

APPENDIX A

**Florida Supreme Court's Criminal Court Steering Committee
The Honorable Kevin Emas, Chair
March 28, 2013**

The Florida Innocence Commission-Final Report

(g) Professional Responsibility

When one thinks of wrongful convictions, an incompetent defense attorney or an overzealous prosecutor may spring to mind. One study has shown that the single most definitive factor in whether a defendant receives a capital sentence is the quality of their defense attorney's representation. Robert H. Jackson, later a U.S. Supreme Court Justice and the lead prosecutor of the Nazi war criminals at the Nuremberg trials, said in 1940 as U.S. Attorney General in a speech to federal prosecutors: "The prosecutor has more control over life, liberty, and reputation than any other person in America."

The Innocence Commission chose to focus its study of professional responsibility solely on defense attorneys and prosecutors due to the central role that both play in the criminal justice system. Professional responsibility issues for both sides of the adversarial system have played a role in wrongful convictions. According to research conducted by the Innocence Project, 54% of the first 255 DNA exonerees raised claims of ineffective assistance of counsel. Further analysis by the Innocence Project shows that appellate courts rejected the overwhelming majority of these claims (81%).

In 2009, The Justice Project determined that prosecutorial misconduct was a factor in dismissed charges, reversed convictions, or reduced sentences in at least

The Florida Innocence Commission-Final Report

2,012 cases since 1970, thirty-two of which involved the wrongful convictions of innocent individuals.

Innocence commissions and task forces in other states have made numerous recommendations for defense attorneys and prosecutors relating to professional responsibility. Common recommendations for defense attorneys include increased educational and training requirements, especially for public defenders, as well as better compensation to retain experienced attorneys and to provide for trial expenses such as expert witness testimony. For prosecutors, common recommendations include requiring policies for exculpatory material (*Brady*) disclosures, open discovery rules, and “best practices” manuals for training new lawyers. Many of these states have also recommended increased funding for the judiciary.

Because attorney malpractice or misconduct may go undiscovered or unreported, addressing steps to increase professional responsibility amongst criminal practitioners is of the utmost importance.

The Commission met on May 21st and May 22nd in Tampa, Florida, to discuss the topic of professional responsibility. Sheriff Bill Cameron, Mr. Todd Doss, Esquire, Mr. Ed Kelly, Esquire, State Attorney Brad King, Public Defender Julianne Holt, and Assistant Public Defender Rory Stein addressed the Commission. The complete presentations and Commission discussion with the

The Florida Innocence Commission-Final Report

speakers are contained in the Commission minutes, attached at Appendix H. The presentations of Mr. King, Ms. Holt, Mr. Doss, Mr. Kelly, and Mr. Stein are relevant to both the issue of professional responsibility and the issue of funding of the criminal justice system. However, the main thrust of their discussions with the Commission centered on funding and the continuing attempt to provide experienced attorneys to represent both the state and defense in criminal cases. Therefore, their presentations are addressed in section VI (h) of this report.

Sheriff Cameron addressed the Commission with regard to his thoughts on professional responsibility. He listed four topic areas that he thought could be discussed by the members that were brushed over by the Commission at earlier meetings.

(1) Suspect Identifications.

Sheriff Cameron noted that the Commission spent a great deal of time discussing photo arrays used by witnesses during criminal investigations and the use of independent photo line-ups. There also was discussion amongst the Commission members about in-court identifications. Sheriff Cameron asked if the Commission should recommend that there be no in-court identification of the defendant. The only identification evidence that would be admitted is the identification made during the investigation of the crime. He noted that he was amazed that witnesses could identify a suspect in court when a great deal of time

The Florida Innocence Commission-Final Report

had passed and the defendant had changed his or her appearance. Sheriff Cameron said it made little sense to him that there is an in-court identification of the suspect. This raises a lot of questions about the validity of the identification.

(2) Ineffective Assistance of Counsel

Sheriff Cameron noted that the Commission had listened to the testimony of four exonerees who appeared before the Commission. The issue of the quality of the representation of these individuals was raised during the discussions. He commented that the members had discussed the underfunding and the understaffing of the public defender's office and the inexperience of some assistants. He asked if the Commission should recommend that in at least capital and life cases, more experienced private counsel be required to be assigned to the case and that the state fund this counsel for the indigent defendant. Sheriff Cameron said there is clearly a difference in the quality of representation between highly paid counsel and other attorneys.

(3) New Technology Evidence Testing

Sheriff Cameron reminded the Commission that there had been discussions in some of the exoneration cases regarding continued requests to have old evidence tested with new DNA technology, but those requests were repeatedly denied by the courts. It took Mr. James Bain, an exoneree, five years to get testing under the new science. When new science appears on the market how do we address this in

The Florida Innocence Commission-Final Report

the future? Can we take discretion away from the trial court? Do we recommend certain guidelines that the court must follow? As science changes, this could become a greater issue of concern.

(4) DNA Funding

Sheriff Cameron commented that the single most current and relevant issue in trying to ensure fewer wrongful convictions is the funding of DNA sampling at the time of arrest and DNA evidence testing. Sheriff Cameron noted that the Florida Legislature had passed a law permitting the taking of a DNA sample from a person who is arrested. This legislation was an unfunded mandate. He suggested that there is no greater thing the state can do than to provide adequate funding for laboratory funding for DNA testing of persons arrested for the commission of a crime.

After the presentation by Sheriff Cameron, the Commission turned its attention to the need for adequate training for prosecution and defense counsel. The Commission recognizes that inexperienced attorneys are deficient in the taking of depositions, filing and responding to suppression motions, and completely understanding the requirements of Florida's rules of criminal procedure, including discovery.

Sheriff Cameron noted that all attorneys are members of The Florida Bar. He asked why state attorneys and public defenders could not have requirements set

The Florida Innocence Commission-Final Report

by The Florida Bar to be continually educated in the field of criminal law and have the courses set by the Florida Prosecuting Attorneys Association and the Florida Public Defender Association.

Mr. Michael Ramage, General Counsel for FDLE, thought that there was room for law schools to focus on practical training for attorneys who desired to become assistant state attorneys or assistant public defenders. Mr. Ramage said it is clear that law schools do not teach law students how to be assistant state attorneys or assistant public defenders. Students receive very little practical experience. Instead, they are taught legal theory.

Judge Perry asked why simulated training could not be provided so that attorneys get the basics without having to wait for a full training class. Judge Perry suggested that one way to handle the issue was through on-line courses.

Ms. Barzee raised the issue of staffing in public defender and state attorney offices. There is a question of whether you should have a young attorney handling a third degree felony, when the penalty could be thirty years, not five.

Ms. Daniels noted that the professionalism course required by The Florida Bar is not well suited for state attorneys and public defenders. There are topics such as setting fees that are not relevant to what prosecutors and defense counsel do. Ms. Daniels commented that her office has to pay for assistants to attend the course. The attorneys have reported back saying they lose a half-day of work and

The Florida Innocence Commission-Final Report

it is a waste of time. Ms. Daniels recommended that public defenders, state attorneys and attorneys who do criminal appellate work for the Department of Legal Affairs have a separate professionalism program.

Ms. Snurkowski noted that there has not been any success in getting the Bar to change the curriculum. The Bar does not acknowledge that there is a body of graduates who come out of law school and go to state offices.

Mr. Coxe commented that taking the professionalism course for new lawyers does not even require that an attorney leave his or her office to obtain the continuing education training. He said one problem that has been identified is that attorneys do not recognize what *Brady* requires. Rule 3.112 of the Florida Rules of Criminal Procedure requires that an attorney have twelve hours of special education on the defense of capital cases. The rule does not say you take the course only if you can afford it. For all lawyers it is not unreasonable to have a two hour program on *Brady* delivered on DVD or compact disk. In the event an attorney fails to certify that the course has been completed, the attorney would be prohibited from representing any defendant in a felony case.

Mr. King advised that many years ago, a prosecutor could opt out of the professionalism training until such time as the person left the state attorney's office. The course is now mandatory for all attorneys who practice in Florida. Ms. Daniels suggested that the previous requirement that the course be taken after the

The Florida Innocence Commission-Final Report

attorney leaves the service of the public defender or state attorney be reinstituted. This would help in two ways. First, the state attorneys and public defenders would not have to bear the \$160.00 cost of the program. The attorney could pay for the cost of the course when he or she leaves the office. Second, have The Florida Bar approve a course for prosecutors and defense attorneys. *Brady* and discovery obligations would be included in the professionalism program.

Mr. Coxe said the problem with exempting out one class of lawyers is that other lawyers would argue they should not have to take the course either. The Bar has said that the basics of professionalism need to be taught to all attorneys. Training on professionalism works if it is uniform for everyone.

Mr. Hill said it made a lot of sense to offer a professionalism program for new attorneys. He did not think the Commission could mandate what a law school does. He said the Commission should encourage the law schools to offer a course in being a public defender or state attorney.

Dean Acosta thought perhaps this should go a little further. Law schools have externship programs with public defender and state attorney offices. It includes a component of what it means to be a state attorney or public defender. He said the law schools should shift to an apprentice model and not an externship model. He suggested a student should actually spend his or her final semester in a public defender or state attorney office. This gives the student a set of skills that

The Florida Innocence Commission-Final Report

you can't get in the classroom. He suggested recommending that law schools be encouraged to work with state attorneys and public defenders and imbed students in those offices during the final semester by serving as assistant state attorneys or assistant public defenders.

Judge Perry drew the Commission's attention to a report by the Justice Project. Judge Perry pointed out that according to the report; the most common form of misconduct is the failure of prosecutors to provide favorable evidence to the defense. He asked if someone would like to offer a motion that the FPAA develop training programs that can be remotely delivered dealing with discovery, *Brady*, *Giglio*, and other cases setting forth the prosecutions' obligations. In addition, any motion should include recommending that the Legislature provide funding in this area.

Mr. King moved to recommend to the Florida Supreme Court that Florida Rule of Criminal Procedure 3.112 be amended 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. The motion was seconded, and passed the Commission by a unanimous vote.

Staff advised the Commission that two choices were available with regard to the recommendation. The Commission could file a petition with the Court seeking an amendment to rule 3.112. The problem with this procedure is that the

The Florida Innocence Commission-Final Report

Commission will no longer exist after June 30, 2012. In addition, the Commission staff will terminate their employment with the Office of the State Courts Administrator, and no staff member will be available to follow through with the rule proposal. As an alternative, the Commission could recommend that the Court forward the recommendation for a rule amendment to The Florida Bar Criminal Procedure Rules Committee. Ms. Snurkowski asked if the Commission could recommend to the Court that the rules committee handle this within a certain period of time. The members were advised that the Commission could make that recommendation, but it is within the discretion of the Court to set any time limits.

Commission members discussed the possibility of recommending to the Court that the Supreme Court Criminal Court Steering Committee be tasked with proposing a rule amendment to the Court because it is more streamlined than the rules committee. Florida Supreme Court Administrative Order AOSC10-34 sets forth the authority of the Criminal Court Steering Committee. The committee is not specifically authorized to propose a rule amendment to rule 3.112. However, the committee shall perform any task in furtherance of justice in criminal cases as may be requested by the Chief Justice. In addition, the committee is authorized to pursue a proposed rule amendment jointly with the appropriate Florida Bar procedural rules committee and jointly review any amendments or proposals and indicate whether the Bar committee concurs, disagrees, or recommends

The Florida Innocence Commission-Final Report

modifications, further study, or other action with regard to the proposed rule amendments, and thereafter file any proposed amendments and comments in petition form with the Clerk of the Florida Supreme Court.

Therefore, the Commission recommends that the Court issue an administrative order authorizing the Criminal Court Steering Committee to jointly review with the Criminal Procedure Rules Committee the recommendation of the Commission, and consider filing a petition to amend rule 3.112, or create a new rule of criminal procedure to address the education requirement proposed by the Commission.

Mr. Hill moved that the Commission approve a resolution to have the FPAA and the FPDA work together to develop a course to meet the two hour requirement. The motion passed by a unanimous vote.

Mr. King moved that the Commission recommend to The Florida Bar that it suspend the Practicing with Professionalism requirement for assistant state attorneys and assistant public defenders until they leave their employment as government attorneys. However, the assistant state attorney and assistant public defender would be required to take a professionalism course offered by the FPAA or FPDA. The motion failed by a vote of 10 to 9.

Dean Acosta suggested there be more on-line courses for prosecutors and public defenders. He moved that the Commission recommend that the Florida

The Florida Innocence Commission-Final Report

Legislature fund the FPAA and FPDA, the Department of Legal Affairs, and the office of criminal conflict and civil regional counsel, to set up a series of on-line training courses that are available to all government attorneys practicing in the criminal law area. The motion passed by a vote of 18 to 1.

Commissioner Bailey asked the Commission to consider recommending that the Florida Legislature increase funding for FDLE to retain crime laboratory technicians and that all felony offenses be included in the DNA database in order to remove repeat offenders from the street. A complete discussion of the subject matter is included in the Commission minutes at Appendix H. The Commission approved this recommendation by a unanimous vote. The recommendation is set forth in section VII of this report.

Ms. Barnett made a motion to have the Commission recommend to the Florida Legislature to increase funding for the Florida Department of Law Enforcement DNA laboratories to increase the DNA profile database and accelerate its full implementation no later than 2015. The motion passed by a vote of 18 to 1. This recommendation is set forth in section VII of this report.

Commissioner Bailey moved that the Commission recommend that the Florida Legislature reevaluate the salaries and staffing of the biology section of the FDLE crime laboratories in order for FDLE to be more competitive and able to

The Florida Innocence Commission-Final Report

hire and retain trained personnel. The motion passed by a unanimous vote. This recommendation is set forth in section VII of this report.

Mr. Coxe and Ms. Walbolt both recommended that in the event a criminal case is reversed because of attorney misconduct, the name of the attorney who has engaged in such misconduct should be identified by name in any opinion issued by the trial or appellate court. In addition, Ms. Walbolt recommended that the attorney found to have engaged in misconduct should be referred to The Florida Bar for disciplinary action.

Judge Perry suggested that the Commission recommend to the Florida Legislature that a study of the caseloads of the state attorneys, public defenders, and the office of criminal conflict and civil regional counsel, be done by the Office of Program Policy Analysis and Government Accountability (OPPAGA).

The Commission held its last meeting on June 11, 2012 in Orlando, Florida. At the meeting, the members considered whether to adopt as recommendations the proposals of Ms. Walbolt and Mr. Coxe. The full discussion of the members is set forth in the June 11, 2012 Commission minutes at Appendix Q. All of the members agreed that misconduct on the part of the attorneys is a very serious matter that deserves the full attention of The Florida Bar. As a general proposition, the members agreed that the publication in a court opinion of the name of an attorney engaged in serious misconduct might serve as a deterrent. However, Mr.

The Florida Innocence Commission-Final Report

King was concerned that the publication of the name would tend to be one-sided, since the state has no ability to appeal an acquittal in a criminal case. The name of a prosecutor could be published when there was an appeal of a conviction. However, the conduct of any defense attorney in cases of acquittal would never be disclosed. Ms. Snurkowski was concerned that in the event an attorney was cited for misconduct, and the allegations were false, it would be difficult to purge the name of the innocent attorney from the court opinion.

Upon the conclusion of the discussion regarding the recommendations of Ms. Walbot and Mr. Coxe, Mr. Coxe moved that the appellate courts consider the identification of the lawyer who engages in serious misconduct, whether defense or prosecution, that results in a reversal of a conviction. The motion was seconded by Judge Silvernail. The motion passed by a vote of 18 to 1, with Mr. King casting a no vote.

Mr. Hill moved that The Florida Bar carefully review the decisions of the trial or appellate courts which result in a reversal because of attorney misconduct. The motion was seconded by Ms. Daniels. The motion passed by a vote of 18-1 vote, with Mr. King casting a no vote.

The Commission considered the recommendation of Judge Perry that a study of the caseloads of state attorneys, public defenders, and the office of criminal conflict and civil regional counsel be conducted by the Office of Program Policy

The Florida Innocence Commission-Final Report

Analysis and Government Accountability (OPPAGA). Although the members of the Commission are in full agreement that the criminal justice system in Florida is grossly underfunded, and that the Florida Legislature is fully aware of the issue, the members could not reach a consensus on what type of study should be conducted by the Legislature.

(h) Funding of the Criminal Justice System

Over the course of several meetings, the Commission heard presentations from several speakers who addressed the inadequate funding of the criminal justice system. These presentations, along with materials contained in Commission notebooks, and the independent knowledge of the twenty-five Commission members, has led the Commission to issue this statement:

Inadequate funding leads to mistakes that may cause wrongful convictions.

The following presentations before the Commission highlight the seriousness of the problem in Florida:

Mr. Todd Doss, Esquire, and Mr. Ed Kelly, Esquire

Mr. Doss and Mr. Kelly spoke on behalf of the Florida Association of Criminal Defense Lawyers (FACDL), as well as expressing their personal views on the topic of professional responsibility.

The Florida Innocence Commission-Final Report

(6) The Commission recommends that state attorneys notify the Florida Department of Law Enforcement if a case is dismissed or ends in a plea agreement so evidence is not unnecessarily tested at the laboratories.

(7) The Commission recommends that the Florida Judicial College program annually provide education at the New Judges College on the admissibility of expert testimony.

(c) Preservation of Evidence

The Commission recommends that the Florida Legislature continues its work in evidence preservation for DNA testing under section 925.11 and section 925.12, Florida Statutes (2011), which could lead to the exoneration of innocent defendants.

(d) Professional Responsibility

(1) The Commission recommends that the Florida Legislature fund the Florida Prosecuting Attorneys Association, the Florida Public Defender Association, the Department of Legal Affairs, and the office of criminal conflict and civil regional counsel, to set up a series of on-line training courses that are available to all government attorneys practicing in the criminal law area.

(2) The Commission recommends to the Florida Supreme Court 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

The Florida Innocence Commission-Final Report

completed at least a two hour course regarding the law of discovery and *Brady* responsibilities.

(3) The Commission approves a resolution to have the Florida Prosecuting Attorneys Association and the Florida Public Defender Association work together to develop a course to meet the two-hour *Brady* and discovery training requirement.

(4) The Commission recommends that the appellate courts consider the identification of the lawyer who engages in serious misconduct, whether defense or prosecution, that results in a reversal of a conviction.

(5) The Commission recommends that The Florida Bar carefully review the decisions of the trial or appellate courts which result in a reversal because of attorney misconduct.

(e) Funding of the Criminal Justice System

(1) The Commission recognizes the experience and stability of staffing in the state attorney, public defender, attorney general, and regional conflict counsel offices, reduce the likelihood of wrongful convictions and increase the likelihood of effective assistance of counsel.

Therefore, the Commission recommends that the Florida Legislature provide supplemental funding to pay for student loans by enacting 2006 Senate Bill 362 and 2006 House Bill 81. These bills are attached at Appendix R.