is to provide the best mechanism to perceive what happened in any particular incident." (Wyman depo p.17);

5. Additionally, on p. 19 of that same deposition, Mr. Wyman was asked:

> "And you would agree, then, that the people who actually experienced that are in a better position to talk about whether there was contact."

To which he responded:

> "Perhaps. We're back to the witness issue of how people recall things, and how people perceive things…but I don't know that I would defer fully to those involved if there is a conflict with their testimony [with] we see on the video." (Emphasis supplied).

6. With that understanding, that he is able to perceive movements on the video in a way that others without his experience would not, Mr. Wyman testified that he disagreed:

> "…with the video showing any choking maneuvers because I don't see any choking maneuvers." (Wyman depo pgs. 21-22).

7. Further into his deposition, Mr. Wyman was questioned as to whether or not he was considered an expert in "human factors," to which he responded that he was not. However, when asked whether a human factor was even relevant to his analysis, he stated:

> "That wouldn't enter into my analysis at all … that has no bearing on my work with the video at all." (Wyman depo pgs. 35-36);

8. Lastly, Mr. Wyman was asked:

> "Is there anything you see looking at that in your experience that any other human being couldn't see."

His response was:

> "...I believe I may be able to see something in any particular video that others may not perceive." (Wyman depo p. 38)

9. In Lamb v. State, 246 So.3d 400 (Fla. 4th DCA 2018), the Court permitted the police officer, the witness who downloaded the Facebook video in question from the defendant's Facebook profile, to testify about the content of the video. Specifically, the police officer testified that it was the defendant on the video, and pointed out that it was the defendant driving the victim's car on the video. Id. at 408-09. The Court further held that, "Even non-eyewitnesses may testify as to the identification of persons depicted or heard on a recording so long as it is clear the witness is in a better position than the jurors to make those determinations. See Johnson v. State, 93 So.3d 1066, 1069 (Fla 4th DCA 2012) (emphasis supplied);

Indeed, in Lamb, the Court held that even a lay witness in a better position than the jury can identify a witness from a video, which satisfied the best evidence rule. Lamb supra at 412. The Court's holding in Lamb spotlights the legal precept that even a lay witness, much less than an expert witness, in a better position than a jury, can identify a witness in content from a video, and that the same satisfies the best evidence rule. Id. at 412.

In viewing the cases cited by counsel for the JQC, it is apparent that none of those citations are sufficient to block this expert witnesses' testimony in this instant cause. In Mitchell v. State 965 So.2d 246 (Fla. 4th DCA 2007), the appellate court cited four requirements for the admissibility of expert testimony:

> "...(1) that the opinion evidence be helpful to the trier of fact; (2) that the witness be qualified as an expert; (3) that the opinion evidence can be applied to evidence offered at trial; and (4) that evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweigh its probative value." Mitchell supra at 251. (emphasis supplied).

Mr. Wyman's expected testimony and his background, training and experience, neatly fit each of those requirements (parenthetically, Mitchell dealt with the admissibility of the proffered expert's opinion of the state of mind of the defendant in a self-defense case, a subject under the Mitchell facts which was clearly not admissible).

In Johnson v. State, 393 So.2d 1069, 1072 (1980), the Court again held that expert testimony about facts relating to the general unreliability of eye witness testimony to a robbery and murder at a pharmacy were "within the ordinary experience of jurors and did not require any expertise beyond the common knowledge of jurors" in excluding proffered testimony concerning the "general fallibility" of eye witness perceptions and identification.

In the instant cause, no such ephemeral rationale exists in Mr. Wyman's testimony.

In Johnson v. State, 314 So.2d 248 (Fla. 1975), the Court disallowed expert testimony from a pathologist who only had a 10 minute review of a photograph that he did not take, and was of such poor quality that it could hardly not be observed except by his use of a light or magnifying glass (ostensibly while he was on the stand), and had never even been seen by the witness prior to his testimony, on a subject whom he had never seen before either at the time of the injury or afterwards, and that he opined that he saw, in that atmosphere, wounds which he testified were self-inflicted "to a moral certainty." In specifically pointing to the "moral certainty," the Court disallowed this testimony, allowing that the evidence that the "expert" gave was material and central to the defendant's theory of self-defense. In this matter before the Court, certainly the witness, Mr. Wyman, possesses special knowledge and experience separate and apart from that of

an ordinary reasonable juror. Mr. Wyman, pursuant to the "Mitchell rule" previously cited, (1) because of the difficulty in interpreting and seeing exactly what the movement and position of the two parties in that hallway were, and his ability to, and success in, enhancing that video using his special knowledge and experience to do so; (2) in his previously accepted expertise and qualifications therefor; (3) that the opinion would be offered and applied to evidence at trial (the JQC's video); and (4) any danger is insubstantial as compared to the probative value of this cause, meeting every qualification which this witness has in compliance with the "Mitchell rule." Besides the specific admissibility of the expert's opinion itself, the Respondent's ability to effectively cross examine Mr. Grieper, the alleged "victim" in this cause, would be critically hampered if not permitted to place this expert's opinion before the jury, which directly contradicts Grieper's expected testimony and that given in deposition and prior statement. Moreover, with the art of cross examination, counsel for the JQC's ability to examine him on that expertise, and what he saw, and his opinion thereon, as occurred during his deposition, is entirely appropriate and adequate to alleviate any concerns that the admission of that testimony may even approach a F.S. 90.404 consideration – even more critical because Grieper is the only witness to interpret and to testify against the Respondent as to what occurred in the hallway on the date that this incident was captured on the video. The video is difficult, at best, to identify the exact placement of the hands of Respondent, or "touching" if it ever occurred, and especially the "choking" or "shaking," and the ability of a videographer who has multiple years of experience in enhancing and looking at what his experience and training tell him are "clues" that contradict Grieper's testimony, are at the foundation of the Respondent's case. None of the cases cited by the JQC, in fact or law, are applicable.

10. In the instant cause, the Respondent does not seek to have Mr. Wyman provide an opinion on the "touching," as he testified in his deposition that it was "indeterminate." However, what Mr. Wyman can explain and testify to, based on his experience and training, are the hand gestures, angles and orientation which a lay person may not be able to notice. Mr. Wyman will also be able to testify to the elevation of Judge Hawkins' hands which, absent the video enhancements done by Mr. Wyman, a lay person would not be able to see clearly the juxtaposition of hands, fingers, and other movements vis-à-vis articles of clothing which will demonstrate the lack of credibility in Grieper's statement, and it would be doubtful, at best, that they could see it at all. Mr. Wyman will be able to explain and point out to the trial panel, using the slow motion and frame by frame exhibits, rather than the full video played at regular speed, exactly what they are looking at, so they are better able to make a decision one way or another.

11. Furthermore, the victim in this cause testified that the Respondent put her hands around his neck and choked him, and that she shook him with her hands in that position. Mr. Wyman's opinion, after enhancing the video, and reviewing it in eight separate positions, utilizing his experience in noticing and being able to discern actions and positions that the normal juror would not, upon viewing that enhancement, be able to look at, appreciate, and weigh, whether or not such "shaking" or "choking" occurred in his opinion, and explaining to the jury exactly how he reached that opinion from his enhanced video and background and experience in looking for "clues" that an average person similarly would not be able discern or appreciate (See Mitchell v. State, 965 So.2d 246, 251 (Fla. 4th DCA 2007) (quoting State v. Nieto, 761 So.2d 467, 468 (Fla. 3rd DCA 2000)). This is a unique facet of his "experience" that the "average person" would not be expected to understand and appreciate;

12. Thus, in the instant cause, Mr. Wyman "possess specialized knowledge or experience in order to form a conclusion" (see counsel for the trial panel's quoted case of Johnson v. State, 314 So.2d 248 (Fla. 1975)). The expected testimony of Mr. Wyman, as well as what he, at least, partially, adverted to at deposition by counsel for the trial panel, supports this. Mr. Wyman possesses the experience, knowledge, ability and expertise, as set forth in his testimony, to give and make his opinion relevant and admissible. The weight of that testimony is a matter solely within the province of the trial panel, with which they could either agree or disagree, consistent with the law and the operative jury instructions in this matter.

WHEREFORE, Respondent respectfully urges the Court to deny the JQC's Motion in Limine heretofore filed.

I HEREBY CERTIFY that these documents have been filed on this 10th day of November, 2020, by filing electronically on the Florida E-filing Portal, and that copies of the same havebeen e-mailed accordingly to all parties and/or interested persons.

Respectfully submitted,

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