

FLORIDA INNOCENCE COMMISSION

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FINAL REPORT  
TO THE  
SUPREME COURT OF  
FLORIDA

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JUNE 25, 2012

# The Florida Innocence Commission-Final Report

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## **I. Background**

On December 11, 2009, a Petition for a Rule Establishing an Actual Innocence Commission was filed with the Supreme Court of Florida by Talbot D'Alemberte, Esquire, on behalf of sixty-eight petitioners. On July 2, 2010, Chief Justice Charles T. Canady established, by Administrative Order AOSC10-39, the Florida Innocence Commission. The Chief Justice appointed Chief Judge Belvin Perry, Jr., of the Ninth Judicial Circuit, to chair the Commission. Administrative support to the Commission has been provided by the Office of the State Courts Administrator through an Executive Director, an OPS program attorney, and an OPS Administrative Assistant II.

The Chief Justice entered two additional administrative orders since the date the Commission was created. In AOSC11-21, dated July 1, 2011, two additional members were added to the Commission: Mr. H. Scott Fingerhut, Esquire, and the Honorable Paul F. Sireci, Chief of Police, Tampa International Airport Police Department. In AOSC11-29, dated September 7, 2011, the Chief Justice appointed the Honorable Charles McBurney, Florida House of Representatives, to replace the Honorable William D. Snyder, Florida House of Representatives.

The Commission filed an Interim Report with the Court, as required by AOSC10-39, on June 6, 2011. This Final Report of the Commission is filed

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pursuant to the directive in AOSC10-39 to file a final report with the Court no later than June 30, 2012.

Meetings were held in Tallahassee, Jacksonville, Tampa, and Orlando. In addition, working groups within the Commission held several conference calls in order to facilitate Commission business.

The Commission Mission Statement is set forth in the Interim Report. The Commission was established to recommend to the Supreme Court of Florida solutions to eliminate or significantly reduce the causes for wrongful convictions. The solutions set forth by the Commission in the Interim Report and this Final Report include suggested amendments to certain criminal rules, statutory changes, new or amended jury instructions, and detailed funding requests.

The Commission has received a significant number of letters, e-mails, and telephone calls from inmates, and families of inmates, requesting that the Commission investigate their claims of actual innocence. The offenses have run the gamut from third degree felonies to capital offenses. In addition, there have been numerous contacts from citizens residing in Florida and other states who have inquired about the role of the Commission. With all of these contacts, it has been made clear that the role of the Commission is not to serve as an investigative body, provide a method of exoneration for claims of innocence, or delve into the death penalty process.

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Whether Florida chooses to create a new commission modeled after the North Carolina Innocence Inquiry Commission, or form another commission to study criminal justice issues, is left to the sound discretion of the judicial, executive, and legislative branches of government.

## II. Members of the Florida Innocence Commission

The Honorable Belvin Perry, Jr. (Chair), Chief Judge, Ninth Judicial Circuit

The Honorable Joe Negron, The Florida Senate, District 28

The Honorable Gary Siplin, The Florida Senate, District 19

The Honorable Charles McBurney, Florida House of Representatives, District 16

The Honorable Ari Porth, Florida House of Representatives, District 96

The Honorable Patricia Kelly, Appellate Judge, Second District Court of Appeal

The Honorable J. Preston Silvernail, Circuit Court Judge, Eighteenth Judicial  
Circuit

The Honorable Brad E. King, State Attorney, Fifth Judicial Circuit

The Honorable Nancy Daniels, Public Defender, Second Judicial Circuit

The Honorable Gerald Bailey, Commissioner, Florida Department of Law  
Enforcement

The Honorable Bill Cameron, Sheriff, Charlotte County

The Honorable Paul F. Sireci, Chief of Police, Tampa International Airport Police  
Department

Mr. R. Alex Acosta, Dean, Florida International University College of Law

Ms. Martha Barnett, Esquire

Mr. Howard Coker, Esquire

Mr. Henry Coxe, Esquire

Mr. H. Scott Fingerhut, Esquire

Ms. Mary Barzee Flores, Esquire

Mr. Benjamin Hill, Esquire

Mr. Kenneth B. Nunn, Professor, University of Florida Levin College of Law

Ms. Tena Pate, Chair, Florida Parole Commission

Mr. Israel Reyes, Esquire

Mr. Rod Smith, Esquire

Ms. Carolyn Snurkowski, Assistant Deputy Attorney General, Florida Department  
of Legal Affairs

Ms. Sylvia H. Walbolt, Esquire

### *Supreme Court Liaison to the Commission*

The Honorable Peggy A. Quince, Justice, Florida Supreme Court



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## *Special Requests*

Upon request by a qualified individual with a disability, this document will be made available in alternative formats. To order this document in an alternative format, please contact Debra Howells, State Courts ADA Coordinator, Office of the State Courts Administrator, 500 S. Duval Street, Tallahassee, FL 32399-1900; telephone 850-922-4370; email: [ada@flcourts.org](mailto:ada@flcourts.org).

Copies of the Final Report are available upon request by contacting the Office of the State Courts Administrator, 500 S. Duval Street, Tallahassee, FL 32399-1900.

### **III. Commission Funding**

The Commission expenditures are covered by two separate funding sources. The 2011 Florida Legislature, through the Mediation Arbitration Trust Fund (cost center 402), provided funding to the Commission in the sum of \$246,620.00 for fiscal year 2011-2012. As of June 20, 2012, the Commission had a balance of \$6,084.21 in that account. Because of a budget shortfall, \$40,703.00 was taken from the account on April 9, 2012. A grant application for \$114,862.00 (cost center 509) was approved on June 24, 2010, by The Florida Bar Foundation. This grant provided for two semi-annual payments of \$57,431.00. Although the grant expired on June 30, 2011, the foundation was kind enough to extend the grant period to July 14, 2012. As of June 25, 2012, the Commission had a balance of \$59,519.21 left from grant funds.

The total sum expended by the Commission from July 2, 2010 until June 25, 2012 is \$376,862.10.

The Commission funds were managed by the Executive Director. The funding was used to cover salaries, general expenses (including copying, mailing, and meeting expenses), and hotel, travel and per diem costs of Commission members. Funds were also expended for expert and speaker travel expenses and contracted services for administrative or research needs.

## **IV. Acknowledgements**

The Commission wishes to express its gratitude to the President of the Florida Senate, Senator Mike Haridopolos, for his continuing support of the Commission during its two years of work. The Commission also expresses its thanks to the Florida Legislature and The Florida Bar Foundation for providing funding to the Commission for the past two years. The Commission would also like to thank The FLORIDA Channel for its continuing coverage of the Commission meetings.

The Commission wishes to acknowledge the invaluable assistance of Executive Director Les Garringer, Ms. Cheryl Magnes, the Administrative Assistant to the Executive Director, and Ms. Megan Long, Program Attorney to the Commission. The Commission would also like to thank Ms. Jackie Bergen, the former Director of Administration for the Scottish Criminal Cases Review Commission, for providing research materials for use by the Commission members and staff.

The Commission staff would like to thank Mr. Seth E. Miller, Esquire, Executive Director of the Innocence Project of Florida, Inc., for his insight, and Mr. Michael R. Ramage, Esquire, General Counsel for the Florida Department of Law Enforcement, for his wisdom and assistance.

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The extensive research necessary for the Commission to conduct its work, could not have been accomplished without the assistance of the law students at Stetson University College of Law and the University of Florida Fredric G. Levin College of Law.

The following faculty members and law students have devoted an extraordinary amount of time and energy assisting Commission members and staff through their legal research, and when necessary, attending Commission meetings: Professor Judith Scully, Amanda Kotula, Alexandra Menegakis, Gabe Neibergall, Carmen Johnson, Olga Balderas, Caitlin Docherty, Kelly Dugan, Merise Jalali, Lewis Kirvan, Gillian Leytham, Dominique McPherson, Samantha Newman, David Rosenberg, Brandon Sapp, Vivian Seymour, Braja Spellman, Thao Tran, Yvette Wiltshire, Ashley Goggins, Andrew M. Harrison, Meagan Foley, Elisabeth A. Fontugne, Andrew Mitchell, Eric Martucci, Kayla Cash, Justin W. Phillips, Jamie R. Combee, Melissa A. Foss, Laura Zegzdryn, Adlin M. Tuya, Andona R. Zacks-Jordan, Aimée Tecla, Isabella Sobel, Ashley Rector, Alex Seaton, Benjamin Hoffman, LeslieRae Newton, Charlie Lawrence, Lisa Scheibly, Daniel A. Heyman, Kaylin M. Humerickhouse, Katherine W. Ramos and Juliane A. Murphy.

### V. Chairman's Remarks

After two years the work of the Florida Innocence Commission has come to an end. As is evident by an examination of the reports produced by the Commission, a number of sound recommendations have been offered that if implemented, could lessen the likelihood of individuals enduring wrongful convictions in Florida. However, we cannot ignore the fact that if these recommendations are not given serious consideration, thoroughly vetted and implemented in some form, then the problems suffered in the past of wrongful convictions and innocent people sentenced to prison will continue to occur.

Clearly, some of these recommendations will cost money and some may even argue the price of justice is too high. But the consequence of inaction is injustice, and injustice is not what this Country was founded upon. The foundation of this Country, and this State, is based upon the Rule of Law. There can never be an unreasonable price attached to a founding principle of this Country. Whenever one individual has been wrongly convicted we as a society suffer. If wrongful convictions continue, at some point in time it will cause the citizens to wonder whether the system is fair and whether the judgments of our juries and courts should be respected. It is that respect which strengthens the pillars of justice.

We cannot avoid the reality that a number of the problems in our system of justice deal with the issue of adequate funding. Prosecutors, public defenders, and

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the courts are overburdened and do not have adequate tools and resources to keep pace with the volume and complexity of the cases before them. Conflict attorneys are currently undercompensated which will eventually lead to serious problems in ensuring that people who appear before the court have competent and adequate representation.

If we are to uphold what I consider to be the goal of the justice system, that is to protect the innocent and punish the guilty according to the law, then we must be vigilant in ensuring that our system of justice is appropriately funded.

I would like to express my gratitude to the Chief Justice of the Florida Supreme Court, The Honorable Charles T. Canady, for the opportunity and privilege to serve as Chair of the Florida Innocence Commission. I would also like to express my sincere gratitude to the members of the Commission for their time, talent and service. Finally, I would be remiss if I did not thank our Executive Director, Lester A. Garringer, Jr. and his administrative assistant, Cheryl Magnes for a tremendous job well done. Without the tireless hard work and steady hand in leadership consistently demonstrated by Mr. Garringer we would not have been able to accomplish so much in just two short years.

## **VI. Executive Summary**

### *Introduction*

This summary will not attempt to revisit the work of the Commission from July 2, 2010, through June 6, 2011. The Commission work product for that time period can be found in the Interim Report filed with the Court. This Final Report will cover the work of the Commission from June 7, 2011, through June 25, 2012. However, since the issue of eyewitness identification continued to be discussed by the Commission subsequent to June 6, 2011, this topic will also be covered in the Final Report.

An in-depth recitation of the presentations by certain witnesses who appeared before the Commission is set forth below. The thought processes of the members and conclusions reached by the Commission are also included. This information is provided to the Court in order to follow the steps taken in evaluating the issues before the Commission, and the recommendations included in this Final Report.

At the conclusion of all the meetings, Commission members were afforded the opportunity to submit comments regarding their service on the Commission. Individual comments are attached at Appendix S.

Since its creation by Administrative Order SC10-39 on July 2, 2010, the Commission has met thirteen times. In addition, working groups within the

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Commission have held several conference calls in order to facilitate Commission business.

At each meeting, the members were furnished with a notebook or a compact disk that contained all of the research conducted by Commission staff. The contents of the compact disks of the last eight Commission meetings from August 29, 2011 to June 11, 2012, are uniform in that they contain, but are not limited to, the following information:

- (1) Treatises and articles by experts
- (2) Commission, task force, and bar association reports and recommendations
- (3) Statutes from Florida and other jurisdictions
- (4) Court rules from Florida and other jurisdictions
- (5) Case law
- (6) Jury instructions from Florida and other jurisdictions
- (7) Law enforcement protocols
- (8) Commission minutes - Tabs A-F, H, and Q
- (9) PowerPoint presentations by the Chair of the Commission and guest presenters

The Final Report of the Commission is available to any interested person in hard copy and electronic format. In addition, all of the Commission notebooks,



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including the research materials, have been stored on compact disks. This information is also available upon request.

During the two years of its existence, the Commission identified five causes for wrongful convictions: Eyewitness identification, false confessions, informants and jailhouse snitches, improper/invalid scientific evidence, and professional responsibility. While studying the topic of professional responsibility, it became crystal clear to the Commission that a sixth significant cause exists that may lead to wrongful convictions: The underfunding of the criminal justice system in Florida. Because of the significance of this issue, subsection (h) has been included in the Executive Summary. Many members expressed their concerns about criminal justice system funding during discussions that occurred at the June 11, 2012 meeting. The following points raised by three Commission members are the most salient and reflect the mindset of the Commission.

Judge Silvernail stated that without adequate counsel, due process is not assured. If we do not provide adequate funding there is a loss of the due process of law which will lead to wrongful convictions.

Dean Acosta commented that if one is serious about doing something about wrongful convictions we must recognize that a lack of funding is the most serious threat that implicates the state attorneys, public defenders, the Attorney General, criminal conflict counsel, and the judiciary. All of the other recommendations of

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the Commission are secondary. More funding is fundamental to our rights and the system of law.

Mr. Coxe succinctly stated that inadequate funding leads to mistakes that are a recipe for wrongful convictions.

Although the Commission has identified and studied these six causes of wrongful convictions, one should not draw the assumption that the Commission, in its two years of work, has been able to study every conceivable reason that leads to the conviction of the innocent. As Judge Silvernail succinctly stated at the final Commission meeting on June 11, 2012: Attorney misconduct, ineffective defense counsel, prosecution errors, heavy judicial caseloads, and inadequate funding all lead to wrongful convictions.

### ***(a) Eyewitness Identification***

As eyewitness misidentification is the leading cause of wrongful convictions, the Commission elected to study this issue first. According to the Innocence Project, eyewitness misidentification has played a role in more than 75% of convictions subsequently overturned through DNA testing. The United States Supreme Court early on recognized the power of eyewitness identification.

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“There is almost nothing more convincing,” Justice William J. Brennan Jr. wrote in a 1981 dissent, quoting from a leading study, “than a live human being who takes the stand, points a finger at the defendant, and says, ‘That’s the one!’”

Eyewitness identification is powerful because a witness is often completely convinced that he or she is correct about identifying a perpetrator. Additionally, persuasive in-court identifications are the norm in American courtrooms.

However, groundbreaking social science studies over the past thirty years have shown that confidence does not correlate with accuracy. Factors that can lead to eyewitness misidentification include: cross-racial identifications, the presence of a dangerous weapon during the crime, and the type of lineup that law enforcement shows to witnesses. A leading social scientist in this field, Professor Gary Wells, has advocated a certain type of lineup based on his research: A sequential presentation of the photographs by a blind administrator (a person who does not know who the suspect is).

While there is not unanimity of opinion among social scientists about the merits of sequential vs. simultaneous lineup presentation and a blind administrator vs. a person who is aware of the suspect’s identity, there is increasing recognition by various commissions, courts, and nonprofit organizations that memory and the human mind are more fallible than once thought. Since eyewitness

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misidentification was given the highest priority, the Commission spent the most time studying and making recommendations for this area.

The subject of eyewitness identification was first addressed by the Commission as early as August of 2010. Appendices G and H of the Interim Report contain the recommendations of the Commission as set forth in the Standards for Florida State and Local Law Enforcement Agencies in Dealing with Photographic or Live Lineups in Eyewitness Identification and the Commentary and Instructions. This topic was addressed again at the August 29, October 10, and December 12, 2011 meetings held in Orlando, Florida.

On or about June 15, 2011, the Florida Department of Law Enforcement (FDLE), in conjunction with the Florida Sheriff's Association, the Florida Police Chiefs Association and the Florida Prosecuting Attorneys Association, sent to law enforcement agencies a set of recommended standards that differed in some respects from the recommendations of the Commission. A significant difference between the two standards is that the law enforcement standard does not state a preference for an independent administrator to administer lineups. The Commission recommended that an independent administrator be utilized if resources were available.

In order to ensure that law enforcement agencies were aware of the recommendations of the Commission, staff for the Commission gathered a list of

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every law enforcement agency that could be located in Florida and did a mass mailing, with a cover letter, to 321 law enforcement agencies, explaining the work of the Commission. The letter explained how to access the report on the Court website, and included a hard copy of the Commission standards. Staff also prepared a side-by-side comparison of the Commission work product and the law enforcement June 15<sup>th</sup> work product, so that each agency could compare the two sets of standards and adopt a policy that best fit its needs. The letter also asked each law enforcement agency to respond to the Commission by November 1, 2011, and to provide a copy of any standard adopted by the agency.

During the course of collecting law enforcement standards, State Attorney Brad King contacted Commission staff on October 21, 2011. Mr. King advised that the Florida Prosecuting Attorneys Association had met on October 18, 2011. At that meeting, all of the state attorneys agreed to obtain copies of the protocols from their respective law enforcement agencies and deliver them to Mr. King, so they could be forwarded to the Commission.

On February 10, 2012, Mr. King furnished to Commission staff a compact disk containing the protocols of 347 law enforcement agencies. The total number of pages exceeds 2,800 pages. The compact disk was created by Mr. King using links so that each protocol can be accessed by circuit and then by an agency within the circuit, or by an alphabetical list. The complete list of law enforcement

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agencies who have submitted a protocol (including agencies that responded directly to the Commission) is attached at Appendix I.

As noted in the Interim Report filed with the Court, the Commission, in approving the Standards for Florida State and Local Law Enforcement Agencies Dealing with Photographic or Live Lineups in Eyewitness Identification and the Commentary and Instructions did not take a stance with regard to choosing the sequential method of administration over the simultaneous method. These methods are defined as follows:

(1) Sequentially: Presentation of photos in a photo group or individuals in a lineup to a witness one at a time rather than all at once.

(2) Simultaneously: Presentation of photos in a photo group or individuals in a lineup to a witness all at once rather than one at a time.

The Commission's position is set forth in Item F of the Standards (located in Appendix G of the Interim Report): The Method(s) of Presenting the Photo Array or Lineup.

(1) The investigator administering the array shall, in consultation with the agency's legal advisor and the local State Attorney's Office, determine whether the sequential or simultaneous method of conducting photo arrays is to be utilized. Agency policy may allow one method, or both methods.

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As mentioned in the Interim Report, the Commission did endorse Senate Bill 1206 sponsored by Senator Joe Negron. This bill called for the use of the sequential method of administration. The vote to endorse the legislation was 12 to 8. Those opposing Senate Bill 1206 had several objections to the bill. One objection was that there were no scientific studies that have shown that the sequential method of administration is superior to the simultaneous method of presentation.

On September 19, 2011, the American Judicature Society (AJS) released its initial report of a field study conducted by scientists and law enforcement officers comparing simultaneous and sequential photographic lineups. The report is entitled: A Test of the Simultaneous vs. Sequential Lineup Methods. The report is authored by Professor Wells, Dr. Nancy K. Steblay, and Dr. Jennifer E. Dysart. Commission staff's interpretation of the findings of the study concludes:

- (1) The results of the study are consistent with decades of laboratory research showing that the sequential procedure reduces mistaken identifications with little or no reduction in accurate identifications.
- (2) The sequential method is superior for reducing the frequency of a witness selecting a filler photo.

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(3) The 2006 Illinois study which concluded that the simultaneous lineups produced higher suspect identification rates and lower filler picks than sequential lineups used flawed research methods.

The Commission was provided a copy of the AJS study at the October 10, 2011 Commission meeting. At that meeting, staff was directed to solicit the comments of Professor Roy Malpass and report his conclusions regarding the study at the December 12, 2011 meeting. Professor Malpass had presented his findings on eyewitness identification at the January 11, 2011 meeting of the Commission (See Appendix C of the Interim Report filed with the Court on June 6, 2011). Staff contacted Professor Malpass, and the salient portion of his thoughts regarding the AJS study is set forth below:

“Sequential presentation, especially as a mandated wholesale replacement for simultaneous presentation, is certainly controversial, and for that reason it is unwise for non-scientists to adopt a new procedure to the exclusion of others while it is not well understood scientifically - while the scientific jury is still out.”

At the December 12, 2011 meeting, staff advised the Commission of the comments of Professor Malpass. The question presented at this meeting was whether the recommendation of the Commission should be changed in light of the AJS study. Professor Nunn moved to change the Commission recommendation on the method of conducting eyewitness identifications in the Interim Report.



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Professor Nunn stated that Professor Malpass is the only expert holding to the view that the sequential method is not superior. The Commission voted 14 to 7 to not change the Commission recommendation.

On August 15, 2011, the Court requested that the Supreme Court Committee on Standard Jury Instructions in Criminal Cases file a report with the Court no later than January 3, 2012, proposing a new jury instruction to address eyewitness identification. This request was based on a recommendation by the Commission that is set forth in the Interim Report on pages 33 and 34. The jury instructions committee filed its report with the Court on December 29, 2011 in Case No. SC11-2517: In Re: Standard Jury Instructions in Criminal Cases - Report No. 2011-05. Appendix A of the committee report contains proposed jury instruction 3.9(f) on eyewitness identification. The proposal was published in The Florida Bar News. Comments to the proposed instruction were to be filed with the Court no later than April 2, 2012. Comments were received from Assistant State Attorney Richard Mantei, the Florida Public Defender Association, and the Innocence Project of Florida. The committee filed its response to the comments on April 20, 2012. As of the date of this Final Report, the case is pending before the Court.

### **(b) False Confessions**

Until DNA evidence conclusively proved that some people who had confessed to a crime were innocent, popular opinion and many courts assumed that an innocent person would never confess to a crime that he or she did not commit. Research into the cases and psychological studies have shown that people are more apt to confess to a crime when subjected to certain interrogation techniques, and that some categories of people, such as juveniles and mentally incapacitated individuals, are especially susceptible to making a false confession.

The United States Supreme Court and Florida case law precedent is clear: Law enforcement may use deception as an interrogation technique, and deception is not in itself inherently coercive. Florida follows the majority of jurisdictions that have the courts assess the voluntariness and reliability of a confession under a totality of the circumstances test. The court must look at all of the circumstances on a case-by-case basis to make sure that the interrogation was not unduly coercive and that the defendant freely and voluntarily waived his or her *Miranda* rights. The court may assess factors such as the defendant's age, education and experience, as well as the length and type of questions used in the interrogation.

The most commonly advocated method to reduce false confessions is to require that confessions be electronically recorded. One state, Indiana, requires law enforcement to electronically record custodial interrogations through a Supreme

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Court order amending the state's rules of evidence. Still another state, Maryland, provides rules about electronic recordation contained within its code of criminal procedure. And finally, New Jersey requires the recording of custodial interrogations in a place of detention as adopted by court rule.

The reported cases of wrongful convictions, based on DNA evidence, demonstrate that twenty-five percent were the result of false confessions. Of the eleven exonerations in the State of Florida, three were related to false confessions. The Commission studied this issue at the August 29, 2011 and October 10, 2011 meetings.

At the May 16, 2011 Commission meeting, the members were presented an overview of the subject of false confessions by Judge Perry. In order to facilitate a thorough review of the causes for false confessions, and to bring meaningful recommendations back to the Commission, an internal workgroup was formed by the Commission on that date. The chair of the workgroup was Dean Alex Acosta. Participating members were Sheriff Bill Cameron, Ms. Nancy Daniels, Ms. Mary Barzee Flores, Judge Patricia Kelly, Mr. Brad King, and Professor Kenneth Nunn. The workgroup was asked to report back to the Commission at the August 29, 2011 meeting.

The workgroup conducted four telephonic conferences on June 21, July 11, July 25, and August 15, 2011. The final work product of the group titled Standards

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for Electronic Recording of Custodial Interrogations (the standards) was presented to the Commission at the August 29, 2011 meeting. The standards are attached to this report at Appendix J. The central theme of the standards is that law enforcement agencies should be required to electronically record suspect statements when there is a custodial interrogation. Although these standards were not adopted by the Commission as a recommendation, they served as the model for the Commission to ultimately recommend to the Florida Legislature a statutory enactment requiring law enforcement to electronically record suspect statements.

Dean Acosta educated the Commission on the efforts of the workgroup at the August 29, 2011 meeting. He noted that the standards were meant to be a broad policy document. The Commission spent a considerable amount of time reviewing the work product of the workgroup and made modifications to the original standards. A full discussion of the Commission's action regarding the standards is set forth in the August 29, 2011 minutes, located at Appendix A.

At the August 29, 2011 Commission meeting, the members were briefed on how other jurisdictions handle the recording of a suspect statement in criminal cases through legislative enactments.

(1) Illinois: Non-recorded statements are inadmissible. The state can overcome inadmissibility by a preponderance of the evidence.

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- (2) North Carolina: The statute requiring recording applies to homicide cases. The state can overcome inadmissibility by clear and convincing evidence.
- (3) Texas: A statement is inadmissible unless recorded. The entire statement is to be recorded.
- (4) Maine: Written policies for recording are required.
- (5) Missouri: Serious crimes shall be recorded. There is no remedy for non-compliance. The Governor can withhold state funding if there is a lack of good faith by law enforcement agencies.
- (6) Montana: Custodial interrogations should be recorded in a place of detention.
- (7) Nebraska: A jury instruction is given if there is a failure to record.
- (8) New Mexico: Recording of a statement in felony cases is required when feasible, unless exceptions apply.
- (9) Ohio: Felony statements of suspects are presumed admissible if recorded.
- (10) Oregon: Jury instructions are given on the statutory requirements for electronic recording.
- (11) Wisconsin: There is a state policy to record statements taken in felony cases.

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There are exceptions to the recording requirement and they vary from state to state. Some exceptions are: Statements made before a grand jury; statements made on the record in court; custodial interrogations in another state; federal law enforcement interrogations; spontaneous statements; statements made during arrest; and statements made during recording equipment failure.

A few states have addressed the issue of recording of suspect statements through court rules:

(1) Indiana: The rule requiring recording has been adopted by Supreme Court order.

(2) Maryland: Recording is required by the code of criminal procedure.

(3) New Jersey: The rule requires recording of custodial interrogations.

Five states have addressed recording of suspect statements through case law:

(1) Alaska: Unexcused failure to not record a custodial interrogation violates the due process clause of the Alaska constitution.

(2) Iowa: Videotaping should be encouraged.

(3) Massachusetts: If a confession is not recorded, the defense is entitled to a cautionary jury instruction.

(4) Minnesota: A statement that is not recorded is inadmissible if the violation is substantial.

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(5) New Hampshire: There is no requirement to record, but if recorded, the entire interrogation proceeding must be recorded.

At the August 29, 2011 meeting, the Florida Association of Criminal Defense Lawyers (FACDL), through Ms. Nellie King, Esquire, and Mr. Russell Smith, Esquire, addressed the Commission. FACDL urged the Commission to recommend the recording of suspect statements as a means to reduce false confessions for the following reasons:

(1) Electronic recording promotes reliability by standardizing interrogation techniques, allowing for easier review of techniques, allowing for independent review, and distinguishing between officers who interrogate well and those who do not.

(2) Recording promotes efficacy by ensuring constitutional rights, reducing claims of misconduct against law enforcement, protecting against errors caused by language/mental conditions/substance impairment, allowing consistent appellate review, and improving interrogation techniques by review of recordings.

(3) Recording ensures transparency by permitting defense counsel and the defendant to review the recording, allowing prosecutors to evaluate the defendant's statements, protecting defendants who speak English as a second language (particularly important in a state as diverse as Florida), allowing courts to

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accurately evaluate claims of improper police conduct, and improving the jury's ability to determine the evidentiary value of the defendant's statements.

(4) Many prosecutors, based on survey results, say that recordings help them assess the strengths/weaknesses of the state's case and help them prepare for trial.

(5) Section 112.532(1)(g), Florida Statutes (2011): Law enforcement officers' and correctional officers' rights states that the formal interrogation of a law enforcement officer or correctional officer, including all recess periods, must be recorded on audio tape, or otherwise preserved in such a manner as to allow a transcript to be prepared, and there shall be no unrecorded questions or statements.

FACDL also noted that there are arguments against electronic recordings of custodial interrogations:

(1) Law enforcement agencies believe they can self-police. Therefore, legislation is not necessary.

(2) The cost of electronic recording is costly. FACDL countered that recording devices are a reasonable cost and there are virtually no storage costs for digital media.

(3) A recording policy should be determined at the local level. FACDL commented that this would (A) create a patchwork of policies (B) encourage defense counsel to say that a jurisdiction does not use "best practices" and



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therefore request a jury instruction (C) cause justice to be administered differently throughout the state, and (D) increase the likelihood that courts will decide the issue.

Additional benefits of recording are less time between arrest and disposition of a case, fewer suppression hearings, smaller likelihood of hung juries, fewer frivolous appeals, less post-conviction litigation, and lower systemic costs.

As a centerpiece of criminal justice reform, recorded interrogations can help reduce the need for the use of informants and in cases where recorded interrogations result in inculpatory statements, they integrate with eyewitness identifications to strengthen the prosecution's case.

At the October 10, 2011 meeting, retired police detective James Trainum of the Metropolitan Police Department, Washington, D.C., addressed the Commission. Mr. Trainum is considered one of the leading experts on the use by law enforcement of electronic or video recording of suspect interrogations.

Mr. Trainum gave a video and PowerPoint presentation to the Commission on false confessions. His presentation and the minutes discussing the questions and comments of Commission members are attached at Appendix B.

Mr. Trainum stated that recording is the gold standard in false confessions. Videotaping will not eliminate false confessions, but the Reid technique (*Criminal*

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*Interrogation and Confessions, Inbau, Reid, Buckley and Jayne, 5<sup>th</sup> Edition*) does not suggest that recordings not be utilized.

Mr. Trainum covered three main topic areas before the Commission:

(1) The interrogation, including any pre-interview, and *Miranda*, should be videotaped in its entirety.

(2) Videotaping needs to be mandatory.

(3) There needs to be sanctions in place if videotaping does not take place.

As explained by Mr. Trainum, the reasons for videotaping are:

(1) Presentation of the best evidence

(2) Increases public confidence and trust

(3) More confessions

(4) More incriminating evidence obtained

(5) Detectives become better interrogators

(6) Less time is spent in court

(7) There are more guilty pleas

(8) There are fewer lawsuits

Mr. Trainum noted the differences between unrecorded oral statements and videotaping. There is no question regarding what the witness stated when there is videotaping. Mr. Trainum has seen an increase in the number of incriminating

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statements when videotaping was used. He commented that before he used videotaping he had missed incriminating comments that can be picked up by the recording. He believes that videotaping makes investigators better interrogators. Videotaping is a great learning tool. In addition, videotaping helps to prevent lawsuits for wrongful incarcerations.

Mr. Trainum made the following points regarding videotaping:

(1) Videotaping will not prevent a false confession but may pick up subtle information that may lead to an exoneration.

(2) Good detectives may push the envelope when recording is not utilized during an interrogation.

Mr. Trainum noted that a false confession is not easy to identify. At times law enforcement unintentionally contaminates the interrogation. Investigators ask a lot of leading questions. When witnesses guess when answering a question, the investigator tends to remember the incriminating answers. By using techniques that contaminate the interrogation, investigators help the suspect build the full story. The Reid technique teaches that you have to go beyond “I did it.” The only way to prove there was no contamination is to videotape from start to finish. Mr. Trainum stated that he had two false confession cases, and he discovered the second one because of what he had learned from the first one.

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Mr. Trainum advised that there are law enforcement objections to videotaping.

(1) The suspect will never confess if the statement is recorded. His response was that law enforcement officers are the best salesmen in the world. He always felt he could get a suspect past any concerns regarding videotaping if he could obtain a waiver of the *Miranda* warning. Most suspects assume they are being videotaped anyway, so statements are not the problem. Investigators want a controlled environment, not a statement on the street, so this is only a problem if law enforcement tries to interrogate outside the room.

(2) Videotaping will show the techniques that investigators use. That was not a concern to Mr. Trainum, noting that suspects are already aware of investigative techniques.

(3) There is a cost factor for law enforcement. Mr. Trainum countered that the equipment costs are going down, most agencies have recording capabilities and agencies can obtain grants for funding. He stated that videotaping results in more confessions not being challenged and therefore there is less court time for investigators.

(4) There are costs associated with transcribing the tapes. Mr. Trainum commented that in Washington D.C., the investigators do not transcribe every videotape.

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According to Mr. Trainum, the problems with videotaping are no different than other issues that law enforcement deal with. He believes that videotaping must be mandatory and sanctions should be applied for failure to record. Mr. Trainum stated that if videotaping was not legislated, the agencies would not do it. He said it was much like seatbelt enforcement. People would not wear one unless required to do so. He commented that there needs to be a policy in place to be sure the equipment is available and properly maintained. In Washington D.C., there is a rebuttable presumption that the confession was involuntary if it was not recorded. Mr. Trainum said you could turn this around and make the statement presumptively admissible if it were recorded.

At the October 10, 2011 Commission meeting, the Commission members were briefed on what action or recommendations other states have taken with regard to recording of suspect statements. The briefing included references to the Pennsylvania Report on the Advisory Committee on Wrongful Convictions, and New Jersey Court Rule 3.17. In addition, staff provided to the Commission two proposed statutes and two proposed rules of evidence addressing the recording of suspect statements. These four documents were drafted using the workgroup's Standards for Electronic Recordation of Custodial Interrogations. A full discussion of the PowerPoint presentation and the thought processes of the Commission

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members are contained in the minutes of the October 10, 2011 meeting at Appendix B, Section VI, pages 11-19.

At the October 10, 2011 meeting, Mr. Hill made a motion to recommend to the Florida Legislature that a statute under the Florida Evidence Code be enacted making it clear that law enforcement shall record suspect statements during a covered custodial interrogation. Included in the statutory language would be a waiver of any civil liability for failure to comply with the provisions of the statute. In addition, the specific offenses listed in section 775.084(1)(c)1, Florida Statutes, (2011), would be listed. As part of the motion, Mr. Hill stated that there should be an accompanying criminal jury instruction modeled after the New Jersey jury instruction. This motion passed by a vote of 12 to 7. Commission members Barnett, Barzee, Coxe, Daniels, Hill, Pate, Perry, Porth, Silvernail, Smith, Snurkowski, and Walbolt voted yes. Commission members Bailey, Cameron, Fingerhut, Negrón, Nunn, Reyes, and Sireci voted no.

The proposed statute mandates that law enforcement agencies electronically record suspect statements during a covered custodial interrogation. A recording can be either an audio or video recording. The term “covered custodial interrogation” is defined in the proposal. The proposed statute does not require that a suspect statement be recorded for all criminal offenses. The offenses that require recording are listed. The recording should include the requisite *Miranda*

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warnings and any waiver of the rights afforded by those warnings. Law enforcement may meet the requirements of the statute by covertly recording suspect statements, since there is no prohibition in Florida against recording without the knowledge of the suspect. The failure to electronically record a suspect statement is a factor that the trial court can consider in determining the admissibility of a suspect statement. A failure to record may also be considered by the jury in determining whether the statement was made and what weight, if any, to give to the statement. In the event law enforcement failed to record a suspect statement, upon request from the defendant, a cautionary instruction would be given to the jury. The proposed statute is attached to this report at Appendix L.

A proposed jury instruction is attached to this report at Appendix M. Since the proposed statute mandates electronic recording, the instruction advises the jury to weigh with great caution any non-recorded oral statement offered by the prosecution.

The jury instruction and statute are tied together. In the event the Florida Legislature was to adopt the Commission's recommendation and enact a statute, the proposed jury instruction would be submitted to the Court. The Court would be asked to forward the proposed instruction to the Supreme Court Committee on Standard Jury Instructions in Criminal Cases for its review and possible submission to the Court via a petition. As of this date, no action on the

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Commission recommendation that a statute be adopted has been taken by the Florida Legislature. Therefore, the proposed jury instruction is submitted to the Court for informational purposes only.

The members who cast a “no” vote expressed different reasons for not voting for the proposal. Professor Nunn and Senator Negrón did not believe the proposal went far enough. Both of these members believed the statutory proposal should be written in such a way that a non-recorded statement would be inadmissible, absent the state being able to demonstrate that the non-recording met a specific statutory exemption. Professor Nunn also felt that the proposed jury instruction was not going to carry any weight with a jury. Mr. Fingerhut commented that for the proposal to have any teeth there should be a presumption of inadmissibility if a statement is not recorded. Sheriff Cameron, Commissioner Bailey and Chief Sireci did not believe a statute mandating recording was necessary. Sheriff Cameron noted that less than one-half of one percent of all criminal cases involves a false confession. Sheriff Cameron was not opposed to a jury instruction, but he thought the proposal was one that the prosecutors would not accept. Mr. Reyes was opposed to using another jurisdiction’s jury instruction. He felt it would be a better recommendation for the Commission to make a modification to current criminal jury instruction 3.9(e), by referencing videotaping or electronic recording.



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On October 20, 2011, Judge Perry sent a letter to the Honorable Mike Haridopolos, President of the Florida Senate, and to the Honorable Dean Cannon, Speaker of the Florida House of Representatives, advising the Legislature of the Commission's action. The letter is attached at Appendix K. Attached to the letter is the Commission's proposed statute and proposed jury instruction.

### ***(c) Law Enforcement Interrogation Techniques***

As part of the ongoing examination by the Commission of false confessions, Professor Nunn asked the Commission to examine the practices of law enforcement agencies when interrogating individuals suspected of committing criminal offenses. Of particular concern to Professor Nunn is the law enforcement practice of using deceptive techniques when questioning suspects.

At the December 12, 2011 meeting, Judge Perry used a PowerPoint presentation to assist the Commission in examining the issue. The purpose of the presentation was to educate the members on both federal and state case law addressing the use of deceptive techniques by law enforcement in order to obtain a confession from a suspect.

Although there are several United States Supreme Court opinions that address law enforcement interrogation tactics, the leading case appears to be *Frazier v. Cupp*, 394 U.S. 731 (1969). The issue in *Frazier* was whether the deceptive tactic deployed by law enforcement produced an inherently unreliable

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statement. In other words, were the misrepresentations so egregious to overcome the defendant's will so as to render the confession involuntary? In *Frazier*, the police lied to the defendant by telling him that a partner to the crime had already confessed. The court held that police deception is "not alone sufficient to render a confession inadmissible."

In *Lynumn v. Illinois*, 372 U.S. 528 (1963), the United States Supreme Court considered this set of facts: The defendant was convicted of the unlawful possession and sale of marijuana, and sentenced to imprisonment. Her conviction was sustained by the Illinois Supreme Court, notwithstanding the admission in evidence at her trial of an oral confession obtained by threats of police officers that, if she did not "cooperate," she would be deprived of state financial aid for her dependent children and that her children would be taken from her and she might never see them again. The U.S. Supreme Court held that the confession was coerced and its admission in evidence violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Although various state and federal courts have approached the issue of deceptive police tactics, the Hawaii Supreme Court published an opinion that is often cited in the literature. In *State v. Kelekolio*, 849 P. 2d 58 (1993), the court distinguished between permissible and impermissible police deception.

Falsehoods intrinsic to the alleged offense, such as a lie about the evidence, are

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treated as one of the totality of the circumstances surrounding the confession.

Falsehoods extrinsic to the facts of the alleged offense, which are of a type that are reasonably likely to procure an untrue statement regardless of guilt, are treated as coercive per se.

In an early Florida Supreme Court case, *Denmark v. State*, 116 So. 757 (1928), the court stated that it is a fear of material or physical harm, or hope of material reward, that makes a confession inadmissible. However, a confession voluntarily made, but procured by artifice, falsehood, or deception, is admissible.

In *Halliwell v. State*, 323 So.2d 557 (1975), the Florida Supreme Court stated that incorrect or misleading statements made to a defendant by law enforcement do not necessarily invalidate a confession. This is especially true when there is no doubt that the defendant was read his or her *Miranda* rights and stated he or she understood them. In this case, law enforcement had advised the defendant, after a waiver of rights had been obtained, that an accomplice had confessed to the crime.

A Florida appellate case, *State v. Cayward*, 552 So.2d 971 (2<sup>nd</sup> DCA 1989), has been cited by other state courts, in legal treatises, and law review articles. In *Cayward*, the Second District Court of Appeal considered a case involving the sexual assault and murder of a five-year-old girl. The police decided to create false documents to aid them in their interview of the suspect. A letter from a state

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agency and a private laboratory, on official letterheads, both reported that semen stains on the victim's underwear were from the suspect. During the interrogation, the suspect was shown the false documents, which were offered as genuine. At the end of the interview, he confessed.

The court upheld the suppression of the confession by the trial court. The appellate court acknowledged that police deception is a factor that affects voluntariness and does not render a confession involuntary per se. Nonetheless, the appellate court found a qualitative difference between oral deceptions and the use of fabricated documents or physical or tangible evidence. The use of these documents violated due process. In addition, the court was concerned that a false report might be retained in a police file and could potentially end up in court in a later case cloaked with an aura of authenticity.

Brief synopses of other cases that discuss the use of deception by law enforcement are attached as part of the December 12, 2011 Commission minutes, located at Appendix C of this report.

Professor Nunn made a presentation to the Commission after the members were briefed by Judge Perry. Professor Nunn was concerned that the Commission had failed to suggest or recommend good practices for the control of police conduct during a law enforcement interrogation of a suspect. He felt that the

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conduct of law enforcement officers in conducting an interrogation could lead to false confessions.

Professor Nunn used a PowerPoint presentation to cover the following topics:

- (1) States have the power to regulate interrogation techniques
- (2) False confessions do happen
- (3) Not all false confessions are “involuntary” confessions
- (4) False confessions can be caused by interrogation techniques
- (5) Proposals to change interrogation techniques to prevent false confessions

Professor Nunn told the Commission that there are two main areas to discuss where the United States Supreme Court has addressed police interrogations: *Miranda* and voluntary confessions. He noted that in these areas a state can provide greater protections than those afforded under the U.S. Constitution. One exception to this general rule is that Florida must conform its search and seizure laws to the 4<sup>th</sup> Amendment of the U.S. Constitution as interpreted by the U.S. Supreme Court. This is required under Article 1, Section 12, of the Florida Constitution. There is no restriction on Florida courts in the Florida Constitution regarding 5<sup>th</sup> Amendment matters.

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Professor Nunn stated that false confessions do indeed happen. They have been uncovered through DNA testing or by a finding that another person has committed the offense.

Professor Nunn commented that it is the task of the Commission to reduce the number of wrongful convictions. He stated that fourteen percent of the exonerations in Florida are the result of false confessions.

Professor Nunn noted that false confessions can arise as a result of police interrogation techniques. Several techniques have been identified that can lead to false confessions. These are:

- (1) Presentation of false evidence
- (2) Lengthy interrogations
- (3) Physical custody and isolation
- (4) Minimalization
- (5) Promises of leniency
- (6) Youth and mental deficiencies

Professor Nunn drew the Commission's attention to an article written by Professor Welsh S. White titled "*False Confessions and the Constitution: Safeguards against Untrustworthy Confessions,*" 32 *Harvard Civil Rights and Civil Liberties Law Review* 105 (1997). Professor White sets forth the following safeguards against untrustworthy confessions:

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- (1) Restricting police interrogations of especially vulnerable suspects
- (2) Limiting the length of police interrogations
- (3) Prohibiting trickery likely to induce a false confession
- (4) Prohibiting promises likely to induce a false confession
- (5) Videotaping interrogations of suspects

Professor Nunn, by way of a motion, asked the Commission to make the following recommendations:

(1) Interrogations should not last more than six hours. If a subject has been interrogated or held in an interrogation room for longer than 5 and 1/2 hours, he or she should be permitted to rest for at least three hours before being interrogated again.

(2) Subjects of interrogation should not be confronted with fabricated or false scientific evidence of guilt. This prohibition would prohibit the fabrication of scientific reports, tapes, photographs, and other scientific evidence, including false DNA evidence, fingerprints and video recordings.

(3) Police should be especially careful when dealing with juvenile, immature, mentally incapacitated and mentally ill subjects. In such cases, it is recommended that the police be required to follow the recommendations of the Illinois Commission on Capital Punishment on interrogating the mentally incapacitated.

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(4) Police should be required to make a reasonable attempt to determine a suspect's mental capacity (age and mental status) before interrogation, and if a suspect is determined to be mentally incapacitated, (mentally ill or a juvenile under the age of fifteen), the police should be limited to asking non-leading questions and prohibited from implying that they believe the suspect is guilty. This recommendation follows the Illinois Commission proposals.

The United Kingdom has already adopted proposals on how suspects should be interrogated. They have rejected the Reid technique and there has not been a rate of change in the number of confessions since the rules have been in place in the 1990's. Professor Nunn noted that these proposals were adopted in New Zealand and in English-speaking common law countries. Professor Nunn said that in relation to those processes and procedures, what he has suggested to the Commission is quite conservative and limited and it would be an excellent idea for the Commission to step forward and follow the scientific literature that is available. Professor Nunn said that it is important that law enforcement not use manipulation when obtaining a statement from the suspect.

A complete discussion and member comments regarding Professor Nunn's motion is contained in the December 12, 2011 minutes, at pages 9-17. The minutes and PowerPoint presentations are attached at Appendix C.



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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. Coxe, 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 16<sup>th</sup> 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. Coxe 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. Coxe 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. Coxe advised that the term “prosecuting authority” was used because Mr. King did not have a problem sending an email within his own office. Mr. Coxe 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. Coxe 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. Coxe 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. Coxe 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.

### ***(e) Improper/Invalid Scientific Evidence***

The impetus behind many states forming innocence commissions was that exonerees were proven to be innocent using the latest scientific technology: DNA testing. Starting in the late 1980s, for the first time in history, conclusive test results showed that despite other evidence and a trial by jury, people were convicted and imprisoned for crimes that they did not commit. The advent of DNA testing also showed the law enforcement, legal, and scientific communities that other types of scientific evidence were not as accurate or reliable as previously thought.

Examples of improper scientific evidence include: Bite mark analysis, dog sniffing, and comparative bullet lead analysis. In some past wrongful conviction cases, experts testified that a bite mark on a victim's body could be individualized to a particular defendant, or that a dog could sniff a defendant's scent at a crime scene long after the fact. Some scientific disciplines, such as serology and hair/fiber analysis, are generally accepted as valid. Yet, there is still the potential for improper analyst testimony. Many exonerees' cases had scientifically valid testing done by crime analysts, but the analysts testified to false, incomplete, or misleading conclusions in court.

Access to DNA testing, both before and after trial, maintaining quality forensic laboratories and evidence preservation are the key issues for scientific

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evidence. In addition to looking at the science, the Commission looked at funding concerns, which will only likely increase as DNA testing becomes more common and the techniques become more sophisticated.

The subject of improper or invalid scientific evidence was first discussed at the February 13, 2012 Commission meeting. At the meeting, the members were educated on what recommendations have been made regarding this topic by the following entities:

- (1) California Commission on the Fair Administration of Justice
- (2) Illinois Governor's Commission on Capital Punishment
- (3) Massachusetts Boston Bar Association Task Force
- (4) New York State Justice Task Force
- (5) New York State Bar Association Task Force
- (6) Pennsylvania Advisory Committee on Wrongful Convictions
- (7) Texas Timothy Cole Panel on Wrongful Convictions
- (8) Innocence Commission of Virginia
- (9) Wisconsin Avery Task Force
- (10) American Bar Association Recommendations
- (11) The Justice Project

A description of the recommendations of each of these bodies is set forth in a PowerPoint presentation located in this report at Appendix D.

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Several states require forensic laboratory accreditation. Mandatory accreditation is not required in Florida. The Florida Department of Law Enforcement (FDLE) requires that its laboratories be accredited by the non-profit American Society of Crime Laboratory Directors /Laboratory Accreditation Board (ASCLD/LAB). The ASCLD/LAB forensic lab accreditation process is rigorous, with on-site annual inspections. In addition, Florida has five regional forensic laboratories that have their own policies that are not overseen by FDLE. These laboratories are also accredited by ASCLD/LAB.

Ms. Daniels explained that busy, stressed public defenders do not have the knowledge, time, and resources to handle all of the forensic science issues. Public defenders have a fund for experts, but it is very limited. Due process funds for public defenders are falling short. Ms. Daniels has read through all of the Innocence Project cases and of the 228 exonerations, 116 were due to improper scientific evidence involved in the trial. Therefore, more than 50% of wrongful convictions are due in part to bad scientific evidence. She noted that if a public defender receives forensic evidence in discovery, he or she can't ask FDLE to test it without a judge's order. Ms. Daniels explained that each public defender office has access to a due process fund which covers court reporting, DNA testing, and expert witnesses. Half of her funding goes to court reporting, so little is left for experts.

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Mr. King commented that his office has a different perspective. His budget covers the overage for the public defender at the end of the year. To say that they do not hire experts, in his opinion, is not correct. He closely regulates due process money. He currently has a case where private conflict counsel has engaged seven out-of-state experts and has kept secret the ones who gave information that he doesn't like. They not only hire experts, they typically hire the most expensive experts. There are at least four different labs in Florida that do independent work; there is no need to go outside of Florida. Mr. King suggested the Commission look at regulating fees and people who are hired.

Ms. Daniels expressed support for preserving evidence, no matter what the Commission recommends on the other issues.

Ms. Snurkowski said she would support a "best practices" recommendation by the Commission for forensic evidence.

Judge Perry thought the major issues were: (1) the preservation of evidence (2) better education for lawyers and (3) continuing education on how to handle scientific evidence.

Sheriff Cameron said that he did not think the Commission should end without recommending more money for funding. If the Commission does not recommend more funding, it has not fulfilled part of its mission.



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A complete discussion of this topic is contained in the Commission minutes of the meeting, located at Appendix D.

The Commission met on March 12, 2012, and continued its review of this topic area. Since several states require mandatory accreditation of its crime laboratories, the members desired to hear from an expert from FDLE regarding how accreditation works in Florida. Ms. Amanda Julian, the Forensic Services Quality Manager for the department, addressed the Commission.

Ms. Julian explained to the members that there is a difference between accreditation and certification. Laboratories are accredited and examiners are certified. Neither accreditation nor certification is mandatory in Florida.

The FDLE crime laboratories are located in Tallahassee, Pensacola, Tampa, Jacksonville, Orlando, Fort Myers, and Daytona Beach. There are no FDLE laboratories in the southeast portion of the state. If a service is needed and a local laboratory cannot provide assistance, Fort Myers or Tampa laboratories can provide the service. Local laboratories, which are also accredited, exist in Broward County, Indian River County, Miami-Dade County, Palm Beach County, and Pinellas County. In addition, there are accredited government forensic laboratories in Seminole County, Manatee County, the State Fire Marshal, and the Drug Enforcement Agency in Miami.

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FDLE crime laboratories offer forensic disciplines in the following areas: Biology (DNA), chemistry, crime scene processing, digital evidence, DNA database, firearms and toolmarks, impression evidence, latent print processing and comparison, questioned documents, toxicology and trace evidence.

The American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) and the Forensic Quality Services, Inc. (FQS) are the two main accrediting bodies in the United States. ASCLD/LAB first began accrediting laboratories in 1982. ISO 17025 is an international set of standards for testing laboratories. Over 400 standards are required to be met. The program requires full scope on-site visits by assessors every five years, annual reduced scope on-site visits, and an annual report to be filed by the laboratory. Corrective action requests are issued by ASCLD/LAB when compliance with a standard does not occur. Laboratories must come into compliance or face sanctions. FDLE was first accredited in 1990 before any federal requirements existed.

Laboratories pursue accreditation for the following reasons:

(1) Accreditation provides a minimum standard for how to operate a forensic laboratory (2) accreditation instills confidence in law enforcement and the court system (3) federal grant monies are available and (4) accreditation permits participation in the Combined DNA Identification System (CODIS). Reasons that some laboratories are not accredited include financial considerations, not being

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receptive to oversight, and the time and effort it takes to maintain the accreditation.

Accreditation requires maintaining a multi-part quality system. As part of the quality system, FDLE has the following in place: (1) personnel qualifications (2) training (3) competency testing (4) policies and procedures (5) validation and performance checks (6) proficiency testing (7) case file review (8) testimony review (9) technical leaders (10) internal and external audits (11) corrective and preventive action (12) safety program and (13) proper facilities and equipment.

There are certain qualifications needed to become a laboratory analyst. Science based degrees are becoming the norm in all disciplines. Specific classes are required for DNA analysts that are tied to federal standards, such as (1) genetics (2) molecular biology (3) biochemistry and (4) statistics.

ASCLD/LAB requires FDLE to have a documented training program. Crime laboratories in Florida tend to train specialists, not generalists. Components must include general knowledge of forensic science, ethical practices in forensic science, and applicable criminal/civil law and procedures. There are readings, practical exercises, and oral/written tests. The average length of an analyst training program is eleven months.

Competency testing is required before an analyst can handle casework independently. Practical tests (oral board and mock trial) are given so the analyst

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can demonstrate the understanding of the scientific principles being applied.

Practical exercises demonstrate the ability to perform tests.

FDLE developed forensic manuals long before accreditation required them. The manuals give the framework for what needs to be done and how to do it. Manuals ensure consistent application of scientific processes and interpretation of results. They give guidance on handling unusual circumstances.

FDLE requires proficiency testing for each analyst. Annual testing is required of each member. There are three types of tests (1) external – which test the laboratory's quality system (2) internal – which tests the individual's skills and (3) blind testing – which test both the quality system and individual skills.

ASCLD/LAB requires administrative review on all cases and technical review on a sampling of cases. FDLE conducts a 100% technical and administrative case file review. In 2011, FDLE released 74,650 laboratory submissions.

ASCLD/LAB requires that testimony of analysts be reviewed at least once a year. This review is typically handled by a prosecutor or laboratory supervisor.

Technical leaders are also part of the accreditation process. These leaders provide technical expertise and guidance for forensic disciplines. They are required for accredited laboratories that do not have supervisors technically competent in areas they manage. Technical leaders are required for accredited

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DNA laboratories. The leader must have an advanced degree. A DNA technical leader has the authority to suspend casework in a laboratory for technical issues.

The accrediting bodies (ASCLD/LAB and FQS) and federal standards all require internal and external audits. At a minimum, FDLE must perform an annual internal audit. External audits are required once every two years for DNA.

Corrective and preventive action plays a crucial role in accreditation. Having a system in place to review and correct issues is crucial. Within FDLE, the quality manager, laboratory chief, section supervisor and technical leader are all involved. Documentation is reviewed specific to the incident and from the time frame the incident occurred. Corrective actions are tailored to address specific issues and may include, but not be limited to (1) amended reports (2) notifications (3) retesting (4) retraining and (5) procedural changes.

Having in place a safety program is an accreditation requirement. There are laboratory safety concerns with regard to (1) chemical hazards (2) biological hazards (3) firearms and (4) compressed gases.

Ms. Daniels asked if there were states that require mandatory accreditation. Ms. Julian responded by advising that five states have mandatory accreditation. Of those states, three also require certification. A couple of states made it mandatory from commission recommendations. She noted that there is usually a driving force

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behind mandatory accreditation such as a criminal case. New York and Texas accreditations were driven from commission action.

Following the presentation by Ms. Julian, the Commission members engaged in a lengthy question and answer session. The dialogue between Ms. Julian and the Commission is set forth in the Commission minutes located at Appendix E of this report.

Based on the materials reviewed by the Commission, and the presentation of Ms. Julian, the Commission is satisfied that there is no need to recommend a mandatory accreditation requirement for Florida laboratories.

At the March 12, 2012 meeting, the Commission was educated regarding the statutory requirements for DNA testing in Florida. Assistant FDLE Commissioner Jim Madden presented information to the Commission.

Mr. Madden advised the Commission that DNA testing is very expensive and fiscally impactful. He provided the Commission members with a handout addressing DNA database expansion, laboratory equipment, laboratory analysts for CODIS administration, and DNA case work capacity.

Mr. Madden noted that through the next fiscal year budget, FDLE has a \$500,000 grant to buy kits for DNA database expansion. Because of FDLE's accreditation, it gets federal grants and the use of rapid identification devices that can look at fingerprints to determine whether that person's profile is in a DNA

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database. This is much easier than taking swabs from everybody and it does not cost the State of Florida anything.

Mr. Madden said that DNA has had the biggest impact on crime reduction in Florida. In order to keep up with submissions, there are case acceptance policies. FDLE has reduced the number of incoming chemistry cases and put them into biology/DNA. FDLE needs ten more analysts just to remain where it is now. He said that FDLE was proud of its training programs and what it does as an agency, specifically in biology. He commented that in the end of a three-year period, the analysts are free agents. The military will recruit them without having to train them, thus saving an enormous amount of money. The loss of analysts by FDLE means that the agency has to put people through another year of training. FDLE continues to strive to implement retention programs. It is an important tool for the agency to be able to pay the biologists a competitive salary.

Mr. Madden covered the following areas with the Commission members.

### *DNA Database Expansion*

In 2010, the Florida Legislature expanded DNA collection to include arrest-based collection and established a 10-year implementation period.

On July 1, 2011 FDLE began accepting submissions of DNA samples collected from persons arrested for felony crimes set forth in Chapters 782

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(murder), 784 (assault and battery), 794 (sexual battery), and 800 (lewd or lascivious acts).

Florida's Legislature provided funding for additional DNA kits needed to process the increased volume of submissions resulting from expanded collections; however funding was not provided for purchase and deployment of equipment needed to automate the collection process. This equipment is critical to FDLE's ability to process more sample volume without increasing database staff or creating a backlog of DNA samples waiting to be analyzed and entered into the DNA database.

Initial efforts by FDLE to address the added workload resulted in identifying grant funding to purchase Rapid Identification (RID) devices to begin automated DNA collection. The technology will reduce collection documentation errors and prevent duplicate DNA sample collections. FDLE is in the final stages of deploying approximately 200 RID devices, giving all counties RID capability by June 2012.

Assessments and follow-ups are being conducted, and FDLE anticipates that an additional 50 RID devices should be purchased at a cost of \$3,969 per device for a total of \$198,450.

The second phase of arrest-based DNA collection begins January 1, 2013, for Chapters 810 (burglary) and 812 (theft and robbery). FDLE anticipates this



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expansion phase will again increase the volume of submissions to the DNA Database by an estimated 21,184 additional samples in 2013, requiring an additional \$593,152 for DNA kits used for collection and other laboratory supplies that are consumed in the analysis process. ( $\$28 \times 21,184 = \$593,152$ ).

### Laboratory Equipment

FDLE labs currently use the AB 3130 Genetic Analyzer instruments with GeneMapper software for DNA analysis. The AB 3130 instruments and software are reaching their end-of-life cycle and will not be produced or supported within the next three years. FDLE must replace these instruments with the more current model AB 3500. Replacing the current 13 instruments will cost \$160,000 per instrument for a total of \$2,080,000. In addition FDLE will need 130 licenses for the GeneMapper software at \$8,000 per license for a total of \$1,040,000. Total funding for the Genetic Analyzer replacement and accompanying software licenses requires \$3,120,000.

### Crime Laboratory Analysts For CODIS Administration

The increased volume of submissions to the DNA Database will generate an increase in the number of DNA profiles submitted to the Combined DNA Index System (CODIS), and generate a corresponding increase in the number of CODIS matches. The increase in the number of CODIS matches will increase the

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workload for regional crime laboratory analysts assigned as CODIS

Administrators.

Currently, CODIS Administrator duties are assigned to regional case working crime laboratory analysts, which reduces time available for case work. Increasing the CODIS workload will further divert existing crime laboratory analysts to full-time CODIS Administrator duties, and negatively impact FDLE's biology case work backlog and turnaround time, thereby delaying the upload of new DNA profiles to the national database.

To accommodate the increased workload associated with increased CODIS hits, FDLE has proposed adding a new crime laboratory analyst position to serve as regional CODIS Administrator in each region. This initiative will cost an estimated \$470,547 for six new crime laboratory analysts dedicated to handling the additional CODIS workload generated by arrest-based collections and help to avoid diverting additional case working analysts to CODIS administration.

### *DNA Case Work Capacity*

Demand for DNA services continues to increase. Improvements in instrumentation have made it possible to analyze evidence when even a small amount of genetic material is available. Also improved methodologies such as YSTR and Mini-filer technology make it possible to analyze evidence that previously would not have provided usable profiles. Awareness of DNA

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capabilities has also contributed to demand, which resulted in more than 20,600 requests for DNA services in 2011.

FDLE prides itself on the success of its biology training program; this success creates an extraordinary benefit for FDLE but also an opportunity for other entities to recruit trained biologists without expending training dollars or time. FDLE strives to retain its members, but without financial incentives, this at times proves difficult. FDLE continues to explore the reinstatement of a retention program to reward those trained analysts and remain competitive in the biology laboratory environment.

FDLE has 85 biologists working in six crime laboratories throughout the state. These analysts can handle about 18,400 service requests each year. To keep pace with current demand for service, FDLE needs to add 10 biology case working analysts to current staff, in order to avoid increasing backlogs and lengthening turnaround times for law enforcement contributors. Total funding for 10 new crime lab analyst positions requires \$784,245.

The interplay between Mr. Madden and the Commission members is set forth in the March 12, 2012 minutes located at Appendix E.

Based upon the presentation of Assistant Commissioner Madden, the Commission makes the following recommendations to the Florida Legislature:

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(1) Funding to purchase 50 rapid identification devices at a cost of \$3,969 per device for a total of \$198,450.

(2) Funding to purchase 21,184 DNA kits used for collection and other laboratory supplies that are consumed in the analysis process, in the amount of \$593,152.

(3) Funding to purchase 13 AB 3500 Genetic Analyzers at a cost of \$160,000 per instrument for a total of \$2,080,000. In addition, funding is needed to purchase 130 licenses for the GeneMapper software at \$8,000 per license for a total of \$1,040,000. Total funding for the Genetic Analyzer replacement and accompanying software licenses requires \$3,120,000.

(4) Funding of \$470,547 for six new crime laboratory analysts dedicated to handling the additional CODIS workload generated by arrest-based collections to help avoid diverting additional case working analysts to CODIS administration.

(5) Funding of \$784,245 for 10 new crime laboratory analyst positions to keep pace with current demands for service.

At the conclusion of the presentation by Ms. Julian, the Commission turned its attention to crime scene investigations. Mr. Tim Whitfield, the Director of Scientific Investigations Section for the Hernando County Sheriff's Office appeared before the Commission.

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Mr. Whitfield advised the Commission that he has been involved with law enforcement for 37 years, and 35 of them have been in crime scene analysis. He commented that in Florida, not all agencies go about crime scene investigations in the same way.

Mr. Whitfield noted that law enforcement agencies in Florida have different requirements for crime scene investigators. Some require just a high school diploma and a drug screen. Some agencies do not have crime scene specific units at all. Some may request the services of FDLE for major cases. Most agencies recognize the need to have experts. Some do in-house training. Pinellas County has approximately forty-five crime scene investigators. They require a crime scene degree and an applicant has to pass a mock crime scene examination.

Training and certification of crime scene investigators is provided through formal education at St. Petersburg Junior College, St. Leo University, Keiser University, Kaplan University, Palm Beach State College, the University of South Florida, Florida International University, the University of Florida, and Stevenson University. There also is an Institute of Police Technology and Management through the University of North Florida.

Mr. Whitfield told the members that there are in-house field training programs provided by local law enforcement agencies. Most agencies require practical exams and annual testing. But not all law enforcement agencies do this.

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Mr. Whitfield noted that private institutions offer crime scene certifications. But he was not sure what the term “certification” actually means. Does it mean a person is qualified to do crime scene investigations, or is the person an expert in doing crime scene investigations? He commented that some certifications require no examinations.

Mr. Whitfield told the Commission that the International Association of Identification (IAI) offers three levels of certification as (1) a crime scene investigator (2) a crime scene analyst, or (3) a senior crime scene analyst. The problem with establishing three levels is that the defense can argue that the lowest level is not as good as the two upper levels. This creates a problem in testifying.

Other types of certifications that are available through the IAI are blood splatter, forensic art, latent print examiner, forensic photography and crime scene reconstruction.

Mr. Whitfield briefed the Commission members on the collection, storage and preservation of crime scene evidence. All the colleges and universities mentioned by Mr. Whitfield have courses for this subject area. He educated the members on certain principles such as the Associative Triangle (linking the victim to the subject to the crime scene) and the Locard Exchange Principle (whenever you enter an environment, you add to it and detract from it). Collection, storage and preservation of evidence include the sequential processing method (visual

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examination, light energy scan, photography and video), and evidence collection using sterile instruments (scalpels, razors, water, swabs). The FDLE submission manual is referenced when packaging and submitting crime scene evidence to laboratories for testing. Examples of items submitted are biological (organic), weapons, casings, projectiles, and latent print evidence. After crime scene evidence is collected, an agency has to make a determination regarding the selection of a crime laboratory (state, federal, or private). This selection process is driven by the type of evidence that is secured at the crime scene.

Mr. Whitfield advised the Commission members that certain databases are available to assist agencies. Examples are (1) Automated Fingerprint Identification System (2) Combined DNA Index System (3) National Integrated Ballistics Information Network and (4) National Missing and Unidentified Persons System.

The last component of collection and preservation of crime scene evidence is the courtroom testimony of the expert witness. Mr. Whitfield noted that several colleges and universities offering training and certification of crime scene investigators include courses on courtroom testimony.

Mr. Whitfield advocated statewide standards for crime scene technicians. He recommended that all crime scene investigators be required to take a proficiency examination. In addition, he would like to see a formal academy established similar to what is offered by the Criminal Justice Standards and

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Training Commission. Right now, crime scene investigators may be certified or they may not be. He has visited law enforcement agencies where no person in the department is certified in any discipline.

Mr. Whitfield noted that some departments don't require formal training or education, but they do give entrance exams. He commented that at the Hernando County Sheriff's Office they hire investigators with a two year degree, but prefer a four year degree along with an examination.

At the conclusion of Mr. Whitfield's presentation, the Commission discussed possible recommendations. Judge Perry thought there needed to be uniform certification for crime scene technicians. Ms. Daniels voiced her support for this suggestion. She commented that you can have certification programs and degrees, but unless you've been tested, a critical part is missing. Professor Nunn noted that the issue is not so much training, but rather testing and continuing professional education.

There was consensus among the Commissioners to recommend a certification program for crime scene technicians so that they must pass a test. The testing would be conducted by the Criminal Justice Standards and Training Commission. Judge Perry restated the recommendation as: "The Commission recommends that the Criminal Justice Standards and Training Commission establish a program for crime scene technicians to be certified by written



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examination, and further continuing testing be performed, in order to retain a certification.” Commissioner Bailey reminded the Commission that this will have a fiscal impact on the training centers whose funds are about to be cut again. There is a cost associated with validating the test being administered. He suggested that the Commission recommend that funds be appropriated by the Legislature.

The Commission next considered another possible recommendation that FDLE crime laboratories be made more readily available to the public defenders for forensic examinations. Ms. Daniels stated that she had consulted with FDLE and this could increase FDLE’s workload.

Professor Nunn was concerned about a constitutional issue. When a defendant utilizes the services of a private laboratory, the results of any examination are not disclosed to the state. There is no obligation on the part of the defense to turn over to the prosecution evidence that is incriminating. However, if the defense uses the services of an FDLE crime laboratory, state law requires that the results of the examination be furnished to the state. If a defendant is in the position of being forced to disclose information that would be incriminatory, then the issue is whether or not to take that risk. A person will waive the right against self incrimination to see if there is a valid claim. Professor Nunn thought a better way is to simply say that defense attorneys, both public and private, should be

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entitled to expert assistance when reasonably necessary, and funding should be provided for it.

Professor Nunn was also concerned that not enough judges are granting access to laboratory testing. Judge Perry commented that in Orlando, if the defense files a motion that is more than a fishing expedition, the court funds it if the defendant is indigent. Availability is there if a legal basis can be stated. The cost of the examination comes out of due process funds.

Based on Commission discussion at the March 12, 2012, April 16, 2012, and May 21, 2012 meetings, the Commission voted unanimously to recommend that the Florida Legislature provide more funding to public defenders, criminal conflict and civil regional counsel, and conflict counsel to use FDLE crime laboratories, or increase funding for public defenders for private testing.

At the March 12, 2012 Commission meeting, the members acknowledged that forensic science is becoming more common in criminal investigations and in the courtroom. Prosecutors and defense attorneys are confronted with challenges over the introduction of scientific and extremely technical evidence. The trial courts must evaluate the relevance, reliability and admissibility of the evidence being proffered. The Commission noted that a bill filed during the 2012 legislative session would have changed the standard of admissibility of expert witness testimony in Florida from the *Frye* test to the *Daubert* standard. See *Daubert v.*

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*Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). In *Daubert*, the United States Supreme Court held that the Federal Rules of Evidence superseded *Frye* as the standard for admissibility of expert evidence in federal courts. The bill to change the standard in Florida failed in the Legislature.

Judge Perry cited the *Marsh v. Valyou* opinion (977 So. 2d 543 (Fla. 2007)). Judge Perry noted that Florida adheres to the *Frye* test but only where the expert opinion is based on new or novel scientific techniques. Judge Perry noted that most expert opinion testimony is not subject to *Frye*, such as an opinion based only on the expert's experience and training. Judge Silvernail opined that if Florida had strictly applied the *Frye* standard, the courts might not have accepted mitochondrial DNA. He advised the Commission to be very careful when considering changing the standard for admissibility. Mr. Smith concurred. He said the beauty of *Frye* is that it does have some flexibility and allows for other tests. It is not perfect, but it is better than some of the alternatives. Mr. Smith noted that there will always be alchemy and quackery when it comes to "scientific" evidence. He suggested that the Commission had done the best that it can, and we have to trust the system.

The Commission elected to not make any recommendation with regard to changing the standard of admissibility in Florida.

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Judge Perry asked if there were any other suggestions regarding scientific evidence. Ms. Daniels thought there should be a presumption of some kind that if there is evidence that has not gone through an accredited crime laboratory it should be not be admissible. The Commission took no action on this recommendation.

At the April 16, 2012 Commission meeting in Orlando, the Commission again discussed the topic of scientific evidence. A complete discussion of the subject is contained in the minutes of the April 16, 2012 meeting. The minutes are attached at Appendix F.

Judge Perry pointed out that the members also discussed other possible recommendations at the March meeting, but did not vote on the proposals. These proposals are:

(1) Education for judges on the admissibility of expert testimony regarding scientific evidence.

(2) State Attorneys should notify FDLE if a case is dismissed or ends in a plea agreement so evidence is not unnecessarily tested at their laboratories.

Judge Perry said there was no disagreement that judges should be educated. Judge Silvernail noted that scientific evidence was not part of the curricula for the new judges. It is part of the annual education conference for circuit judges. Judge Perry moved that the Commission recommend that the New Judges College provide education on the admissibility of expert testimony. The language of the

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proposal reads: “The Florida Judicial College program annually provide education at the New Judges College on the admissibility of expert testimony.” The motion passed by a unanimous vote of the Commission.

The Commission was unanimous in recommending that the FDLE crime laboratories be notified by the state attorney when a criminal case is closed. The recommendation reads: “State Attorneys should notify FDLE if a case is dismissed or ends in a plea agreement so evidence is not unnecessarily tested at the laboratories.”

### ***(f) Evidence Preservation***

The issue of preserving evidence collected by law enforcement during the investigation of a crime was discussed by the Commission at the April 16, 2012 meeting. The focus of the discussion centered on the preservation of any evidence that may be suitable for DNA testing that could lead to exonerations of innocent persons. See pages 23-29 of the Commission minutes attached at Appendix F for the full discussion on this topic.

Governmental entities and law enforcement agencies are accumulating more physical evidence and storing it for longer periods of time. This is causing fiscal issues due to storage costs and the hiring of additional personnel to inventory and manage the ever-growing inventory. Because of the advancements in the science

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of DNA, the Commission recognizes that potentially any physical evidence that is collected now, or in the future, may be suitable to DNA testing.

To address physical evidence accumulation, the 2010 Florida Legislature considered Senate Bill 2522. The bill redefined current statutory requirements for governmental entities' preservation of evidence that may contain DNA. The bill contained the following language:

Governmental entities shall preserve physical evidence potentially containing biological evidence on which a post-sentencing testing of DNA may be requested if that evidence is secured in relation to an investigation or prosecution of:

a serious crime for the period of time that the serious crime remains unsolved; or

a serious crime for the period of time that an individual is incarcerated based on a conviction for that serious crime and is in the custody of an evidence-holding agency in this state on July 1, 2010.

In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days after execution of the sentence. In all other cases, a governmental entity may dispose of the physical evidence if;

the term of the sentence imposed in the case has expired and no other provision of law or rule requires that the physical evidence be preserved or retained; or

the physical evidence is of such a size, bulk, or physical character as to render retention impracticable. When such retention is impracticable, the governmental entity shall remove and preserve portions of the material evidence likely to contain biological evidence related to the serious

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crime in a quantity sufficient to permit future DNA testing before returning or disposing of the physical evidence.

Upon written request by the defendant in a case of a serious crime, a governmental entity shall prepare an inventory of biological evidence that has been preserved in connection with that case.

Senate Bill 2522 was not enacted by the Florida Legislature. The Senate Interim Report discussing the bill points out that the original bill filed in the Legislature was a collaborative effort between the Florida Police Chiefs Association and the Innocence Project of Florida. However, amendments to the bill resulted in the Innocence Project of Florida and the Florida Public Defender Association not supporting the final version.

Defendants who have been convicted or who have entered a plea of guilty or nolo contendere after 2006 may petition for post-sentencing DNA testing under the Florida statutes and the Florida Rules of Criminal Procedure.

Sections 925.11 and 925.12 Florida Statutes (2011), address DNA testing in Florida. Subsection (4) of section 925.11 covers the preservation of evidence. In 2006, the Florida Legislature eliminated the time limitations in which a person can file a petition seeking postconviction DNA testing. It now appears that the government must preserve evidence until the end of a defendant's sentence, because a defendant could potentially petition for the testing at any time. It is also important to note that in 2006, the Legislature allowed people who entered a plea

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of guilty or nolo contendere to felony charges to also seek postconviction testing.

Together, these amendments have led to more physical evidence being retained for the possibility of DNA testing. Subsection (4) of section 925.11 states:

(a) Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to, any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law Enforcement shall maintain any physical evidence collected at the time of the crime for which a post-sentencing testing of DNA may be requested.

(b) In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days after execution of the sentence. In all other cases, a governmental entity may dispose of the physical evidence if the term of the sentence imposed in the case has expired and no other provision of law or rule requires that the physical evidence be preserved or retained.

In October 2010, The Florida Senate's Committee on Criminal Justice issued Interim Report 2011-112. As part of the report, Senate staff recommended amendments to s. 925.12, Florida Statutes. The Senate Interim Report is included in this report at Appendix P.

Section 925.12 was enacted in 2006, and sets forth the requirements for a defendant to request DNA testing when he or she has entered a plea of guilty or nolo contendere in a felony case. Subsection (3) of section 925.12 expresses the legislative intent that the Florida Supreme Court enact a rule of criminal procedure



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requiring an inquiry by the trial court regarding DNA testing before accepting a plea in a criminal case.

Subdivision (d) of Florida Rule of Criminal Procedure 3.172 was adopted by the Florida Supreme Court in response to the legislative intent set forth in section 925.12, Florida Statutes. Subdivision (d) of the rule states:

“Before accepting a defendant’s plea of guilty or nolo contendere to a felony, the judge must inquire whether counsel for the defense has reviewed the discovery disclosed by the state, whether such discovery included a listing or description of physical items of evidence, and whether counsel has reviewed the nature of the evidence with the defendant. The judge must then inquire of the defendant and counsel for the defendant and the state whether physical evidence containing DNA is known to exist that could exonerate the defendant. If no such physical evidence is known to exist, the court may accept the defendant’s plea and impose sentence. If such physical evidence is known to exist, upon defendant’s motion specifying the physical evidence to be tested, the court may postpone the proceeding and order DNA testing.”

Inquiries by the trial courts vary from circuit to circuit. In the Ninth Judicial Circuit, a standardized form is signed by the state and defense covering the requirements of the rule. In addition, judges make a specific inquiry at the time a plea is entered. Some circuits rely on the form but the trial judges do not engage in an in-court inquiry.

The Commission discussed the possibility of recommending to the Florida Legislature that a central depository be created to store potential DNA evidence

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taken from a crime scene. As an alternative, a central depository could be created to handle only evidence that is stored, or could be stored, in postconviction relief proceedings. Law enforcement agencies statewide could submit the evidence to the depository. This method of storage would result in significant cost savings to local agencies.

However, the members recognized that there would be a significant cost factor involved in such an undertaking. Considering that DNA science is ever evolving, it would be extremely difficult, if not impossible, to draft proposed legislation at this point in time. There also was a concern among the members that attempting to change the way physical evidence is now handled by law enforcement agencies could possibly lead to the destruction of evidence that might be invaluable at a later date.

Law enforcement members of the Commission noted that evidence preservation is always an issue with law enforcement. However, there is no push by agencies to change existing policies with regard to evidence retention.

At the conclusion of the discussion, the Commission by a unanimous vote, recommended that the Florida Legislature continues its work in evidence preservation for DNA testing under section 925.11 and section 925.12, Florida Statutes (2011), which could lead to the exoneration of innocent defendants.

### ***(g) Professional Responsibility***

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

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

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

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

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

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

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

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

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

(1) Suspect Identifications.

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

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

### (2) Ineffective Assistance of Counsel

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

### (3) New Technology Evidence Testing

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

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

### (4) DNA Funding

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

Mr. King moved to recommend to the Florida Supreme Court that Florida Rule of Criminal Procedure 3.112 be amended to require that any attorney who is practicing law in a felony case must have completed at least a two hour course regarding the law of discovery and *Brady* responsibilities. The motion was seconded, and passed the Commission by a unanimous vote.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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King was concerned that the publication of the name would tend to be one-sided, since the state has no ability to appeal an acquittal in a criminal case. The name of a prosecutor could be published when there was an appeal of a conviction.

However, the conduct of any defense attorney in cases of acquittal would never be disclosed. Ms. Snurkowski was concerned that in the event an attorney was cited for misconduct, and the allegations were false, it would be difficult to purge the name of the innocent attorney from the court opinion.

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

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

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



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

### ***(h) Funding of the Criminal Justice System***

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

**Inadequate funding leads to mistakes that may cause wrongful convictions.**

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

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

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

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Mr. Doss explained to the Commission that the Legislature has created a system where conflict cases go from the public defender to regional counsel, and then if necessary, to conflict counsel. He noted that the legislatively mandated fee schedule affects the quality of representation. He commented that section 27.40, Florida Statutes (2011) was amended by the 2012 Legislature. The statute now permits the court to establish a registry of attorneys agreeing not to exceed the cap. The caps set forth in s. 27.5304, Florida Statutes (2011), are \$15,000 for a capital case, \$3,000 for a life felony, \$2,500 for a non-capital felony, and \$1,000 for a misdemeanor or juvenile case. Mr. Doss noted that some of these cases take hundreds of hours to complete. Some have multiple defendants or co-defendants. Some cases involve multiple jurisdictions and have sentencing enhancements. Other cases involve prison releasees or habitual offenders. These types of cases raise the questions of whether the case should be pled, or go to trial. In addition, consideration has to be given to what investigative techniques should be used prior to trial.

Mr. Doss drew the attention of the members to rule 4-6.2(b) of The Rules Regulating The Florida Bar. A portion of the rule states:

“A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as when:

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(b) representing the client is likely to result in an unreasonable financial burden on the lawyer.”

Mr. Doss explained that this rule creates tension for what the attorneys are asked to do. As an example, in one case, the court assigned attorneys outside the list because no registry attorney would take the case. The case took five hundred hours of preparation before even going to trial. These attorneys were sole practitioners and have an overhead of ten to twelve thousand dollars a month to keep their practices going. Under the Justice Administrative Commission (JAC) rules you get no interim payments. A person does not get paid until the case is over. Mr. Doss said there are situations where the JAC has refused to authorize payment of expert witness fees and the attorneys were stuck with paying the fee to the expert. The pay in these cases does not even cover the overhead of the attorneys appointed to represent the client.

In the event an attorney seeks a fee in excess of the statutory maximum, it is necessary to set the matter for a hearing. If the court orders payment in excess of the fees set by statute, and the JAC appeals, the attorney does not get paid until the appeal is final. Mr. Doss explained that an attorney may ask for compensation above the flat fee based on the number of hours put into a case. He said the court may order compensation to be paid to the attorney at a percentage above the flat fee rate. However, the percentage may not exceed 200 percent of the established

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flat fee, absent a specific finding that 200 percent of the flat fee in the case would be confiscatory. Mr. Doss said some of the fees come out to fifteen dollars an hour.

Mr. Doss said that in order to pay the fees for an expert, a motion is filed with the court. He said the court usually sets a fee and if the attorney needs additional money to cover the cost of an expert, he or she comes back to the court. He noted that one issue is that the JAC will not appeal until the attorney asks that the expert be compensated. There is no compensation for the expert until the appeal is over.

Mr. Coxe asked Mr. Doss to comment regarding those situations where an attorney agrees to the statutory fee, but the case turns out to be extremely time intensive. What are the ethical considerations when the case has not even been investigated? Mr. Doss said this puts the attorney at risk of violating the rules of The Florida Bar and creates an ethical dilemma. The attorney either has to be wealthy or the client is going to get short shrift. Mr. Doss said the American Bar Association notes that there are fee structures set so low that there are incompetent or inexperienced lawyers handling the cases.

Mr. Doss said there needs to be better funding for conflict cases. There are an inordinate number of attorneys on the list who are inexperienced and get their

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experience at the expense of the defendant. He said that there are good attorneys on the lists who look at it as performing a pro bono service.

Mr. Ed Kelly, Esquire, addressed the Commission. He advised the Commission that he is on the registry list and had a case that went to trial twice. He has a law practice that has both civil and criminal components to it. He commented that he is not wealthy, but can pick and choose the cases he wishes to handle. In one particular case, he put in 272 hours in one year, including the investigation. Based on all the work done, he desired to exceed the statutory cap. He said he filed a motion with the court and a hearing was held. Mr. Kelly advised the Commission that if the judge is going to double the fee, there has to be a showing that the case was extraordinary and unusual. In this case, the judge doubled the fee. The judge has to make a finding that the fee is not confiscatory, but failed to do that in his order. Mr. Kelly commented that based on the number of hours dedicated to the case, his hourly fee came out to \$14.00 an hour. Mr. Kelly said his office expenses are \$40 an hour to pay salaries and pay the rent. Mr. Kelly opined that the fee schedules are going to affect the quality of representation.

*Mr. Brad King, State Attorney, 5<sup>th</sup> Judicial Circuit*

Mr. King gave a presentation on behalf of the Florida Prosecuting Attorneys Association (FPAA). A PowerPoint presentation outlining the work of the state attorneys in the twenty judicial circuits is attached at Appendix H.

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Florida has 20 judicial circuits and they are all different in composition and population and the way the cases are handled and how budgets are administered.

The following is a list of state attorney output measures for the twenty judicial circuits serviced by the state attorneys in 2011.

- (1) Criminal Allegations: 1,228, 394
- (2) Reopened Cases: 255, 627
- (3) Civil Cases: 34, 261
- (4) Cases Referred to State Attorneys: 1,628,282

The following is a breakdown of the total number of cases handled by the state attorneys in 2011.

- (1) 1.628 million case referrals
- (2) 1809 assistant state attorneys
- (3) 900 case referrals per assistant state attorney annually

1,169 assistant state attorneys handled 430,484 felony referrals in 2011.

This means that on average, each assistant state attorney was responsible for 368 case referrals in 2011.

470 assistant state attorneys who handle misdemeanor cases were referred 1.027 million cases in 2011. This averages out to 2,185 case referrals per assistant in 2011.

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171 assistant state attorneys assigned to juvenile cases in 2011 were responsible for 136,383 juvenile case referrals. This averages out to 798 case referrals per assistant for the year 2011.

An assistant state attorney who has three years or less experience in an office is approximately 29 years of age. His or her average student loan is \$80,000 to \$100,000. The average starting salary is \$40,000. The average salary is \$47,000.

Fifty-six percent of the assistant state attorneys have less than 5 years experience. Nineteen percent have 6 to 10 years experience. Nine percent have 11 to 15 years experience. Five percent have 16 to 20 years experience. Eleven percent have 21 or more years of experience.

The turnover rate for assistant state attorneys in fiscal year 2009-2010 was 14.71%. The turnover for fiscal year 2010-2011 was 15.38%. Two benefits for working as an assistant state attorney are health insurance and retirement benefits. However, the Legislature has eroded both of these benefits by requiring payment into the retirement fund and increasing the cost of health care coverage. Mr. King noted that a study showed that most private entities don't give the same benefits. The salary of an assistant state attorney always ranks at the low end of the salary scale. Mr. King noted that county attorneys, city attorneys, and their assistants, make considerably more than assistant state attorneys.

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Ms. Snurkowski stated that there are 119 attorneys handling criminal appeals statewide in the Department of Legal Affairs. She noted that the requirement to pay into the retirement fund, along with a reduction in insurance coverage and increase in premium payment has affected the ability to retain attorneys.

Ms. Barzee asked if it would be helpful if the assistants could defer payments for student loans. Mr. King said the state attorneys have lobbied for student loan deferment. In 1992 the state attorneys asked for 15 million dollars for salaries to hire new assistants. The Legislature appropriated just over three million dollars.

Judge Silvernail said he was concerned with the lack of adequate funding. Mr. King said the concern was somewhat alleviated this year because the state attorneys did not get the same cuts as other agencies. He said if cuts had occurred, county court cases would not have been prosecuted in order to take care of the felony cases. He said the state attorneys view the problem from a public safety perspective. In his office, staff brainstormed what cases to prosecute and what cases to let go. In certain types of cases he advises law enforcement via a letter that the cases cannot be handled by his office.

*Ms. Julianne Holt, Public Defender, 13<sup>th</sup> Judicial Circuit*

Ms. Holt said that the criminal justice system is only as good as the people that are in it. The question is can we do everything we can to stop wrongful



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convictions. For public defenders in Florida, no matter how underfunded, they have the responsibility to minimize wrongful convictions. Ms. Holt noted that in her circuit, two weeks of orientation training is offered to new assistants. Other offices have been required to put very experienced and highly paid attorneys in the juvenile system because these juveniles are placed in the state prison system. Ms. Holt noted that errors are being made at sentencing because of the convoluted sentencing system.

Ms. Holt said there is a continuing attempt to raise the quality of representation. There are 1,500 assistant public defenders in the State of Florida. In Hillsborough County, it takes two hours to go through the process to see and interview a client. It is an emotional and taxing job to be an assistant public defender. Ms. Holt commented that the career assistants are there because it is a calling. The average salary for over twenty-one years of experience is \$90,000. These attorneys handle capital homicide and capital sexual battery cases. All of the experienced attorneys serve as mentors, coaches, trainers, etc. The adequacy of funding or proper funding needs to be addressed.

Ms. Holt advised the Commission that the Florida Public Defender Association has urged that the Legislature conduct a weighted caseload study. This should include regional counsel and the Department of Legal Affairs.

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Ms. Holt noted that in the private sector, an entry level attorney makes \$75,000 to \$125,000 with a firm. Included in the salary package is an investment plan and health insurance. When people say the state provides equal pay and benefits to the private sector that just is not true. Ms. Holt said she would like to have additional funds available to reward those attorneys who go above and beyond the call of duty. She noted that attorneys take college courses just to defer payments on their student loans. Many public defenders do not allow their assistants to take second jobs. In the private sector, you can always find something else to do to make money. The assistant public defenders cannot do criminal defense work outside their practice of criminal law.

Ms. Holt said she had suggestions with regard to workload and attorney competency. There must be full and adequate funding of due process costs. That amount has been reduced over the years.

Ms. Holt said there is no doubt that sentencing reform is something that should be looked at as well as decriminalization of certain criminal offenses. The types of cases that are in the system should be those that impact public safety.

Ms. Holt commented that there is no doubt that a lack of funding has affected representation. The lack of funding has made for more triages, and more motions for postconviction relief are being filed in her circuit than ever before. There is a problem with not calling witnesses to testify. She thought that open

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discussions with defendants in court with regard to maximum sentences would help reduce the number of postconviction relief motions.

Mr. Coxe asked how the lack of funding has affected Ms. Holt's office. She said there are not sufficient funds to investigate whether there are eyewitnesses to a crime, or whether the stop by law enforcement is lawful. Ms. Holt commented that the majority of her cases are robberies and homicides. Mr. Coxe asked what is not being done other than the need for more people. Ms. Holt said that in a perfect world every juvenile should be evaluated for competency with regard to waiver of *Miranda*. She said the inability to have a competency evaluation means that *Miranda* stands and the statement is admitted into evidence.

Judge Perry said the Commission should consider other issues besides a lack of funding. He noted that motions are not being filed to attack lineups; investigations are not being conducted regarding alibis; and there is little or no training for lawyers on how to attack junk science. He said he has spent time researching some cases that were not read by the state or the defense. He asked what is it we can do in the realm of training the prosecutors and defense counsel.

Ms. Daniels said she had been thinking along the lines expressed by Judge Perry. She noted that both the Florida Prosecuting Attorneys Association and the Florida Public Defender Association hold conferences where training is conducted. A well attended conference might have two hundred assistants present.

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Ms. Holt agreed that more training was needed. As an example, training is needed on filing motions to suppress and how to properly depose medical examiners. Ms. Holt noted that except for board certification, attorneys can earn the required continuing legal education hours by taking any course on any subject that is offered.

Ms. Barzee commented that if you have a caseload of six hundred cases and two hours available to conduct one interview, there has to be a lack of communication. People must be going months without seeing an attorney. Ms. Holt said her office has a policy to interview the client once between court dates.

Ms. Holt reiterated that certain cases need to be taken out of the system and decriminalized. A beginning lawyer needs at least one hour to conduct a case conference. In addition, he or she has to be able to read police reports and recognize there is going to be a supplemental report. You don't learn any of this from law school. She noted that managing a case takes away the time with a client. It takes three years of training to become a felony attorney in any public defender office.

*Mr. Rory Stein, Assistant Public Defender, 11th Judicial Circuit*

Mr. Stein said there was no doubt that the workload of the public defenders has an impact on wrongful convictions. Everyone can agree that ferreting out

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innocence requires a competent attorney to investigate the evidence. The attorney needs to be both ethical and diligent.

Mr. Stein said public defenders have back-loaded their resources and concentrate on cases that survive arraignment. That is where the resources are used. Now with ever increasing caseloads, defendants are offered a plea at arraignment. Twenty-five to thirty percent of the cases are disposed of at the arraignment. If these cases were not disposed of, it would be impossible for the courts to handle all the cases on the criminal dockets.

Mr. Stein covered three main points during his presentation:

(1) Not every defendant who pleads guilty at arraignment is guilty. Those in jail need to get out, get to a job, or feed a family.

(2) At the time of arraignment, the lawyer is not in a position to adequately advise the defendant if he or she should enter a plea. All the attorney has available is the arrest warrant and five to ten minutes to talk to the client. There is no opportunity to do a meaningful investigation. In 34 years of practice, Mr. Stein has never seen enough information in the arrest form to properly advise a client how to proceed. Therefore, it is not possible to be sure the plea is willfully, freely, or knowingly entered. Mr. Stein said if a client is in custody, there is a non-attorney paralegal who will see the client. It is a usual practice to seek review of the defendant's bond status. Many clients will resolve a case just to get out of custody.

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Getting out of jail has an impact on how a case is resolved. Mr. Stein said there is never a thorough client intake session, along with any crime scene investigation. He said that up to three years ago, there was no contact until the time of arraignment. There now is a unit in place to review the arrest warrant and try to interview clients, but this does not occur 100% of the time. The first time a client is seeing an attorney is at arraignment.

(3) There is not enough time, especially for young attorneys, to know if the client is suffering from a mental condition. Clients who do not understand the case or the nature of the proceeding make decisions based on three to five minute conversations with the assistant public defender.

Mr. Stein noted that in a line of cases, the United States Supreme Court has placed the onus on defense counsel to properly advise the client under the Sixth Amendment. This can only be done when there is adequate time to investigate the crime. The problem with wrongful convictions is that they are discovered years after the offense is committed. At arraignment, there has been no testing of evidence and no investigation. People are being asked to plead guilty without much assistance from the attorneys.

Mr. Stein advised the Commission regarding the *Padilla* decision. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), is a case in which the United States Supreme Court decided that criminal defense attorneys must advise non-citizen clients about

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the deportation risks of a guilty plea. The case extended the Supreme Court's prior decisions on criminal defendants' Sixth Amendment right to counsel to immigration consequences. Mr. Stein pointed out that defense counsel must know immigration law and advise a client as to the consequences. At arraignment, there is not an opportunity to learn what all the consequences might be for each defendant.

A few years ago a study was done showing that the caseload for assistant public defenders handling non-capital cases was 500 felony cases a year. At today's levels, the caseloads are deeply concerning.

Mr. Stein pointed out that since the 1970's, technological advancements, such as the Internet and the use of Skype have made lawyers more efficient. However, there are thousands of non-English speaking clients. There are not enough interpreters in the system. In the Eleventh Judicial Circuit, if a non-English speaking witness needs to be deposed, an assistant public defender has to wait until the afternoon when the interpreters are finished with court work that is handled during the morning sessions. In Miami, traveling to the pretrial detention facility takes one-half to two-thirds of a day. At the facility there are workforce restrictions and fewer personnel available. All this reduces the time available to ferret out innocent clients.

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Mr. Stein commented on the turnover that occurs at both the state attorney and public defender offices. This turnover creates a situation where the new attorney has to spend time with a supervisor, thus reducing the effectiveness of both attorneys.

Mr. Stein recommended that the Florida Legislature conduct a case weighted workload study. It is important to determine how much time it takes to handle a caseload. One needs to take into account that triaging is not the goal. The goal is proper representation to curtail wrongful convictions. We should not guess how much work a lawyer should have. We need to know how much work a person can handle.

Mr. Stein discussed the moral authority of the courts that is derived both from the U.S. Constitution and the statutes. It is important that victims have respect for the decisions reached by the courts. They have this respect because there is a fair fight and only proper funding allows for this. When either side gains an advantage, the cases are eroded, and it undermines the courts. What is critical is that there be in place adequate funding for both sides in the workplace.

Mr. Stein noted that public defender offices train individuals to be trial lawyers, but they are not trained to be psychologists. Attorneys are being asked to determine the competency of a client in a very short period of time.



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Ms. Barzee raised the issue of staffing in public defender and state attorney offices. She asked what recommendations Mr. Stein might have regarding staffing needs. Mr. Stein said that over time he has observed that some attorneys coming to the office are less equipped than in the past. Many public defender offices are unable to provide mentoring. In the past, it usually took two years before an attorney would handle a felony case. Now, it is a year to fifteen months. Mr. Stein noted that there have been no raises to employees over the last several years and the attorneys are getting younger. He said if the trend continues, there may not be enough lawyers to meet the standards for capital cases. If there is no opportunity for economic advancement, and no loan forgiveness programs, the young attorneys will leave. Now, many attorneys stay only three or four years, even though they are dedicated to the mission and love the work. You can only ask someone to be poor for so long.

Judge Perry asked if there were factors Mr. Stein sees that leads to wrongful convictions. Mr. Stein advised Judge Perry that the lawyers do not depose every witness. It just is not possible. He said more investigators are needed to get out into the street. He said the public defenders need to have the ability to forensically test what evidence is found. Due process costs are provided, but one has to constantly weigh the needs of one client against the needs of another. There is a finite pot of money. Mr. Stein said the public defenders have learned to prioritize

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their caseloads. Their work is similar to a MASH unit. It is not unheard of to have forty or fifty cases set for trial on a given day.

*Ms. Nancy Daniels, Public Defender, 2<sup>nd</sup> Judicial Circuit*

At the June 11, 2012 meeting, Ms. Daniels spoke on behalf of the Florida Public Defender Association and as the Public Defender of the 2<sup>nd</sup> Judicial Circuit.

Ms. Daniels noted that there are public defender offices in all twenty circuits, and the public defenders also handle cases in the five appellate districts. In 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> circuits, the appellate backlog is substantial. If an appellate record were to arrive on June 11, 2012, it would be September before someone would look at it. This problem is the same for the Attorney General's Office. The lawyers have had to ask the chief judges for help in getting extensions of time for filing pleadings in cases on appeal.

Ms. Daniels explained all the services the public defenders provide to the criminal justice system. Statistics show that statewide there are 504 cases per attorney. There are 1,511 assistant public defenders, statewide, to handle approximately 761,689 cases. This means that one attorney has, on the average, only two hours to devote to a case.

Ms. Daniels advised that the rate for a newly hired attorney at base is \$39,074. A salary this low does not permit her office to keep an attorney on staff unless there is the ability to raise the base salary in later years.

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Ms. Daniels said that assistant public defenders have approximately \$80,000 to \$100,000 in student loans. This averages out to \$1,100 a month in loan payments, on a starting salary of \$3,076 a month. She advised that there is the John R. Justice Loan Forgiveness Program, but one has to stay in public service for a specified number of years. A person has to make the loan payments for years before there is loan forgiveness on the balance. She commented that she does not have people staying that long just to pay off a student loan.

Ms. Daniels advised that in her office, and statewide, an attorney is moved into a felony division to handle serious criminal offenses after about three years of service.

Ms. Daniels stated that both the state attorney and public defender salary structures are inadequate. The funding is also inadequate for the office of criminal conflict and civil regional counsel. Government lawyers have suffered as a result of being required to contribute to their retirement plan, as well as paying for increases in health care premiums.

Ms. Daniels commented on the language in Senate Bill 1960 (2012-123, Laws of Florida). The legislation states that if the chief judge of a circuit establishes a limited registry that includes only those attorneys willing to waive compensation in excess of the flat fee, the court shall appoint attorneys from that registry unless there are no attorneys available to accept the appointment on the

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limited registry. Ms. Daniels found this legislation to be particularly troublesome and felt it was unfair to require attorneys to waive asking for any fee above the amount set by the Legislature, no matter how complex the case. The end result of this legislation is that new attorneys, and attorneys who need clients, will agree to the fee, while other attorneys will refuse to handle conflict cases.

Mr. Coxe said that Senate Bill 1960 is a repeal of *Gideon v. Wainwright*. It is an economically driven issue, not a quality of representation issue and asked if the Commission would take a stand on the legislation.

Judge Perry commented that if the State of Florida was serious about wrongful convictions, Senate Bill 1960 may fly in the face of that. There will be an increase in rule 3.850 motions that the criminal justice system will have to deal with. There will be lawyers who may not have taken depositions, have not done discovery, will see the client at a pretrial hearing, and then convince the defendant to plead guilty so he or she can get out of jail. Later, there will be a probation violation and the defendant will be sentenced to prison. At that time, the 3.850 motion will be filed and the defendant will claim he or she was not guilty of the original offense.

Mr. Smith felt that eventually there will be a legal challenge to the flat fee schedule.

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The Commission is convinced that the fees set by the Legislature to privately appointed counsel under s. 27.5304(5), Florida Statutes (2011), are completely inadequate. The Legislature has applied a dollar value to felony offenses based on the degree of the felony. As an example, the fee paid to a private attorney for representation at trial in any noncapital, nonlife felony is \$2,500. One attorney may be paid \$2,500 for a third degree felony grand theft, while another attorney receives exactly the same amount for a first degree felony robbery with a weapon. It is illogical to set an identical fee based on the degree of the felony. Instead, a fee schedule should be established based on the level of the felony offense.

Section 921.0022, Florida Statutes (2011), sets forth the Criminal Punishment Code. The Code applies to any felony offender whose offense was committed on or after October 1, 1998. The Code establishes severity offense rankings for most felony offenses in Florida. The rankings range from a score of 1 to 10. The least severe offense is rated a 1, while the most serious offense scores a 10. The list of offenses is set forth in s. 921.0022(3), Florida Statutes. Not every felony offense is covered by this section. Until the Legislature specifically assigns an offense to a severity level in the offense severity ranking chart, the severity level is within the following parameters: A third degree felony is a level 1 offense.

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A second degree felony is a level 4 offense. A first degree felony is a level 7 offense. A first degree felony punishable by life is a level 10 offense.

The level of the offense, not the degree of the felony, is critical in determining the possible sentence imposed on a felony offender. Although the court may sentence any offender to the statutory maximum upon conviction, the Criminal Punishment Code scoresheet is utilized to guide the trial court in imposing a sentence that is somewhat uniform statewide. The state attorney shall prepare the scoresheet for each defendant to determine the permissible range for the sentence that the court may impose. For any defendant, the magic number to be achieved is a score of 44 points or lower. 44 points or lower creates the possibility of a non-state prison sanction, unless the court determines within its discretion that a prison sanction (up to the statutory maximum) is appropriate.

For the most experienced assistant state attorney, a proper calculation of the total number of sentencing points can be a significant challenge. Sentencing points are applied for the primary offense, additional offenses at conviction, victim injury, community sanction violations, prior criminal record, habitual violent offender, and habitual offender, etc. In addition, sentencing multipliers are used for drug traffickers, offenses against law enforcement officers, certain motor vehicle thefts, criminal gang offenses, and certain types of domestic violence cases.

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A primary level 10 offense scores 116 points. A level 9 offense scores 92 points. It is not until a defendant reaches a level 6 offense (36 points), that the possibility of a state prison sentence diminishes. The sentencing points continue to drop as the severity level decreases until the bottom of the scale is reached. A level 1 offense scores 4 points. In Florida it is not difficult at all to easily exceed 44 sentencing points, regardless of the degree of the primary offense.

The possible scoresheet scenarios to demonstrate the workings of the Criminal Punishment Code are seemingly endless. But looking only at those offenses that are a level 7 give some insight into why s. 27.5304, Florida Statutes, is a misguided attempt to provide effective assistance of counsel at rock bottom prices. A level 7 offense (with no other points assessed on the scoresheet) scores the offender 56 points. Section 924.0024(2), Florida Statutes, requires that 28 points be subtracted from the total sentencing points when the total number of points exceeds 44, and the remaining total is then reduced again by 25 percent. The final number reflects the number of months that the offender is to serve in prison. This number represents the lowest permissible sentence the court may impose, absent certain circumstances set forth in s. 921.00241(1), Florida Statutes. If the total score is 11 months or less, the offender cannot be sentenced to state prison, but if a sentence of incarceration is imposed, shall serve the time in a county jail facility. In the example set forth above, a score of 56 points is reduced

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to 28. That number is further reduced by 25% to leave the offender with a total score of 21 points. In other words, assuming the court does not downwardly depart, any felony offender convicted of a level 7 offense may easily be sentenced to twenty-one months, or more, in the state prison. There are 115 felony offenses listed as level 7 offenses in s. 921.0022(3)(g), Florida Statutes. 43 of these offenses (37%) are third degree felony offenses. The remaining 72 offenses are second degree felonies or higher.

Certain types of felony offenses are more likely than others to require the trial courts to appoint private attorneys because of a conflict that has been established in the case. Racketeer Influenced and Corrupt Organization (RICO) cases are good examples of conflict cases because there are usually multiple defendants. A RICO violation is a level 8 felony offense and scores 78 points at conviction, assuming there are not other points included in the scoresheet. A RICO conviction almost guarantees a person a sentence of imprisonment under the Code since the scoresheet calculation comes out to 34.5 months. It is not surprising that the Trial Court Budget Commission has determined that one of the major reasons the trial courts have exceeded the fee cap set forth in s. 27.5304, Florida Statutes, is because of the complexity of RICO cases.

A significant number of extremely serious felony offenses are assigned offense levels 8, 9, and 10. The vast majority of these offenses in levels 8 and 9



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are first degree felony offenses punishable by a maximum sentence of thirty years in the state prison. As an example, there are 45 level 9 felony offenses listed in the Code. Of this number, 34 are first degree felonies. There are 8 felony offenses listed in level 10, of which 3 are first degree felonies.

A review of the hundreds of felony offenses listed in s. 921.0022(3), Florida Statutes, reveals that only ten of these offenses are either first degree felonies punishable by life imprisonment, or life felonies. Yet the Florida Legislature has determined that based on the degree of the offense, not the level of the felony offense, the sum of \$2,500 is adequate to secure effective assistance of counsel.

Whenever the likelihood of incarceration in the state prison is a significant possibility, more time, effort, and expertise is needed in order to ensure effective assistance of counsel. Any offender who scores 44 points or more falls into this class. A flat fee of \$2,500 for any non-capital, non life felony bears no rational relation to the possible incarceration of the defendant in the state prison system.

The faulty logic of s. 27.5304, Florida Statutes, is even more apparent when examining the fees for first degree felonies punishable by life, life felonies, and capital cases. Only two felony offenses that are categorized as a first degree felony punishable by life imprisonment are level 7 offenses. All of the remaining ones are listed as felony levels 8, 9, or 10. All life felonies in Florida are either level 9 or level 10 offenses. The Legislature has determined that these first degree felonies

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punishable by life, and life felonies, are valued at \$3,000 when it comes to the fee schedule. Common sense tells us that these cases are heavily litigated and rarely, if ever, result in the imposition of a non-state prison sanction.

Last, but not least, is the flat fee schedule for capital cases. The Legislature has asked an attorney to accept a flat fee of \$15,000 to represent a defendant who faces, at a minimum, a sentence of life imprisonment, or at most, a sentence of death.

The Commission believes that the current funding process for private court appointed counsel under section 27.5304(1), Florida Statutes, invites ineffective assistance of counsel and wrongful convictions. Therefore, the Commission recommends that the Florida Legislature immediately determine that the funding for private court-appointed counsel be based on the level of the felony involved and not a flat fee approach.

Excerpted below, in italics, is a summary of the comments from the Chair of the Commission. There are few jurists better qualified to render an opinion regarding the state of the criminal justice system in Florida. This excerpt is taken from the Commission minutes of June 11, 2012, located at Appendix Q.

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*Judge Perry said we have to think of the cost of injustice. This is hard to quantify. Someone in jail who is wrongfully convicted, or someone who is inexperienced, has to battle in court against experienced attorneys. The only thing the criminal justice system has is the confidence that people have in it. The underfunding of this system in this state is going to lead us to a situation where people will look at the system and have no faith or confidence in it. We hear about the executive branch hiring out-of-state counsel for three to four hundred dollars an hour. It would be one thing if we start paying someone one hundred to one hundred twenty-five dollars an hour to represent a person charged with murder in the first degree, considering the state wants to impose the ultimate sanction to forfeit that person's life. Now an attorney has to sign an agreement to take \$15,000 for a case lasting more than a year. That is a mockery in and of itself. When we have 10-20-life, we still have to give the person a chance to come to court and require the state to prove guilt. I challenge you to pull out the Declaration of Independence and read what led to this country breaking away from England. Read what the*

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*King of England did and ask if we are heading down  
that path.*

Mr. Reyes moved that the following recommendation be approved by the Commission:

“The Commission believes that the current funding process for private court-appointed counsel under section 27.5304(1), Florida Statutes, invites ineffective assistance of counsel and wrongful convictions. The Commission therefore recommends that the Florida Legislature immediately determine that the funding for private court-appointed counsel be based on the level of the felony involved and not a flat fee approach.”

Judge Perry called for a vote on the recommendation. The Commission passed the recommendation by a unanimous vote.

Mr. Hill offered a motion to address the student loan situation mentioned both by Ms. Daniels and Mr. King. After Commission discussion, and input from Judge Silvernail, the motion read:

“The Commission recognizes the experience and stability of staffing in the state attorney, public defender, attorney general, and regional conflict counsel reduces the likelihood of wrongful convictions and increases the likelihood of effective assistance of counsel.

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Therefore, the Commission recommends that the Florida Legislature provide supplemental funding to pay for student loans by enacting Senate Bill 362 and House Bill 81.”

Mr. Hill’s motion passed the Commission by a unanimous vote.

## **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:

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- funding to purchase 50 rapid identification devices at a cost of \$3,969 per device for a total of \$198,450;
- funding to purchase 21,184 DNA kits used for collection and other laboratory supplies that are consumed in the analysis process, in the amount of \$593,152;
- funding to purchase 13 AB 3500 Genetic Analyzers at a cost of \$160,000 per instrument for a total of \$2,080,000;
- funding purchase 130 licenses for the GeneMapper software at \$8,000 per license for a total of \$1,040,000;
- funding of \$470,547 for six new crime laboratory analysts dedicated to handling the additional CODIS workload generated by arrest-based collections and help to avoid diverting additional case working analysts to CODIS administration;
- funding of \$784,245 for ten new crime laboratory analyst positions to keep pace with current demands for service.

(5) The Commission recommends that the Florida Legislature provide adequate funding for due process services to the public defenders, the office of criminal conflict and civil regional counsel, and conflict counsel for the use of FDLE crime laboratories or certified private laboratories.



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

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

### ***(c) Preservation of Evidence***

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

### ***(d) Professional Responsibility***

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

(2) The Commission recommends to the Florida Supreme Court that Florida Rule of Criminal Procedure 3.112 be amended, or a new rule created, to require that any attorney who is practicing law in a felony case must have

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

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

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

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

### ***(e) Funding of the Criminal Justice System***

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

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

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(2) The Commission believes that the current funding process for private court appointed counsel under section 27.5304(1), Florida Statutes, invites ineffective assistance of counsel and wrongful convictions.

Therefore, the Commission recommends that the Florida Legislature immediately determine that the funding for private court-appointed counsel be based on the level of the felony involved and not a flat fee approach.

Respectfully submitted this 25<sup>th</sup> day of June, 2012.



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The Honorable Belvin Perry, Jr.  
Chief Judge, Ninth Judicial Circuit  
Chair, Florida Innocence Commission  
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