

THE SUPREME COURT *of* OHIO

TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

March 19, 2021
Meeting Minutes

Task Force Members in Attendance

Hon. Gene Zmuda (Chair)
Sixth District Court of Appeals

Sara Andrews
Director, Ohio Sentencing Commission

Hon. Pierre Bergeron
First District Court of Appeals

Hon. Michael P. Donnelly
Ex-officio member
Supreme Court of Ohio

Mark Godsey, Esq.
Ohio Innocence Project

Rep. David Leland
District 22

John Martin, Esq.
Cuyahoga County Public Defender's Office

Hon. Stephen McIntosh
Franklin County Common Pleas Court

Elizabeth Miller, Esq.
Non-voting Designee of Tim Young
Office of the Ohio Public Defender

Meredith O'Brien, Esq.
Ohio Association of Criminal Defense Lawyers

Sheriff Tom Rigganbach
Buckeye Sheriff's Association

Joanna Sanchez, Esq.
Non-voting Designee of Tim Young
Wrongful Conviction Project
Office of the Ohio Public Defender

Hon. Nick Selvaggio
Champaign County Common Pleas Court

Timothy Young, Esq.
Ohio Public Defender

Approval of February 12, 2021 Meeting Minutes

Task Force Chair Judge Gene Zmuda opened the meeting by requesting approval of the February 12, 2021 meeting minutes. Judge Nick Selvaggio moved to approve the minutes and the motion was seconded by Judge Pierre Bergeron. The minutes were then passed unanimously by a show of hands.

News Related to Wrongful Convictions

Judge Zmuda pointed out to members that hyperlinks to some informational materials—including a video seminar on Conviction Integrity Units, the text of Ohio House Bill 8, and an opinion article by a former Alabama Attorney General—were included in the meeting agenda. He hoped that members would find these materials helpful in presenting outside knowledge and perspectives. Judge Zmuda explained that he would continue to present relevant news materials in future meetings to aid the Task Force in its work.

Thank You to Staff Liaison Justin Kudela and Welcome Staff Liaison Bryan Smeenk

Judge Zmuda took a moment thank Staff Liaison Justin Kudela for his efforts in assisting the task force in its work thus far and to congratulate him on his new position as Court Administrator at Delaware County Municipal Court.

Judge Zmuda then introduced Staff Liaison Bryan Smeenk, who will be taking over for Kudela.

Discussion on Potential Changes to Rules and Statutes

Discussion included the following:

Proposed Criminal Rule 33.1

- Judge Zmuda opened the meeting to discussion of the Proposed Criminal Rule 33.1, which had been drafted based on discussions in previous meetings and sent to members for vetting prior to this meeting.
- Tim Young explained that he and some others found there to be “insurmountable issues” with the creation of a standalone innocence rule. Mainly, he said, ethical issues would arise if defense attorneys were made to choose to file under the innocence rule in some cases and not others. Young suggested that the group return to attempting to edit the existing Rule 33.

- Godsey agreed with Young and added that the Proposed Rule 33.1 would be “unworkable” due to the inability of defendants to affirmatively prove innocence and the difficulty in setting a definition of what constitutes “actual innocence.” In many cases, he said, the Ohio Innocence Project’s (“OIP”) cases involve credibility and *Brady* issues, rather than concrete proof of actual innocence. Godsey felt the creation of such a rule would set the innocence movement back and make OIP’s work more difficult. He also thought the group should return to editing Rule 33.
 - Judge Nick Selvaggio asked Godsey how this group can reconcile the idea of a jury as the sole judges of credibility with a defendant who claims that witness testimony should not have been believed.
 - Godsey responded that OIP would not typically bring such a case. Credibility issues would come into play when *Brady* violations led to a jury hearing some testimony while other testimony was suppressed. In such a case, the issue is not that the jury believed one side over the other, but that it did not have the chance to hear all relevant testimony before making a decision. In this situation, the defense does not necessarily have affirmative proof of innocence, but it has evidence that warrants a new trial.
 - Justice Michael Donnelly suggested that any changes or improvements should create an incentive for a trial court judge to hold a hearing on any new evidence that undermines the theory of guilt that was used to convict.
- Justice Donnelly and Carol O’Brien, Chief Counsel at the Ohio Attorney General, disagreed with the idea that actual innocence is difficult to define. In their view, actual innocence simply defined as when a person factually did not commit the crime of which they are accused.
 - Young responded that he did not disagree with that definition, but he felt that there was great difficulty in determining what standard of evidence allows a case to fall under that definition of actual innocence and allow for a higher level of review.
- Judge Pierre Bergeron expressed concern about returning to the process of editing Rule 33. The group previously agreed to create Proposed Rule 33.1 due to the difficulty they faced in attempting to edit Rule 33 without unintentionally “opening the floodgates” to frivolous motions or affecting cases outside the scope of the task force’s work, he said. Judge Bergeron suggested that an attorney could move under both Rule 33 and Rule 33.1 if they had any doubts about the implications of using one over the other.
 - Joanna Sanchez responded that she did not think modifying Rule 33 to remove some procedural barriers would lead to an increase in frivolous filings. Even if it did, she said, those cases would quickly be dismissed on their merits. More importantly, said Sanchez, it would shift the analysis so that judges would spend more time and resources assessing the merits of case rather than focusing on procedural issues like timeliness.
 - Godsey agreed with Sanchez and said that OIP would like to see some small procedural changes to Rule 33. Even when OIP has strong cases, he said, they are often dismissed on procedural grounds under the current framework.

- Judge Zmuda asked members whether there was consensus to move forward with Proposed Rule 33.1 or to return to the process of modifying the existing Rule 33.
 - Justice Donnelly responded that he did not think it mattered whether the concerns members raised were addressed in the existing rule or in a new standalone rule. The most important thing is to create language that lets a case be heard on its merits without significant procedural bars when there is new evidence that undermines the conviction, he said.
 - Judge Bergeron felt that the Proposed Rule 33.1 could address the procedural concerns raised and provide additional assistance to those claiming actual innocence.
 - Carol O'Brien added that a separate rule could provide a way for prosecutors to bring actual innocence claims, something that does not currently exist. Additionally, she said, it could create an easier route for less experienced attorneys to bring such claims.
 - Godsey said that the existing rule already contains the standard for new evidence that Justice Donnelly suggested. He believed that modifying the existing rule to remove the procedural barriers would make more sense than creating a new rule.
 - Sanchez and Young agreed with Godsey that a new rule was not necessary. Any case in which new evidence undermines the conviction could be considered an “actual innocence” case, they said. The difficulty lies in determining what factors cause a case to fall under the new rule.
- Judge Zmuda asked that those members who wished to modify Rule 33 provide draft language to be compared to the Proposed Rule 33.1 at the next meeting.

Postconviction Relief Petitions R.C. 2953.21 and Ohio Criminal Rule 35

- Sanchez suggested that access to evidence be addressed in the postconviction statute. Evidence from outside of the record is required in postconviction petitions, but there is no right to discovery in non-capital cases. Petitioners are also often denied access to public records, Sanchez said.
 - Judge Bergeron agreed that there should be some mechanism to provide discovery for cases that show merit.
- Young agreed with Sanchez and added that right to counsel should also be addressed. Like discovery, this right only currently exists for death-penalty cases. Young did not suggest that all postconviction cases should be provided counsel, but that those cases with merit should be able to have counsel appointed. The difficulty, he said, would lie in deciding the standard a case should meet in order to have the right to discovery and appointed counsel.

- Judge Stephen McIntosh pointed out that a somewhat-lengthy investigation would likely have to occur before a case could show enough merit to receive appointed counsel. This would mean a petitioner would need counsel well before the court could make an appointment, he said.
- Young agreed with Judge McIntosh’s observation and said that there is no clear answer to that fundamental question as of yet.
- Meredith O’Brien said that the group should also consider the removal of language requiring substantive grounds for relief prior to holding a hearing.
- Young also suggested that the language requiring a “strong probability of a different outcome” be replaced with a “reasonable probability of a different outcome.”
 - Godsey agreed and added that Ohio is the only state with this higher standard.
- Justice Donnelly said he would like to see some mechanism added that provides postconviction petitioners who claim actual innocence with some right to a speedy hearing or speedy ruling on their motions for new trial. These motions sometimes languish without rulings for years, he said. The only recourse petitioners currently have available to them is to seek a writ against the same judge from whom they are seeking a favorable ruling.
 - John Martin suggested that the first deadline imposed for a ruling could be a decision on whether to appoint counsel.
 - Meredith O’Brien asked Justice Donnelly if providing this right to a speedy hearing or ruling would provide petitioners with grounds for relief when that right is violated.
 - Justice Donnelly responded that this provision would be intended to create an incentive for judges to make speedy rulings because they could face a writ against them if they do not.
 - Judge Zmuda added that the Rules of Superintendence could be an avenue for at least addressing the reporting of this issue. Currently, courts are not required to report the number of postconviction petitions they have pending or the length of time that they take to rule on those motions.
 - Sara Andrews told Judge Zmuda that the Ohio Sentencing Commission’s statutory authority and obligations contains language requiring that it collect and maintain data that pertains to the cost to the counties of postconviction-relief-proceeding provisions in R.C. 2953.21. She said that the commission needs a way to meet that statutory obligation because one is not currently available.
- Judge Zmuda asked that members submit specific language addressing each of these issues for discussion at the next meeting.

Scheduling

Judge Zmuda suggested that the previously scheduled meeting on April 16 could be changed to April 23, if the members wanted more time between meetings. It was agreed that the meeting will remain scheduled for April 16.

With a goal of July 2021 for the completion of the final report and recommendations, the meeting schedule remains as follows:

Friday, April 16, 2021

Friday, May 7, 2021

Friday, May 21, 2021

Friday, June 11, 2021

Future meetings will tentatively include participation from the Ohio Prosecuting Attorneys Association, Ohio's three Conviction Integrity Units, and the North Carolina Innocence Inquiry Commission.

Martin noted that the Commission on the Rules of Practice and Procedure has its last meeting on July 9, 2021, before making its recommendations to the Supreme Court in the fall. He said the Task Force should be mindful of completing its final report and recommendations in time for the Commission to consider them.

Judge Zmuda said he was aware of the Commission schedule and clarified that the final report must first be sent to the Court, which will then submit it to the Commission on the Rules of Practice and Procedure.

Next Meeting Date – Friday, April 16, 2021 from 10:00 a.m. to 12:00 p.m.

The next meeting of this Task Force is scheduled for April 16, 2021 from 10:00 a.m. to 12:00 p.m.