

THE SUPREME COURT *of* OHIO

TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

August 13, 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

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

Hon. Stephen McIntosh
Franklin County Common Pleas Court

Hon. Lindsay Navarre
Lucas County Common Pleas Court

Sheriff Tom Riggensbach
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 June 11, 2021 and July 9, 2021 Meeting Minutes

Task Force Chair Judge Gene Zmuda opened the meeting by requesting approval of the June 11, 2021 and July 9, 2021 meeting minutes. Representative David Leland moved to approve the minutes. The motion was seconded by Judge Pierre Bergeron. The minutes were then unanimously approved by a show of hands.

Vote on Suggested Changes to Ohio Adm.Code 120-1-10

Judge Zmuda asked Staff Liaison Bryan Smeenck to hold a roll call for the approval of the suggested changes to Ohio Adm.Code 120-1-10 as revised at the previous meeting. The present members voted unanimously to approve the recommendation of the changes to Ohio Adm.Code 120-1-10. The votes were as follows:

Sara Andrews: Yes

Judge Pierre Bergeron: Yes

Mark Godsey: Yes

Representative David Leland: Yes

Judge Stephen McIntosh: Yes

Judge Lindsay Navarre: Yes

Sheriff Tom Riegenbach: Yes

Judge Nick Selvaggio: Yes

Tim Young: Yes

Judge Gene Zmuda: Yes

Presentation by Beth Tanner, Associate Director of the North Carolina Innocence Inquiry Commission

Judge Zmuda introduced guest speaker Beth Tanner.

Beth Tanner is the Associate Director of the North Carolina Innocence Inquiry Commission (“the Commission”). Created by the North Carolina General Assembly in 2006, the Commission is the first statewide innocence commission in the nation.

Tanner's presentation included the following:

What is the North Carolina Innocence Inquiry Commission?

- The Commission is a neutral fact-finding state agency charged with investigating and evaluating postconviction claims of actual innocence. It is the first and only neutral state agency of its kind in the nation.
- The North Carolina General Assembly created the Commission to ensure that both the guilty as well as the innocent receive justice. The General Assembly believed that public confidence could be strengthened by a thorough and timely inquiry into these claims and that the claims could be most effectively and efficiently evaluated through a complete and independent investigation.
- The Commission hears innocence claims outside of the regular appeals process. It is an extraordinary procedure to investigate and determine credible claims of factual innocence that requires a claimant to voluntarily waive rights and privileges.

Important Statistics and Numbers

- The Commission's budget for the current fiscal year is \$620,697. Its upcoming budget request includes an additional \$700,000. The Commission is also funded by a variety of grants totaling over \$1 million.
- The Commission receives an average of 208 case applications each year. Most applications come directly from inmates in North Carolina's state prisons. The Commission issues a document to every state prison that notifies inmates of their ability to apply. Starting this year, the document has also been included as part of the prison intake packet. The Commission can also receive referrals from judges, district attorneys, defense attorneys, etc.
- The average to complete an initial review of an application is 21 days. This is the time it takes to determine if an application meets the statutory requirements to move forward for further evaluation.
- Total case length varies depending on the complexity of the case. The Commission has not currently had any case for longer than three years.
- The Commission averages 50 open cases at any given time. It holds an average of 1-3 hearings per year, with 17 total hearings being held since its inception.
- There have been 15 total exonerations based on the work of the Commission. These exonerations represent less than 1% of the total claims brought to the Commission. An exoneration under this process is a finding of complete factual innocence.

- The Commission has located evidence in 28 cases. Of the Commission 15 exonerations, 12 involved physical evidence that was previously considered missing.

Advantages of the Commission Model

- The Commission’s leadership are state employees, not elected or appointed officials. This separates them from the politics of the cases they review.
- The Commission’s statewide authority and centralization is more economically efficient for North Carolina. The district-attorney offices, particularly in small rural counties, do not have the resources to handle conviction-review work.
- Independence from other criminal-justice agencies allows the Commission to only be concerned with truth in its investigations. The Commission’s only association is with the judicial branch, which appoints commissioners and serves other administrative purposes.
- The Commission can serve as a partner in improving justice through what it learns investigating cases (such as with evidence practices and victim support).

Commission Staff

- The Commission is made up of six state-funded and four grant-funded positions:
 - Executive Director
 - Associate Director
 - Two Staff Attorneys
 - Case Coordinator
 - Administrative Secretary
 - Two Grant Staff Attorneys
 - Grant Legal Investigator
 - Victim-Services Coordinator (grant funded)
- The Commission’s upcoming budget request would add three state-funded positions, including moving the Victim-Services Coordinator to a state-funded position.

Commission Members

- The Commission is made up of 16 members: eight distinct Commissioner roles with one alternate for each. Commissioners are appointed on an alternating basis by the Supreme Court of North Carolina's Chief Justice and the Chief Judge of the Court of Appeals.
- Commissioners serve three-year terms and are intended to represent a cross-section of the criminal-justice system. They include:
 - Superior Court Judge/Commission Chair *
 - Prosecuting Attorney
 - Criminal-Defense Attorney
 - Victim Advocate
 - Sheriff
 - Public Member
 - Discretionary Member I
 - Discretionary Member II

* A Superior Court is North Carolina's equivalent of a Court of Common Pleas

What the Commission is Not

- The Commission is not affiliated or associated with nonprofit innocence organizations or school-run innocence projects and wrongful-convictions clinics.
- The Commission is not a sworn law-enforcement entity but has been granted broad statutory authority to conduct investigations.
- The Commission does not represent the claimants or any other inmate. There is no attorney-client relationship.
- The Commission is not political or policy driven.
- The Commission does not protect inculpatory evidence.

Case Criteria and Requirements

- To meet the Commission's criteria for review, an applicant must be living and convicted of a felony in a North Carolina state court.

- After meeting the initial criteria, an applicant must demonstrate that they are claiming complete factual innocence of any criminal responsibility for the crime, that there is new evidence of innocence that the jury did not hear or was not reasonably available prior to plea, and that the evidence is credible and verifiable.

Process for Reviewing an Innocence Claim

- The process for reviewing an innocence claim is as follows:
 1. Innocence claim initiated
 2. Staff screens and investigates claim
 3. Initial review
 - At its inception, the Commission received several hundred applications. The initial screening and review stages eliminate cases that do not meet the statutory criteria. The Commission's Executive Director is also given discretion to prioritize cases. Older cases and cases with applicants who are currently incarcerated are prioritized.
 4. Further review
 5. Investigation
 - Leadership and staff members (excluding the Victims-Services Coordinator) conduct the investigations themselves. This includes conducting depositions, locating and interviewing witnesses, delivering evidence to labs, etc.
 6. Formal inquiry
 - Formal inquiry is reserved for cases for which the Commission is likely to hold a hearing because victim notification and updates to the district attorney and defense counsel are required by statute at that point in the process. Statute also requires the Commission to contact any co-defendants if an application is moved into the formal inquiry stage.
 7. Commission hearing
 - The Commission's Executive Director determines if a case will move forward to a nonadversarial hearing before the eight Commissioners. The hearing is held in Raleigh (not in the county of conviction). All evidence is presented by the Executive Director of the Commission — the claimant and the state do not participate. Other Commission staff act as witnesses. At the hearing, the

commissioners will decide if there is sufficient evidence to move forward to a three-judge panel.

8. Three-judge panel

- A three-judge panel is held in county of original conviction. The three judges are appointed by the Chief Justice of the Supreme Court. The appointed judges are superior-court judges from outside the county of conviction. At the panel, the claimant is represented by defense counsel and the state is represented by the district attorney (or the attorney general in the event of a conflict). The Executive Director and Commission staff act solely as witnesses.

Hallmarks of the Commission

- Tanner believes the following to be hallmarks of the Commission and recommends that other states consider similar provisions when creating their own agencies:
 - Neutrality by statute ensures the Commission’s legal work does not create an attorney-client relationship.
 - Broad statutory authority allows the Commission to gain information from a variety of sources. The Commission has all the power and authority of both criminal and civil procedure.
 - Commission investigation is confidential, allowing greater transparency from witnesses and other sources.

Neutrality

- There is no attorney-client relationship developed. The Commission does not represent the claimant.
- The Commission does not represent the state/prosecution.
- The claimant must waive all his/her procedural safeguards and privileges to participate.
- The staff can be curious as they are not looking for a specific answer. The goal is to find the truth.

Broad Statutory Authority

- The Commission has the following authority:
 - Issue process to compel attendance of witnesses and production of evidence
 - Administer oaths
 - Serve subpoenas or other process
 - Entitlement to a copy of all records
 - Entitlement of access to inspect, examine, and take custody of physical evidence
 - A common theme Tanner has noticed in cases in which the Commission has located evidence is a lack of sufficient evidence policy and procedures. In older cases, evidence was not consistently catalogued or organized, and destruction records were not maintained. The Commission has statutory authority to conduct searches for missing evidence. Commission staff will communicate with evidence custodians and long-time employees to aid in their in-person searches.
 - Right to subject physical evidence to forensic and DNA testing, including consumption of biological materials as necessary for the Commission's inquiry
 - It is completely within the Commission's purview to decide where DNA material is sent for testing and private labs are used often.
 - If an applicant's co-defendant has not yet been convicted, the Commission might begin to review their case but will not move on to testing evidence until the co-defendant's trial is completed.
 - Any dispute related to the Commission's access to evidence is heard by the Commission's Chair in his or her judicial authority.
 - The legal work at the Commission happens both within individual cases and in representing the Commission as a whole or its employees.
 - The Commission's investigative staff are attorneys, including the Associate Director. The only nonlicensed position is the Grant Legal Investigator. The Case Manager, the Administrative Assistant, and the Victim-Services Coordinator, are nonattorney positions. The Director is required by statute to be a licensed attorney.

Confidentiality

- The Commission’s case files are confidential, but information may be released in the following circumstances:
 - Evidence of wrongdoing/other crimes
 - Evidence favorable to the claimant
 - Commission hearings that move forward become public record
 - Three-judge panel orders the entire case file to be turned over
 - The Commission may obtain a protective order over the case file
- The Commission’s file in a case can contain materials about not only the claimant, but also about alternate suspects, witnesses, and even victims.
- The types of materials the file can include: NCDPS records (including medical and mental-health records); SBI files; Crime Lab files; laboratory reports; law-enforcement files; district-attorney files; interviews; Commission memoranda and work product; correspondence with various other agencies; defense attorney-files (including attorney-client-privileged materials); DCIN and CJLEADS records.

Victims’ Rights

- The Commission’s statute delineates victims’ rights with the following:
 - §15A-1467(c) — The victim must be notified when a case moves into formal inquiry.
 - §15A-1468(b) — The victim must be notified 30 days before any proceedings before the full Commission regarding the victim’s case.
 - §15A-1468(c) — The Executive Director must use all due diligence to immediately notify the victim of the Commission’s conclusion after a hearing.
- Tanner advised that it is necessary to include a dedicated staff member (who is not involved in investigations) to work with victims. Victim participation in Commission hearings has increased from 22% to 77% since the addition of a Victim-Services Coordinator.
- The Commission views the following as guiding principles in developing its victim-services program:

- Trauma-informed: affirming victims' preferences and autonomy, combating the feelings of helplessness that accompany trauma; sensitivity to victims' reactions
- Accessible: using clear and consistent communication so victims feel informed and considered in the Commission's process
- Informative: communicating respect by providing victims the opportunity to ask questions and voice & revisit any concerns
- Various factors can present challenges in providing victims services, such as:
 - Time since the crime occurred
 - Potentially disrupting sense of closure
 - Previous experience with law enforcement and investigation
 - Media attention
 - Attention is (rightfully) paid to exoneree and victim can feel left behind

Questions and Answers

- Judge Bergeron asked Tanner what changes she would make the Commission's structure if she were able to start over from the beginning.
 - Tanner responded that she would've included a requirement for a Victim-Services Coordinator from the beginning. She also would include more funding for staff to help tackle the backlog of cases.
- Judge Zmuda requested that Tanner provide some background on how these types of postconviction cases were handled before the Commission's existence and how the Commission itself was formed.
 - Tanner explained that, before the formation of the Commission, postconviction cases were initiated by a Postconviction Motion for Appropriate Relief. In the early 2000s, there were some high-profile wrongful-conviction cases that put on display the failures of the criminal-justice system; mainly that of Darryl Hunt. In 2002, the North Carolina Chief Justice's Criminal Justice Study Commission was established by then Chief Justice I. Beverly Lake, Jr. One of the first priorities of the Chief Justice's Commission was to evaluate North Carolina's postconviction review of innocence claims. The Chief Justice's Commission drafted and presented to the North Carolina General Assembly a bill establishing the North Carolina Innocence Inquiry Commission. The bill was signed into law in August 2006.

- Tanner pointed out that, while the Innocence Inquiry Commission itself is not political, the Chief Justice who initiated its eventual creation was a Republican and the bill establishing its creation was passed by a Republican legislature. She said that the Commission has always enjoyed bipartisan support in North Carolina.
- Judge Navarre asked Tanner to explain how the Commission has been able to secure buy-in from district attorneys in North Carolina.
 - Tanner said that the waiver of the claimants’ rights, the requirement that the Commission report any evidence of wrongdoing, and the Commission’s overall commitment to neutrality helped get the district attorneys on board. Additionally, she said, the district attorneys saw the Commission as taking some pressure off underfunded district-attorneys’ offices to spend time reviewing convictions. The Commission also makes efforts to attend law-enforcement conferences and district-attorney conferences to help educate them about the Commission’s work.
- Judge McIntosh asked Tanner to explain what happens in the 21 days that it typically takes to complete the initial review of an application.
 - Tanner said that after an application is received, the Commission will send the applicant a 20-page questionnaire. Once the questionnaire is returned to the Commission, the Case Coordinator and Administrative Assistant will review it and draft a memorandum outlining the case, claims of innocence, and other relevant information. The Executive Director will then review the memorandum and decide whether to move forward. Roughly a quarter of the applications are accepted for further review.
- Douglas Dumolt asked Tanner to explain the process by which exonerees are compensated by the state after being found innocent by the Commission.
 - Tanner explained that such claims fall under North Carolina’s Tort Claims Act. Claims are reviewed and paid out by the North Carolina Industrial Commission. Exonerees are eligible to receive \$50,000 for each year of imprisonment, up to \$750,000. Separate claims can also be raised in federal court.

Presentation by the Ohio Sentencing Commission on Data Collection

Ohio Sentencing Commission (“OSC”) Director and task force member Sara Andrews introduced OSC researchers Niki Hotchkiss and Todd Ives.

Hotchkiss and Ives’s presentation covered the following:

Ohio Sentencing Commission's Enabling Statutes

- The enabling statutes of the Ohio Criminal Sentencing Commission (Commission) include study on sentencing structure, sentence-appeal provisions and postconviction-relief proceedings:
 - R.C. 181.25(A)(2)(c) — The impact of the sentencing-structure and the sentence-appeal provisions in effect on and after July 1, 1996, on the appellate courts of this state, including information regarding the number of sentence-based appeals, the cost of reviewing appeals of that nature, whether a special court should be created to review sentences, and whether changes should be made to ensure that sentence-based appeals are conducted expeditiously.
 - R.C. 181.25(A)(5) — Collect and maintain data that pertains to the cost to counties of the felony-sentence-appeal provisions set forth in section 2953.08 of the Revised Code, of the postconviction-relief-proceeding provisions set forth in division (A)(2) of section 2953.21 of the Revised Code, and of appeals from judgments entered in such postconviction-relief proceedings. The data so collected and maintained shall include, but shall not be limited to, the increase in expenses that counties experience as a result of those provisions and those appeals and the number of felony-sentence appeals made, postconviction-relief-proceedings filed, and appeals of postconviction-relief-proceeding judgments made in each county under those provisions.

Data Collection and R.C. 181.25

- After the passage of S.B. 2, which created a formal sentencing-appeals mechanism, in 1997, the legislature also created an “Appeals Cost Oversight Committee” as part of the Commission to study what was expected to be an increase in case filings, and therefore additional cost to Ohio’s appellate-court system. The legislature allocated \$2 million to the Commission for reimbursement to courts for the expected increase in costs of appeals.
- While there was a spike in appeals in 1997, in 1998, the Commission concluded that the prediction of a dramatic increase in appellate cases would not happen, and the Oversight Committee abolished itself (after meeting only once) and returned the \$2 million to the General Revenue Fund (“GRF”). From the highwater mark in 1997 to 2002, appeals were lower than pre-S.B. 2 levels and steadily declining.
- What we know today is that trial-court criminal dispositions have slightly increased over the past two decades, while appeals have remained relatively consistent.

Recommendation to Amend R.C. 181.25(A)(5)

- Given this evidence, coupled with the difficulty of collecting accurate and meaningful data on the cost of appeals, OSC's report recommends that R.C. 181.25(A)(5) be amended to remove a requirement to study the cost to counties and the Sentencing Commission should consider collecting and maintaining data points with a focus on case data on felony and postconviction-relief appeals.
- In addition to the summary statistics reported annually by the Ohio Supreme Court, and to achieve a more precise statistical analysis of appellate cases and postconviction-relief proceedings, the following revision is suggested:

R.C. 181.25(A)(5) Collect and maintain data ~~that pertains to the cost to counties~~ of the felony sentence appeal provisions set forth in section 2953.08 of the Revised Code, of the postconviction relief proceeding provisions set forth in division (A)(2) of section 2953.21 of the Revised Code, and of appeals from judgments entered in such postconviction relief proceedings. ~~The data so collected and maintained shall include, but shall not be limited to, the increase in expenses that counties experience as a result of those provisions and those appeals and the number of felony sentence appeals made, postconviction relief proceedings filed, and appeals of postconviction.~~ Data shall be collected by each appellate court and reported annually to the Sentencing Commission on January 15 of each year for the preceding year. Each court shall supply the data for the last full year prior to these amendments (e.g., if this is implemented in November of 2022, courts shall supply this information for 2021). If the last full year is 2020, please provide 2019 information as well.

Courts shall report the following information, per year, for each of the following types of appeals:

- All felony appeals, as set forth in R.C. 2953.08
- Appeals of postconviction-relief proceedings

Data points:

- Number of appeals filed
- Percent of total appeals filed
- Details about cases filed:
 - Number of convictions resulting from a trial
 - Number of convictions resulting from a plea
 - Convicted offenses (e.g., murder, robbery, assault, etc.)
 - Basis for postconviction relief
- Number of dispositions by disposition type:

- Decision or opinion (one decision could contain more than one type)
 - Affirm conviction
 - Reverse conviction
 - Remand for further proceedings (subset of reversal)
- Dismissal
- Stay
- Other Terminations (specify): (e.g., Not a final, appealable order)
- Reasons for dismissing a postconviction-relief appeal (e.g., the claim was procedural, no reliable evidence, application of the doctrine of res judicata, etc.)

Report on CIU Best Practices

- Hotchkiss and Ives submitted to the task force a report on Conviction-Integrity Units completed by one of their Spring 2021 semester interns, Lydia Shafik.
- The Commission asked Shafik to study CIUs in Ohio and across the country to provide background, current status, relevant information — including structure of the CIUs, best practices, data collection/reporting, and to make recommendations based upon her findings.
- Ives emphasized the importance of planning for data collection now while Ohio is still in the early stages of implementing conviction-review models and not viewing data collection as an afterthought.

Proposed Amendments to Prof.Cond.R. 3.8

- At the previous meeting, Staff Liaison Smeenck had submitted to members two versions of Ohio Prof.Cond.R. 3.8 — one with changes incorporating ABA Model Rule 3.8 and one incorporating Model Rue 3.8 plus best practices from a University of Illinois Law Review article. Judge Zmuda asked that members review both versions as well as the law-review article.
- Judge Zmuda opened the meeting for discussion of the two versions of Ohio Prof.Cond.R. 3.8.

Prof. Cond.R. 3.8 with ABA Model Rule Additions

- Dumolt said he did not have any issues the version of the rule that incorporated the ABA’s Model Rule. He found the changes to be fairly minor and felt that most of the standards were commonly practiced even if not formally included in the rule.
- Judge Selvaggio expressed support for the addition of the ABA standards.

Prof. Cond.R. 3.8 with ABA Model Rule and Best-Practices-Article Additions

- Justice Michael Donnelly raised concern about Section (A) of the revised rule. He felt that the requirement that a prosecutor not bring charges against a person unless a reasonable person would believe that the person is guilty was not strong enough. Justice Donnelly said that a prosecutor should be required to maintain a good-faith belief in a person’s guilt at all times. If any evidence comes to light that undermines that belief, a prosecutor should dismiss a case, he said.
 - Judge Selvaggio thought that this provision would create too high of a standard that would not account for instances in which evidence is not provided to a prosecutor by police. He also argued that “bring charges against” was vague language that could be interpreted to correspond to a variety of different actions. However, he did agree that a higher ethical consideration could be expressed using different language.
- Dumolt found this version of the rule to be significantly out of line with ethical standards in other states. He argued that Ohio would be implementing a far stricter standard than what exists in any other state if this version were to be adopted.
- Judge Selvaggio took issue with much of this version of the rule. Specifically, in Section (C), he did not find it appropriate to create a higher duty to disclose information about police-officer witnesses than other witnesses. Additionally, he felt that much of this version’s language was subjective or attempted to create standards that prosecutors may fail to meet through no fault of their own.
 - Dumolt agreed with Judge Selvaggio that this version would create subjective standards about what prosecutors “should have” known. He also found Sections (C), (D), and (L) to be duplicative of standards that already exist for all attorneys.
- Judge Navarre echoed Judge Selvaggio’s and Dumolt’s concerns about the onerous nature of this version’s standards. She added that she had concerns about Section (I)’s attempt to forbid what is a common prosecutorial practice in her experience — inducing a defendant to waive certain appellate rights as a condition of receiving a favorable guilty-plea offer.
- Judge Zmuda concluded that there did not seem to be any significant support for this version of the rule but that several members supported added aspirational ethical considerations for

prosecutors. He asked Dumolt, Justice Donnelly, Judge Navarre, and Judge Selvaggio to submit alternative language that could be considered at the next meeting instead.

Missouri Supreme Court Decision, *State v. Johnson*

- Judge Zmuda asked that task force members review the Missouri Supreme Court's decision in *State v. Johnson*, which was included with this meeting's materials, so that a discussion may be held at the next meeting. He felt this case raised important questions about the procedural avenues for innocence claims that may apply in Ohio as well.

Next Meeting Date – Friday, September 10, 2021, from 10:00 a.m. to 1:00 p.m.

The next meeting of this Task Force is scheduled for September 10, 2021, from 10:00 a.m. to 1:00 p.m.