

IN THE SUPREME COURT OF FLORIDA

IN RE: FLORIDA INNOCENCE
COMMISSION'S RECOMMENDED
AMENDMENT TO FLORIDA RULE OF
CRIMINAL PROCEDURE 3.220

SC13-1541

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**REPORT OF THE CRIMINAL COURT STEERING COMMITTEE
REGARDING FLORIDA INNOCENCE COMMISSION'S
RECOMMENDED AMENDMENT TO
FLORIDA RULE OF CRIMINAL PROCEDURE 3.220**

The Supreme Court's Criminal Court Steering Committee ("Steering Committee"), by and through its chair, submits this report addressing whether, in light of the recommendations of the Florida Innocence Commission, Fla. R. Crim. P. 3.220 should be amended. After thorough study and spirited discussion, a majority of the Steering Committee recommends that rule 3.220 not be amended at this time.¹

Background and Overview

On June 25, 2012, the Florida Innocence Commission ("the Commission") issued a final report to the Court. *See* Appendix A. That report included a recommendation that the Court amend rule 3.220 to: (1) create a new category of witnesses subject to disclosure ("informant witnesses"); and (2) require the prosecution to disclose to the defense an informant witness's criminal history,

¹ As a result, and unless this Court directs otherwise, the Steering Committee does not intend to file a petition for the instant referral.

testimony in other cases, financial compensation, reduction in sentence or other benefits conferred. As a result, the Court referred this matter to the Steering Committee for consideration. A copy of the referral letter is attached to this report. *See* Appendix B.²

Overview of Florida Innocence Commission Report

During its review of professional responsibility issues, the Commission discussed a study that concluded the most common form of misconduct is the failure to disclose favorable evidence to the defense. The Commission's report included a discussion regarding "Informants and Jailhouse Snitches." The Commission report indicated that jailhouse informants testified in over 15% of wrongful conviction cases and that, of the exonerees released from death row, 45.9% were convicted in part, due to false informant testimony. According to the Commission, fabricated testimony is a leading cause of wrongful convictions in capital cases. *See* Appendix A, at 49.

² The referral letter also directed the Steering Committee to consider whether to propose the adoption of a rule imposing a continuing legal education requirement on attorneys handling felony cases. *See* referral letter, Appendix B. Simultaneous with this report, the Steering Committee has filed a petition recommending the adoption of a new rule (proposed rule 3.113), which would require attorneys handling adult felony cases to complete a two-hour continuing legal education course covering the law of discovery and the principles of *Brady* and *Giglio*. The text of proposed rule 3.113 can be found at note 14 *infra*.

As a result, the Commission made three recommendations,³ one of which included amendments to rule 3.220 that “would ensure the information regarding the possible testimony of an informant witness is disclosed to the defense.” *See* Appendix A, at 167.⁴

The Steering Committee Process

The Steering Committee has twelve members: two district court of appeal judges, six circuit court judges, a county court judge, a state attorney, a 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.

In an effort to gather additional information from those who served on the Commission, 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 Fifth Judicial Circuit and Mr. Scott Fingerhut is a private criminal defense attorney

³ The Commission made two other recommendations under the heading “Informants and Jailhouse Snitches:” (1) that the Florida legislature adopt a statute requiring electronic recording of statements of suspects during a custodial interrogation; and (2) that the Court direct the Committee on Standard Jury Instructions to propose a standard jury instruction regarding the testimony of “informant witnesses.”

⁴ 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.

in Miami.⁵ Both Mr. King and Mr. Fingerhut served as members of the Innocence Commission workgroup that studied the “informant” issue for the full Commission. Additionally, the Steering Committee invited a representative from the Criminal Procedure Rules Committee (Mr. David Gillespie) to participate in the Steering Committee’s discussion.

Specifics of Florida Innocence Commission Report

In order to place into context the discussion of the Steering Committee, below are additional details of the Commission’s Report regarding informant witnesses:

According to the Commission, figures from the Innocence Project and other studies shows that fabricated testimony from a “jailhouse snitch” has been a factor in nearly 50% of wrongful convictions. The problem appears to be that jurors are not particularly adept at determining whether a “jailhouse snitch” is credible or not. As a result, some states have responded with a variety of reforms, for example: requiring that testimony of a “jailhouse snitch” be corroborated; mandating a pre-trial reliability hearing before admitting such testimony; providing a cautionary jury instruction; and imposing additional discovery obligations.

Following a discussion, the Commission rejected the concept of a

⁵ Additionally, Steering Committee member Judge Belvin Perry Jr. served as the chair of the Florida Innocence Commission.

corroboration requirement and a pre-trial reliability hearing. The Commission did recommend that the Court adopt a standard cautionary jury instruction.⁶

With regard to discovery obligations, the Commission created a workgroup to consider how rule 3.220 addresses the disclosure and testimony of “jailhouse snitches” and informants. As mentioned above, the workgroup included Mr. Brad King and Mr. Scott Fingerhut. The Commission also solicited input from the Florida Prosecuting Attorneys Association (“FPAA”).

The Commission’s workgroup was not able to reach a consensus on an amendment to rule 3.220. Ultimately, the Commission considered recommendations from the workgroup and from the FPAA. The Commission’s final recommendation was to amend two subsections of rule 3.220(b) as follows (Commission’s recommended additions are underlined):

(b) Prosecutor’s Discovery Obligation.

(1) Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and permit the defendant to inspect, copy, test, and photograph the following information and material within the state’s possession or control, except that any property or material that portrays sexual performance by a child or constitutes child pornography may not be copied, photographed, duplicated, or otherwise reproduced:

⁶The Supreme Court Committee on Standard Jury Instructions in Criminal Cases filed a petition proposing the adoption of such a standard jury instruction. That petition is pending before the Court. *See In Re: Standard Jury Instructions Criminal Cases, Petition 2012-07 (SC12-2593).*

(A) a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial under section 90.404(2), Florida Statutes. The names and addresses of persons listed shall be clearly designated in the following categories:

(i) Category A. These witnesses shall include (1) eye witnesses, (2) alibi witnesses and rebuttal to alibi witnesses, (3) witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant, which shall be separately identified within this category, (4) investigating officers, (5) witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged, (6) child hearsay witnesses, ~~and~~ (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify, and (8) informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried.

(ii) Category B. All witnesses not listed in either Category A or Category C.

(iii) Category C. All witnesses who performed only ministerial functions or whom the prosecutor does not intend to call at trial and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense;

(B) the statement of any person whose name is furnished in compliance with the preceding subdivision. The term "statement" as used herein includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, but shall not include the notes from which those reports are compiled;

(C) any written or recorded statements and the substance of any oral statements made by the defendant, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements;

(D) any written or recorded statements and the substance of any oral statements made by a codefendant;

(E) those portions of recorded grand jury minutes that contain testimony of the defendant;

(F) any tangible papers or objects that were obtained from or belonged to the defendant;

(G) whether the state has any material or information that has been provided by a confidential informant;

(H) whether there has been any electronic surveillance, including wiretapping, of the premises of the defendant or of conversations to which the defendant was a party and any documents relating thereto;

(I) whether there has been any search or seizure and any documents relating thereto;

(J) reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons; and

(K) any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the defendant.

(L) any tangible paper, objects or substances in the possession of law enforcement that could be tested for DNA.

(M) whether the state has any material or information that has been provided by an informant witness, including:

(i) the substance of any statement allegedly made by the defendant about which the informant may testify;

(ii) a summary of the criminal history record of the informant witness;

(iii) the time and place under which the defendant's alleged statement was made;

(iv) whether the informant witness has received, or expects to receive, anything in exchange for his or her testimony;

(v) the informant witness' prior history of cooperation, in exchange for any benefit, as known to the prosecutor.

Committee Notes

2012 Amendment.

3.220(b)(1)(A)(i)(8) is not intended to limit in any manner whatsoever the discovery obligations under the other provisions of the rule.

3.220(b)(1)(M)(iv) The committee recognizes the impossibility of listing in the body of the rule every possible permutation expressing a benefit by the state to the informant witness. Although the term "anything" is not defined in the rule, the following are examples of benefits that may be considered by the trial court in determining whether the state has complied with its discovery obligations. The term "anything" includes, but is not limited to, any deal, promise, inducement, pay, leniency, immunity, personal advantage, vindication, or other benefit that the prosecution, or any person acting on behalf of the prosecution, has knowingly made or may make in the future.

The Steering Committee Review and Discussion

The Steering Committee discussion started with presentations from Mr. Brad King, Mr. Scott Fingerhut, and Judge Belvin Perry Jr. about the Innocence Commission's work on "informants and jailhouse snitches." Mr. King informed the Steering Committee that the FPAA was opposed to any rule amendment, but that the FPAA was trying to be amenable to the work of the Commission. Mr. King pointed out that the Commission had a problem with the definition of the

term “informant,” that he thought the Commission was trying to limit the rule to “jailhouse snitches,” but that the Commission was unsuccessful. Mr. King also thought the existing rules of discovery and constitutional obligations render an amendment to the rule unnecessary.

Mr. Fingerhut stated that the Commission’s proposal went beyond the concept of “jailhouse snitches.” He also informed the Steering Committee that the Commission focused on the recommended changes to subdivision 3.220(b)(1)(M) rather than the recommended changes to subdivision 3.220(b)(1)(A)(i).

At its meeting (and in this report), the Steering Committee addressed separately the Commission’s recommended amendments to rule 3.220(b)(1)(A)(i) and 3.220(b)(1)(M).

Rule 3.220(b)(1)(A)(i):

The current rule provides seven categories of witnesses who must be disclosed as “Category A” witnesses. *See* rule 3.220(b)(1)(A)(i)-(vii).⁷ The

⁷The seven current categories of “A” witnesses are: (1) eyewitnesses; (2) alibi (and alibi rebuttal) witnesses; (3) witnesses present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant; (4) investigating officers; (5) witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged, (6) child hearsay witnesses; and (7) expert witnesses. The Commission recommended adding an eighth category: “(8) informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried.”

Commission recommended adding a separate witness category for “informant witnesses.” However, representatives of the Commission were unable to provide any factual support for the need to amend the rules of discovery in this fashion. The Steering Committee accepted the Commission’s conclusion that fabricated testimony from “jailhouse snitches” has played a role in a significant percentage of wrongful convictions. Nevertheless, the Commission was not able to point to any cases where this was a result of the testifying informant not being listed as a witness. The Steering Committee finds it unlikely that prosecutors in the State of Florida do not understand the existing requirement to list all potential witnesses, including a jailhouse informant who was present when a statement was made by the defendant. The current rule provides that the prosecutor must list “all persons known to the prosecutor to have information that may be relevant” The current rule also requires disclosure of “witnesses present when a... statement was taken from or made by a defendant....” These provisions certainly and obviously include the disclosure of an informant who may testify at trial and who heard a statement made by the defendant. Representatives of the Commission indicated that the recommended change was intended simply to highlight the prosecutor’s obligation to disclose these types of witnesses. However, a majority of the Steering Committee believes this recommended change offers little value. Moreover, a majority of the Steering Committee concluded that potential problems

might well be created by such a recommended change. One such example is discussed below.

Definition of "Informant", "Jailhouse Snitch" and "Informant Witness"

Judge Perry informed the Steering Committee that the primary goal of this portion of the Commission's report was to address "jailhouse snitches" but that the Commission's definition of "informant" still needed a lot of work. In fact, it became readily apparent that there was disagreement among the Commission members about the scope of the term "informant witness", and that the Commission had never adequately resolved that dispute. There was also disagreement among Steering Committee members about the need for providing such a broad definition for the term "informant"⁸ especially given its primary goal of creating a disclosure rule for "jailhouse snitches."⁹

Without resolving that issue, the Steering Committee then discussed whether there was any evidence that a wrongful conviction could be traced to a discovery

⁸The Commission's recommended change would require disclosure of "informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried."

⁹As proposed, the Commission's definition of "informant witness", *see* note 8 *supra*, would require disclosure of the name of any "informant" (including, for example, confidential informants in narcotics cases) who heard or overheard any statement by a defendant, regardless of whether, at the time of the statement, the defendant was in custody and regardless of whether, at the time of the statement, the informant was in custody.

problem, such as a failure to disclose an informant witness before trial. None of the Commission members and none of the Steering Committee members could cite to any instance in which, by the time of trial, a defense lawyer was surprised by the existence of a “jailhouse snitch”, was unaware that such a witness was being called by the State to testify, or did not have the opportunity before trial to discover the substance of this witness’ anticipated testimony.

Although Commission representatives agreed that lying “jailhouse snitches” were the problematic witnesses, the Steering Committee (like the Commission) had a difficult time arriving at a consensus for a definition that would provide meaningful reform without risking unintended mischief. Should such a rule be adopted, any definition will likely engender significant litigation regarding the precise contours and application of such a new disclosure provision.¹⁰

Rule 3.220(b)(1)(M):

Current rule 3.220(b)(1)(B)-(L) requires the disclosure of eleven categories of evidence as part of the prosecutor’s discovery obligation. The Commission proposed adding a twelfth category:

¹⁰ Some Steering Committee members were concerned, for example, that adding a new category for “informant witnesses” would be argued as having narrowed the broader disclosure requirement at the beginning of rule 3.220(b)(1)(A) (providing that “the prosecutor... shall disclose to the defendant...a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged....”).

(M) whether the state has any material or information that has been provided by an informant witness, including:

- (i) the substance of any statement allegedly made by the defendant about which the informant may testify;
- (ii) a summary of the criminal history record of the informant witness;
- (iii) the time, place, and any other corroborative circumstances under which the defendant's alleged statement was made;
- (iv) whether the informant witness has received, or expects to receive, anything in exchange for his or her testimony;
- (v) the informant witness' prior history of cooperation, in exchange for any benefit, as known to the prosecutor.

A majority of the Steering Committee concluded that these proposed amendments were: already covered by the current rule; already covered by the obligations imposed under *Brady/Giglio*; likely to be disclosed during the discovery deposition process; or were otherwise unnecessary.

Subsection (i) is already covered elsewhere in rule 3.220¹¹, so any amendment to add this language would be duplicative.

Subsection (ii)'s required disclosure of a criminal history summary is at least partially covered by existing case law applying *Brady/Giglio*. See *State v.*

Crawford, 257 So. 2d 898, 901 (Fla. 1972) (“[T]he prosecuting attorney may be

¹¹ Rule 3.220(b)(1)(C) provides that the State shall disclose “any written or recorded statements and the substance of any oral statements made by the defendant, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements;”

required to disclose to defense counsel any record of prior criminal convictions of defendant or of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial...."). This record of prior criminal convictions must be disclosed if it is in the actual or constructive possession of the prosecutor. *State v. Coney*, 272 So. 2d 550, 555 (Fla. 1st DCA 1973), *approved State v. Coney*, 294 So. 2d 82 (Fla. 1983) ("So long as the pertinent and relevant information requested by a defendant is readily available to the state attorney from other state governmental agencies for his use in the prosecution of the case even though not reduced to his actual possession, then it should likewise be made available to the defendant upon his timely demand.").

The Steering Committee acknowledges that the disclosure required by these cases is limited to convictions, so the proposed rule (which would require disclosure of "a summary of the criminal history record") appears to be broader than existing disclosure requirements.¹² However, the defendant would have the opportunity, during a discovery deposition, to inquire of an informant witness' criminal history not resulting in conviction.

¹² The existing discovery obligation has been interpreted to require disclosure of a witness' prior qualifying convictions under section 90.610, Florida Statutes, and any pending criminal proceeding against such witness. *State v. Wright*, 803 So. 2d 793, 795 (Fla. 4th DCA 2001). The proposed amendment does not define "criminal history record", though it could certainly be interpreted to include arrests as well as convictions for misdemeanors not involving dishonesty or false statement.

4 A prosecutor will generally have no ability to provide the information required by subsection (iii), except to the extent that the witness informant (or law enforcement) provides this information to the prosecution. Furthermore, this information can be sought during a deposition of the informant witness.

The disclosure required under subsection (iv) (“whether the informant witness has received, or expects to receive, anything in exchange for his or her testimony”) is duplicative of the existing disclosure requirement under principles of *Brady* and *Giglio* and, again, can be explored during the deposition process. *See, e.g., Phillips v. State*, 608 So. 2d 778 (Fla. 1992) (defendant was permitted to depose witness before trial and discover nature and extent of any benefits offered by prosecution in exchange for testimony).

Subsection (v) (“the informant witness’ prior history of cooperation, in exchange for any benefit, as known to the prosecutor”), though generally not required to be disclosed under the existing rules or under *Brady/Giglio*, is information that could be obtained during the course of the informant witness’ deposition. If the prosecutor is aware of, but fails to correct, a false statement made by an informant witness in a deposition, which is later repeated or presented to a jury, *Giglio* provides a remedy.

Judge Perry and Mr. Fingerhut acknowledged that most of the Commission proposals were already covered, in large part, by existing rules and case law.

However, they expressed the sentiment that doing something was better than doing nothing. The majority of the Steering Committee did not agree.

A majority of the Steering Committee concluded that it was unnecessary, in light of the existing rules and the principles of *Brady* and *Giglio*, to remedy any perceived shortcomings by adding a twelfth category of materials to be disclosed to the defense under rule 3.220. The majority believed that if existing rules are not being followed, the proper remedy should be improved enforcement of existing rules rather than the creation of new or additional rules. The majority also believed it would not properly serve the purposes of the Court or the people of the State of Florida to recommend improvident changes in order to say that something had been done.

The majority of the Steering Committee concluded that the primary concern with informant witnesses in general, and jailhouse snitches in particular, was an adjudicative -- rather than a disclosure -- issue. In other words, given the relatively broad nature of Florida's existing discovery obligations, the more reasoned approach would be to assist the jury in assessing the credibility of such witnesses at trial. The Steering Committee believed that a more effective solution was, for example, a cautionary jury instruction to help guide the jury during trial.¹³

¹³ As indicated earlier, The Criminal Jury Instructions Committee filed a petition proposing the adoption of such a cautionary jury instruction. *See In Re: Standard*

If a problem exists with prosecutors failing to disclose information and materials required by the existing discovery rule and *Brady/Giglio*, these violations are a result of ignorance: ignorance of the existence of the information not disclosed and ignorance of the applicable law. Ignorance of the law can and should be remedied, and should result in a better ability to uncover, and to disclose to the defense, information previously unknown. To this end, the Steering Committee has filed a petition proposing, consistent with a separate recommendation of the Commission, the adoption of a new rule imposing a continuing legal education requirement for attorneys handling adult felony cases.¹⁴

Jury Instructions Criminal Cases, Petition 2012-07 (SC12-2593). A copy of the petition, and proposed instruction, can be found on the Court's website at <http://www.floridasupremecourt.org/clerk/comments/2012/index.shtml>. That proposed instruction would modify Fla. Std. J. Instr. (Crim.) 3.9 ("Weighing the Evidence") by adding the following section:

Accomplices and Informants.

You must consider the testimony of some witnesses with more caution than others. For example, a witness who [claims to have helped the defendant commit a crime] [has been promised immunity from prosecution] [hopes to gain more favorable treatment in his or her own case] may have a reason to make a false statement in order to strike a good bargain with the State. This is particularly true when there is no other evidence tending to agree with what the witness says about the defendant. So, while a witness of that kind may be entirely truthful when testifying, you should consider [his] [or] [her] testimony with more caution than the testimony of other witnesses. However, if the testimony of such a witness convinces you beyond a reasonable doubt of the defendant's guilt, or the other evidence in the case does so, then you should find the defendant guilty.

¹⁴ See *In Re: Florida Innocence Commission's Recommended Amendment to*

If this proposed rule is adopted,¹⁵ the Steering Committee believes it will help guide prosecutors in the inquiry they must make of informants and law enforcement and to ensure that, prior to trial, both the State and defense are aware of, and in possession of, all relevant information and materials regarding an informant witness.

Conclusion

There is no evidence that inadequate discovery is a primary cause of innocent people being wrongly convicted in Florida. The proposal from the Florida Innocence Commission is likely to prove counterproductive. The existing rules of discovery in Florida are already broad and comprehensive. Together with corresponding constitutional obligations, these discovery rules adequately cover this area if proper compliance is observed. A cautionary jury instruction and a newly-proposed continuing legal educational requirement are likely to be more

Florida Rules of Criminal Procedure to Add CLE Requirement.

¹⁵ This text of this proposed rule 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).

effective in addressing the existing concern regarding informant witnesses.

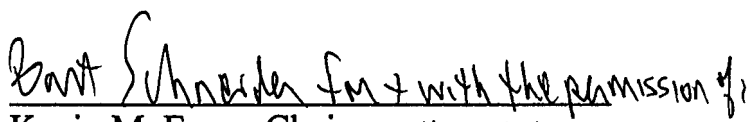
Accordingly, the Steering Committee (by a vote of 6-5) does not recommend a rule amendment at this time. However, if this Court disagrees, the Steering Committee respectfully requests that the matter be referred back to the Steering Committee for any further action on the recommendations of the Commission.¹⁶

This report contains the following appendices:

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

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

Respectfully submitted,


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¹⁶ It should be noted that some Steering Committee members in the minority (i.e., those who voted in favor of taking action on the Commission recommendation) did not support certain aspects of the Commission's proposal.

CERTIFICATE OF TYPE AND FONT

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

Bart Schneider for + with the permission of
Judge Kevin Emas #0936065
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APPENDIX A

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

The Florida Innocence Commission-Final Report

The Commission voted on Professor Nunn's motion. His motion failed by a vote of 17 to 4.

(d) Informants and Jailhouse Snitches

According to the Innocence Project, an in-custody informant ("jailhouse informant") testified in over 15% of wrongful conviction cases later overturned through DNA testing. Of the exonerees released from death row, 45.9% were convicted, in part, due to false informant testimony. This makes fabricated testimony a leading cause of wrongful convictions in capital cases. Further studies have shown that informant perjury was a factor in nearly 50% of wrongful murder convictions.

While the justice system trusts that jurors will be able to determine whether a jailhouse informant is credible or not, an intriguing study conducted by social scientists Paul Eckman and Maureen O'Sullivan tested accuracy rates of different groups of people at detecting deception by actual inmates. The group with the highest accuracy rate for detecting inmate deception, U.S. Secret Service agents, was correct only 64% of the time.

Other states and national policy institutions have recognized the dangers of false informant and jailhouse snitch testimony. The four main reforms that have been advocated are: A testimony corroboration requirement, a pre-trial reliability

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hearing, a cautionary jury instruction, and requirements for prosecutorial disclosures.

The Commission has identified two distinct types of informant testimony. One type is the individual who is confined in a location where he or she may have direct or indirect contact with other inmates. The terms “in-custody informant,” “jailhouse informant” or “jailhouse snitch” are used in several states to describe this witness. The other type of witness is identified by the term “informant” or “street informant” who provides information to law enforcement. All of the studies and reports concerning these two types of witnesses agree that the vast majority of informant cases involving wrongful convictions stem from the in-custody or jailhouse snitch witness.

Numerous commission reports have advocated four main ways to reduce the risks associated with jailhouse informant testimony.

(1) Requiring that informant testimony be corroborated with independent evidence (excluding the testimony of another informant) in order to be used at trial. Eighteen states already require that accomplice testimony be corroborated.

(2) Cautionary jury instructions that tell jurors to weigh the testimony of an informant.

(3) Pre-trial reliability hearings, similar to ones held for the admission of expert testimony.

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(4) A requirement that the prosecution disclose information such as an informant's criminal history, testimony in other cases, financial compensation or reduction in sentence, to the defense.

It is important to note that other state commissions have principally addressed in-custody informant testimony. New York's commission addressed jailhouse snitches as a main problem, but the recommendations in the report cover all informants. The commission recommended (A) corroboration (B) a jury instruction (C) videotaping of informant statements and (D) best practices for prosecutors.

The California commission recommended (A) best practices for district attorneys (B) written disclosures and (C) a statute requiring corroboration of informant testimony. California enacted Senate Bill 687 in 2011, to require corroboration of in-custody informant testimony.

The Illinois commission recommended (A) written disclosures and (B) a pretrial reliability hearing in capital cases. Illinois enacted a statute requiring a pre-trial reliability hearing for in-custody informant testimony. If the state does not prove reliability of the statement by a preponderance of the evidence, the testimony is excluded. The hearing is confined to capital cases. Illinois is the only state in the nation to enact such a requirement.

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The recent report of the Pennsylvania Committee on Wrongful Convictions has recommended (A) a cautionary jury instruction for jailhouse informants (B) a pretrial reliability hearing (C) written disclosures and (D) law enforcement should electronically record statements given to a jailhouse informant by a suspect.

In a 2005 resolution, the American Bar Association (ABA) recommended prosecutorial screening of jailhouse informant testimony. In addition, the ABA has recommended that jailhouse informant testimony be corroborated.

A full discussion of the topic of informants and jailhouse snitches took place at the December 12, 2011 Commission meeting. The PowerPoint presentation by Judge Perry and the full discussion of the topic by Commission members are attached at Appendix C.

The Commission discussion condensed the topic area into the following categories:

- (1) Statutory corroboration of an informant or jailhouse snitch testimony
- (2) Cautionary jury instructions
- (3) Pretrial reliability hearings
- (4) Pretrial disclosures by the state

Several Commission members offered various suggestions on the best method or methods to address jailhouse snitches and informants. Judge Perry felt that a jury instruction would be appropriate and directed the members' attention to

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the instruction used by the federal court in the Eleventh Circuit. Ms. Daniels also expressed support for the Eleventh Circuit instruction and for a pretrial reliability hearing. Mr. Coker also expressed support for such a hearing. Mr. Fingerhut asked whether the Commission should consider a corroboration statute similar to those in Texas and California. Sheriff Cameron supported the Oklahoma jury instruction. Mr. Coxe noted that this was a serious problem and hoped that the members would not just dispense with the issue by only recommending a jury instruction.

Mr. Coxe favored the Illinois pretrial reliability hearing approach. Judge Kelly agreed with Mr. Coxe that the Illinois model was the way to screen informant testimony.

Mr. Reyes suggested that rule 3.220 of the Florida Rules of Criminal Procedure could be amended to add references to an incarcerated witness or informant. Professor Nunn pointed to the Illinois statute as being the most comprehensive. He too was not satisfied that a jury instruction would solve the problem. The professor also was in favor of requiring corroboration of any informant testimony.

Mr. Coxe moved that Commission staff draft standards to be considered by the trial judge at a pretrial hearing to determine the reliability of an informant's statement. The pretrial hearing would be conducted for a statement or statements

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made by the defendant to a jailhouse snitch, informant, or any person who has a pending criminal prosecution. No single factor would block the admissibility of the statement (including lack of corroboration). However, even if the state has other evidence, a hearing would be required. The motion was seconded by Ms. Walbolt. The motion passed with Ms. Snurkowski dissenting.

Judge Perry directed staff to review the Eleventh Circuit's jury instruction and consider adding parts of the Connecticut and Oklahoma Instructions.

During the February 13, 2012 meeting, the members reviewed Commission staff proposals for a statute requiring a pretrial admissibility hearing, and a model Florida jury instruction. The minutes of the Commission meeting that set forth the full discussion of the members is attached at Appendix D.

Mr. Smith noted that a statute requiring a pretrial admissibility hearing would add to the expense of a case. Creating a statute would add great difficulty in cases and is designed to take away the decision making from the finder of fact. He said that Florida does not require an admissibility hearing with regard to codefendant testimony. Mr. Smith said there was nothing out there that suggested to him that we need to radically change the law in Florida. He commented that if he wanted a judge to make a decision, he would waive the right to a jury trial. This can be taken care of by a jury instruction. Having a hearing in all felony cases

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would be too expensive. It might be possible to hold such a hearing in a death penalty case, but he still would not support any legislation creating such a hearing.

Dean Acosta felt that given the burden already on the court system, a statute would place even greater stress on the courts even if the hearings were limited to a small number of felony cases.

Ms. Barzee agreed with Mr. Smith's stance. Juries need to know how to evaluate witness testimony (such as expert witnesses). Therefore, there should be an instruction on how to evaluate a witness. But, it is not in the court's province to pick and choose the witnesses, no matter how unreliable. Allowing this creates a separation of powers problem.

Mr. Coxe felt that if the statute were confined to jailhouse statements there would be no impact on court resources or court time. He said that he was not talking about out-of-custody informants. Courts do determine prior to trial the admissibility of expert witnesses. If it is important enough for an expert, it is important enough for a court to decide if informant testimony is credible. He reiterated that he was not talking about the broad spectrum of informants.

Mr. Hill said that in civil practice this is the equivalent of a *Daubert* hearing and this can go on for days. He felt the Commission was building in some real potential problems.

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Sheriff Cameron agreed with Mr. Smith that this is a jury issue and should remain so.

Mr. King said he was concerned. If a jury is willing to listen to a witness and convict the defendant based on a reasonable doubt standard, the court, using a lower burden, would be deciding not to have the witness testify. This is turning the system on its head. It is wrong to single out that one group.

Mr. Smith noted that the legal test is whether the science is reliable and whether the witness has the requisite expertise. But the court does not decide whether to believe the witness. In child hearsay cases it is a competency question, not one of believability. He said the Commission was about to go to the very heart of what a jury does – decide who to believe. The question of whether you believe the witness is solely a jury question.

A motion was made by Sheriff Cameron not to recommend to the Florida Legislature that a statute be enacted requiring a pretrial admissibility hearing. The motion carried by a vote of 16 to 5. Judge Kelly, Mr. Fingerhut, Mr. Cox, Ms. Daniels, and Professor Nunn (via proxy) opposed the motion.

A motion was made and seconded to recommend that the Court adopt the Eleventh Circuit jury instruction on informant testimony. The only change in the instruction was to change the word “government” to “state.”

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Mr. Smith commented that institutionally there is a reason to have a jury instruction. His concern is about how the jurors should weigh this. He noted that the Eleventh Circuit instruction has been tested over time. History has shown that cases in the Eleventh Circuit have not led to excessive acquittals. This instruction tells the jury to weigh the testimony with more caution. The Eleventh Circuit instruction is easy to adopt and it is workable.

Sheriff Cameron said he was a full supporter of a jury instruction, but it needed to be neutral.

The Commission approved the motion to recommend to the Court that the Eleventh Circuit instruction be adopted for use in Florida criminal cases. The vote was 21 to 1. Since the Commission does not have the authority to petition the Court for the adoption of a jury instruction, the Commission recommends that the Florida Supreme Court ask the Supreme Court Committee on Standard Jury Instructions in Criminal Cases to consider recommending to the Court an adoption of an instruction that mirrors the Eleventh Circuit. Sheriff Cameron opposed the motion. He took exception to the terms “must” and “should” in the current instruction of the Eleventh Circuit, which reads in part: “You must consider some witnesses’ testimony with more caution than others ... So while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.” Sheriff Cameron

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believed the instruction should read, in part: "You may consider some witnesses' testimony with more caution than others ... So while a witness of that kind may be entirely truthful when testifying, you could consider that testimony with more caution than the testimony of other witnesses."

In drafting a proposed jury instruction, Commission staff included nine factors that may be considered by the jury when considering the testimony of an informant witness. Judge Perry asked the members if they wanted to include any of the factors in the Eleventh Circuit instruction.

Mr. King said those factors are all contained in the general instructions that are given to the jury in standard jury instruction 3.9 (Weighing the Evidence). He thought that giving to the jury a detailed list subjects that testimony to being overly evaluated and almost is a comment on the evidence. He advised it was better to let the lawyer argue the current cautionary instruction.

Mr. Hill agreed and said the laundry list in the staff instruction goes well beyond what is needed. These factors can be argued by the lawyers to the jury.

Ms. Barzee and Mr. King informed the members that there is a current standard jury instruction given to the jury in state court. That instruction and the informant instruction would cover all that is needed to fully instruct the jury.

Dean Acosta noted that as the time to finish the Commission work ebbs, getting things done on recommendations that have a chance of passing is where the

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Commission should go. There is a better chance of adoption if the Eleventh Circuit instruction is presented to the Court as written.

Judge Perry asked if there was a motion to leave the Eleventh Circuit instruction as is and not add any additional factors. A motion was made and seconded to not make any substantive changes to the Eleventh Circuit instruction. The motion passed by a unanimous vote. The proposed jury instruction to be forwarded to the criminal jury instructions committee is attached at Appendix N. Additional state and federal jury instructions that the Supreme Court Committee on Standard Jury Instructions in Criminal Cases may wish to review are attached at Appendix O.

At the December 12, 2011 meeting, the Commission began to consider any possible amendments to Florida's criminal procedure rules and how current rule 3.220 addresses the disclosure and testimony of jailhouse snitches and informants. Judge Perry formed a pretrial disclosure workgroup to be chaired by Mr. Scott Fingerhut. Members of the workgroup included Judge Silvernail, Ms. Daniels, Ms. Walbolt, Mr. King, and Mr. Coxe. The workgroup was directed to focus on amendments to rule 3.220 to require additional disclosures when the state was going to introduce the testimony of a jailhouse snitch or informant regarding statements made to, or overheard by, the snitch or informant while the witness was incarcerated with a defendant in a criminal case.

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At the February 13, 2012 meeting in Orlando, Mr. Fingerhut briefed the Commission members on the progress of the workgroup.

The workgroup agreed that given the troubling incidence of wrongful convictions in cases involving "jailhouse informants," two areas needed to be addressed: (1) Disclosure of the existence of the jailhouse informant and (2) highlighting the disclosure, despite any discovery rule redundancies.

The workgroup then addressed two predominant matters: First, the workgroup discussed the independent identification of the "jailhouse informant" as a Category A witness under Florida Rule of Criminal Procedure 3.220(b)(1)(A)(i). The workgroup acknowledged that the rule requires the listing of a witness or witnesses to any statement of the accused, provides for listing the address of the witness, provides for disclosing the statement of the witness, provides disclosure of the substance of any oral statement made by the accused, and sets forth sanctions which can befall the prosecution for nondisclosure. However, the sentiment was also expressed that, despite the apparent clarity of the rule, there nonetheless exists considerable flux in the manner in which the rule is interpreted and implemented by prosecutors' offices across the state. Therefore, in order to improve on the possibility of preventing wrongful convictions, more specific disclosure is imperative.

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Second, the workgroup considered several ways in which to highlight and in some instances supplement the prosecutor's discovery obligation under Rule 3.220(b). In doing so, the workgroup recognized Florida's liberal discovery rules, generally (and the deposition process in particular), and remained sensitive neither to task prosecutors with inordinately difficult, if not impossible, fact-finding, nor unduly burden the prosecution with "doing the defendant's work" to prepare for trial. The workgroup was reticent to create unnecessary or unwarranted litigation for the trial and appellate courts.

Accordingly, the subcommittee thought it wise to preface some, if not all, of any new and/or specifically-expressed discovery obligations with the following language: "to the extent the prosecution has *actual* knowledge" of the information requested, as well as encourage "*substantial* compliance" (and *Richardson* hearings for noncompliance) as the benchmark.

The workgroup considered to the extent actually known by the prosecution, the following criteria:

- (1) The substance of the statement allegedly made by the accused against whom the informant witness may testify;
- (2) The time, place, and any other corroborative circumstances under which the alleged statement by the accused was made;

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(3) Whether the informant witness has received anything in exchange for, or subsequent to, his or her testimony (including any deal, promise, inducement, pay, leniency, immunity, personal advantage, vindication, or other benefit that the prosecution, or any person acting on behalf of the prosecution, has knowingly made or may make in the future);

(4) The informant witness' prior history of cooperation, including the case name, case number, and jurisdiction in which the informant witness has previously testified;

(5) The criminal history of the informant witness (subject, of course, to any legitimate restrictions placed on the prosecution and FDLE to retrieve such information); and

(6) Any other evidence relevant to the informant witness' credibility.

The workgroup also discussed situations in which an informant witness has offered statements against an accused but was either not called by the prosecution to testify or whose testimony was otherwise not admitted in the case, as well as situations in which an informant witness recants or materially changes his or her testimony.

Mr. Fingerhut advised that the workgroup had not been able to finalize any suggested amendments to rule 3.220 based on the above-listed criteria. Mr.

Fingerhut advised the Commission that continuing teleconferences with workgroup

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members would be needed. A full discussion of the briefing by Mr. Fingerhut, and the Commission discussion, is included in the Commission minutes, pages 2-15.

The minutes are attached at Appendix D.

At the March 12, 2012 meeting, Mr. Fingerhut reported that the workgroup was continuing its work on rule 3.220. The workgroup looked at materials provided by staff, internal policies, best practices, training programs, and materials from California, Pennsylvania, the Justice Project and the American Bar Association.

Mr. Fingerhut told the members that critical input had been received from the Florida Prosecuting Attorneys Association (FPAA), and the workgroup was also considering comments from other members of the Commission. Mr. Fingerhut told the members that there was some thought about recommending a centralized database containing a list of informants. The workgroup was in agreement as to the structure of the rule amendment. The group needed to add the term "informant witness" to the rule and specify disclosure requirements. An "informant witness" is defined as a person who is in custody and who offers to testify against the defendant. The group was working on an introductory clause, and a summary or criminal history statement. There were still some differences on what disclosure should be made describing the circumstances under which a statement was made. There also had been a discussion among the workgroup

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regarding disclosure of the jail cell location, and who was present when a statement was made. Mr. Fingerhut advised there would be a full report at the next meeting.

Judge Perry asked Mr. Fingerhut if there were any disagreements among the members of the workgroup. Mr. Fingerhut said one issue was who is tasked with the knowledge concerning the informant. Should knowledge be imputed to the entire staff or to an individual prosecutor? Is the knowledge requirement one of actual knowledge? The workgroup was attempting not to build in a *Richardson* (*Richardson v. State*, 246 So. 2d 771 (Fla. 1971)) inquiry.

On April 16, 2012 and May 21, 2012, the Commission brought closure to any recommended amendment to rule 3.220 of the Florida Rules of Criminal Procedure. The minutes of the meetings set forth the full discussion of the members, and the ultimate conclusions and recommendations reached by the Commission. The minutes are attached at Appendix F and Appendix H.

The relevant parts of rule 3.220(b)(1) that were discussed by the workgroup and the full Commission are set forth below.

(b) Prosecutor's Discovery Obligation.

(1) Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and permit

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the defendant to inspect, copy, test, and photograph the following information and material within the state's possession or control:

(A) a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial under section 90.404(2), Florida Statutes. The names and addresses of persons listed shall be clearly designated in the following categories:

(i) Category A. These witnesses shall include (1) eye witnesses, (2) alibi witnesses and rebuttal to alibi witnesses, (3) witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant, which shall be separately identified within this category, (4) investigating officers, (5) witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged, (6) child hearsay witnesses, and (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify.

(B) the statement of any person whose name is furnished in compliance with the preceding subdivision. The term statement as used herein includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording. The term

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statement is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, but shall not include the notes from which those reports are compiled;

(C) any written or recorded statements and the substance of any oral statements made by the defendant, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements.

The Commission recognizes that the current rule requires, among other things, that the state furnish to the defendant the name and address of any person who has information relevant to the offense charged. In addition, the state is obligated to furnish any statement of a person who has relevant information, and any written or recorded statement, or the substance of any oral statement of the defendant. Along with this obligation is the duty to disclose the name and address of any witness to the statement.

Clearly, the state already has an affirmative obligation to disclose the identity of any "informant witness." The concern of the Commission is that the identification of this person is not clearly and conspicuously set forth in the rule. Because there have been a significant number of wrongful convictions obtained through the false testimony of these types of witnesses, the Commission believes that more detailed disclosure is warranted by amending rule 3.220.

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The workgroup developed an amended rule proposal during the months it worked on this issue. However, the workgroup was not able to reach a consensus on the language of the amendment. The inability to find total common ground occurred because prosecution and defense members of the workgroup could not agree on every aspect of the rule amendment. In addition to input from workgroup members, the Florida Prosecuting Attorneys Association (FPAA) was solicited to assist in the rule drafting process. Ultimately, two proposals were presented to the full Commission for deliberation and possible acceptance. The two proposals are set forth below. The workgroup proposal was approved by all of the members of the workgroup with the exception of Mr. King. Mr. King was instrumental in having the FPAA present its own suggested rule amendment.

Both the FPAA and workgroup proposals sought to add subdivision (8) to 3.220(b)(1)(A)(i) and add subdivision (M) to 3.220(b)(1).

FPAA Suggestions for Rule 3.220(b)(1)(A)(i)

(8) informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant concerning the crime for which the defendant is being tried.

Workgroup Recommendation for Rule 3.220(b)(1)(A)(i)

(8) informant witnesses, whether in custody, who offer testimony against the defendant.

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At the April 16th meeting, Mr. Coxe asked whether the amendment to the rule would cover similar fact evidence. Mr. Reyes suggested changing the wording to read: informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant relevant to the crime for which the defendant is being tried. That way if statements are being used for the purpose of impeachment, they would be covered by the rule. Mr. Coxe suggested the following: informant witnesses, whether in custody, who offer testimony concerning the issues for which the defendant is being tried. This change would not do violence to what Mr. King thought was appropriate language.

At the May 21, 2012 meeting, the Commission, by a vote of 17 to 2, agreed on the following language to amend 3.220(b)(1)(A)(i), by adding subdivision (8) to the rule. The amendment reads as follows:

(8) informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried.

After approving language to amend 3.220(b)(1)(A)(i) at the May 21, 2012 meeting, a question was raised as to whether the amendment to the rule could be construed by the state to limit other discovery requirements contained in the rule. Ms. Walbolt moved that the Commission recommend adding a comment to the subdivision of the rule noting that this only addresses statements of the defendant

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offered by the informant witness, and does not supersede the general rule. Dean Acosta said that he had reviewed the entire rule and was satisfied that the change to the rule does not limit the effect of the rest of the rule. Mr. Coxie seconded the motion to add a comment. Mr. King said he agreed with Dean Acosta. He said he was familiar with rule 3.220 and the amendment to part of the rule did not limit full disclosure required by the entire rule. He noted that there are seven subdivisions that precede subdivision (8). Judge Perry asked how it could hurt to have a comment. Mr. Coxie said the purpose of the comment is to make clear the intent of the rule. Dean Acosta said it struck him as odd to have this comment in the rule. Judge Perry thought a comment would make it clear that the amendment does not alleviate the obligation of the state to full disclosure under the rule. Judge Perry said he was concerned that if the informant witness did not offer a statement made to him or her by the defendant, someone could read the rule to mean that there was not a need to disclose the name of the informant witness under other sections of the rule.

The Commission voted 16 to 3 to add a comment to rule 3.220 stating that subdivision (8) of the rule is not intended to limit in any manner whatsoever the discovery obligations under the other provisions of the rule.

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FPAA Suggestions for rule 3.220(b)(1)(M)

whether the state has any material or information that has been provided by an informant witness, including:

(i) the substance of any statement allegedly made by the defendant about which the informant witness may testify;

(ii) a summary of the criminal history record of the informant witness;

Workgroup Recommendation for rule 3.220(b)(1)(M)

whether the state has any material or information that has been provided by an informant witness, including:

(i) the substance of any statement allegedly made by the defendant about which the informant witness may testify;

(ii) a summary of the criminal history record of the informant witness;

The FPAA and the workgroup agreed with the preamble and these two subdivisions of the rule. The proposals were approved by the Commission by a unanimous vote.

FPAA Suggestions for rule 3.220(b)(1)(M)(iii-v)

(iii) the time and place under which the defendant's alleged statement was made;

(iv) whether the informant witness has received anything in exchange for his or her testimony;

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(v) the informant witness' prior history of cooperation, in return for any benefit, actually known to the prosecuting authority.

Workgroup Recommendation for rule 3.220(b)(1)(M)(iii-vi)

(iii) the time, place, and any other corroborative circumstances under which the defendant's alleged statement was made;

(iv) whether the informant witness has received anything in exchange for, or subsequent to, his or her testimony (including any deal, promise, inducement, pay leniency, immunity, personal advantage, vindication, or other benefit that the prosecution or any person acting on behalf of the prosecution has knowingly made or may make in the future);

(v) the informant witness' prior history of cooperation, including the case name, number, and jurisdiction in which the informant witness has previously testified;

(vi) any other evidence relevant to the informant witness' credibility.

At the April 16, 2012 meeting, Mr. Fingerhut said the heart of the Commission discussion should center on subdivision (M). An issue discussed at length by the workgroup centered on what type of knowledge was needed by the prosecution that would trigger the discovery response. In other words, the issue is whether the discovery requirement should be limited to actual knowledge. Ms. Barzee asked if the workgroup's discussion on actual knowledge took into account

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the holding in *Kyles v. Whitley*, 514 U.S. 419 (1995). Mr. Fingerhut said the workgroup did not specifically address if they were inadvertently narrowing Supreme Court precedent. Ms. Barzee pointed out that the prosecuting authority has the affirmative duty to disclose favorable evidence. As noted in *Kyles*, this means that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. This goes beyond having knowledge of information in the possession of the law enforcement officer working on the case. Mr. Fingerhut believed that *Kyles* would require knowledge by the prosecutor in the circuit, but not require the prosecutor to know what was in the possession of other prosecutors in the state. Ms. Barzee noted that there already is a body of constitutional law requiring the prosecution to turn over favorable evidence. Ms. Barzee cited *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), as examples of court opinions requiring disclosure by the prosecution.

Ms. Barzee was concerned that the proposed language by the workgroup narrowed what is required by the case law. Ms. Barzee suggested that the Commission look at the language in *Kyles*. She was concerned that a prosecutor reading the rule would think that this is the law and not care what *Kyles* said. If the language is part of a Florida Supreme Court rule, a trial judge may think it was based on the holding in *Kyles*.

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Mr. Coxe commented that Mr. King had mentioned during the workgroup sessions that there was a logistical inability to gather the information required by the proposed rule amendment. Assistant state attorneys leave the office and take the knowledge with them.

Mr. Fingerhut advised the Commission that the FPAA did not concur with the workgroup recommendation for 3.220(b)(1)(M)(iii). The association felt the term "corroborative circumstances" was an undefined term of art which is subject to many varying interpretations and is subject to discovery through depositions and other discovery tools.

Judge Perry asked why the workgroup wanted subdivision (iii) in the rule. He said that there are depositions in Florida and the information can be disclosed in that manner. Ms. Daniels said she was thinking of a case where the defendant made a statement to a jailhouse companion. The state knew the date and time, the cell number, and who the witnesses were that were present when the statement was given. The name of the witness was buried in a list of 300 other witnesses. Her office was unaware of the importance of the witness until late in the case, and there was no time to take a deposition. It has occurred to her that if the state knows the identity of the witness, the state should disclose what is known about the statement even if only one or two details are known.

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Mr. Smith noted that Florida has widespread rights to discovery. He said the language regarding any other corroborative evidence reeks of an additional imposition on the state and the state does not have that obligation. Pursuant to notice, the deposition will uncover what is needed. There is a difference between the state doing its job and having to do more than what is required. The state's obligation is to disclose the name of the informant and the statement. The rest can come from discovery.

Ms. Barzee said that if the defense gets the name and place then the burden is on the defense to depose witnesses and find out who the cellmates are.

Mr. Fingerhut expressed his reasons for being in favor of the paragraph. He said that if all the obligations under the case law and the rules were working as intended, we would not have the number of wrongful convictions that have occurred. More is required of the state, but not so much as to be unreasonable. Corroborative circumstances do not mean the state has to prove more than it is required to. It cannot hurt for the state to incorporate more into its disclosure.

Sheriff Cameron commented that when a statement is taken from a witness it is delivered to the defense. The defense is going to know the circumstances of the taking of the statement.

Judge Perry said the language in subdivision (iii) of the proposal places an additional burden on the state. He could understand the need for the language if

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Florida did not have discovery depositions. But defense counsel has an obligation to do discovery. The rules of discovery were not designed to eliminate investigation by the defendant.

Mr. Hill felt that the proffered language by the workgroup using the term "corroborative circumstances" could lead to litigation and varying interpretations. Mr. Hill thought the language was too broad and put a burden on the state.

Mr. Smith moved to adopt subdivision (iii) as suggested by the FPAA. The motion was seconded. The motion passed by a vote of 17 to 2, with Mr. Fingerhut and Ms. Daniels voting no.

Mr. Fingerhut drew the Commission's attention to 3.220(b)(1)(M)(iv). He advised that the workgroup and the FPAA agreed on part of the language, but not on the entire paragraph.

Ms. Daniels thought the language in the workgroup recommendation should be broader. What should be disclosed is not only what the witness has been given as an inducement, but what is implied that he or she will get. Even if the majority of the members do not want to go with everything, there still should be something included about promises and implied recommendations. Many times there are no direct promises. If there is a promise of any kind it should be disclosed.

Mr. Coxe said to adopt the FPAA recommendation is to adopt the minimum standards under the law. He said he did not know what is lost if we say to disclose

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everything that might be a benefit. This sends a message that when dealing with these people everyone knows what the promises are. This recommendation does not foster further litigation. It just says tell us now what the promise is.

Ms. Barzee suggested adding the words "or expects to receive" after the words "informant witness has received."

Sheriff Cameron expressed concern over the words "personal advantage" that is set out in the workgroup proposal. He asked what does that mean. He advised the members not to open the door on this.

Ms. Barzee asked what if an informant is offered an extra two hours of exercise. This is not unheard of. There are quid pro quos. Sometimes it is a small advantage that means something to the inmate. Even these small inducements that are promises should be turned over to the defense.

Judge Perry noted that the proposed workgroup language includes the word "received anything." Would that not also include "personal advantage?"

Mr. Smith agreed with Ms. Barzee that the words "expect to receive" need to be added to the proposal. An expectation may be what prison a witness gets assigned to. An expectation may be that the Department of Corrections is going to transfer the witness to another state to serve a sentence. The question to be decided is whether the jury can trust the statement that the informant witness is volunteering. The term "anything" is actually very broad. The state has an

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obligation to disclose anything the witness is promised or expects to receive. The expectation is what affects the statement.

Representative McBurney had a question about the words "expects to receive." He asked if the expectation was to be viewed from the perspective of the witness. Judge Perry commented that most smart prosecutors will tell the defendant they will consider something after the witness testifies. If there is a benefit beforehand, they may have to undo the plea. Some folks will testify in the hope they will receive some sort of leniency.

Judge Perry noted that sometimes the Criminal Procedure Rules Committee adds comments to a rule. He said the Commission could ask the committee to put into the comment section the things the Commission is looking for. Adding examples such as deals, promises, inducements, leniency, etc., would give the trial court some guidance.

Mr. Coxe said that if we just use the term "anything" we have done nothing more than discuss *Brady*. If the rules says "included but not limited to" it makes the prosecutor think of what needs to be disclosed. This educates the prosecutors.

Judge Silvernail had a concern about situations where the witness would allege a breach of an expectation in a postconviction relief proceeding. The witness could raise this when the expectation that he or she had was not fulfilled by the state. Judge Silvernail said he would worry about what happens when that

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expectation is not realized. Once you put it in the rule you will see it in a postconviction proceeding. This just adds another line item to Florida's postconviction relief rule 3.850.

Mr. Fingerhut asked if adding the "expects to receive" language would take care of the rest of the paragraph. Ms. Barzee said the remaining text could be deleted. The paragraph would read: "Whether the informant witness has received, or expects to receive, anything in exchange for his or her testimony."

Mr. Smith moved to add "expects to receive" and to strike the term "or subsequent to." The motion passed by a unanimous vote.

Judge Perry asked the members if they wished to include the rest of the language in the proposal as part of the rule or include the language in a comment to the rule. Ms. Barzee moved to include it. Mr. Reyes said the language should say "including but not limited to." The members approved the amendment to the sentence by a unanimous vote.

Ms. Daniels thought that in the comment section of the rule the committee could include language stating that what needs to be disclosed is anything the defendant has a reason to expect he or she will receive.

Representative McBurney asked how does the prosecution know what is in the informant's mind and how should that be disclosed. Ms. Barzee said that many times the witness tells law enforcement exactly what he or she wants in exchange

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for the testimony. Examples could be things like “keep me from being deported,” or “keep me from being transferred to another facility.” The investigator or prosecutor knows or has a pretty good idea what the informant wants.

Mr. Fingerhut said there may be things in the mind of a witness that only he or she has thought of. The rule amendment is not intended to try to cover that. If an obligation is placed on the state, it has to be something the state is reasonably charged to know.

Judge Perry noted that any defense attorney is going to want to know how the statement was conveyed to law enforcement. He or she will depose the law enforcement officer. He or she will ask if any promises have been made. Judge Perry thought the Commission had taken a major step in identifying the witness rather than hiding the person in the back of the pack of listed witnesses by adding subdivision (8) to rule 3.220.

Mr. Hill said he shared Representative McBurney’s concern. When you put in “expects to receive” this goes to what is in the mind of the informant. Mr. Hill thought the best approach was to let the deposition answer what the witness expected to receive.

Judge Perry commented that what you want to try to ascertain is what is in the mind of the witness and the prosecutor as to what might be conferred in the future.

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Mr. Coxe said the whole issue is what is in the informant's mind. He did not think that the Commission needed to address the prosecution's obligation. The issue is not the cross examination of the prosecutor, it is the cross examination of the informant witness. Under *Giglio* the state already has the obligation to disclose to the defense any agreements with the witness. The Commission should just focus on the disclosure requirements.

Mr. Smith commented that what actually happens is someone at the jail, or a lawyer, contacts the prosecution with an offer of information. An example would be the witness telling the state that his family has to drive seven hours to see him. The prosecutor will say we will talk about this after the case is over. The witness, in his mind, has an expectation that his family won't have to drive that far in the future, but no promise has been made.

Mr. Hill asked if the informant does not say anything how does the prosecutor know that the witness is thinking. The way the rule is written is too great a burden on the state. Ms. Walbot opined that actual knowledge on the part of the prosecutor is the key.

Sheriff Cameron noted that what a witness receives or expects to receive is clear cut. You are going to get those things in discovery. However, there can be wishes or requests from the witness that are not promised by the state. But, the witness may still have an expectation that the wish or request will be granted. This

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can be ferreted out in a deposition. What we are trying to say is that the state must disclose what a person receives or expects to receive, as offered by the state.

Dean Acosta said he understood the concerns of Mr. Hill and Representative McBurney. The proffered language would hold the prosecutor to a standard that makes him get into the witness' mind. A prosecutor will rarely make a promise. In his office, he would not allow a prosecutor to make promises. Both the witness and the prosecutor have a sense as to what a witness expects to receive. However, there is a third category. There is the question of what a witness hopes to receive. An unarticulated hope cannot be disclosed since the prosecutor does not know it. There is a difference between the unarticulated hope and the expectation.

Mr. Smith made a motion to amend the original motion by Ms. Barzee to provide that the language in the workgroup proposal that begins "including any deal, promise, inducement" be attached in the committee notes to the rule and not in the body of the rule. The motion to amend passed by a vote of 10 to 9.

Mr. Smith then made a motion to include as a comment to the rule the following language: "includes, but is not limited to, any deal, promise, inducement, pay, leniency, immunity, personal advantage, vindication, or other benefit that the prosecution or any person acting on behalf of the prosecution has knowingly made or may make in the future." The motion passed by a vote of 17 to 2 (Mr. Fingerhut and the proxy vote for Professor Nunn voting no).

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The actual language of subdivision (iv), as approved by the Commission, reads:

(iv) whether the informant witness has received, or expects to receive, anything in exchange for his or her testimony.

The Commission next turned its attention to subdivision (v) of 3.220(b)(1)(M). Mr. Fingerhut advised the FPAA and the workgroup were in agreement on a portion of the language. The FPAA did not agree that the state had the duty to include a case name, number, and jurisdiction with regard to the prior record of cooperation of the informant witness, unless the prosecutor already had that information. The FPAA opined that the case law is clear that the state is not required to do the work of the defense in investigating its case. There is no reason to shift the burden for the impeachment of a witness from the defense to the state.

Judge Perry felt that the FPAA proposal put the burden on the state to disclose what they actually knew. He asked if the workgroup proposal required the state to ferret out the information. Mr. Fingerhut thought the workgroup proposal required the state to divulge the information within the state's possession or control only if the state had knowledge of the existence of the information. Judge Perry expressed his concern that someone may interpret this language as an affirmative obligation to send out a "facts net" to different offices to find out whether they

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have used the witness as an informant. Mr. Fingerhut replied that this was the spirit of the workgroup's language, but not the FPAA language.

Sheriff Cameron noted that the workgroup language does not limit it to Florida. Mr. Fingerhut said the workgroup expected that the prosecutor would put forth a good faith effort to gather the information by sending an email to other prosecutors or make phone calls.

Sheriff Cameron reminded the members that there are two categories of witnesses. There are jailhouse informants and regular informants. This portion of the rule should come down to having to disclose what the prosecutor actually knows regarding the jailhouse informant.

Dean Acosta pointed out that many of the Commission recommendations are carefully calibrated to address resource concerns. The resources required to implement an informant database to capture this type of information would be huge, especially when you already have depositions. A deposition can be used to gather this information.

Judge Barzee said she agreed with Dean Acosta. She suggested that the term "known" be inserted after the word "informant's" and before the word "prior" in the workgroup proposal. The sentence would read: "The informant witness' known prior history of cooperation, including the case name, number, and jurisdiction in which the informant witness has previously testified." Ms. Barzee

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said that as databases become available, what constitutes a known prior history will develop. Ms. Barzee did not think the FPAA proposal was what the Commission was looking for.

Ms. Daniels noted that some of these informant witnesses are regular customers. With existing resources it is not onerous for a minimal inquiry to be made within the office of the state attorney. She asked how difficult could it be for prosecutors to send an email to their own office. She said she was not trying to make the prosecution go on a hunt. It is not unreasonable to put in some minor requirement that the office look to see if an informant witness was used.

A question arose as to why the FPAA suggestion contains the term "prosecuting authority" rather than the word "prosecutor." Mr. Cox advised that the term "prosecuting authority" was used because Mr. King did not have a problem sending an email within his own office. Mr. Cox said he did not know what the cost of an informant database would be. He noted that FDLE had one. He thought the Commission would be well served to recommend that law enforcement explore creating a statewide database.

Mr. Michael Ramage, General Counsel for FDLE, told the Commission that the FDLE database is a case management database solely for the use of FDLE. The information regarding the testimony of an informant witness would not surface on a query. The database is an investigative report database and not shared with

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other law enforcement agencies. Mr. Ramage noted that these types of databases are quite expensive. He said databases have to be managed and be maintained with personnel and equipment. For all the state law enforcement agencies to have a database would be expensive. The FDLE database cannot be expanded for law enforcement use because it was not created for that purpose.

Mr. Fingerhut pointed out that the FPAA suggestion states “actually known to the prosecuting authority.” This differs from the workgroup recommendation. Mr. Fingerhut asked if the consensus of the members was on the “informant’s prior history of cooperation” as shown in the FPAA version.

Dean Acosta believed that if the Commission adopted the workgroup proposal there would be hundreds of emails a week being sent by prosecutors. These are large offices that are already overburdened. If there is a failure to respond there would be a rule violation. This could create an onerous situation that will tie up offices and stimulate litigation.

Sheriff Cameron noted that there would be a need for two databases. The confidential informant database is not shared by anyone to protect the informant and the integrity of the case. There are thousands of street level informants and law enforcement does not want internal leaks. A jailhouse informant is different. If there is a way to create a database that is one thing. But the two types of informants in the proposal are not being clarified.

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Mr. Fingerhut said that the workgroup was sensitive to the issue of confidential informants. The informant witness that the rule proposal addresses is an informant in custody.

Ms. Barzee commented that there are reasons to protect a confidential informant. There are times when law enforcement will not divulge the identity of the informant. But once the informant is no longer confidential and the person is listed as a witness we are in a different ball park. The street level informant might be a resource that law enforcement never wants to reveal, but once you put that person on the stand, there are rights that the criminal defendant has.

Judge Perry said the Commission was putting disclosure of the informant witness on the front burner, not the back burner. Florida is one of the most liberal states with regard to discovery that is given to defendants. The defense can take that person's deposition and take advantage of Florida's public records law. There are numerous opportunities to narrow the scope of the inquiry and find out information. To require a database is just not realistic. The question before the Commission is which of the two versions the Commission should recommend.

Mr. Fingerhut pointed out that the FPAA proposal is limited to the prior history of the informant witness' history of cooperation actually known to the prosecuting authority. Mr. Fingerhut said that Mr. King was willing to accept on behalf of the FPAA the use of the term "known." Mr. Coxe asked known to

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whom? Dean Acosta asked whether the information was known to the individual prosecutor or the entire office.

Mr. William Cervone, the State Attorney for the Eighth Judicial Circuit, spoke on behalf of the FPAA. He said requiring an entire office to have imputed knowledge of the information, or to attempt to ascertain if a witness had testified in the past, would create an impossible situation. He noted that he could have an assistant resign the day before an email might be sent out. On a daily basis, his prosecutors are in court or otherwise out of the office.

Mr. Coxé asked what obligation the assistant state attorney had to find the information. Mr. Cervone said the defense has the obligation to ask questions at a deposition. Mr. Cervone said he could see where the individual prosecutor had an obligation to find out. But circulating an email or making phone calls is too broad.

Dean Acosta said the prosecuting authority is the office, thus making any employee aware of the disclosure requirement. If you say that you are imposing an affirmative obligation this would extend even if a person has left the office. Mr. Cervone said this is just not doable.

Judge Perry asked why this information could not be divulged during a deposition of the witness. Ms. Daniels responded by saying the witness is not always truthful. Judge Perry replied that the Commission was placing an affirmative duty to have the prosecutor find out the information.

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Mr. Fingerhut wondered if there was a minimal consensus to use the term “prosecutor” rather than “prosecuting authority.” He asked if that amendment would affect other parts of the rule. He said he preferred keeping the language “prosecuting authority.”

Judge Perry commented that in the future he strongly recommended that a database be kept regarding informants who testify. But he recognized that getting agencies to do this is something that might not occur.

Judge Perry reminded the members that the Commission discussion was now centered on the informant’s prior history of cooperation. This history could be something that is in the possession of the prosecutor, or the prosecutor’s office, or even outside the office.

Dean Acosta asked Mr. Fingerhut if he was willing to change the language in the proposal to substitute the term “prosecutor” for the term “prosecuting authority.” Mr. Fingerhut felt more comfortable leaving the wording as is.

Dean Acosta moved to amend the words “prosecuting authority” to the word “prosecutor.” The motion passed by a vote of 10 to 6.

The Commission then voted 16 to 2 to recommend the following language for subdivision (v) of the rule:

(v) “the informant witness’ prior history of cooperation, in return for any benefit, actually known to the prosecutor.” This language is identical to the FPAA

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suggestion except the substitution of the word “prosecutor” for the term “prosecuting authority.”

At the May 21, 2012 meeting, the Commission, by a unanimous vote, modified the language in subdivision (v) of the rule. The revision reads:

(v) “the informant witness’ prior history of cooperation, in return for any benefit as known to the prosecutor.”

Mr. Fingerhut directed the Commission’s attention to the following language contained in subdivision (vi) of the workgroup proposal: “Any other evidence relevant to the informant witness’ credibility.” This proposal of the workgroup was rejected by the FPAA. Mr. Fingerhut explained that the workgroup culled this out of the thirty of more possibilities regarding the issue of an informant witness’ credibility. He said a majority of the workgroup did not think the language would hurt.

Mr. Coxé asked if this sentence was rejected by the Commission when approving the language in subdivision (iv) of the proposal which states: “Whether the informant witness has received, or expects to receive, anything in exchange for his or her testimony.” Judge Perry thought that Mr. Coxé made a good point.

Ms. Barzee said she understood the purpose of the language, but *Brady* and *Bagley* (*U.S. v. Bagley*, 473 U.S. 667 (1985)), already require this. The state has to

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provide this about any witness. It might be misinterpreted to mean just informant witness information, not everyone.

Mr. Fingerhut agreed with Ms. Barzee, but thought the Commission needed to do more. He noted that *Brady* has not stopped discovery violations. He asked how it could hurt to send this message. He noted that much of what the workgroup had done could be said to be redundant, but the group was trying to highlight things to reduce wrongful convictions.

Mr. Smith opined that this was an invitation to disaster. It is an impossible standard. He moved to reject subdivision (vi) contained in the workgroup proposal. The Commission voted 15 to 3 to delete subdivision (vi). Mr. Fingerhut, Professor Nunn (proxy vote by Mr. Fingerhut) and Ms. Daniels voted in favor of the workgroup proposal.

The final version of the recommended amendments to rule 3.220 is set forth below and at Appendix G of this report.

3.220(b)(1)(A)(i)

(8) informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried.

3.220(b)(1)(M):

whether the state has any material or information that has been provided by an informant witness, including:

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(i) the substance of any statement allegedly made by the defendant about which the informant witness may testify;

(ii) a summary of the criminal history record of the informant witness;

(iii) the time and place under which the defendant's alleged statement was made;

(iv) whether the informant witness has received, or expects to receive, anything in exchange for his or her testimony;

(v) the informant witness' prior history of cooperation, in return for any benefit, as known to the prosecutor.

Committee Notes

2012 Amendment.

3.220(b)(1)(A)(i)(8) is not intended to limit in any manner whatsoever the discovery obligations under the other provisions of the rule.

3.220(b)(1)(M)(iv) The committee recognizes the impossibility of listing in the body of the rule every possible permutation expressing a benefit by the state to the informant witness. Although the term "anything" is not defined in the rule, the following are examples of benefits that may be considered by the trial court in determining whether the state has complied with its discovery obligations. The term "anything" includes, but is not limited to, any deal, promise, inducement, pay,

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leniency, immunity, personal advantage, vindication, or other benefit that the prosecution, or any person acting on behalf of the prosecution, has knowingly made or may make in the future.

The Commission discussed whether the proposed rule amendment should be sent to the Court via a petition to amend the rule, or as a recommendation that the Court direct The Florida Bar Criminal Procedure Rules Committee to study the Commission proposal and determine if a rule amendment was in order. The Commission recognizes that any amendment to rule 3.220 has far reaching implications, both for current and future cases and cases that are not final but are on appeal.

The Commission is of the opinion that the Bar committee, comprised of judges, prosecutors, and defense attorneys who are experts in criminal law, is best suited to determine if the Commission proposal is workable, and has merit. In addition, the Commission members expressed a concern that there is no mechanism in place for any staff at the Office of the State Courts Administrator to follow-up on a rule petition filed by the Commission. The Commission will be disbanded on July 1, 2012. There will be no staff institutional knowledge available to file any response to comments filed in the event a case is created by the filing of a petition.

VII. Commission Recommendations

(a) Informant and Jailhouse Snitches

(1) The Commission recommends the adoption of a jury instruction regarding the testimony of persons who have been labeled by the Commission as an “informant witnesses.” The Commission does not have the authority to submit to the Court a specific jury instruction via a petition. Therefore, the Commission recommends that the Court request that the Supreme Court Committee on Standard Jury Instructions in Criminal Cases review the proposed jury instruction dealing with informant testimony for possible submission to the Court by way of petition. The proposed instruction is set forth at Appendix N.

(2) The Commission recommends that the Florida Legislature adopt a statute mandating the electronic recording of statements of suspects during a custodial interrogation, as set forth in Appendix L of this report. In the event the Florida Legislature follows the recommendation of the Commission, it is recommended that the Supreme Court Committee on Standard Jury Instructions in Criminal Cases consider petitioning the Court to approve a companion jury instruction as set forth in Appendix M of this report.

(3) The Commission recommends that the Court refer the Commission’s suggested amendments to Florida Rule of Criminal Procedure 3.220 to the Supreme Court Criminal Court Steering Committee or The Florida Bar’s Criminal

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Procedure Rules Committee for review and possible filing of a rule petition with the Court. A rule amendment would ensure that information regarding the possible testimony of an informant witness is disclosed to the defense. The proposed rule amendment is set forth at Appendix G of this report.

(b) Scientific Evidence

(1) The Commission recommends that the Criminal Justice Standards and Training Commission establish a program for crime scene technicians to be certified by written examination, and further continuing testing be performed, in order to retain certification.

(2) The Commission recommends 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 hire and retain trained personnel.

(3) The Commission recommends that the Florida Legislature 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.

(4) The Commission recommends that the Florida Legislature provide more funding to the Florida Department of Law Enforcement for DNA testing as recommended by the department, as follows:

Appendix G

Commission Recommendation for Amendment to

Florida Rule of Criminal Procedure 3.220

Rule 3.220. Discovery

(a) Notice of Discovery. After the filing of the charging document, a defendant may elect to participate in the discovery process provided by these rules, including the taking of discovery depositions, by filing with the court and serving on the prosecuting attorney a Notice of Discovery which shall bind both the prosecution and defendant to all discovery procedures contained in these rules. Participation by a defendant in the discovery process, including the taking of any deposition by a defendant or the filing of a public records request under chapter 119, Florida Statutes, for law enforcement records relating to the defendant's pending prosecution, which are nonexempt as a result of a codefendant's participation in discovery, shall be an election to participate in discovery and triggers a reciprocal discovery obligation for the defendant. If any defendant knowingly or purposely shares in discovery obtained by a codefendant, the defendant shall be deemed to have elected to participate in discovery.

(b) Prosecutor's Discovery Obligation.

(1) Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and permit the defendant to inspect, copy, test, and photograph the following information and material within the state's possession or control:

(A) a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial under section 90.404(2), Florida Statutes. The names and addresses of persons listed shall be clearly designated in the following categories:

(i) Category A. These witnesses shall include (1) eye witnesses, (2) alibi witnesses and rebuttal to alibi witnesses, (3) witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant, which shall be separately identified within this category, (4) investigating officers, (5) witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged, (6) child hearsay witnesses, and (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify. (8) informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried.

(ii) Category B. All witnesses not listed in either Category A or Category C.

(iii) Category C. All witnesses who performed only ministerial functions or whom the prosecutor does not intend to call at trial and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense;

(B) the statement of any person whose name is furnished in compliance with the preceding subdivision. The term "statement" as used herein includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, but shall not include the notes from which those reports are compiled;

(C) any written or recorded statements and the substance of any oral statements made by the defendant, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements;

(D) any written or recorded statements and the substance of any oral statements made by a codefendant;

(E) those portions of recorded grand jury minutes that contain testimony of the defendant;

(F) any tangible papers or objects that were obtained from or belonged to the defendant;

(G) whether the state has any material or information that has been provided by a confidential informant;

(H) whether there has been any electronic surveillance, including wiretapping, of the premises of the defendant or of conversations to which the defendant was a party and any documents relating thereto;

(I) whether there has been any search or seizure and any documents relating thereto;

(J) reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons; and

(K) any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the defendant.

(L) any tangible paper, objects or substances in the possession of law enforcement that could be tested for DNA.

(M) whether the state has any material or information that has been provided by an informant witness, including:

(i) the substance of any statement allegedly made by the defendant about which the informant witness may testify;

(ii) a summary of the criminal history record of the informant witness;

(iii) the time and place under which the defendant's alleged statement was made;

(iv) whether the informant witness has received, or expects to receive, anything in exchange for his or her testimony;

(v) the informant witness' prior history of cooperation, in return for any benefit, as known to the prosecutor.

Committee Notes

2012 Amendment.

3.220(b)(1)(A)(i)(8) is not intended to limit in any manner whatsoever the discovery obligations under the other provisions of the rule.

3.220(b)(1)(M)(iv) The committee recognizes the impossibility of listing in the body of the rule every possible permutation expressing a benefit by the state to the informant witness. Although the term "anything" is not defined in the rule, the following are examples of benefits that may be considered by the trial court in determining whether the state has complied with its discovery obligations. The

term "anything" includes, but is not limited to, any deal, promise, inducement, pay, leniency, immunity, personal advantage, vindication, or other benefit that the prosecution, or any person acting on behalf of the prosecution, has knowingly made or may make in the future.

APPENDIX B

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



Supreme Court of Florida

500 South Duval Street
Tallahassee, Florida 32399-1925

RICKY POLSTON
CHIEF JUSTICE
BARBARA J. PARIENTE
R. FRED LEWIS
PEGGY A. QUINCE
CHARLES T. CANADY
JORGE LABARGA
JAMES E. C. PERRY
JUSTICES

THOMAS D. HALL
CLERK OF COURT

SILVESTER DAWSON
MARSHAL

October 9, 2012

Honorable Kevin M. Emas
Chair, Florida Supreme Court
Criminal Court Steering Committee
2001 SW 117th Ave.
Miami, Florida 33175-1716

Re: Florida Innocence Commission's recommended amendments to Florida
Rules of Criminal Procedure 3.112 and 3.220

Dear Judge Emas:

At the direction of the Court, I am writing you in your capacity as Chair of the Florida Supreme Court Criminal Court Steering Committee to ask the Steering Committee to consider two important recommendations contained in the Florida Innocence Commission's Final Report to the Court. For your convenience, I have enclosed the Final Report in CD format, along with hard copies of the relevant portions of the report and appendices.

The Court would like the Steering Committee to consider Recommendations (a)(3) and (d)(2) contained in the Commission's report and propose rule amendments consistent with those recommendations. First, the Court asks the Steering Committee to consider and propose amendments to implement Recommendation (a)(3) concerning the Commission's proposed amendment to Florida Rule of Criminal Procedure 3.220 contained in Appendix G to the Final Report. See Final Report at 166-67. The Court also would like the Steering Committee to consider

Honorable Kevin M. Emas

October 9, 2012

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and propose amendments to implement Recommendation (d)(2), which recommends that Florida Rule of Criminal Procedure 3.112 be amended or a new rule adopted to require that any attorney who is practicing law in a felony case must have completed at least a two hour course on the law of discovery and Brady responsibilities. See Final Report at 169-70.

Your report should be filed with my office by March 1, 2013, with copies to the liaison justice to the Steering Committee and the director of central staff. Since your report will contain proposed rule amendments, it should be in the form of a proper petition, in accordance with Part IV of the Court's Guidelines for Rules Submissions. See In re Guidelines for Rules Submission, Fla. Admin. Order No. AOSC06-14 (June 14, 2006). If you determine that more time is required to address these issues, please file a motion for extension of time with my office.

Thank you in advance for your consideration of this matter, and please do not hesitate to contact me or the Court's liaison to your Committee, Justice Labarga, if you have any questions.

Most cordially,

By:


CHIEF DEPUTY CLERK

Thomas D. Hall

TDH/ckd/sb

Enclosures

cc: The Honorable Jorge Labarga, Liaison to Steering Committee
The Honorable Peggy A. Quince, Liaison to Commission
The Honorable Belvin Perry Jr., Commission Chair
Mr. Bart Schneider, OSCA Support Staff to the Steering Committee
Ms. Deborah J. Meyer, Director of Central Staff