

## IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE  
FLORIDA RULES OF CRIMINAL  
PROCEDURE (RULE 3.112)

SC13-

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### PETITION OF THE CRIMINAL COURT STEERING COMMITTEE

The Supreme Court's Criminal Court Steering Committee ("Steering Committee"), by and through its chair, submits this petition recommending that a new rule of criminal procedure be adopted, requiring a two-hour (one-hundred minute) continuing legal education (CLE) course covering the law of discovery and principles of *Brady*<sup>1</sup> and *Giglio*<sup>2</sup> for attorneys handling adult felony cases.

#### Overview

On June 25, 2012, the Florida Innocence Commission issued a final report to the Court in which the Commission recommended, *inter alia*, that "Florida Rule of Criminal Procedure 3.112 be amended, or a new rule created to require that any attorney who is practicing law in a felony case must have completed at least a two hour course regarding the law of discovery and *Brady* responsibilities." *See* Appendix A, at 169-70.<sup>3</sup> As a result, the Court referred this matter to the Steering

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<sup>1</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>2</sup> *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>3</sup> The final report of the Florida Innocence Commission (and the appendices to the report) may be accessed and downloaded electronically at the Court's website. *See* [http://flcourts.org/gen\\_public/innocence.shtml](http://flcourts.org/gen_public/innocence.shtml).

Committee. *See* referral letter, Appendix B.<sup>4</sup>

### **The Florida Innocence Commission Report**

During its review of professional responsibility issues, the Florida Innocence Commission (“the Commission”) discussed a study that concluded the most common form of misconduct is the failure to disclose favorable evidence to the defense. This study, and the discussion which followed, led the Commission to vote unanimously in favor of a rule requiring attorneys handling felony cases to complete at least a two-hour course regarding the law of discovery and *Brady* responsibilities. *See* Appendix A.

### **The Steering Committee Process**

The Steering Committee is comprised of twelve members: two district court of appeal judges, six circuit court judges, one county court judge, one state attorney, one chief assistant public defender, and a criminal conflict and civil regional counsel. The members comprise a diverse group in terms of geography, circuit population, background, and experience. The Steering Committee is authorized to propose rule changes in response to a referral letter from the supreme court, pursuant to Fla. R. Jud. Admin. 2.140(f).

In an effort to obtain input from those who had served on the Florida

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<sup>4</sup> The referral letter also directed the Steering Committee to consider whether to propose an amendment to Rule 3.220. The Steering Committee is filing a separate report addressing that portion of the referral.

Innocence Commission,<sup>5</sup> the Steering Committee invited Mr. Brad King and Mr. Scott Fingerhut to participate in the referral. Mr. Brad King is the State Attorney for the 5th Judicial Circuit and Mr. Scott Fingerhut is a private criminal defense attorney in Miami. State prosecutors were also represented by Steering Committee member Mr. Bernie McCabe, the State Attorney for the Sixth Judicial Circuit. Public defenders were represented by Steering Committee member Mr. Bob Wills, the Chief Assistant Public Defender for the 17th Judicial Circuit. The Criminal Procedure Rules Committee (“CPRC”) participated in this referral and was represented by CPRC member Mr. David Gillespie.

### **The Steering Committee Review**

The Steering Committee determined relatively quickly, and with unanimity, that both prosecutors and defense attorneys handling felony cases should be required to take a course in the rules of discovery and the principles of *Brady* and *Giglio*. It was also determined that the creation of a new rule of criminal procedure, rather than an amendment of existing Fla. R. Crim. P. 3.112, would better serve this goal. The Steering Committee’s in-person and e-mail discussions focused on:

1. Whether, in addition to attorneys handling felony cases, the CLE

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<sup>5</sup> The chair of the Commission, Judge Belvin Perry, Jr., serves as a member of the Steering Committee.

requirement should apply to attorneys handling misdemeanor cases, juvenile delinquency cases, post-conviction proceedings, and criminal appeals; and

2. The most effective manner of implementing the new rule.

### **Scope of Application**

The discussion regarding the scope of application of the rule was animated and divergent. Those who were in favor of applying the CLE rule to postconviction proceedings and criminal appeals believe that it would be beneficial for any attorney participating in a felony case at any level (trial, appellate or collateral) and that a two-hour CLE course would not impose a burdensome requirement. Those opposed to extending the application of the rule believe that the underlying purpose of the CLE course is to educate trial attorneys on their legal and ethical obligations in order to prevent discovery violations from occurring at the pretrial and trial stages of a felony case. Further, those members felt that most direct appeals from criminal convictions do not involve *Brady or Giglio* issues; and while *Brady* and *Giglio* issues are frequently raised in the postconviction context, nearly all postconviction motions (and appeals) are filed by a defendant *pro se*, and therefore the CLE requirement would be largely inapplicable on the defense side of postconviction proceedings. On the State side, a postconviction proceeding at the trial level is generally handled by an assistant state attorney, who would likely already have completed the CLE requirement (as is discussed under

“Implementation”, *infra*).

The Steering Committee also sought the input of the Appellate Court Rules Committee (ACRC) regarding application of the CLE requirement to attorneys handling criminal appeals (direct or collateral). The ACRC provided a letter report to the Steering Committee. *See* Appendix C. The Criminal Practice Subcommittee of the ACRC, and the full ACRC, recommended against applying this proposed rule to attorneys handling criminal appeals. The ACRC offered two primary reasons for this position:

- The *Brady* and *Giglio* issues meant to be addressed by the proposed rule are rarely raised in criminal appeals;
- In the normal course of appellate practice, appellate practitioners who may be faced with these issues would be expected to thoroughly and independently review the current law applied to these issues to ensure they have the most up-to-date law regarding the issue on appeal.

### **The Steering Committee’s Recommendations**

The Steering Committee ultimately recommended:

1. By unanimous vote, that the Court adopt a rule requiring any attorney of record participating in an adult felony case to complete a 100-minute CLE course.
2. By a vote of 7-5, that the CLE requirement should apply to attorneys

handling adult felony postconviction proceedings at the trial level.

3. By unanimous vote, that the CLE requirement should not apply to attorneys handling misdemeanor or juvenile delinquency cases. As a practical matter, most of these cases will be handled by prosecutors and public defenders (who will in fact already have completed the required CLE course, as discussed at “Implementation” *infra*).
4. By a vote of 10-2, that the CLE requirement should not apply to attorneys handling criminal appeals (direct or collateral), and that a committee comment be added to reflect this.

Based upon the votes as described above, proposed Rule 3.113 provides:

**Rule 3.113. Minimum Standards for Attorneys in Felony Cases**

Before an attorney may participate as counsel of record in the circuit court for any adult felony case, including postconviction proceedings before the trial court, the attorney must complete a course, approved by The Florida Bar for continuing legal education credits, of at least 100 minutes and covering the legal and ethical obligations of discovery in a criminal case, including the requirements of rule 3.220, and the principles established in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972).

**Implementation**

As for implementation, the Steering Committee decided that all attorneys handling felony cases should be required to complete the course, without

consideration of the attorney's experience with criminal cases.<sup>6</sup>

Also, it was represented to the Steering Committee that the Florida Prosecuting Attorneys Association ("FPAA") and the Florida Public Defenders Association ("FPDA") were in the process of creating separate 50-minute presentations on the rules of discovery and *Brady* responsibilities, which could be consolidated into a single, 100-minute CLE course. The current plan is to submit these presentations to the Florida Bar for approval for CLE credit. After approval, the seminars will be video recorded and each will be reviewed by the other organization for accuracy. The videos will then be sent to The Florida Bar in order for the Bar to place the video recorded presentations on its web page. It is also anticipated that the FPAA and FPDA will post the videotapes of the seminars on their websites. If all goes according to plan, attorneys will be able to view the seminars for free via the internet. The state attorney and public defender representatives of the Steering Committee indicated that it is intended that all assistant state attorneys and assistant public defenders will be required to complete this CLE course as a part of their training.

After much discussion, the Steering Committee concluded the best way to implement the proposal would be for the Court to promulgate the new rule in an

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<sup>6</sup>One Steering Committee member proposed adding a good cause exception to the new rule. However, no other member of the Steering Committee agreed with this proposal.

opinion, but for the Court to make the rule effective two years after the date of the opinion. The Steering Committee believes this would provide adequate time for the development of the curriculum and course by the FPAA and FPDA, the approval process by The Florida Bar, the recording of the presentations, and the placement of the CLE presentations on the appropriate websites. The two-year period will also allow adequate time for attorneys to complete the CLE course.

### **Conclusion**

The Steering Committee recommends that a new rule of criminal procedure be adopted requiring that, before an attorney may participate as counsel of record in the circuit court for any adult felony case, including postconviction proceedings before the trial court, the attorney must complete a course, approved by The Florida Bar for continuing legal education credits, of at least 100 minutes and covering the legal and ethical obligations of discovery in a criminal case, including the requirements of Fla. R. Crim. P. 3.220, and the principles established in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972).

The Steering Committee recommends that the Court make the effective date of the rule at least two years from the date of the Court's opinion, to enable the course and curriculum to be fully developed and to allow adequate time for attorneys to complete the CLE course.

The Steering Committee further recommends that this rule not be applied to



attorneys participating as counsel of record in criminal appeals (direct or collateral), and that a committee commentary be added to reflect this.

The proposed rule, together with the Steering Committee's commentary, are contained in Appendices D and E. Note: The proposed rule has not been published.

**This petition contains the following appendices:**

Appendix A: Relevant portions of final report of the Florida Innocence Commission.

Appendix B: Supreme Court referral letter dated October 9, 2012.

Appendix C: Report of Appellate Court Rules Committee on application of proposed new rule, Fla. R. Crim. P. 3.113, to criminal appeals.

Appendix D: Proposed new rule, Fla. R. Crim. P. 3.113, with Steering Committee commentary.

Appendix E: Proposed new rule, Fla. R. Crim. P. 3.113, in two-column format, with Steering Committee commentary.

Respectfully submitted,

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Judge Kevin Emas  
Florida Bar No. 353566  
Chair, Criminal Court Steering Committee  
Third District Court of Appeal  
2001 S.W. 117<sup>th</sup> Avenue  
Miami, FL 33175  
305-229-3200

**CERTIFICATE OF TYPE AND FONT**

I hereby certify that this Petition has been typed using Times New Roman 14.

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Judge Kevin Emas  
Chair, Criminal Court Steering Committee  
Florida Bar No.: 353566

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition has been furnished by interoffice mail to Justice Jorge Labarga, Liaison Justice to the Steering Committee and Ms. Deborah Meyer, Director of Central Staff, 500 S. Duval Street, Tallahassee, Florida, and by U.S. Mail to Mr. Mark Caliel, Chair, Criminal Procedure Rules Committee, State Attorney Office, 220 East Bay Street, Jacksonville, FL 32202, this \_\_\_\_\_ day of March, 2013.

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Judge Kevin Emas  
Chair, Criminal Court Steering Committee  
Florida Bar No. 353566