

# THE SUPREME COURT *of* OHIO

## TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

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February 12, 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

**Sen. Theresa Gavarone**  
District 2

**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 Rigganbach**  
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 January 15, 2021 Meeting Minutes**

Task Force Chair Judge Gene Zmuda opened the meeting by requesting approval of the January 15, 2021 meeting minutes. Representative David Leland moved to approve the minutes and the motion was seconded by Judge Pierre Bergeron. The minutes were then passed unanimously by a show of hands.

## **Discussion on Potential Changes to Rules and Statutes**

Discussion included the following:

### *Review of Suggested Changes to Ohio Criminal Rule 33*

- The Task Force began its work by reviewing the suggested changes to Rule 33 that members have added to the Task Force Google Drive since the previous meeting.
- Judge Zmuda asked Judge Nick Selvaggio for any additional comments or explanation related to his suggested language:
  - (A) Purpose. This rule recognizes that notwithstanding honorable efforts, certain errors, omissions or prior use of dated technology may produce an unjust result. This rule provides the procedural mechanism for evaluating post-trial colorable claims of innocence and wrongful convictions. This rule seeks to balance the desire for finality of conviction against the recognition that notwithstanding honorable efforts, certain errors, omissions or prior use of dated technology may produce an unjust result.
  - (B) Requirement for pre-file review. Before a motion for new trial can be heard by a court, the motion shall set forth one of the enumerated grounds for new trial and contain a certification that the defendant has a colorable claim to support the motion for new trial. The certification shall be made by an individual who is authorized to practice law and is qualified to review claims of innocence and wrongful convictions. Absent such certification, the trial court receiving the motion may elect to refer the motion for new trial to the Office of the Ohio Public Defender or other entity accredited to investigate colorable claims of innocence and wrongful convictions as designated by the Ohio General Assembly.
- Judge Selvaggio explained that, due to the controversial nature of the Task Force’s work and the sensitivity of some prosecutors to the issues being addressed, he felt it was important to set forth introductory language detailing the purpose of the rule changes in a non-accusatory way. Section A of Judge Selvaggio’s suggested language serves to provide that purpose. Section B of his proposed language, he said, intends to establish a standard of review for motions for new trial to be performed by qualified individuals.

- John Martin said he liked Judge Selvaggio’s purpose language, but expressed concern that the introduction as it was added to the beginning of Rule 33 would extend to cover cases other than those claims of actual innocence on which the Task Force has agreed to focus its efforts. Martin suggested that the language may serve its purpose better as a proposed staff note rather than language to be included in the rule. He acknowledged that there may be some downsides to using a staff note for this purpose, in that it may be less likely to be read or subject to changes by the Rules Commission. It would be unfortunate to drop the language completely, he said, because it could serve as an “olive branch” to extend to prosecutors and help garner support for the rule changes.
- Judge Bergeron liked the idea of including the purpose language to frame the rule changes, but agreed with Martin that adding the language to the beginning of the rule would affect its application to non-actual innocence cases. He suggested that the language be moved within the rule to provide the purpose for a new actual innocence subsection.
- Tim Young had concerns with the second sentence of the purpose clause. While he did not have a problem with the inclusion of a purpose clause, he felt the use of the word “balance” would create a potential new standard and lead to the use of a balancing test.

*Potential Creation of Ohio Criminal Rule 33.1*

- Judge Zmuda asked the group if there was consensus on creating a subsection focused exclusively on actual innocence claims and moving the purpose clause to that section.
  - Judge Selvaggio suggested that a separate rule could be created to more clearly separate actual innocence claims from the other cases covered by the existing Rule 33. He also acknowledged Young’s point about the use of “balance” and suggested it could be changed to “recognize.”
  - Douglas Dumolt agreed with Judge Selvaggio. Creating a separate rule would help to avoid any unintended consequences that could result from altering the existing Rule 33.
- Judge Zmuda asked for any if there were any objections to creating a separate rule. No objections were raised.
- Judge Zmuda then asked members if there was agreement that a purpose clause should be included in the language of the new rule rather than in a staff note, since the creation of a new rule would avoid the issues previously raised. No objections were raised.
  - Justice Michael Donnelly suggested that the language regarding finality of judgment be removed so that the purpose clause would simply recognize that wrongful convictions may occur despite the best efforts of those involved.

- Young agreed with the removal of the finality language. He said that he did not believe there should any balance of finality when it comes to wrongful convictions. Just as some of the most serious crimes do not have a statute of limitations, there should be no time limit on remedying wrongful convictions.
- Dumolt agreed with Justice Donnelly and Young. The purpose clause should be edited to remove any unnecessary language outside of the recognition that wrongful convictions may occur despite the honorable efforts of all involved, he said. Dumolt suggested the following language as a starting point:
 

“Notwithstanding the honorable efforts of all involved, this rule recognizes the possibility that an innocent person may be convicted. This rule seeks to provide a mechanism by which those claims can be evaluated and litigated.”
- Judge Selvaggio expressed concern that leaving the phrases “honorable efforts” and “all involved” undefined would lead to the perception that prosecutors would be left responsible for any unjust results. He also acknowledged that trying to include too many parties could become cumbersome.
- Staff Liaison Justin Kudela suggested that “the criminal justice system” could be used in place of “all involved.”
- Dumolt and Justice Donnelly felt the phrase “all involved” was an appropriate catch-all that would account for a variety of situations, including those instances in which no official error or misconduct occurred.
- In the interest of time, members decided they would return to finalizing the language of the purpose clause at the next meeting.
- Judge Zmuda moved the discussion to Section B of Judge Selvaggio’s proposed language and its inclusion in a potential Rule 33.1
  - Young was concerned about the legality of limiting an individual’s ability to bring a claim by imposing a certification requirement. Further, he thought the authority to make such changes to the practice of law in Ohio would fall to the justices of the Supreme Court of Ohio.
  - Representative Leland agreed with Young. He also expressed concern about the attorney qualification language and wondered if such a certification existed for attorneys in Ohio.
  - Judge Zmuda responded that the Task Force would discuss professional standards in a later meeting and creating such a certification could be considered.
  - Judge Selvaggio explained that the intention behind this language was to account for the amount of time and resources that often go into an innocence claim before a motion for

- new trial is filed and not to limit any person’s ability to hire their own counsel or represent themselves. He said this language would allow trial courts to get some insight into a case from a qualified entity such as the Office of the Ohio Public Defender (“OPD”).
- Judge Bergeron agreed thought that a certification process could help cases with merit move faster and receive serious consideration, but he worried that there would not be enough available experts in the state to evaluate the claims.
  - Young confirmed that the resources did not currently exist to implement such a process at OPD.
  - Dumolt suggested that this language could be altered to make clear that a judge has the discretion to appoint counsel to provide assistance or representation while not imposing a requirement. He speculated that counties may run into issues with reimbursement for public defender appointments that fall outside of certain guidelines.
  - Martin expressed concern that a criminal defense attorney appointed by the court to evaluate a claim would run into ethical issues if they were required to act as an advocate for a defendant while also advising the court about the validity of a claim. He agreed with Dumolt that simply allowing the trial court discretion to appoint defense counsel would make more sense. Martin suggested that a court’s staff attorneys could evaluate a claim and a judge could dismiss the claim if it is found to be without merit.
  - Justice Donnelly felt that allowing judges complete discretion to dismiss actual innocence claims without any outside evaluation would lead to colorable claims getting thrown out too easily. He asked Martin’s opinion on allowing an advocate to review a case without assigning to them the responsibility of representing the defendant.
  - Martin still felt that there would be an ethical issue in such a scenario. As a defense attorney, he did not think he would feel comfortable potentially undermining a pro-se defendant’s claim to the court.
  - Judge Selvaggio referenced Mark Godsey’s September 17, 2020 letter and pointed to his comments about the lengthy investigation periods involved in actual innocence claims. He said his language seeks to address the need for resources to shorten that process and address the fact that defendants with shorter sentences may not ever receive justice within the current framework.
  - Judge Zmuda concluded that more research would be required to move forward with this language. He told members that he would follow up about their concerns in a later meeting.
- Judge Zmuda asked Representative Leland any additional comments about his proposed language and its inclusion in the potential Rule 33.1 before opening it to discussion.

- Representative Leland explained that his suggested changes to Rule 33 drew from statutes in other jurisdictions throughout the country. The language in Section A(6) came primarily from New York:

(6) When new evidence material to the defense ~~is~~ has been discovered since the entry of a judgment based upon a guilty verdict, which the defendant could not with reasonable diligence have discovered and produced at the trial and which is of such character as to create a probability that the verdict may have been more favorable to the defendant had the new evidence been received at the trial. ~~When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.~~

- Dumolt pointed to the comments he made on the Rule 33 Google Doc about the bar of “probability” and “more favorable” being too low. He said his comments were made under the impression that this language would be added to the existing Rule 33 and not included in a new standalone rule, so some of his concerns about the implications for non-actual innocence cases were no longer relevant. Even so, Dumolt did not believe that the issue of a “more favorable outcome” – for example the difference between a second-degree felony and third-degree felony – would apply to actual innocence cases.
- Young stated that many of the joint suggestions submitted by OPD, the Ohio Innocence Project (“OIP”), and Martin would also no longer be relevant for inclusion in a new standalone rule. He suggested that more time be taken to reorganize the suggestions for discussion at a later date.
  - Judge Zmuda agreed and said that he would work with the members who made suggestions to format them into a new rule for discussion at the next meeting.

### *Rules of Evidence and Statutes on Evidence*

- Judge Zmuda asked Pierce Reed to provide members some context for the brainstorming ideas previously submitted to the Task Force by Mark Godsey and OIP concerning evidence statutes.
- Reed prefaced his presentation by informing members that there are conversations currently happening in this area and legislation being considered, although no bills have been formally introduced at this point. He said that the suggestions may be informed by those conversations, as well as an Ohio Supreme Court ruling that recently held that DNA evidence not requested by a defendant may not be used in a postconviction hearing.

- Judge Zmuda asked Senator Theresa Gavarone and Representative Leland if they were aware of any broad overhaul of criminal statutes currently being discussed in the Ohio General Assembly.
- Representative Leland responded that, as the ranking member of the Criminal Justice Committee, he is looking into a number of issues in that area but not necessarily aware of a “comprehensive overhaul.” Representative Leland and Senator Gavarone said they would get back to the Task Force with any further information regarding DNA evidence statutes.
- Reed went on to say that OIP is more likely to use Criminal Rule 33 in their work than R.C. 2953.71 to 2953.81 because of the many issues laid out in Godsey’s brainstorming submission. The statute was written in 2003 and does not account for the many advances in science that have occurred since then.
- Another issue with the statute, according to Reed, is the way it gives discretion to a judge to accept or deny an application for DNA testing. Defense attorneys spend time litigating the acceptance of the application and this takes away from the time that can be spent arguing the merits of a case, he said. Reed suggested that certifying certain labs to do DNA testing work would be a way to speed up the process.
  - Reed also said that some courts interpret the scope of the statute to be limited to the testing of certain types of DNA evidence, such as blood and semen. Innocence organizations have argued for the inclusion of other biological materials like autopsy slides, hair samples, and fingerprints.
  - The current statutory scheme also provides only that a convicted person may apply to have the own DNA tested, Reed said. In many cases, evidence that could establish innocence may come from another individual or a deceased person whose biological material is possessed by the government.
  - Dumolt commented that although members of the Task Force may lack the expertise needed to argue another perspective on OIP’s suggestions, those perspectives should be considered. There are many competing interests in this area, he said. For example, autopsy slides may not be made available by a coroner’s office due to the risk of the slides being damaged or destroyed.
  - Reed acknowledged Dumolt’s point and added that other types of DNA evidence not belonging to a deceased person should still be accounted for in statute. For example, DNA evidence belonging to an unknown party may exonerate the defendant but still cannot be tested under the current framework. Oftentimes, Reed added, a convicted person cannot even get access to this evidence even if the testing is done at their own expense.
- Judge Zmuda asked if OIP had any proposed language relating to DNA evidence statutes already prepared.

- Reed responded that they did not currently have language but would be happy to draft something.
- Judge Zmuda asked Reed if OIP had any proposed statutory changes related to shifting science that he would like discuss.
  - Reed explained that OIP's suggestions for addressing shifting science would be included in the potential Rule 33.1 rather than in statutory changes.
  - Judge Zmuda asked that the proposed rule language be sent along with any proposed statutory language so that it may be discussed at the next meeting.

### **Scheduling**

Judge Zmuda outlined the following schedule for future meetings, subject to additions:

Friday, April 16, 2021  
Friday, May 7, 2021  
Friday, May 21, 2021  
Friday, June 11, 2021

All meetings are currently set to be held via Zoom but may be held in-person if permitted by the Ohio Judicial Center in the future.

### **Next Meeting Date – Friday, March 19, 2021 from 10:00 a.m. to 12:00 p.m.**

The next meeting of this Task Force is scheduled for March 19, 2021 from 10:00 a.m. to 12:00 p.m.