THE SUPREME COURT *of* OHIO

TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

May 21, 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

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

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

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

Dave Yost, Esq.
Ohio Attorney General

Timothy Young, Esq.
Ohio Public Defender

Approval of May 7, 2021 Meeting Minutes

Task Force Chair Judge Gene Zmuda opened the meeting by requesting approval of the May 7, 2021 meeting minutes. Judge Pierre Bergeron moved to approve the minutes. The motion was seconded by Tim Young. The minutes were then unanimously approved by a show of hands.

Vote on Proposed Criminal Rule 33.1

Judge Zmuda asked Staff Liaison Bryan Smeenk to hold a roll call for the approval of the Proposed Criminal Rule 33.1 as revised at the last meeting. The Task Force voted 9-2 to approve the recommendation of Proposed Criminal Rule 33.1. The votes were as follows:

Sara Andrews: Yes

Judge Pierre Bergeron: Yes

Mark Godsey: Yes

Representative David Leland: Yes

John Martin: Yes

Meredith O'Brien: Yes

Judge Nick Selvaggio: Yes

Andy Wilson: No

Dave Yost: No

Tim Young: Yes

Judge Gene Zmuda: Yes

Discussion on Potential Changes to Rules and Statutes

Discussion included the following:

OPD's Proposed Changes to R.C. 2953.21

- Joanna Sanchez presented to the Task Force an overview document providing background information on the postconviction process under R.C. 2953.21 and context for the Office of the Ohio Public Defender's ("OPD") proposed changes to the statute. Sanchez and Young submitted

this document with the intention to explain the reasoning behind their previously submitted language changes and to acquire feedback that could be used to edit their proposed language.

- Sanchez explained that OPD's proposed R.C. 2953.21(K) provides that, upon a motion by the petitioner, a judge other than the one who presided over the trial shall be appointed for the purposes of postconviction review. This would be consistent with the prohibition of an appellate court judge hearing a case on appeal if they were the trial court judge on the case and provide the petitioner a "clean slate" to have their claims heard without the possible influence of previously held beliefs about their guilt or innocence.

    - Judge Zmuda pointed out that there was a similar provision included in the initial draft of Proposed Criminal Rule 33.1 that was ultimately removed due to concerns raised by several members. He also expressed concern that the provision could potentially create a precedent that would prevent trial court judges from hearing cases that are remanded back to the trial court from a court of appeals.

    - Judge Stephen McIntosh agreed with Judge Zmuda that the extension of this provision's logic that a judge cannot act without bias in reevaluating their own prior decisions would affect other appellate matters. He added that judges hearing postconviction claims on decisions made years prior often give deference to the judgment of their predecessors on the bench, meaning that a new judge is not always unbiased toward previous decisions.

    - Martin did not think that the provision would change the precedent for the way cases are heard when they are remanded back from the court of appeals because such cases would be dealing only with evidence already established in the record whereas a postconviction case would deal with evidence outside of the trial record.

    - Judge Selvaggio reiterated the concerns he raised about the provision when it was proposed for inclusion in 33.1. He felt the provision would create difficulties for single-judge courts in rural counties and effectively prevent those judges from hearing postconviction petitions at all.

    - Douglas Dumolt added that this provision would be unnecessary considering that petitioners already have the ability to file an Affidavit of Disqualification if they believe a judge does not have the ability to act fairly and impartially. He also thought that assigning visiting judges for these cases could be financially burdensome.

    - Justice Michael Donnelly acknowledged the ability file an Affidavit of Disqualification but added that the vast majority of those affidavits are denied. He said that petitioners and their counsel may be hesitant to make accusations of bias against a judge if they believe their affidavit will be denied and the case will proceed before that same judge. Justice Donnelly said that the Task Force should explore whether it is appropriate for the same judge who denied a motion for new trial that is later granted on appeal to preside over the new trial.

- Young explained to that the intent of the provision was to address a human's inherent cognitive bias to support their own prior decisions. He felt that this bias was a contributing factor to the fact that the majority of postconviction petitions never even receive a hearing and that this provision could increase the system's ability to correct for human error.

- OPD's proposed changes included language to build into R.C. 2953.21 exceptions to the one-year time limit to file an initial petition. Exceptions already existing under R.C. 2953.23 were added into 2953.21 for clarity, with claims based on new federal or state rights created by the Supreme Court of the United States being modified to include rights created by the Supreme Court of Ohio. Cause-and-prejudice and manifest-injustice exceptions were borrowed from federal habeas corpus law. Sanchez said these provisions were added to ensure that valid and meritorious claims would not fail for reasons outside of petitioner's control, such as when counsel fails to timely file or fails to discover evidence.

    - Dumolt worried that the manifest-injustice exception would create too subjective of a standard due to the vagueness of the term.

    - Sanchez responded that manifest injustice has been clearly defined in federal case law and that it will fall to judges to interpret its meaning under this statute, which will allow a standard to emerge under Ohio law. She felt that it was likely that judges would look to federal case law when interpreting its meaning under this statute but suggested that a definition could be added to the language if needed.

    - Martin added that a definition of manifest injustice already exists under state law. The term is used in Crim.R. 32.1 in regard to postsentencing withdrawal of a plea, he said, and courts have already defined the term in Ohio case law.

    - Judge Zmuda felt that it might be helpful to add a definition in order to aid the language in passing through the General Assembly, if it did end up as part of the final report and recommendations. If the intention is to use only the definition under federal case law, he said, this would be necessary.

    - Young said the term was left undefined so that courts could choose to look to federal case law for its definition or choose to develop the definition further under Ohio case law.

- OPD also proposed to remove the distinction between capital and noncapital cases in the requirements for amending the initial petition. Currently, death-sentenced petitioners have the ability to amend their petition without leave of court within six months after filing. All other petitioners may only do so before the State has filed its response (between ten and twenty days after filing of the petition). Sanchez explained that incarcerated petitioners have a limited ability to discover evidence and cannot typically do so within such a strict time limit.

    - Judge Zmuda asked if this change would allow petitioners to file an amended petition after a response has been filed by the State.

- Sanchez said that it is possible that the State could have the ability to file an amended response if an amended petition was filed after a response had already been made.

- Dumolt said that if an amended petition without leave were to be explicitly allowed by the statute, then an amended response should be explicitly allowed as well.

- Young agreed with Dumolt that an amended response should be allowed.

- Judge Zmuda suggested that another possibility could be to allow an amendment without leave within six months if the state has not yet filed a response but require leave if a response has been filed.

- Judge Zmuda and Judge McIntosh recalled the State typically filing outside of the twenty-day timeline in their experiences as trial judges.

- Judge Selvaggio questioned extending rights allowed in capital cases to all cases and wondered if the length of sentence should be considered. He said it may be a drain on resources to allow petitioners with shorter sentences all the rights currently afforded only to capital petitioners.

- Young responded that it would be unlikely for OPD or any other counsel to bring a petition in cases without a lengthy sentence because there would not be enough time to secure a remedy.

- Dumolt and Judge McIntosh responded that counsel may not bring such petitions but pro-se petitioners often do.

- R.C. 2953.21 currently allows capital petitioners to obtain discovery for good cause shown. OPD's proposal would remove the distinction between capital and noncapital petitioners to allow the discovery provisions to apply to all petitioners.

    - Dumolt strongly disagreed with this provision, saying it would create a lengthy process which could be used to harass victims, witnesses, counsel, and judges.

    - Sanchez pointed out that a judge has the ability to control and limit discovery. The judge would only grant discovery in these matters if good cause was shown. In such a case, counsel would likely be appointed, thus the fear of pro se petitioners using discovery as a tool for harassment would not be legitimate. Further, she said, discovery is needed in these cases because a large number involve official misconduct which cannot be uncovered without discovery.

    - Young and Sanchez said that discovery requests made by OPD in these cases are typically seeking documents rather than depositions from parties. In some cases of *Brady* violations, they may seek depositions from prosecutors and law enforcement.

- Judge Selvaggio asked if Young and Sanchez have found that the difficulty of obtaining documents has been reduced since Crim.R. 16 was amended to include open discovery rules in 2010. If so, would this provision mostly apply to older cases?

- Sanchez responded that OPD has received discovery in federal habeas corpus cases in which evidence was found that was not previously disclosed in open-file discovery. She said there may also be evidence that is relevant to the case that would not have been included in pretrial discovery.

- Young said that there are substantial exceptions to open discovery rules in Ohio and that Hamilton County, for example, places significant limits on what is considered discoverable.

- Martin added that postconviction counsel may not always have access to all the files that trial counsel received as part of open discovery, which makes additional discovery as part of the postconviction process necessary. Additionally, it is possible that trial counsel can miss evidence that could be beneficial to the defendant.

- Dumolt pointed out that there are instances in which previous counsel does not provide documents to successive counsel. He did not think the State should be burdened with providing evidence a second time. He felt that having multiple instances of discovery in the same case could be time and resource intensive and that a statutory requirement to maintain files should fall to defense counsel.

- R.C. 2953.21(F) currently provides that the court shall proceed to a hearing on the issues unless the petition, files, or records demonstrate that the petitioner is not entitled to relief. In reality, very few petitions receive a hearing despite this lenient standard. OPD's proposed change would insert language requiring the court to view the petition, files, and records in the light most favorable to the petitioner. Sanchez said this would simply clarify the intended purpose of the provision and ensure that petitions showing merit receive hearings.

    - Judge Zmuda asked if petitions that are denied without a hearing are typically denied without any substantive opinion or explanation of how the petition failed to meet the standard for hearing.

    - Young responded that they are almost always denied without any explanation.

    - Justice Donnelly shared that, in his experience, the State will fight for a hearing not to be held. In his view, hearings should be held more often to ensure the most open and transparent process — even if a claim will be denied.

    - Dumolt said that R.C. 2953.21(D) requires the court to determine that there are substantive grounds for relief before granting a hearing. The State might fight against a hearing being held because they view the granting of a hearing as an acknowledgement that a claim has merit.

- Judge Zmuda suggested that this issue could be solved if the trial court were required to issue an explanation of why a petition does not meet the standard in R.C. 2953.21(F) when the petition is denied without a hearing.

- OPD's proposed change to R.C. 2953.21(J) would provide for appointment of counsel to all indigent petitioners if one or more of the claims have arguable merit or if the court simply decides in its discretion to appoint counsel. The current statute only allows for the appointment of counsel for death-sentenced petitioners.

    - Judge Selvaggio asked if the appointment of counsel would be done before or after the possible removal of the trial court judge.

    - Sanchez responded that the motion for appointment of counsel and motion for removal of the judge would likely be filed with the initial petition. In that case, the new judge would be the one to appoint counsel.

- Currently, R.C. 2953.23(1) only permits a court to consider a petition that is untimely or second/successive if the petitioner demonstrates: (a) they were unavoidably prevented from discovering at the time of trial evidence upon which the claim is based; or the Supreme Court of the United States recognized a new federal right and (b) clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have convicted/sentenced to death. OPD's proposed change would eliminate R.C. 2953.23 altogether, removing the prohibition against second/successive petitions. It would build into the time limit under R.C. 2953.21 the ability to be excused from the 365-day time limit if the petitioner can establish one of the exceptions described in the current R.C. 2953.23(1).

    - Dumolt felt that the prohibition against second/successive petitions should remain, as it is an important protection against pro se litigants who would file several frivolous petitions per year.

- OPD's final proposed change would amend R.C. 2953.21(K) to clarify that the postconviction statute does not preclude a court from granting a motion to withdraw a plea pursuant to Crim.R. 32.1, a motion for new trial pursuant to Crim.R. 33 or 33.1, or any other appropriate remedy.

    - Dumolt asked if this would allow a court to grant a petition for postconviction relief while a direct appeal is pending.

    - Sanchez said that a court would have jurisdiction to grant a postconviction petition while a direct appeal is pending, though it likely would not happen. This provision mainly aims to clarify that claims under this statute or under Crim.R. 32.1, 33, or 33.1 are independent remedies.

- Judge Zmuda asked that Sanchez and Young submit their final version of R.C. 2953.21 based on this meeting's discussion in a week's time. Any other members of the Task Force who would

like to submit an alternative proposal should do so in the same time period, he said. A vote will then be held on the proposals at the next meeting.

Rules of Professional Conduct

- Judge Zmuda informed members that Lou Tobin, director of the Ohio Prosecuting Attorneys Association ("OPAA"), had declined to present to the Task Force OPAA's recommended amendments to Rule 3.8 of the Ohio Rules of Professional Conduct, which they derived from the American Bar Association's ("ABA") Model Rule 3.8. Judge Zmuda asked members if they wished to vet OPAA's recommendations without a presentation.

    - Judge Selvaggio did not think the Task Force should consider a proposal initiated by the OPAA if the association is unwilling to attend a meeting and answer questions about the proposal. However, he would be willing to consider any necessary changes to Rule 3.8 independent of OPAA's proposal.

    - Justice Donnelly felt that ABA Model Rule 3.8 should be considered for adoption into the Ohio Rules of Professional Conduct but agreed with Judge Selvaggio that this did not have to be framed as originating from OPAA if they do not wish to participate.

    - Without any opposition from other members, Judge Zmuda said this topic would be included for discussion in future meetings.

Scheduling

Judge Zmuda told members that he was still awaiting responses from Ohio's three county prosecutors' offices with operational Conviction Integrity Units ("CIU") about their ability to attend the June 11, 2021 meeting.

Judge Zmuda also informed members that the North Carolina Innocence Inquiry Commission had agreed to present to the Task Force to aid in its future discussion of conviction review models.

Meetings are currently scheduled for June 11, 2021 and July 9, 2021, with additional meetings likely to be added. All meetings will be held by Zoom until further notice.

Next Meeting Date – Friday, June 11, 2021 from 10:00 a.m. to 12:00 p.m.

The next meeting of this Task Force is scheduled for June 11, 2021, from 10:00 a.m. to 12:00 p.m.