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New Florida Rule Requires Training for Attorneys Who Handle Adult Felony Cases

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The Florida Supreme Court's new rule of criminal procedure, Fla.R.Crim.P. 3.113, "Minimum Standards for Attorneys in Felony Cases," takes effect May 16, 2016. It mandates training on Florida Rule of Criminal Procedure 3.220 and the principles established by *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). Once it takes effect, attorneys must complete the required training before participating as counsel of record in adult felony criminal cases in Florida. The new rule requires at least 100 minutes of training; two hours of continuing legal education credit is available upon its completion. The training is available through the Florida Public Defender's Association (see http://flpda.org/). **Background**

The new rule is a good reminder of the important principles that *Brady* and *Giglio* established years ago. The Fifth and Fourteenth Amendments, as well as Fla.R.Crim. P. 3.220(b)(4), require the state to disclose specific types of favorable evidence to defendants. In *Brady*, the U.S. Supreme Court held that due process requires the prosecution to disclose, upon request, evidence favorable to an accused when such evidence is material to guilt or punishment. 373 U.S. at 87. A *Brady* violation occurs when (1) evidence is favorable to the accused because it is exculpatory or impeaching; (2) evidence was suppressed by the state, either willfully or inadvertently; and (3) prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Besides exculpatory evidence, the state also must disclose information that could be used to impeach witnesses it calls to testify, especially where the witness's testimony is an important part of the state's case. *Giglio*, 405 U.S. at 150-51. In *Giglio*, the defendant discovered evidence post-trial that the government had failed to disclose a promise of immunity made to the defendant's coconspirator, the only witness. Finding that the government's case "depended almost entirely" on the witness's testimony, the Court reversed the conviction because "evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id.* at 154-55. Although legal advances stemming from *Brady* and *Giglio* encourage disclosure of favorable evidence, and the new Florida Supreme Court rule will soon take effect, defense lawyers must remain vigilant in enforcing a client's discovery rights to favorable evidence in the both the trial and plea setting. Most criminal cases are

resolved with a guilty or no contest plea. Of the vast number of criminal cases filed, very few proceed to a bench or jury trial. Unfortunately, the law remains unsettled concerning the state's responsibility to disclose favorable evidence when the defendant enters a plea. For example, the prosecution is not required to disclose material impeaching information before the entry of a guilty plea if the defendant pleads guilty. *U.S. v. Ruiz*, 536 U.S. 622, 629-33 (2002) (no *Brady* violation where government required defendant to waive access to impeachment evidence before entering into plea agreement). It's uncertain whether the prosecution must disclose material exculpatory evidence under *Brady* before a guilty plea is entered. Federal circuits are divided on this issue. *U.S. v. Conroy*, 567 F.3d 174, 178-79 (5th Cir. 2009) (guilty plea precludes defendant from claiming *Brady* violation because *Brady* protects the integrity of trials, not plea proceedings). *Ferrara v. U.S.*, 456 F.3d 278, 293 (1st Cir. 2006) (*Brady* violation because government failed to disclose important witness's recantation before defendant entered guilty plea). **Guidance for Florida Defense Attorneys**
In Florida, unfavorable authority exists for the disclosure of material that one might use in deciding whether to enter a plea. For example, the state is not legally obligated to advise the court or defense that a witness has died before the defendant's plea. *Adler v. State*, 666 So.2d 998 (5th DCA 1996). Until the law becomes more settled in this area, it may be best to include in a demand of the state for favorable evidence a reminder that, under Florida Rule of Professional Conduct 4-3.8:

> "[t]he prosecutor in a criminal case shall (c) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."

Furthermore, Florida has adopted the American Bar Association's Standards of Criminal Justice Relating to the Prosecution Function. ABA Standard 3-3.11. These standards provide that: (a) a prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." Thus, the ABA Standards provide another tool for defense counsel seeking to obtain favorable evidence from the prosecution in the pre-plea setting to evaluate it "at the earliest feasible opportunity" and before the court conducts a plea hearing.

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