

RECEIVED, 9/27/2013 14:18:32, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE
FLORIDA RULES OF CRIMINAL
PROCEDURE (RULE 3.113)

SC13-552

COMMENT OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Public Defender Association (FPDA) comprises 19 elected public defenders and hundreds of attorney assistants. These attorneys represent indigent clients in criminal proceedings at every level of the Florida court system. This experience enables the FPDA to provide invaluable feedback on proposed rules. For the following four reasons, the FPDA **opposes** proposed Florida Rule of Criminal Procedure 3.113.

First, the rule paints with too broad a brush. The impetus of the rule was the Florida Innocence Commission's observation "that attorneys do not recognize what *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] requires." *See Florida Innocence Commission Final Report* at page 129. Although all attorneys practicing criminal law should know what *Brady*¹ requires, the lawyers who should know it best—and therefore should receive the training on it—are the lawyers who have to comply with it: prosecutors. After all, it is only when prosecutors fail to comply with

¹ *See also* Fla. R. Crim. P. 3.220(b)(4); R. Regulating Fla. Bar. 4-3.8(c).

Brady's requirements that harm is done. By contrast, defense lawyers are hungry for exculpatory and mitigating evidence, and they will introduce it if they have it. And if they have it and don't introduce it, the problem isn't lack of knowledge about the discovery rules: it's a lack of judgment about what is exculpatory or mitigating evidence—something that will take a lot longer than 100 minutes to fix.

In short, while the requirement that all lawyers who try felony cases receive training on “discovery in a criminal case” has an even-handed appeal, the solution is not tailored to the problem it sought to address: some prosecutors' failure to comply with the requirements of *Brady*.

Second, quality legal representation—civil or criminal—requires training and continuing education on a broad array of subjects and topics. Public defenders consider training and education part of their mission to provide effective and zealous representation. And while knowledge of the discovery rule is important, so too is knowledge of the rules of evidence, sentencing law, cross-examination techniques, and DNA analysis (to name just a few). In short, it is a mistake to single out one topic for mandatory training when there are so many important topics. And it is especially a mistake to single out this one when the problem is that some prosecutors have difficulty complying with their legal and ethical responsibility to disclose exculpatory or mitigating evidence.

Third, and more fundamentally, our rules of procedure should stick to procedure. A rule of procedure that mandates lawyer training on the problem *du jour* ventures into the subjects of lawyer regulation and discipline—issues better addressed in other ways and in other venues. For example, at one time—and perhaps still today—the problem of improper closing arguments in civil cases was widespread. *See Hammond v. Mulligan*, 667 So. 2d 854, 855-56 (Fla. 5th DCA 1996) (“It is evident from the expressions of concern and frustration in opinions issued from this court and the other district courts of appeal that the problem of improper closing arguments is widespread.” c.o.). But a rule of civil procedure mandating training on this topic—a rule that would require all lawyers to suffer for the sins of a few—would not be the right way to combat the problem.

Fourth, the FPDA believes that sanctions are available and should be utilized for a prosecutor’s failure to comply with the ethical and legal requirement of providing the defense with exculpatory information. However, this falls within the realm of lawyer regulation and discipline as does the mandating of continuing legal education.

Two final observations. First, the FPDA’s opposition to this proposed rule is not inconsistent with its support of Florida Rule of Criminal Procedure 3.112, which addresses the issue of defense attorney competence in capital cases. Rule

3.112 requires training directed to “the defense of capital cases” but it does not dictate the specific areas of training. Rather, it sets minimum requirements that must be fulfilled. The FPDA supported these standards and annually conducts training for capital defenders (Life Over Death). The FPDA will continue to fulfill its mission to provide training to defenders in capital defense as well as training in many other areas, including discovery obligations. Indeed, the FPDA sponsors training seminars twice a year (Summer Conference and Winter Conference), and twice a year it holds two three-day trial practice seminars (Defender College). In fact, this year’s Winter Conference will have a panel presentation on discovery and *Brady*.

Second, it should be noted that the FPDA representative to the Innocence Commission advocated to the FPDA Board to support the proposed rule. However, the majority of the board believed that it was inappropriate to dictate training in the Rules of Criminal Procedure particularly in an area that is uniquely a prosecutorial function (disclosing exculpatory and mitigating evidence). The board did, however, support the proposed training at the Winter Conference on the defense discovery obligation.

For these reasons, this Court should not adopt proposed rule 3.113.

CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I certify that a copy of this comment has been electronically filed with the Court and that a copy was furnished by email to the Honorable Judge Kevin Emas, Committee Chair, Third District Court of Appeal, 2001 S.W. 117th Avenue, Miami 33175, emask@flcourts.org, and on the Staff Liaison to the Steering Committee, Bart Schneider, Office of the General Counsel, 500 S. Duval Street, Tallahassee 32399-1925, schneidb@flcourts.org, this 27th day of September, 2013.

/s/ Paul E. Petillo
Paul E. Petillo
Assistant Public Defender
Fla. Bar No. 508438
Office of the Public Defender
15th Circuit
421 Third Street
West Palm Beach, FL 33401
ppetillo@pd15.state.fl.us
appeals@pd15.org