

# THE SUPREME COURT *of* OHIO

## TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

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July 9, 2021  
Meeting Minutes

### Task Force Members in Attendance

**Hon. Gene Zmuda (Chair)**  
Sixth District Court of Appeals

**Hon. Stephen McIntosh**  
Franklin County Common Pleas Court

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

**Elizabeth Miller, Esq.**  
*Non-voting Designee of Tim Young*  
Office of the Ohio Public Defender

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

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

**Rep. David Leland**  
District 22

**Joanna Sanchez, Esq.**  
*Non-voting Designee of Tim Young*  
Wrongful Conviction Project  
Office of the Ohio Public Defender

**John Martin, Esq.**  
Cuyahoga County Public Defender's Office

**Hon. Nick Selvaggio**  
Champaign County Common Pleas Court

**Timothy Young, Esq.**  
Ohio Public Defender

### Approval of June 11, 2021 Meeting Minutes

The June 11, 2021 meeting minutes could not be approved because a quorum was not present for the vote.

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

A vote on the suggested changes to Ohio Adm.Code 120-1-10 was not held because a quorum was not present. Judge Zmuda told members that an effort would be made to hold a vote at the following meeting.

John Martin submitted several grammatical changes to be made to the suggested language for the sake of clarification. Those changes were agreed upon by the members and will be incorporated in the version that will be presented for a vote.

## **Dark Pleas with Justice Michael P. Donnelly**

Justice Michael Donnelly gave a brief presentation on what he calls “dark pleas,” also known as “reduced prison sentence pleas.” The presentation covered the following:

### *Dark Pleas Defined*

- Justice Donnelly described a dark plea as “a legal fiction produced from backroom, off-the-record negotiations, which prevents truth and causes unjust resolutions.” He explained that dark pleas often occur in the postconviction process during the pendency of a motion for new trial and a request for a hearing. Before a hearing and a ruling from the court, the government offers the prospect of a reduced prison sentence in exchange for a plea to charges from which a conviction has already been obtained and the appellate process exhausted.

### *Ethical Issues in Dark Pleas*

- Justice Donnelly questioned the motives of a prosecutor who would offer a reduced sentence in such a scenario. In his view, the prosecutor would likely do so because they believe that an innocence claim has merit and wish to prevent the evidence warranting a new trial from being presented at a hearing in open court.
- Justice Donnelly also took issue with the power imbalance which he feels exists in the negotiations of dark pleas. At the time the negotiations take place, a prisoner has virtually no leverage, he said. When faced with the possibility of a years-long legal battle even after a hearing is held, the prospect of a reduced sentence is too enticing even for someone who is actually innocent. Justice Donnelly said that this type of confession is essentially coerced.

- On top of all the other ethical issues, the dark-plea negotiations are held in private and contribute to a lack of transparency in the postconviction process.

### *Solutions*

- Justice Donnelly suggested that the Ohio General Assembly pass legislation outlawing dark pleas and presented the following as potential language:

“A court shall at all times remain cognizant of the negotiating leverage between the parties during the postconviction process. After a motion for a new trial has been filed with supporting evidence which has been timely opposed by the government, the courts shall promptly set the matter for a hearing. After the trial court conducts a hearing on the pending motion the court shall issue a ruling no later than 30 days. During the pendency of this matter the court shall not accept a negotiated agreement which reduces the applicant’s prison sentence conditioned upon an admission to the charges previously resolved. In the event that the government voluntarily withdraws its opposition to the motion for a new trial prior to the completion of a hearing and a ruling from the court, the court shall grant the motion for a new trial, conduct a hearing to address the issue of bond and promptly set a new trial date for the newly pending charges.”

- Justice Donnelly cited The Civil Justice Reform Act, which requires the Director of the Administrative Office of the United States Courts to prepare a semiannual report showing, by U.S. district judge and magistrate judge, all motions pending more than six months, all bench trials submitted more than six months, all bankruptcy appeals pending more than six months, all Social Security appeal cases pending more than six months, and all civil cases pending more than three years. He said that a similar provision in Ohio’s postconviction process could enhance transparency, efficiency, and uniformity and allow cases to be heard on their merits.

### **Discussion of Justice Donnelly’s Presentation**

Discussion included the following:

#### *Procedure and Rate of Occurrence*

- Douglas Dumolt asked Justice Donnelly to explain the mechanics of how a dark plea is accepted by a court.

- Justice Donnelly pointed to an example case in which a prosecutor informed the judge of a negotiated resolution at the start of a hearing on a motion for new trial. The prosecution withdrew its brief in opposition in exchange for keeping the original conviction intact. The conviction was then allowed to be amended and the prison sentence was reduced.
- Tim Young further explained that these pleas can also follow other procedures. A conviction can be withdrawn and a new conviction entered based on the plea or a motion for new trial can be granted with a plea agreement already set.
- Dumolt questioned the need for specific legislation targeting this type of plea agreement because it seems to be something that is already precluded by existing rules and statutes.
- Justice Donnelly responded that the deals happen regardless of the fact that they do not comply with existing law. He added that a majority of innocence projects throughout the country that were surveyed on the topic responded in favor of continuing to allow dark pleas, as they are sometimes the only way a client can get out of prison.
- Representative David Leland asked how dark pleas are affected by Marcy’s Law.
  - Justice Donnelly responded that in order to comply with Marcy’s Law, a victim would have to be informed of a plea deal and made part of the process.
- Senator Theresa Gavarone asked how often these types of deals happen and if other states have legislation concerning them.
  - Justice Donnelly said that a recent study found that somewhere around 11% of DNA exonerees had accepted some type of plea agreement. He was not aware any legislation targeting dark pleas but pointed out that the American Bar Association (“ABA”) Ethics Committee had taken up the issue.

### *Ethical and Financial Considerations*

- Justice Donnelly asked Young if he felt that an individual is making a plea agreement voluntarily under these circumstances.
  - Young responded that, legally speaking, the plea is entered voluntarily. As defined by the public, it would probably be a split vote.
- Representative Leland questioned why a plea would be offered to release someone from prison whom the prosecution believes is guilty. From the public’s perspective, prosecutors are either releasing guilty people or trying to uphold the conviction of an innocent person.
  - Young suggested that financial motives are involved. If an innocent person accepts a plea offer in order to avoid staying in jail for years during the trial and appeal process, they waive their ability to bring a financial claim for their wrongful conviction.

### *Public Defender Perspective*

- Judge Stephen McIntosh asked Young for his position on Justice Donnelly’s proposal to disallow any negotiations before the ruling on a motion for new trial.
  - Young responded that these types of plea deals are becoming more and more common and agreed with Justice Donnelly’s assessment of the coercion involved. While he would like for innocence claims to be resolved the right way, he said, it is a client’s decision to take the plea or risk staying in prison.

### *Other Solutions*

- Dumolt asked Justice Donnelly if he would support an on-the-record colloquy detailing the plea offer and ensuring the movant’s understanding of it, similar to what would happen with an *Alford* plea.
  - Justice Donnelly did not think this would alleviate the coercion.

Judge Zmuda concluded the discussion and welcomed Justice Donnelly to submit any potential recommendations for formal consideration by the Task Force.

### **Proposed Amendments to Prof.Cond.R. 3.8**

Staff Liaison Bryan Smeenck 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 for discussion at the next meeting.

### **Next Meeting Date – Friday, August 13, 2021, from 10:00 a.m. to 12:00 p.m.**

The next meeting of this Task Force is scheduled for August 13, 2021, from 10:00 a.m. to 12:00 p.m.

This meeting will include a vote on suggested changes to Ohio Adm.Code 120-1-10, vetting of changes to Ohio Prof.Cond.R. 3.8, a presentation from the North Carolina Innocence Inquiry Commission, and a presentation from Task Force member and Executive Director of the Ohio Criminal Sentencing Commission, Sara Andrews, on data-collection provisions.