

# THE SUPREME COURT *of* OHIO

## TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

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September 10, 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

**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

**Hon. Lindsay Navarre**  
Lucas County Common Pleas Court

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

**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

**Andy Wilson, Esq.**  
Senior Advisor on Criminal Justice Policy  
Office of the Governor

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

## **Approval of August 13, 2021 Meeting Minutes**

Task Force Chair Judge Gene Zmuda opened the meeting by requesting approval of the August 13, 2021 meeting minutes. Judge Pierre Bergeron moved to approve the minutes. The motion was seconded by Mark Godsey. The minutes were then unanimously approved by a show of hands.

## **Discussion of Ohio Sentencing Commission Data Collection Presentation**

- Representative David Leland asked if provisions for the collection of data on demographics such as gender and ethnicity should be included in the changes to the Ohio Sentencing Commission's guiding statute.
  - Judge Zmuda responded that there is a separate movement to create a data-collection platform to gather that demographic information for felony convictions. At this time, however, the Task Force would only make recommendations relating to data collection for felony appeals and postconviction appeals.

## **Vote on Ohio Sentencing Commission's Recommendation to Amend R.C. 181.25(A)(5)**

Judge Nick Selvaggio moved to adopt the Ohio Sentencing Commission's recommendation to amend R.C. 181.25(A)(5) for inclusion in the Task Force's final report and recommendations. Martin seconded the motion. Staff Liaison Bryan Smeenk held a roll call and the present members voted unanimously to approve the recommendation. The votes were as follows:

Sara Andrews: Yes

Judge Pierre Bergeron: Yes

Mark Godsey: Yes

Representative David Leland: Yes

John Martin: Yes

Judge Lindsay Navarre: Yes

Meredith O'Brien: Yes

Sheriff Tom Riegenbach: Yes

Judge Nick Selvaggio: Yes

Andy Wilson: Yes

Judge Gene Zmuda: Yes

## **Discussion of North Carolina Innocence Inquiry Commission Presentation**

At the previous meeting, Task Force members heard a presentation from Beth Tanner, the Associate Director of the North Carolina Innocence Inquiry Commission. Judge Zmuda opened this meeting to a discussion of Tanner's presentation and the possibility of the Task Force recommending the creation of similar statewide commission in Ohio.

Discussion included the following:

### *Initial Reactions*

- Godsey indicated that he would be in favor of a statewide commission similar to North Carolina's Commission, given that it would have the same level of independence and political insulation and that it would be properly funded.
- Dumolt found the concept of a statewide commission interesting and worthy of further discussion but added that differences in North Carolina and Ohio state law would add some level of complexity to creating an agency based on the North Carolina model.
- Judge Selvaggio favored the North Carolina model over some other models explored by the Task Force because he felt it would help give small rural counties equal access to conviction-review resources. He also thought an independent commission would foster public confidence in the justice system.

### *Legislative Process*

- Because the creation of a statewide commission is something that would have to be initiated by the Ohio General Assembly, Judge Zmuda asked if Representative Leland and Senator Gavarone had any insights into the possibility.
  - Senator Gavarone did not have a sense of what the reaction to the concept would look like but thought that it would be important to hold discussions.
  - Representative Leland added that the Ohio House has already done some interesting work in the area of criminal-justice reform. For that reason, he felt that this idea would receive open discussion and a hearing process based on its merits.

### *Potential Cost-Benefit Analysis*

- Judge Bergeron said that comparing the North Carolina Commission’s \$700,000 budget with some of the costly settlements awarded to those who have been wrongfully convicted in Ohio would potentially make for a cost-benefit analysis favorable to the creation of a statewide commission.
  - Dumolt disagreed that the existence of a commission would result in cost savings in terms of settlements for exonerated people. The commission would not prevent someone being wrongfully convicted on the front end, he said, it would just create an avenue to prove their innocence and still receive compensation.
  - Godsey said that counties would see savings if the creation of a commission meant that they did not need to establish and maintain conviction-integrity units.
  - Judge Zmuda added that the commission would likely reduce the number of postconviction motions filed if innocent people had success within the commission’s process.
- Justice Michael Donnelly shared a spreadsheet containing information on settlements paid to exonerees in Ohio going back to 1976. He felt this data could be useful in presenting the potential savings associated with the creation of an innocence commission.
  - Judge Zmuda said an innocence commission could potentially create savings on settlements to exonerees by speeding up the process by which they are exonerated, thus reducing the number of years of incarceration for which they are compensated.
  - Godsey added that the compensation process would be simplified within the commission model. Recent changes in Ohio case law have created complexities in the process by which exonerees are currently compensated, he said. If an innocence commission in Ohio were to use the same process as North Carolina, someone who is declared innocent by the commission would avoid litigation and be able to go directly to the Ohio Court of Claims to receive compensation.

### *Potential Recommendation*

- Judge Zmuda asked members if there was agreement that a recommendation for the creation of a statewide innocence commission should be pursued.
  - No objections were raised. Andrews, Dumolt, Godsey, Martin, Sanchez, Judge Selvaggio, and Wilson volunteered to form a working group for the creation of a draft recommendation.

### **Ohio Prof.Cond.R. 3.8**

At the previous meeting, Dumolt, Justice Donnelly, Judge Navarre, and Judge Selvaggio formed a working group to draft a new version of Ohio Prof.Cond.R. 3.8 for the Task Force to review. Judge Zmuda requested an update on the group's activity.

- Judge Selvaggio reported to members that, while the working group did not have time to meet, they were able to communicate some ideas over email. Justice Donnelly, with Martin's help, submitted to the group a first draft. Multiple members of the group raised concerns about the draft and consensus has not been reached on a version to present to the Task Force, he said.
  - Specifically, Judge Selvaggio raised concerns about the about language from the draft rule requiring a prosecutor to “undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant is innocent of the crime” after gaining knowledge of new, credible, and material evidence. He felt that this language could be interpreted as requiring a prosecutor to make a judgment of innocence.
  - Martin interpreted the language as requiring the prosecutor to initiate an investigation that would ultimately determine innocence, not requiring the prosecutor to determine innocence themselves. He agreed, though, that the language could be made clearer.
- Judge Selvaggio also expressed concern over including in a new draft of Ohio Prof.Cond.R. 3.8 ethical aspirations beyond what have already been established as best practices by the American Bar Association (“ABA”), especially without input from the Ohio Prosecuting Attorneys Association (“OPAA”).
  - Dumolt agreed that some provisions of the current draft rule beyond the inclusion of ABA Model Rule 3.8 gave him serious pause.
- Judge Zmuda asked the members of the working group if they felt they could come to some consensus on a draft rule to present to the Task Force if given until the next meeting to work on it.
  - Justice Donnelly and Martin urged that the working group should continue to work toward an agreed-upon draft. Martin also suggested that additional ethical aspirations could be submitted as comments rather than included in the draft rule itself.
  - Judge Selvaggio agreed that the group could continue to work on a draft. Judge Zmuda requested that they have a draft to present at the next meeting of the Task Force.

## **Missouri Supreme Court decision, *State v. Johnson***

During last month's meeting, Judge Zmuda submitted to Task Force members the Missouri Supreme Court's decision in *State v. Johnson*, in which the Missouri Supreme Court ruled that there isn't a procedure for a prosecutor to seek a new trial years after a conviction, even when the state agrees that the convicted inmate is innocent. He asked that members review the decision and prepare to discuss any implications for conviction integrity in Ohio.

Discussion included the following:

- Dumolt said that a similar ruling could be possible in Ohio because the existing postconviction rules and statutes do not address whether a prosecutor can initiate a claim of innocence. He saw the scenario in which a court dismisses a claim based on lack of standing for the prosecutor to initiate the claim as somewhat unlikely but believed that conflicts with Marcy's Law that could arise if a victim opposed the claim.
  - Godsey agreed that the situation could arise, though it would be unlikely.
  - Meredith O'Brien expressed concern over the potential conflicts under Marsy's Law.
- Judge Zmuda asked if members felt it would be necessary to adjust the recommendation changes to postconviction rules and statutes to address this potential issue.
  - Members agreed it was not necessary.

## **Remaining Topics for Study**

Judge Zmuda explained to members that the Task Force would begin to wrap up its work in the coming weeks and begin to draft its final report and recommendations. He asked if members felt there were any remaining issues that the group should address before the end of its work.

- Dumolt felt that the Task Force should do more to develop recommendations that would prevent wrongful convictions on the front-end. He said that ineffective assistance of trial counsel is one cause of wrongful convictions that could be addressed to that end. Dumolt said that the Task Force could consider drafting changes to professional rules for defense counsel, in addition to the changes for professional rules for prosecutors.
  - Martin agreed that it is important to consider ineffective assistance of counsel as a factor that contribute to wrongful convictions but cautioned against promoting the use disciplinary action against attorneys who make mistakes unintentionally.

- Judge Selvaggio agreed with Martin and added that many instances of ineffective assistance of counsel can occur because counsel doesn't have access to certain information.
- Justice Donnelly agreed with Dumolt's sentiment about doing more to prevent wrongful convictions before they occur. He suggested that the rule requiring defense counsel to assert an alibi only seven days in advance of trial is another topic that could be discussed. Justice Donnelly felt that the time limit is too short and does not allow enough time for investigation of the alibi.
  - Martin agreed that seven days is an insufficient amount of time for a prosecutor to investigate an alibi but did not necessarily think that the result of increasing that time would be beneficial to those claiming innocence.
  - Judge Bergeron added that the deadlines for turning over many discovery items in criminal cases is often too close to trial, but he felt that reforms to discovery practices would be outside of the purview of the Task Force.
  - Judge Zmuda thought that the alibi rule would fall under the category of reforms to discovery practices and thus, in his opinion, also fall outside of the purview of the Task Force. He asked that Justice Donnelly submit something for the Task Force to consider at the next meeting.

**Next Meeting Date – Friday, October 1, 2021, from 10:00 a.m. to 12:00 p.m.**

The next meeting of this Task Force is scheduled for October 1, 2021, from 10:00 a.m. to 12:00 p.m.