

THE SUPREME COURT *of* OHIO

TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

Brainstorming Ideas Submitted by Task Force Members

- 1. Lack of right to counsel in cases such as post-conviction matters - Hon. Pierre Bergeron**
 - a. Precludes pro se litigants from adequately developing their theories/arguments and then makes things challenging on the courts trying to decipher the filings
 - b. Automatic right to counsel would be incredibly expensive, and many of these cases border on the frivolous

- 2. Many junior lawyers would be willing to take on post-conviction cases pro bono - Hon. Pierre Bergeron**
 - a. Difficulty finding someone (or more appropriately, some organization) to serve in a gating capacity to figure out which cases could benefit from counsel's participation, and then matching those cases with the junior lawyers who would be willing to take them
 - b. Lawyers would also need training, which could be provided by OPD or OIP, and maybe you could pair them with a more senior lawyer who would be willing to serve as a mentor
 - i. [Similar Program in Arizona](#)

- 3. Data collection and subsequent evaluation to achieve, at minimum, the statutory obligations below - Sara Andrews**
 - a. [ORC 181.25 \(A\)\(2\)\(c\)](#)
 - b. [ORC 181.25 \(A\)\(5\)](#)

- 4. Contemplate whether statutory revision is necessary – Sara Andrews**
 - a. Especially for data and information collection, evaluation and fiscal impact assessment

- 5. Make an earnest effort and underscore a special emphasis on identifying the key facets of an effective Conviction Integrity Unit (CIU) – Sara Andrews**
 - a. In terms of promoting justice, transparency, and public trust

6. Examining and defining the necessary components of an "effective" CIU (instead of creating one just to say “we have one”) – Sara Andrews

- a. It will allow us to understand best practices (and those that aren't so good) from a national perspective and in turn make informed recommendations for adoption in Ohio.

7. Legitimate claims of innocence are disregarded because they are not raised in a timely fashion. – Rep. David Leland

- a. There should not be a time limit on Justice.
- b. Having an independent board review these types of cases is also something to be considered.

8. Include representatives from the victim/survivor community and someone with expertise in forensic sciences – Pierce Reed

- a. The impact of wrongful conviction on the victims of the crimes that give rise to the conviction is not well addressed in the broader discussion around the country about wrongful convictions. It is always important to have that perspective, particularly as victims are often forgotten or ignored, and sometimes vilified and blamed.
- b. One organization that is at the forefront of this work is the [Healing Justice Project](#) which was founded by a rape survivor, Jennifer Thompson

9. Ohioans have been impacted by faulty science in many cases – Pierce Reed

- a. Including those involving a now disgraced BCI analyst, Michelle Yezzo, whose work has been at issue in several wrongful conviction cases
- b. The fear of the pervasiveness of her misconduct in testimony and techniques during a long career led to the US Department of Justice awarding OIP a grant to review hundreds of convictions in which her testimony was at issue.
 - i. BCI may be of some assistance
 - ii. It may be helpful to have an outside organization assist as well. The National Academy of Science may have an expert to assist – [The Houston Forensic Science Center](#) is also a leader in this area

10. Procedural barriers are frequently invoked to prevent post-conviction claims and new trial motions from being heard on their merits - Tim Young/OPD

- a. Establish a standalone actual innocence claim, through which a person may obtain relief based on their innocence (and not tied to either newly discovered evidence or a violation of their constitutional rights)

- b. Establish actual innocence as a gateway through which to overcome procedural barriers and permit a petitioner's claims to be considered on their merits (similar to federal law – See *Schlup v. Delo*, 513 U.S. 298 (1995); *McQuiggin v. Perkins*, 569 U.S. 383 (2013))
- c. Remove/amend the requirement contained in Criminal Rule 33(B) and R.C. 2953.23(A)(1)(a) (relating to successor petitions filed pursuant to R.C. 2953.21) that a person demonstrate he was “unavoidably prevented” from discovering evidence
- d. Amend Criminal Rule 33 to remove case-made “reasonableness” requirement applied to motions for leave to file motions for new trial (*State v. Stansberry*, 8th Dist. Cuyahoga No. 71004, 1997 WL 626063 (Oct. 9, 1997)).
- e. Alternatively: Recognize an ineffective assistance of postconviction counsel claim/consider counsel's role in causing delay in discovery and filing of evidence
- f. Recognize ongoing investigation as reason for delay in discovery and filing of new evidence
- g. Consider absence of counsel and incarceration as reasons for delay in discovery and filing of new evidence
- h. Consider whether the prosecutor suffered any burden as a result of the delay
- i. Remove defense diligence requirement where new trial motions/post-conviction petitions are filed based on Brady violations (*Banks v. Dretke*, 540 U.S. 668 (2004); *United States v. Tavera*, 719 F.3d 705 (2013))
- j. Reconsider *State v. Petro*, 148 Ohio St. 505 (1947), which sets forth the factors to consider upon the filing of a motion for new trial based on newly discovered evidence.
- k. Replace “strong probability of a different result” with “reasonable probability of a different result”
- l. Eliminate “merely cumulative” and “merely impeaches or contradicts” prongs
- m. Upon a defendant's request, assign motions for leave to file a motion for new trial, motions for new trial, and postconviction petitions to a judge who did not preside over the trial
- n. Mandate hearings on motions for leave to file motions for new trial, new trial motions, and postconviction petitions that allege innocence
- o. Require a hearing where petitioner makes prima facie showing that he satisfies jurisdictional requirements of R.C. 2953.23(A)
- p. Amend R.C. 2953.23(A): petitioner meets jurisdictional requirements if he demonstrates an Ohio Supreme Court decision is retroactive
- q. Require a judge to issue findings of fact and conclusions of law when they decide either a motion for leave to file a motion for new trial or new trial motion

11. Current evidentiary rules often allow junk science to continue to be used in courtrooms and other evidentiary rules, while well intended, incentivize decision making that falls short of achieving justice - Tim Young/OPD

- a. Eliminate the second prong of Brady – it incentivizes suppression of exculpatory evidence
- b. Legislation or rule change addressing changes in forensic science/medicine as new evidence
- c. Legislation requiring double-blind lineup administration to reduce risk of mistaken eyewitness identification otherwise identification excluded
- d. Amend statute on evidence preservation to comport with NIST best practices
- e. Legislation requiring recording of interrogations otherwise statement excluded
- f. Legislation and/or jury instructions regarding the reliability of informant testimony
- g. Jury instructions regarding the reliability of eyewitness identification, especially where the identification is cross-racial
- h. Create statewide forensic science commission to establish procedures, policies, and practices to improve the quality of forensic analyses
- i. Increased access to postconviction testing of non-DNA evidence (fingerprints, ballistics, etc.)

12. Many cases of actual innocence are never litigated due to a lack of access to counsel and of those cases that are brought, shortcomings in defense counsel skills and knowledge hinders justice - Tim Young/OPD

- a. Require specialized PC training and/or other training requirements
- b. Mandated Brady training to ensure attorneys understand the State's duty to disclose exculpatory and/or impeachment evidence. Require training before attorney can be placed on appointment list
- c. Eliminate the second prong of Strickland, refocusing the inquiry on whether trial counsel performed deficiently
- d. Right to counsel in postconviction proceedings
- e. Increase defense funding at both trial and postconviction stages
- f. Increase funding for investigators and experts

13. In a recent study of exonerations, it was found that official misconduct, primarily by prosecutors and police, account for 54% of the wrongful convictions - Tim Young/OPD

- a. The number one form of misconduct was the suppression of exculpatory evidence, occurring in 44% of exonerations.
- b. Eliminate CIU's due to the inherent structural deficiency in having only one side in an adversarial system make an innocence decision; and due to the conflict of interest that is inherent in also representing the government on civil claims that would result from a determination of actual innocence
- c. If CIUs continue, mandate the use of best practices and civilian oversight
- d. Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h), requiring the prosecution to disclose exculpatory evidence discovered after conviction and requiring the prosecutor to remedy a conviction where there is clear and convincing evidence the defendant is innocent
- e. Mandated Brady training to ensure prosecutors understand their duty to disclose exculpatory and/or impeachment evidence. Training should include discussion of official misconduct as a cause of wrongful convictions. (*See The National Registry of Exonerations, Government Misconduct and Convicting the Innocent*)
- f. Mandate forensic evidence training (I.e. eyewitness identification, pattern evidence, ballistics, gunshot residue, fire investigation, etc.)
- g. Mandate implicit bias training, including discussion of how implicit bias impacts the legal system and the overrepresentation of people of color among those who have been wrongfully convicted
- h. Mandate Brady lists (lists of law enforcement officers, lab examiners, and other agents of the State with credibility, honesty, and/or misconduct issues)
- i. Prohibit the trial prosecutor from litigating post-conviction petitions, motions for new trial, and other post-trial motions where it has been alleged they violated Brady or engaged in other prosecutorial misconduct.

14. The suppression of exculpatory evidence often occurs before it ever reaches the prosecutor - Tim Young/OPD

- a. In addition, outdated line-up procedures, interrogation tactics like the Reid technique, and broad reliance on disproven types of 'forensic' evidence all contribute wrongful convictions.
- b. Mandated Brady training to ensure police officers understand their duty to disclose exculpatory and/or impeachment evidence. Training should include discussion of official misconduct as a cause of wrongful convictions. (*See The National Registry of Exonerations, Government Misconduct and Convicting the Innocent*)

- c. Mandated forensic evidence training (I.e. eyewitness identification, pattern evidence, ballistics, gunshot residue, fire investigation, etc.)
 - d. Mandated confirmation bias training with an emphasis on techniques to reduce or eliminate tunnel vision and confirmation bias
 - e. Mandated implicit bias training, including discussion of how implicit bias impacts policing and the overrepresentation of people of color among those who have been wrongfully convicted
 - f. Mandated training on the prevalence of false confessions, risk factors, and appropriate interrogation techniques
 - g. Eliminate use of the Reid technique (and similar interrogation techniques)
 - h. Require the presence of an attorney before a juvenile may be interviewed or interrogated
- 15. The holding of individuals, often over the financial inability to post bail combined with bail being improperly used as a means to effectuate a safety hold, prevents individuals who are factually innocent from being able to effectively assist in his or her own defense - Tim Young/OPD**
- a. End cash bail to reduce the risk of people pleading guilty to crimes they did not commit and to prevent incarceration due only to inability to pay
 - b. Recording of all pretrials and trials, at the request of a party
 - c. Educate jury pool about implicit bias
- 16. A significant barrier to advancing claims of innocent is the lack of compensation for both the individual and the attorneys who would represent those individuals – Tim Young/OPD**
- a. Create a schedule of compensation for wrongfully convicted individuals without artificial distinctions regarding the reason or procedural step causing the wrongful conviction
 - b. Create a schedule of attorney fees allowable in the Court of Claims to assist in bringing these claims on behalf of the wrongfully convicted
- 17. Can we create a vetting process for post-conviction motions for a new trial that identify and prioritize claims of actual innocence and further identify those motions that clearly and logically warrant a full hearing to determine the motion’s merits? – Justice Michael Donnelly**
- a. Can legislation be enacted that provides claimants something akin to “speedy ruling rights” to prevent a motion for a new trial based on actual innocence from languishing for years on trial court dockets?
 - b. Is it reasonable to expect attorneys seeking a favorable decision to seek a writ against the same judge who they hope will render such decision?

- c. Is the trial judge who presided over the original case against a defendant claiming actual innocence the appropriate jurist to rule on a motion for a new trial since he/she may have formed a belief that the verdict is correct no matter how persuasive new evidence is or that a different theory of guilt may exist?
- 18. When a motion alleges witness recantations, should a hearing be mandated with de novo review applied by the court to determine if the new testimony is both credible and outcome determinative? – Justice Michael Donnelly**
- 19. Can ethical rules be created to prohibit what I have previously denominated “dark pleas?” – Justice Michael Donnelly**
- a. A dark plea happens when the state offers the defendant the opportunity for freedom in exchange for dropping the motion for a new trial before a court hearing is held or ruling is released.
- 20. Would our state benefit from a free independent-standing innocence commission to view innocence claims? – Justice Michael Donnelly**
- a. Similar to the commission enacted in North Carolina where representatives from prosecuting attorneys’ associations, innocence advocates, and citizen-representatives would serve as commission members.
- 21. Can a statutory fix be created to allow claimants to raise new arguments to address advancements in scientific forensic evidence that would undermine the state’s theory of guilt that was used to convict the defendant prior to the acceptance of such scientific developments? – Justice Michael Donnelly**
- 22. How can we best address and eradicate the myth that is prevalent among many citizens that “everyone” who is convicted in the criminal justice system eventually claims that they are actually innocent? – Justice Michael Donnelly**
- a. How do we change a persistent attitude by some (note, I did not say all) prosecutors that attorneys at the Innocence Project and other attorneys that advocate on behalf of the actual innocent are simply an extension of the criminal defense bar looking for a second bite of the apple?
- 23. Are the proposed rule changes provided by the OPAA in compliance with the current model ABA rules governing prosecutor’s ethical obligations? – Justice Michael Donnelly**
- a. Have any states adopted stronger measures or imposed a duty of good faith upon prosecutors in responding to claims of actual innocence?

24. It is important that the Task Force, as a whole (not via subcommittees) define what we mean by a "wrongful conviction" and a conviction that has been reached via "integrity." – John Martin

- a. Many view a wrongful conviction as one where a person who has done nothing wrong is convicted of a crime they did not commit.
- b. If we limit our vision to these "actual innocence" cases, without turning our attention to examining whether the process has been fair in every case, we ignore two important considerations:
 - i. We fail to adequately appreciate that the integrity of the verdict relies upon the integrity of the system that produced that verdict,
 - ii. We ignore the genesis for many of the wrongful convictions that have occurred and thus fail to prevent new occurrences.

25. Find ways to ensure that wrongful convictions do not occur in the first place. – John Martin

- a. Examine the process of how crimes are investigated by law enforcement, reviewed by county prosecutors, presented to grand juries, prosecuted post-indictment, and defended through the trial process.
- b. Ensure that convictions can be reviewed meaningfully to determine if the trial process got it right -- both in process and in result

26. Task Force's work be divided into two primary categories: Prevention and Remediation – John Martin

- a. Organize by the various stakeholders in the system, to include the three branches of government as well as the defense bar.

27. Prevention – John Martin

- a. Law enforcement officers
 - i. Do we have adequate training on the importance of preserving and memorializing evidence that appears non-consequential?
 - ii. Do we need increased training on investigatory bias? Cultural bias, including eyewitnesses and investigators? Confirmation bias? Reid technique?
 - iii. Should all interrogations be videotaped? Are there adequate protections in place regarding interrogations of juvenile suspects? Should counsel be available for pre-accusatory interrogations? Is there adequate training on how to interview juveniles?

- iv. Does more need to be done statewide regarding body cams and dashcams? Should there be more transparency in obtaining evidence of investigative misconduct?
- b. Forensic investigators
 - i. To what extent, if any, are forensic investigations skewed by information from law enforcement investigators? Does there need to be specific training? Do we need forensic laboratories to be removed from BCI?
 - ii. Are we allowing too much unreliable science?
 - iii. Should laboratory tests that consume the entirety of evidence be subject to different protocols, e.g. independent contemporaneous monitoring?
 - c. Medical personnel
 - i. Is training needed with respect to patient interviewing to ensure reliability with respect to descriptions of persons and places (as opposed to the reporting of medical symptoms)?
 - ii. What level of cooperation/collaboration is present between law enforcement and medical personnel, e.g., unnecessary blood draws for law enforcement purposes?
 - d. Social workers/agencies
 - i. To what extent should social agencies and law enforcement agencies investigating the same matter be allowed to share information?
 - ii. Are social workers adequately trained with respect to bias?
 - iii. To what extent should social agencies have to comply with a defendant's privilege against self-incrimination, right to counsel, etc.
 - e. Prosecutors and their support staffs
 - i. Is bias training, cultural and/or confirmatory, needed? What type of training is available in interviewing techniques to avoid skewing testimony?
 - ii. Is there adequate training on the meaning of exculpatory evidence? What happens when a witness tells a prosecutor or paralegal something inconsistent with their previous account or upcoming testimony? Is that information being transmitted to the defense as exculpatory? Should training be administered by non-prosecutors as well as prosecutors?
 - iii. Is over-charging contributing to wrongful convictions?
 - f. Judges

- i. Should judges do more to ensure timely production of Brady material? Are judges adequately trained on Brady? Should there be stronger discovery sanctions for failure to turn over exculpatory evidence prior to trial?
 - ii. Are judges in the best position to appoint defense counsel? Should judges decide if the defense needs expert assistance? Should judges decide if the defense needs investigative assistance? Are judges employing a trial tax at sentencing when a defendant does not plead?
 - g. Juries
 - i. Do juries receive adequate training on bias? Are courts employing informal procedures for excusing potential jurors in advance and affecting jury demographics?
 - h. Plea bargaining
 - i. Is there a need to examine the plea process under Crim. R. 11 to ensure that guilty or no contest pleas are not contributing to wrongful convictions? Is Marsy's Law impeding plea bargaining?
 - i. Procedural rules
 - i. In multi-defendant cases, are present joinder and severance provisions adequate? (Crim. RR. 8, 14) Is Evid. R. 404(B) contributing to wrongful convictions? Is Evid. R. 807 (child abuse hearsay exception) contributing to wrongful convictions?
 - ii. Should jury instructions be mandated on informant testimony? Should jury instructions be mandated on eyewitness testimony? Should jury instructions be mandated regarding novel/junk science?
 - j. Statutory
 - i. Are mandatory sentences contributing to plea bargaining to avoid severe punishment, despite actual innocence? Is Marsy's Law contributing to wrongful convictions by withholding exculpatory evidence and/or interfering with plea bargaining?
 - k. Trial defense
 - i. Should there be a specific CLE prerequisite to be on a court-appointed list? Should there be more emphasis on Brady training? Should we have a mentoring system as prerequisite to appointments? Do the experience requirements for appointments need to be changed?
 - ii. Are defense attorneys adequately compensated? Does the defense have adequate funding for forensic and investigatory resources in a typical trial?

- iii. Should the defense be given increased access to eyewitness identification expert assistance? Should the defense be given increased access to false confession expert assistance? Are there other resources, e.g. jury consultants, that are not adequately accessible?

28. Remediation – John Martin

- a. Law enforcement agents
 - i. What disciplinary/corrective measures are employed when mistakes are made by law enforcement? Should there be a publicly accessible data base of these incidents?
- b. Prosecutors
 - i. How are Conviction Integrity Units performing? What steps are in place for post-trial disclosure of exculpatory evidence?
- c. Judges
 - i. Should the trial judge appoint appellate counsel? Should counsel be consistently appointed for taking the appeal to the Ohio Supreme Court following an adverse decision? By what standard should counsel be appointed to pursue motions for new trial?
 - ii. By what standard should counsel be appointed to pursue post-conviction relief? Should defense have a right to different judge on a re-trial after reversal on appeal?
- d. Magistrates
 - i. Would the post-conviction process be aided by the use of magistrates? If so, what should be the role of the magistrate?
- e. Procedural Rules
 - i. Is Crim. R. 33 adequately providing for new trial motions? (see letter of Innocence Project detailing deficiencies)
 - ii. Should the Ohio Supreme Court Rules be amended so that raising an issue on appeal to the Ohio Supreme Court will no longer be a requirement for exhaustion in State court prior to federal habeas litigation?
 - iii. In order to make post-conviction review meaningful, should there be a right to discovery at the post-conviction level? Should there be a ban on local rules precluding contacting jurors after a verdict?
- f. Legislation

- i. Does Ohio need to revise the postconviction relief statutes, R.C. 2953.21 et seq., to expand relief? (see also letter of Ohio Public Defender) Time for filing? Bases for relief? (e.g. new Ohio S.Ct. decision). Actual innocence as an independent basis for relief? Eliminate ban on successor petitions?
 - ii. Does Ohio need specific statutory relief for actual innocence cases and/or recognition of a writ of coram nobis at the trial court level? Should statutory provisions regarding immunity for law enforcement officers and/or prosecutors be amended?
- g. Defending in Post-Conviction
 - i. Is there adequate post-conviction training available? Should post-conviction training be required for appointment?
 - ii. Are counsel properly compensated? Is there adequate funding for experts/investigators?
 - iii. Are defense counsel being given adequate expert assistance? Are defense counsel being given adequate investigative assistance?

29. Changes to Ohio Criminal Rule 33 – Mark Godsey

- a. Rule 33 governs motions for a new trial based on newly discovered evidence.
- b. Defendant has 120 days from the verdict to file a motion for a new trial based on newly discovered evidence, “unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding.”
- c. Crim.R. 33 poses major obstacles for counsel representing clients asserting innocence and wrongful conviction claims during post-conviction proceedings.
- d. Judicially-engrafted requirement on the timing of the motion for a new trial and the omission of shifting science as a ground for raising a motion for a new trial.

30. Timing of the Filing of a Motion for New Trial – Mark Godsey

- a. No language anywhere within Criminal Rule 33 that sets a specific time limit for filing a motion for leave to file a motion for new trial after the “newly discovered evidence” is identified.
- b. Convicted people have been denied consideration on the merits of their claims for delays as small as two months.
- c. Judicially-created standard purportedly allows trial courts to determine whether the timing of a defendant’s filing based on newly discovered evidence was reasonable or whether the defendant adequately explained the reason for any passage of time between discovery and filing.

- d. Leads to disparate and unpredictable results, and does not serve the stated interest of protecting the State from any undue delay caused by the defendant.
- e. Motions are denied without consideration of the merits raised by the convicted person.
- f. Innocence cases are generally complex and involve the most serious offenses, including cases in which a death sentence has been imposed. Investigating a convicted individual's claim of innocence is, necessarily, time-consuming.
- g. Placing arbitrary deadlines on motions for new trial is equivalent to placing a one-year window on homicide detectives to file charges against homicide suspects. Sometimes it takes years to find the witnesses, etc., necessary to bring homicide charges against a person, and strict deadlines do not reflect the reality of the challenges homicide detectives face. The same is true for the work of innocence attorneys.
- h. Consider proposing a change to Rule 33(B) to make clear that there is no time limit in which to file a motion for new trial.
- i. Counsel for people raising innocence claims would be served better by a clear deadline of two years from the date on which the convicted person discovered new evidence, without need to explain the delay.
- j. For claims outside of the two-year window, there should be a balancing test in which the State can object based on prima facie showing of prejudice, at which point the convicted person must establish that the delay was unavoidable and the need for the delay outweighs the prejudice to the State.

31. Shifting Science as a Ground for Relief – Mark Godsey

- a. Shifting science plays a significant role in innocence cases.
- b. Nationally, there have been approximately 350 wrongful convictions that were overturned due to DNA evidence, and about one-half of those cases involved improper or invalidated forensic evidence.
- c. Advancements in scientific knowledge and techniques continue to undermine conclusions about forensic evidence used in criminal convictions
- d. Although science constantly evaluates itself, the law clings to past beliefs and finality of past decisions.
- e. Criminal justice system makes it extremely difficult to correct a wrongful conviction based on forensic evidence that new science has shown to be flawed.
- f. In other states, the courts recognized early on that shifting science is inherently a legitimate basis for a new trial motion under their corollaries to Rule 33. But this has not happened in Ohio.

32. The Court does have the power to revise the rules of criminal procedure – Mark Godsey

- a. Reform and relief to counsel representing people with innocence claims
- b. Inclusion of language in Crim. R. 33(A)(6) that expressly provides for shifting science claims to be brought in a motion for a new trial.

33. Standard for granting motion for new trial – Mark Godsey

- a. Ohio law on new trial motions require a showing of a “strong probability” that the evidence in question would lead to a different result if a new trial were granted.
- b. The standard employed by most states is “reasonable probability” or a “preponderance of the evidence.”
- c. The prejudice question in *Strickland* analyses and the materiality question in *Brady* inquiries requires a showing that there is a reasonable likelihood that the outcome of the proceeding would have been different if no constitutional violation had occurred
- d. A motion for a new trial in a criminal case in Ohio should be evaluated under the reasonableness standard
- e. Those motions, like those that claim prejudice in ineffective assistance of counsel claims and those that assert a materiality showing in *Brady* claims, all require a court to assess the impact that newly discovered evidence or evidence that had been withheld from the defendant at trial or sentencing might have on the result of the original trial
- f. There must be a *reasonable* likelihood of a different result, or at least a result “more likely than not,” rather than a standard that requires a showing of reasonable probability. The distinction is not a mere matter of semantics.

34. Expanded Post-Conviction Access to Evidence for Testing – Mark Godsey

- a. Through Senate Bill 77 and related statutes, Ohio law has provided specific procedures for postconviction DNA testing since 2003.
- b. Pursuant to [R.C. 2953.71](#) through [.81](#), a convicted person may petition the trial court to order state funded DNA testing on biological material from their cases if the person satisfies the criteria for eligibility, see [R.C. 2953.72\(C\)\(1\)](#) and other statutory factors
- c. Even with those standards met, the trial courts have discretion – they “may accept” – an application for DNA testing. See [R.C. 2953.74 \(B\), \(C\)](#)
- d. The current statutory scheme provides only that a convicted person may apply to have their own DNA compared against biological evidence recovered from the victim or the crime scene, and only for the purpose of scientifically precluding the offender as a “contributor of biological material from the crime scene or victim in question.”

- e. Provides an opportunity for the accused to establish that another individual committed the crime in question. But the current framework is limited and leaves several deficiencies that undermine the intent of the statute.
- f. In some cases, it is the victim's DNA that is critical to an innocence claim but unavailable to the convicted person because a victim's DNA is not within the statutory rubric.
- g. Some courts hold that the statutory scheme gives only the right to compare DNA evidence and do not permit access to other biological evidence, including autopsy slides, hair samples, and fingerprints.
- h. The effectiveness of DNA testing and searches of the national DNA database is well-known. All 50 states, as well as the federal government, provide some kind of right to post-conviction DNA testing. But there is no such right to fingerprint matching in Ohio or most states.
- i. In many cases, expanding access to post-conviction testing is simply a matter of allowing defendants to access evidence for testing or analysis at their own expense.
- j. Although such non-statutory testing is not prohibited by law, there is no formal rule or mechanism to guide courts in deciding when defendants should be allowed postconviction access to evidence for independent testing at their own expense. As a result, such requests for access are routinely denied.
- k. Where the evidence in question is a part of the trial record, broader access to analyze and inspect this evidence could be accomplished by amendments to the Rules of Superintendence.
- l. Expansion of the statutory rubric is the province of the General Assembly, but a discussion about the need for expansion of the statute within the Task Force would help explore the parameters of any legislative amendment efforts.

35. Changes to Ethical and Professionalism Standards – Mark Godsey

- a. The American Bar Association's Standards for Criminal Justice: Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993) provide: "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."
- b. The attorney disciplinary system in Ohio speaks little of any specific duty on attorneys who prosecute cases to comply with a standard like ABA Standard 3.8.
- c. The Supreme Court of Ohio, as the ultimate arbiter of attorney misconduct and sole authority on the regulation of the practice of law in Ohio, should consider the development of ethical and professional standards that guide all prosecutors in Ohio.

- d. The Ohio Supreme Court should consider how the current system addresses claims of prosecutorial misconduct, including *Brady* violations.

36. Establish Independent Conviction Review Units - OPAA

- a. An independent review process requires the involvement of experienced prosecutors and investigators who were not involved with an offender's case at the trial level or on appeal.
- b. Because the public may perceive that trial prosecutors have a vested interest in defending a conviction, the prosecutors who were involved with the case at the trial level should not work on the case as a reviewing prosecutor in a Conviction Review Unit. Such a policy promotes public confidence in the integrity of the State's review process.
- c. Separating the post-conviction review process from the existing procedures governing postconviction litigation, such as petitions for post-conviction relief and motions for new trial, ensures that questions regarding the validity of a conviction are properly vetted. Postconviction litigation in appellate units often relies on the Criminal Rules, Ohio postconviction statutes, and precedent that may present legal bars to evaluating or investigating the merits of post-conviction claims. Additionally, appellate divisions may not have dedicated investigators or other resources needed to fully vet claims in the post-conviction setting.
- d. The creation of a separate unit dedicates staff to time-intensive historical case review and allows staff to address possible additional forensic analysis and other investigatory steps that may be required to respond to a claimant's concerns.
- e. Independent review requires the recruitment of experienced prosecutors who have the ability to research and understand new scientific techniques, communicate with leading experts, and evaluate the impact of new or improved technology on a conviction.
- f. Units must have the authority and autonomy to evaluate claims, thoroughly review cases, and conduct investigations. The director of the Unit should report directly to the elected County Prosecutor.

37. CRU Written Policies and Procedures - OPAA

- a. Clearly define the purpose of a Conviction Review process; define what qualifies as a wrongful conviction; define the review process; and set standards of review for applications that are accepted for investigation.
- b. Formalize an application procedure for requesting review by the Unit.
 - i. Cases may be referred to the Unit for consideration by external and internal sources, including but not limited to pro se defendants, defense attorneys, state or local public defenders, innocence project organizations, legal aid societies, the media, other prosecuting attorneys or assistant prosecutors, judges, court personnel and law enforcement agencies.

- ii. In the application, defendants agree to waive attorney client confidentiality to allow defense attorneys to provide defense investigatory material to the Conviction Review Unit for review. Such a requirement shows an offender's good faith in submitting an application for review. The defense file would be considered confidential by the Unit.
 - iii. Defendants should also agree to additional forensic analysis if their cases are accepted and if scientific analysis is warranted under the facts of the case. (Such a requirement exists for applications for DNA testing under R.C. 2953.72(A)(10))
 - c. Disclose criteria for evaluating cases.
 - i. The Unit should not reject applications based exclusively on delay or procedural defaults. If an application is accepted, that delay should be investigated.
 - ii. The Unit should have written guidelines governing the evaluation of claims and cases. These procedures should be disclosed to applicants.
 - iii. The rationale for acceptance or rejection of an application must be documented and disclosed to the applicant.
 - d. Victim notification
 - i. Victim rights must be acknowledged, and victims should be notified on a case-by-case basis of case referrals to the conviction integrity unit. It may be best to notify victims only when notification is necessary to investigate a claim or when it appears that a defendant may have a legitimate claim that could impact a verdict. Alternatively, victims could be notified when the Unit accepts a case for investigation. Notification should provide information to the victim regarding the review process.
 - e. Identify investigatory procedures following acceptance of an application
 - i. Where an offender is represented by counsel, Conviction Review Unit personnel should work cooperatively with defense counsel and the parties should engage in open, reciprocal discovery.
 - ii. Reviewing prosecutors should identify confidential material and any disclosure of that material, or portions thereof, should be raised and reviewed with the elected Prosecuting Attorney.
 - iii. Pro se applicants should be notified of the progress of pending investigations.
 - f. Reporting
 - i. The Prosecuting Attorney and Director of the Conviction Review Unit should establish program evaluation goals and criteria to document the efforts of the Unit. Reports should be made at least annually.

- ii. Quantifiable criteria in a specified time frame may include, but are not limited to: the number of applications received, the number of applications related to convictions following trial or plea; the number of applications where the applicant pursued appellate and post-conviction remedies and/or where those remedies have expired; the average number of claims per application; the number of applications by type of applicant (pro se, defense attorney, innocence project organizations, etc.); the number of applications accepted for additional investigation; the number of and types of claims accepted for review (forensic analysis, newly discovered evidence, etc.); the number of cases where investigation did not or could not support an applicant's claim; the number of cases where additional investigation revealed evidence supporting a conviction; the number of cases where investigation supported a conclusion of wrongful conviction.
- iii. Documenting and reporting these criteria quantifies the significant work conducted by Conviction Review Units and promotes faith in the criminal justice system.

38. Establish multi-jurisdictional agreements - OPAA

- a. Where the creation of an independent unit is not feasible in a specific jurisdiction, the Prosecuting Attorney may enter into an agreement to enlist the aid of an established Conviction Review Unit in a different jurisdiction. The attorneys in the established Units, acting as special prosecutors, could then review applications and perform any additional investigation as is warranted in a specific case.