

Recommendation for an Ohio Innocence Commission

The Task Force recommends that the General Assembly create an innocence commission to investigate and adjudicate claims of innocence. An innocence commission would supplement, not replace, existing post-conviction mechanisms for challenging a conviction.

The purpose of an innocence commission is to add to Ohio's justice system an independent body whose only allegiance is to ascertaining the truth. To that end, the commission must be able to independently investigate the facts of a case in an inquisitorial (as opposed to adversarial) setting and follow the evidence, guided by a commitment that neither the guilty should be exonerated nor the innocent remain convicted.

If the General Assembly decides to act upon this recommendation, the Task Force recommends a commission be created with all of the following features:

1. The commission should be an independent, neutral, fact-finding entity empowered to investigate claims of innocence arising out of felony convictions from any court of common pleas.
2. The commission should be comprised of a variety of individuals with past or present professional involvement in the criminal justice system, as well as members of the community.
3. The commission staff should be a professional staff insulated from political pressure aimed at overturning or validating criminal convictions.
4. The commission's authority to review claims should be limited to claims where the claimant has, with the benefit of counsel, waived their Fifth Amendment right and attorney-client privilege reasonably related to the claim of innocence.
5. The commission should be empowered to issue subpoenas for documents, compel the attendance of witnesses, and utilize the methods of discovery available under the rules of Criminal and Civil Procedure.
6. The commission should have the power to inspect, examine, and temporarily take possession of physical evidence for forensic examination or testing.
7. The commission's authority, policies, and practices must be consistent with Article I, Section 10a of the Ohio Constitution (Marsy's Law).
8. The commission should be adequately funded to investigate claims of innocence and comply with the constitutional and statutory rights Ohio affords to crime victims
9. Subject to limited exceptions involving circumstances where exculpatory or inculpatory evidence is discovered during its investigation, as well as in cases where there is sufficient

evidence to warrant a public hearing on the claim, the commission's work product should be confidential.

10. In cases where the innocence commission believes a viable claim of innocence has been established, a specially authorized three-judge panel comprised of sitting appellate court judges from outside the appellate district where the case arises should consider the matter. Judicial proceedings should be public and should provide an opportunity for the defendant (through counsel if desired), the prosecutor and the victim to be heard. In the event that a judicial panel finds the defendant to be innocent, the panel shall be authorized to take appropriate remedial measures to vacate the conviction.

Additional considerations

Several topics relating to a potential innocence commission gave rise to significant discussion with the Task Force. Policy decisions on each of these points would affect the fundamental structure and authority of any commission. To that end, the Task Force recommends the General Assembly consider the following issues in the enactment of any legislation establishing an innocence commission.¹

A. *What does it mean to "establish innocence?"*

The question of establishing innocence is fundamental to the mission of any post-conviction extraordinary relief -- which is what an innocence commission represents. Some Task Force members, noting that the fact of conviction has already required either a guilty plea or a jury's verdict, believe that "innocence" requires proof that the defendant was not the perpetrator of either the offense of conviction or another offense related to the criminal event alleged in the underlying case. However, others voiced the difficulty of proving a negative and believe that this standard should also be met when the three-judge panel, considering all evidence presented by the commission, concludes that no reasonable juror would be able to find the defendant guilty of the offense of conviction beyond a reasonable doubt.

The North Carolina Innocence Commission, the only such commission in the United States, is limited by statute to reviewing claims of factual innocence. As defined in North Carolina, a claim of factual innocence means a claim on behalf of a living person convicted of a felony in the General Court of Justice of the State of North Carolina, asserting the complete innocence of any criminal responsibility for the felony for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief. An examination of some exonerations by the North Carolina Commission would

¹ It should be noted that, if Task Force members offer testimony with respect to enabling legislation considered in the General Assembly in the future, that testimony represents their individual positions and not those of the Task Force.

suggest that the commission might utilize a broader definition than a strict reading of the statute would suggest.

B. *Who can refer cases to an innocence commission?*

The Task Force discussed at length practical and philosophical considerations relating to the issue of who can refer cases to an innocence commission. Some Task Force members supported a limitation on the referral of innocence claims to prosecutors and the judiciary. Conversely, other members of the Task Force supported allowing any defendant to directly submit a claim directly to the commission.

It should be noted that North Carolina addressed this issue by bifurcating the submission of claims. Under North Carolina law, only innocence claims for certain serious felony convictions can be directly submitted to the Commission by the claimant. Claims of innocence relating to all other offenses must be referred to the commission by a court, a State or local agency, or the claimant's counsel.

C. *What circumstances will justify an inquiry by the commission?*

There was a lack of consensus among the Task Force members about the quantity and quality of information necessary to trigger a commission's review of a conviction. There was agreement that the commission's purpose is not simply to review the same evidence presented at trial and then second-guess a jury's verdict. Similarly, there was agreement that new evidence, unavailable to the defense at trial, which credibly establishes that the defendant was not the perpetrator of any criminal offense (e.g., DNA evidence that identified a different perpetrator who then confessed to the offense) would justify the commission's inquiry. But, between these two poles, there was a lack of agreement regarding at least three important questions: first, the extent to which evidence that may have been available at trial but not presented to a jury can be the basis for an application to the commission; second, the extent to which evidence of innocence must be verifiable; third, the extent to which evidence of innocence must be completely exculpatory as opposed to compelling a reduction in the offense of conviction.