THE SUPREME COURT *of* OHIO

TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

May 7, 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. Rocky Coss
Highland County Common Pleas Court

Douglas Dumolt, Esq.
Non-voting Designee of Dave Yost
Ohio Attorney General's Office

Sen. Theresa Gavarone
District 2

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

Hon. Lindsay Navarre
Lucas County Common Pleas Court

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

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

Andy Wilson, Esq.
Office of the Governor

Dave Yost, Esq.
Ohio Attorney General

Timothy Young, Esq.
Ohio Public Defender

Approval of April 16, 2021 Meeting Minutes

Task Force Chair Judge Gene Zmuda opened the meeting by requesting approval of the April 16, 2021 meeting minutes. Judge Nick Selvaggio moved to approve the minutes and the motion was seconded by Representative David Leland. The minutes were then passed unanimously by a show of hands.

Discussion on Potential Changes to Rules and Statutes

Discussion included the following:

Proposed Crim. Rule 33.1

- Judge Zmuda reminded members that they had received a "synthesized Rule 33.1" prior to the meeting. This version of the rule was the result of efforts by Judge Zmuda and support staff to synthesize the suggested changes to the previous version of the rule (presented by Justice Michael Donnelly and Judge Pierre Bergeron) that received the most consensus during discussion at the previous meeting.

- After distributing the synthesized Crim. Rule 33.1, Judge Zmuda and support staff received from some members a modified draft of Crim. Rule 33.1 reflecting minor edits to the synthesized version. Members also received the modified draft of Crim. Rule 33.1 prior to the meeting. Because the modified version of the rule contained edits that Judge Zmuda felt were appropriate, he suggested that the group move forward with vetting this version of the rule. There were no objections and Judge Zmuda opened the meeting up to discussion.

Crim. Rule 33.1 Title

- Douglas Dumolt raised concerns about the title Crim. Rule 33.1: "New Trial Based on Claims of Actual Innocence." He did not feel that the title was reflective of the language in the body of the rule because "actual innocence" is not mentioned in the body. On top of not including the phrase "actual innocence," Dumolt felt the overall language of the rule was not even tied to the concept of innocence. He suggested that the title could be changed to something along the lines of "New Trial Based on Newly Discovered/Additional Evidence."

    - Judge Selvaggio added that the use of "actual innocence" in the title of Crim. Rule 33.1 could cause issues due to the phrase's definition being tied to DNA evidence in the postconviction statute. He agreed with Dumolt that the language of the rule did not fully align with the title.

- Tim Young disagreed with Dumolt's characterization of the rule as being divorced from the concept of innocence. He felt that requirement of evidence that produces "a reasonable likelihood of acquittal" as grounds did reflect the concept of innocence, if not necessarily "actual innocence" as defined in statute.

- Mark Godsey suggested that "New Trial Based on New Evidence that Produces a Reasonable Likelihood of Acquittal" would be more reflective of the body of the rule while still distinguishing it from the existing Rule 33, which addresses mainly procedural issues.

- Judge Zmuda asked for any objections to Godsey's proposed title. No objections were raised and the title of Proposed Crim. Rule 33.1 was changed to "New Trial Based on New Evidence that Produces a Reasonable Likelihood of Acquittal."

Crim. Rule 33.1(A)

- Judge Stephen McIntosh requested clarification of the purpose of using "evidence not considered at trial" rather than "evidence not introduced at trial." Would evidence that was offered but not allowed by the court be classified as "not considered" or "not introduced?"

    - Judge Rocky Coss did not think that such evidence would be acceptable as grounds for new trial under the current proposed language of Crim. Rule 33.1. Acceptable evidence would have to be evidence that was not offered or considered in any way, he said.

    - Judge Zmuda agreed with Judge Coss and pointed out that there are instances in which efforts are made to introduce evidence and the court decides not to allow the evidence, but the evidence is not proffered into the record. Such evidence would be classified as "not considered." He concluded that, in his and Judge Coss's interpretations, the current language would narrow the scope of evidence that could be used as grounds under Crim. Rule 33.1.

    - Dumolt disagreed with Judge Coss and Judge Zmuda. He felt that the current language could expand the evidence that could be used as grounds under Crim. Rule 33.1 because "considered" is vaguer than "introduced."

    - Godsey explained that the intent behind the language change was to narrow the scope of evidence that could be used. "Introduced" was changed to "considered" so that evidence offered but not accepted by the court at trial would be excluded under this rule, he said. Godsey suggested that "not part of the trial record" could be used if something more concrete was needed.

- Judge Selvaggio said that the language of the rule should aim to be as user-friendly as possible. He felt that "proffered" or "admitted" would be preferable to "considered" because those words are more measurable.

- Judge Zmuda argued that the Task Force should aim to create a rule that meets its goals without tying the hands of the trial-court judge who must interpret it, instead of trying to find ironclad language. The judge will make the determination as to what "considered" means and that decision can be appealed. The important thing is that a rule for actual innocence cases exists where one did not before, he said.

- Attorney General Dave Yost disagreed with Judge Zmuda. He did not feel that the group should settle on language that is "good enough." In his view, "considered" is much broader than "introduced."

- Young said that both "considered" and "introduced" were too vague. He favored Godsey's suggestion of "not part of the trial record."

- Yost agreed with Godsey and Young that "not part of the record" would be more concrete and understandable.

- Judge Coss suggested "not proffered at trial or during any proceedings in the case."

- Godsey disagreed with Judge Coss's language because there are instances where some proffered evidence may not be admitted because it is not considered exculpatory at the time. Later on, other evidence or testimony may arise that could help that previously excluded evidence reach a higher standard. Such evidence should be considered grounds under this rule, he said.

- Young suggested that Judge Coss's language could be changed to "not proffered at trial or during any pretrial proceedings in the case" to avoid the situation described by Godsey.

- Judge Zmuda asked for any objections to "not proffered at trial or during any pretrial proceedings in the case." No objections were raised and section (A) of Proposed Crim. Rule 33.1 was edited to reflect the change.

Crim. Rule 33.1(C)

- (C)(1) was edited to be consistent with the agreed-upon language changes to section (A).

- Dumolt expressed concern over the inclusion of an entitlement of the movant to "invoke the discovery processes available under the Ohio Rules of Criminal Procedure or Civil Procedure or elsewhere in the usages and principles of law" in (C)(2). He did not think it would be appropriate to include the Ohio Rules of Civil Procedure in the language, as the rights under those rules are much more expansive. Dumolt said that the inclusion of discovery rights under the Rules of Civil Procedure could enable the harassment of victims after a claim has only met the low standard of "not patently frivolous." He also thought the inclusion of "or elsewhere in the usages and

principles of law" would only serve to cause confusion. Thus, the rule should only allow discovery under the Ohio Rules of Criminal Procedure.

  - Yost pointed out that the language in (C)(2) only provides an entitlement to the discovery process for the movant and not the prosecution. He then agreed with Dumolt that it was not appropriate to include the Civil Procedure in the language, adding that this would provide an expanded discovery process in postconviction procedure that is not available at the trial level.

  - Godsey and Young agreed with Dumolt and Yost that "or Civil Procedure" should be removed from the language of (C)(2).

  - Martin did not feel there was an issue with the language only stating the movant's entitlement to invoke the process of discovery, since discovery rights are reciprocal under the Ohio Rules of Criminal Procedure.

  - Judge Zmuda asked if there was consensus to remove "or Civil Procedure or elsewhere in the usages and principles of law" and to change "movant" to "parties." No objections were raised and (C)(2) was edited to reflect the changes.

- Yost commented that the language in (C)(3) requiring the court to promptly set the matter for hearing after the conclusion of discovery leaves the timeline somewhat open-ended. One party often has an interest in prolonging the proceedings in any given case and this language could be abused to that end by prolonging the discovery process, he said.

  - Judge Zmuda responded that the purpose of the language was to require trial-court judges to issue prompt decisions rather than allowing motions to languish without rulings. The discovery process would be managed by the trial court, he said.

- Judge Selvaggio requested that the definition of "patently frivolous" in (C)(4) be reworded. He felt that the definition "offering no new evidence which could be tested at a hearing to determine if it satisfies the standard in section (A)" could be problematic because it is unclear how the evidence would be tested. Judge Selvaggio did not disagree with the intent of language but felt that it could be written more clearly.

  - John Martin suggested that the definition could read "offering no new evidence which, even if true, would satisfy the standard in section (A)."

  - Dumolt added that the definition of "patently frivolous" should also include cumulative evidence and evidence on collateral matters.

  - Judge Bergeron was supportive of Martin's suggested language and felt that it would cover Dumolt's concerns without specifically stating them because cumulative evidence or evidence on collateral matters would not satisfy the standard in section (A).

- Judge Zmuda asked if there was consensus to use Martin's suggested language. No objections were raised and (C)(4) was edited to reflect the change.

Crim. Rule 33.1(D)

- Dumolt voiced disapproval of the range of types of evidence that could be considered under the rule as written in section (D). He did not think that all evidence that undermines the State's theory of guilt or contradicts the evidence used to convict would necessarily be connected to actual innocence. Dumolt argued that allowing claims based on such evidence with no time limitations was not necessary.
    - Godsey thought that it was implicit that the types of evidence listed in section (D) would have to satisfy the standard of evidence stated in section (A)—meaning that the evidence would have to produce a reasonable likelihood of acquittal and thus be connected to innocence. He suggested that if Dumolt was not satisfied with the clarity of section (D), language could be added to explicitly reference back to section (A).
    - Dumolt responded that he did not take issue with the clarity of language in this section. Instead, he felt the rule as whole would allow too wide a breadth of claims.
    - Judge Selvaggio suggested that "or any other evidence that undermines the State's theory of guilt or that directly contradicts the evidence used to convict the defendant" be removed from this section since the phrase "but are not limited to" already conveys that the list of specific types of evidence is not all-inclusive. This would help ease concerns about broadness, he said.
    - No objections to Judge Selvaggio's suggested change were raised and the language of section (D) was edited to remove "or any other evidence that undermines the State's theory of guilt or that directly contradicts the evidence used to convict the defendant."
- Judge Zmuda suggested that section (D) be edited to read "types of evidence to be considered under this rule" rather than "types of claims to be considered under this section." Members agreed and the language was changed.

Recommendation of Crim. Rule 33.1

- Martin moved to approve Crim. Rule 33.1 as drafted for inclusion in the Task Force's final recommendations. Young seconded the motion.
    - Andy Wilson suggested that the vote to approve Crim. Rule 33.1 be postponed to the next meeting in order to give members time to review the changes made in this meeting.

- Yost indicated that, whether the vote is held during this meeting or the next, he plans to vote no on Crim. Rule 33.1. He explained that, in his view, this rule would be in significant tension with the statutory substantive rights granted by the General Assembly and is not within the Ohio Supreme Court's authority to adopt into Rules of Criminal Procedure. If the Task Force votes to approve Rule 33.1, Yost plans to move for Rule 33.1 to be submitted to Commission on the Rules of Practice and Procedure, rather than directly to the Court, so that it may consider the conflict he described.

- Judge Zmuda concluded that the vote should be postponed for the May 21, 2021 meeting so that members may review a fully updated draft of Crim. Rule 33.1 in advance of the vote. The vote will be held without discussion of any further revisions, he said.

OPD's Draft R.C. 2953.21

- Joanna Sanchez presented to the Task Force the Office of the Ohio Public Defender's ("OPD") proposed language changes to R.C. 2953.21.

- Judge Zmuda asked Sanchez if OPD's proposed statutory changes were closely tied to the language of Proposed Crim. Rule 33.1. Since the Task Force is seeking to improve the integrity of convictions as well as the postconviction process as a whole, he wondered if there were changes the postconviction process unrelated to actual innocence that should be made.

    - Sanchez responded that there is some overlap between the types of cases that would be raised under Proposed Crim. Rule 33.1 and this draft of R.C. 2953.21. She said that OPD looked at the two separately and made the necessary revisions, considering it is uncertain if Proposed Crim. Rule 33.1 will be adopted. Changes to the postconviction process regarding access to evidence and right to counsel need to be addressed regardless of the adoption of Proposed Crim. Rule 33.1, she said.

Draft R.C. 2953.21(A)

- Sanchez explained that many defendants, especially noncapital defendants who are without counsel, are not aware of the availability of the postconviction remedy and often only learn of the postconviction petition after the time to file has passed. OPD's draft language incorporates R.C. 2953.23, which addresses time for filing, into R.C. 2953.21 so that the two would not require cross-referencing. It also extends the right to discovery, currently allowed to only petitioners with capital sentences, to all postconviction petitioners.

    - Judge Selvaggio said that he would not oppose the extension of discovery rights to those with life sentences, but would oppose the extension of rights to all postconviction petitioners.

- Dumolt did not think it would be appropriate to extend discovery rights beyond death-penalty cases, even to life sentences. Death-penalty cases are protracted and resource-intensive because of these additional rights, he said, and extending those rights to all postconviction cases would "open the floodgates" for other cases to consume large amounts of time and resources.

- Sanchez responded that OPD was not suggesting the extension of all rights that exist for capital petitioners, only the right to discovery. The right to discovery is necessitated by the fact that over half of all known wrongful convictions happen as a result of prosecutorial misconduct and the withholding of evidence, she said.

- Dumolt also claimed that discussing statutory changes was not an appropriate use of the Task Force's time and that such changes should be pursued by OPD and the Ohio Innocence Project by advocating directly to the General Assembly.

- Representative Leland disagreed with Dumolt. He felt it was important to discuss these changes so that the Task Force could make a recommendation to the legislature, which would make the ultimate decision on what is an appropriate use of public resources.

- Sanchez said that new language added to this section was borrowed from federal habeas corpus processes in order to clarify when a petitioner can bring second and successive filings and to cover situations in which a petitioner was prevented from discovering evidence either because it was suppressed by the State or due to ineffective assistance of counsel.

    - Judge Selvaggio did not find it necessary to state in (A)(2)(c)(iii) the already existing right to file a petition if The United States Supreme Court or Ohio Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

    - Dumolt did not believe that federal habeas corpus standards and procedures would be worthwhile to recreate under state law. In his view, those processes are inefficient and should not be emulated in postconviction procedures. Dumolt also felt this language would eliminate meaningful timelines and create res judicata issues.

Draft R.C. 2953.21(F)

- Sanchez explained that "viewed in the light most favorable to the petitioner" was inserted in this section to account for the fact that petitioners most often do not have counsel and do not have access to discovery to help them build their claim. The insertion of this language would help claims with merit gain access to a hearing, she said.

    - Dumolt commented that hearings for these claims are infrequently granted for good reason. He argued that the scale should not be tipped in favor of the petitioner, especially when frivolous claims are often made.

- Sanchez responded that her interpretation of (F) is that petitions should already be viewed in the light most favorable to the petitioner and this language only serves to clarify that. Frivolous claims, even viewed in the most favorable light, would not be granted hearing if unable to state substantive grounds for relief.

Draft R.C. 2953.21(J)

- New language in section (J) intended to create a mechanism for counsel to be appointed for noncapital offenders when an arguable merit standard is met, said Sanchez. A corresponding change was also made in OPD's draft revision of Criminal Rule 32 requiring a sentencing judge to notify a defendant of the postconviction relief statute and their ability file for appointment of counsel.
    - Dumolt asked for the reasoning behind allowing motions for appointment of counsel to be filed ex parte.
    - Sanchez responded that this was intended to allow defendants to develop the merits of their case in order to obtain counsel without prematurely sharing that information with the other side.
    - Judge Selvaggio asked how a judge would go about appointing counsel under this section given the need for defense attorneys with specialized knowledge and experience. He referenced previous discussion within the Task Force about establishing a system to refer cases directly to OPD and/or OIP.
    - Sanchez responded that OPD has developed some suggested changes to the Ohio Administrative Code that would establish higher continuing-legal-education and other requirements for attorneys who would be appointed to postconviction cases. OPD and OIP would be on the list to be appointed to these cases but would not have the resources to handle the review of all postconviction cases, she said.
    - Young said that requirements for postconviction training would be recommended to the Ohio Public Defender Commission, which has rulemaking authority.
    - Judge Zmuda added that the creation of a statewide innocence commission or other body to manage and track postconviction cases is something that would be discussed in subsequent meetings, after statutory and rule changes are finalized.

Draft Rule R.C. 2953.21(K)

- Judge McIntosh asked if there was a standard that must be met in order for a new judge to be appointed on a motion by the petitioner or if a new judge would automatically be appointed if a motion is filed. If so, would a petitioner be able to have a new judge appointed multiple times if successive petitions are filed?

    - Sanchez said it was not OPD's intention to include a standard in (K) because, according to their research, a petitioner is unlikely to be granted relief by the same judge who presided over the trial. Since the only purpose is to appoint a judge who did not preside over the trial, a petitioner would only be able to have a new judge appointed once, not including recusal or disqualification.

    - Judge Zmuda pointed out that similar language was removed from Proposed Crim. Rule 33.1 due to issues raised by Judge Selvaggio and others surrounding the difficulty of appointing new judges in smaller counties and the existence of other avenues to remove judges who act with bias. Additionally, he said, this could create questions about a trial court's ability to retry a case that has been remanded to them by a court of appeals.

    - Dumolt felt that the ability to have a new judge assigned to postconviction cases combined with a right to appointed counsel would effectively create a parallel system to what already exists at the trial level. He said that this would be a drain on public resources and undermine the existing system.

Draft R.C. 2953.21(L)

- Sanchez said that the added language in this section would serve to clarify that R.C. 2953.21 is not the exclusive method to challenge a conviction and that remedies under Crim. Rule 32.1 and Crim. Rule 33 are also available.

Next Meeting Date – Friday, May 21, 2021 from 10:00 a.m. to 12:00 p.m.

Judge Zmuda told members that discussion of R.C. 2953.21 would continue at the next meeting. Proposed changes to Crim. Rule 32 will be introduced, as well.

Lou Tobin, Director of the Ohio Prosecuting Attorneys Association has also been invited to the next meeting to discuss ethical and professionalism standards. The Task Force is awaiting his response to the invitation. Judge Zmuda also said he intends to invite prosecutors from the three Ohio counties with established Conviction Integrity Units.

The next meeting of this Task Force is scheduled for May 21, 2021, from 10:00 a.m. to 12:00 p.m.