

THE SUPREME COURT *of* OHIO

TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

October 22, 2020
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

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

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

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

Sheriff Tom Rigenbach
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

Andy Wilson, Esq.
Office of the Governor

Timothy Young, Esq.
Ohio Public Defender

Approval of September 17, 2020 Meeting Minutes

Task Force Chair Judge Gene Zmuda opened the meeting by requesting approval of the September 17, 2020 meeting minutes. A motion was made by Judge Rocky Coss to approve the minutes as written, the motion was seconded by Representative David Leland. The minutes were unanimously approved by a verbal vote.

Survey Questions for Prosecutors

Judge Zmuda asked Task Force members for any suggested changes to the list of survey questions to be sent to prosecutors on behalf of the Task Force, which was distributed prior to the meeting. No changes were suggested.

Judge Zmuda suggested that the Task Force revisit the survey questions in the future after the presentation by John Hollway as his presentation may result in changes or additions survey questions.

Correspondence Requesting Investigation of Specific Cases

Judge Zmuda explained to Task Force members that as a consequence of the high level of public interest in the work of the Task Force, members may receive correspondence from the public requesting investigation of specific cases.

Judge Zmuda instructed Task Force members to forward any future correspondence to Staff Liaison Justin Kudela so that a standard response may be sent to anyone requesting that the Task Force investigate specific cases.

The members indicated that to date no one had received any requests by the public for investigation of specific cases by the Task Force.¹

Overview of Research Materials Provided to Task Force – Ohio’s Postconviction Review and 50-State Survey of Postconviction Review

Judge Zmuda thanked Justice Donnelly’s interns, Elliot Nash and Jordan Rowland, for preparing the memo that provided a background and analysis of the current postconviction review process in Ohio.

¹ Staff Liaison, Justin Kudela, has used a standard letter to explain that the Task Force does not have the authority to investigate specific case to respond to some inquiries that have been received by him as Staff Liaison since the creation of the Task Force.

Judge Zmuda also thanked the Supreme Court Law Library research librarians, Michelle Graff and Rachel Dilley, for preparing the 50-State survey of postconviction review in other states. It was stated that a full discussion of the materials could happen in future meetings.

Presentation by John Hollway of the Quattrone Center for the Fair Administration of Justice

Judge Zmuda introduced guest speaker John Hollway, Associate Dean and Executive Director of the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Law School. Hollway's research helps organizations confront challenges and turn negative occurrences into opportunities for quality improvement. He is a national leader on the use of root cause analysis in criminal justice, and is a frequent consultant to criminal justice agencies and corporations on quality improvement.

Hollway presented Task Force members with an analysis of the systemic and proximate causes of wrongful convictions, an overview of emerging trends and issues in the work of Conviction Review Units ("CRUs"), and insights on the best policies and practices of effective CRUs.

Hollway's presentation covered the following:

Wrongful Convictions

- Of the 2,678 exonerations recorded by the National Registry of Exonerations (84 of which are were in Ohio), 85% of the exonerations were in cases that went to trial and 15% of the total exonerations were in cases that involved a plea bargain.
- Generally, only 3% of all criminal cases go to trial, thus it is likely that there are a number of cases that involve a wrongful conviction that have been missed because cases that involve a plea bargain typically aren't reviewed by conviction review units or innocence commissions.
- Statistical analysis suggests that 4% of all capital cases are likely wrongful convictions. This means that 107 Americans nationwide, and 5 Ohioans, are wrongfully convicted and currently subject to a sentence of death.

How Do Other Complex Systems Prevent Errors

- When there is an airplane crash the National Transportation Safety Board uses a multidisciplinary approach to look at any and all contributing factors to the crash. The process is not one of assigning blame, but is instead one that looks to prevent future crashes based on any and all of the causes of the crash under investigation.
- When hospitals have a "never event" (i.e. sponge left in patient, operate on wrong limb, etc) they use peer review to implement new policies and procedures to prevent a similar event from ever happening again in the future.

Systemic Errors in the Criminal Justice System

- The criminal justice system, unlike other systems (transportation, healthcare, etc.), does not perform constant research and analysis or utilize public feedback to update its functions.
- Errors in the criminal justice system may be remediated through the appeal process, but few mechanisms exist to prevent future errors.
- Ultimately, everyone has a vested interest in avoiding wrongful convictions because a wrongful conviction means not only that there was a person wrongfully incarcerated, but also that the correct person is not held accountable and possibly is still at-large.

Finding Error and Avoiding Blame

- Placing blame or looking for “bad apples” is not an effective approach when confronting the systemic causes of wrongful convictions.
- Often times, an error occurs when all parts of a system fail simultaneously, thus in doing reviews it is important to take blame out of the equation.
- Avoiding blame encourages all stakeholders to participate in the quality improvement process without feeling threatened. In Philadelphia they have a group that involves all justice system partners (i.e. police, prosecutors, defense attorneys, judges, others) that reviews wrongful convictions when they are discovered and work to implement improvements to prevent the reasons for the wrongful conviction from happening in the future. The process is called a “sentinel event review.”
- Quality improvements to a system occur incrementally. This means a mistake is reviewed, then steps are taken to fix that mistake to insure it doesn’t happen again, then the next mistake is reviewed, and more steps taken to insure that the next mistake doesn’t happen again.
- The current criminal justice system follows the “Swiss-cheese Model of Error” – each interaction has some potential for making a mistake. Police -> Prosecutor -> Defense Counsel -> Trial Court -> Appellate Court. Most often an error is caught by one layer, but occasionally an error makes it all the way through.

Causes of Wrongful Convictions

- There are lots of reasons that account for a wrongful conviction, not just DNA evidence.
- One area is a change in science. For example, the science regarding arson has changed since the 1990’s and this has resulted in a number of arson convictions being overturned.
- There are viable preventative measures that can be taken to reduce wrongful convictions – for example double-blind photo lineups and videotaping custodial interrogations.

Conviction Review Units

- A conviction review (or integrity) unit is an organization within a prosecutor's office conducting extrajudicial, fact-based review of secured convictions following plausible allegations of actual innocence.
- In most states, there is no claim for actual innocence permitted in postconviction review petitions. A CRU looks at an actual innocence claim.
- The trend nationally is that there is an increase in the number of jurisdictions that have a CRU. Most often they are in urban jurisdictions because they have more cases and also more prosecuting attorneys to staff a CRU (75% of prosecutors' offices in the country have 3 or fewer attorneys).
- North Carolina has a statewide innocence commission that has subpoena power that investigates claims of actual innocence.

Emerging Trends in Conviction Review Units

- There are a number of different types of CRU's that have emerged over the years. There is a statewide CRU model in which the statewide CRU handles all conviction review in the state. There is a model where there is both a statewide and a local (county level) CRU with both entities having concurrent jurisdiction to review convictions. There is also a model that has both statewide and county level CRU's, but the statewide CRU needs permission of the local CRU to review a conviction.

Qualities of Effective Conviction Review Units

- Structural Independence
 - A CRU should report directly to the elected prosecutor/district attorney (and not be housed within another division) in order to avoid procedural or bureaucratic barriers.
 - People with credibility within the prosecutor's office are needed to secure buy-in to the process and help the CRU pursue good cases.
 - External stakeholder participation is needed to provide credibility against "fox guarding the henhouse" claims.
- Procedural Flexibility
 - CRUs should be open to cases coming from multiple sources.
 - CRUs should focus only on whether a plausible claim of innocence is raised and not preclude cases based on guilty pleas or other procedural barriers.

- CRUs shouldn't allow procedural policies to get in the way of actual facts. If there is a procedural hurdle, then the case can be moved to a 'holding (parking) area' until the procedural hurdle is resolved by the petitioner, then the case can and should be reviewed again by the CRU.
- Procedural Transparency
 - CRUs should collaborate with petitioner and counsel when performing investigations.
 - CRUs should not handle cases involving allegations of *Brady* violations to avoid unnecessary friction in the office.
 - Separate the CRU from timely, independent and transparent disciplinary review regarding *Brady* violations.

Policies That May Facilitate Conviction Review

- Generally, the appellate unit in a prosecutor's office is trained as a conviction preservation unit, so tolling the appellate process while a claim of actual innocence is investigated by a CRU may facilitate conviction review.
- There are 3 possible outcomes of a CRU review of a petition: (1) CRU agrees petitioner is innocent; (2) CRU disagrees with petition and petitioner is not innocent; (3) the CRU can't determine for sure and agrees to disagree with the petitioner and let the appellate process continue to determine any issues.
- Other possible ways to facilitate conviction review: waive attorney-client privilege or enter into collaboration agreements.

Discussion of John Hollway Presentation

Discussion during and after the presentation included the following topics:

Distinctions in Terminology

- Douglas Dumolt noted that the words "wrongful conviction," "exoneration," and "innocence" seemed to be used somewhat interchangeably and wondered if there was a meaningful distinction.
- John Hollway answered that the National Registry of Exonerations (which provided data used in the presentation) uses "exoneration" to mean exonerated of all charges, which does not necessarily equate to actual innocence.

Rate of Wrongful Convictions

- Judge Stephen McIntosh asked whether there was reason to believe that the rate of wrongful convictions in death penalty cases is similar to the rate of wrongful convictions in life without parole cases in jurisdictions that have outlawed the death penalty.
- John Hollway answered that there is nothing to suggest that the error rate is different, but that it is possible that the rate of detection of error may be higher in death penalty cases due to the extensive appeal process.

Rate of Exonerations

- Judge Pierre Bergeron questioned why the statewide Innocence Commission in North Carolina reported such a small number of exonerations compared to other organizations considering it has subpoena power and resources for investigations.
- John Hollway replied that an organization may see lower exoneration numbers after its first few years in operation due to a decline in applications over time or because it has already worked through the most “obvious” cases. Mark Godsey added that in some places previously established nonprofit innocence projects may account for a higher share of exonerations than public commissions.

Prevention vs. Remediation

- Douglas Dumolt wondered whether it would be more effective to allocate additional resources to educating prosecutors and public defenders to prevent wrongful convictions before the fact rather than attempting to remedy wrongful convictions after the fact through the use of CRUs and other organizations.
- John Hollway responded that both measures need to be taken because errors will always occur in any system.
- Judge Stephen McIntosh asked how CRUs learn from cases to prevent future errors.
- John Hollway answered that more work is needed in this area and that it can be difficult for CRUs to work towards prevention because many changes that are needed are outside of the scope of a prosecutor’s work.

Actual Innocence Issues vs. Procedural Issues

- John Martin expressed concern that putting too much focus on cases of actual innocence will hurt the ability to address systemic problems.
- Judge Pierre Bergeron added that appellate judges see systemic issues arise when reviewing cases but have little ability to approach those issues.

Challenges of Working in a Non-unified System

- Judge Zmuda requested insight on operating in a very non-unified system like Ohio's 88 counties.
- John Hollway stated that this is an issue everywhere and that the best practices for CRUs apply mostly to internal operations and general public perception so that they may be applicable anywhere.
- Judge Rocky Coss suggested that this question be addressed in future presentations because it will present a challenge to making effective recommendations. Judge Zmuda indicated he would inform the presenters for November 19, 2020, of Judge Coss's question so that it may be addressed.

Next Steps for the Task Force

Judge Zmuda informed members that the next meeting of the Task Force would be dedicated to consolidating and framing brainstorming ideas to create a framework for moving forward.

The next meeting of this Task Force is scheduled for November 5, 2020 from 10:00 a.m. to 12:00 p.m.