THE SUPREME COURT *of* OHIO

TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

January 15, 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

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 Riggenbach
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 December 10, 2020 Meeting Minutes

Task Force Chair Judge Gene Zmuda opened the meeting by requesting approval of the December 10, 2020 meeting minutes. Judge Pierre Bergeron moved to approve the minutes and the motion was seconded by Representative David Leland. The minutes were then passed unanimously by a show of hands.

Discussion on Potential Changes to Rules and Statutes

Discussion of potential changes to Ohio's rules and statutes included the following:

Ohio Criminal Rule 33: Timing

- Mark Godsey began the discussion by going over some points made in a letter submitted to the Task Force by the Ohio Innocence Project ("OIP") in September 2020.

- Godsey explained that Rule 33 does not provide a clear time limit for filing a motion for new trial after new evidence is discovered in a years-old case. In recent years, the view of the courts has been that the motion should be made within a "reasonable amount of time." Judges will use their own discretion to determine what is reasonable, without realizing that it may take a year or more for organizations like OIP and the Ohio Public Defender ("OPD") to properly investigate a claim of innocence after the new evidence is initially received.

- The timeliness standard applied by the courts is not actually written in the rule. According to Godsey, if this judicial standard were to become law, cases would not be properly vetted prior to being brought before a court. Godsey believes the rule should be amended to clarify that there is no timeliness requirement and that the burden of proof should fall to the prosecution to prove that a motion is unreasonable if brought after two years.

- John Martin suggested that maybe the problem lies in the use of the word "discovery" in Rule 33(B). If a case does not fall under the 120-day time limit because "the defendant was unavoidably prevented from the discovery of the evidence," then a judge may view the time when the evidence was later discovered as the beginning of the "reasonableness' time clock rather than a later time when the evidence had been properly vetted.

    - Godsey replied that courts do not explicitly point to that language as the rationale behind the judicially-imposed timeliness standards, but that it may be a factor. He agreed that a judge's definition of "discovery of evidence" can differ from defense counsel's definition. Defense counsel would not view something like a single affidavit as sufficient evidence without a proper investigation.

- Douglas Dumolt pointed out that the thorough work done by the OIP and OPD is not the norm. They take on a small number of the cases that are sent to them. The cases they reject are often brought to the courts by pro-se filers without being properly investigated. Dumolt was skeptical of changing the rule based on a minority of cases. He also saw a judge's "reasonableness' requirement as something that an innocence organization could meet by articulating to the judge the need for a thorough investigation.

    - Godsey responded that the small minority of cases to which Dumolt referred are the cases of actual innocence. In Godsey's view, those defendants should be protected.

- Justice Michael Donnelly suggested that the rule be amended in some way to separate claims of actual innocence from other claims. Rule 33, he said, encompasses a wide variety of situations in which a defendant would file a motion for new trial – not all of them involving actual innocence. From a judge's perspective, he understands the need for time requirements when a defendant points to something like jury misconduct as the reason for a new trial. In his view, actual innocence claims should have a separate standard, but should be evidence brought to the court's attention as soon as possible so that a judge can then allow time for investigation.

    - Godsey responded that the vast majority times that OIP receives a piece of evidence such as an affidavit, they do not end up bringing an innocence claim to court because their investigation shows that the person is not actually innocent. Bringing that evidence to the courts before doing an investigation puts innocence organizations in the position of going to court on innocence claims that end up being frivolous. The benefit of doing an investigation before bringing a claim, he said, is that the OIP is not yet representing a defendant in the investigation stage. After a motion is filed in court, the OIP would have a duty to represent the defendant even if an investigation finds that their claim is frivolous.

- Judge Rocky Coss suggested that language could be added to require a motion to be filed in a certain period of time if there is a good faith belief that there is a colorable claim of innocence based on a proper investigation. He referenced the local rule requiring pretrial motions in the Highland County Common Pleas Court to be filed when the grounds for the motion become known as an example.

    - Godsey and Tim Young agreed with the addition of such language.

- Young added that because there are so few lawyers doing innocence work in Ohio, many cases are brought by pro-se filers. He said that some of those cases may have legitimate claims of innocence and should not be dismissed purely on the basis that the defendant does not have access to representation.

- Martin proposed that Rule 33(B) could be amended to extend the initial 120-day window in which a motion for new trial based on newly discovered innocence must be made (unless the defendant was unavoidably prevented from the discovery of the evidence). He pointed to Federal Rule 33 as a model, which gives three years to file such a motion.

- Judge Zmuda paused the discussion to remind Task Force members that they are tasked with reviewing conviction integrity *and* the postconviction review process in general. He asked for anyone with concerns about Rule 33 in regards to cases other than those of actual innocence to bring them forward. No one took issue with the rule as it applies to those other cases.

- Judge Zmuda then raised the question of why the 120-day window for bringing new evidence is tied to the date of the verdict. He suggested that the "trigger' for the 120-day window could be modified.

    - Dumolt answered that 120-day limit serves to protect victims in situations like child sexual assault cases. Oftentimes, victims are under pressure from unscrupulous actors to recant their testimony and including a time limit can relieve some of that pressure.

- Godsey clarified that the 120-day window is not relevant to OIP's work. That window applies evidence relating to the events of a trial, which is handled by trial counsel. OIP's cases relate to evidence that often arises decades after a trial.

Added Distinction in Rule 33 for Actual Innocence Claims

- Judge Zmuda asked members if there was consensus to discuss amending Rule 33 to create a distinct category for claims of actual innocence, while leaving existing rule to apply to other types of cases. Members agreed that this was appropriate.

    - Martin agreed with the creation of a new category and added that he also thought extending the 120-day time limit to three years to conform with federal law for other cases involving the discovery of new evidence would be beneficial and would not hurt the goals of the added language.

    - Dumolt pointed out that the existing rule does not state who can bring innocence claims forward. He suggested that the rule be amended to make some clarification, as it may become necessary as Conviction Integrity Units housed in prosecutors' offices become more prevalent.

- Judge Zmuda cautioned that the group should be mindful when creating this new category of innocence petitions that it may lead to an increase of filings in an attempt to get cases on a "different track."

    - Young responded that he didn't think the creation of a separate category would lead to a major increase in frivolous filings, but that it would eliminate some constraints on the work of OPD and OIP. He suggested that the group be deliberate in the actual innocence requirements when creating the language to avoid any abuse of the system.

    - Judge Bergeron added that the creation of any new language allowing for a new type of innocence petition would unavoidably lead to some instances in which a defendant would

attempt to mold their claim to fit the requirements. He said that the group can be mindful of that by creating a threshold that a case must meet to be considered an actual innocence claim, or by allowing a judge to exercise some discretion in determining if a claim is legitimate.

- Judge Coss said that the decision should be left to a judge to determine whether a defendant has a colorable enough claim of innocence to be brought for a hearing, after which point the case can be judged on its merits.

- Dumolt suggested that the innocence petition statute could provide some guidance on how to use judges as initial gatekeepers to ward off invalid claims, as well as provide some potential model language.

- Martin asked how this approach would account for situations in which new evidence arises that does not clearly exonerate a defendant but calls into question the integrity of a conviction – for example, when only one of three witnesses recants or when some official misconduct is discovered.

    - Godsey and Young responded that their organizations would not be likely to bring such a case to court because it would not meet the high standard of proof needed to be successful.

- Justice Donnelly suggested that a distinction can be made between cases of false identification and cases of false accusation to reduce the pressure on victims to recant legitimate testimony. He acknowledged that false accusations do occur and suggested that they be vetted through hearings, while false identification cases could perhaps be given more urgency. Justice Donnelly requested for Godsey and Young to provide guidance on how to define actual innocence and make such a distinction.

    - Godsey responded that child sexual assault cases are a unique category. A claim of false accusation could be considered an actual innocence claim, but the high pressure on victims to falsely recant complicates things.

    - Young explained that innocence claims can fall into two categories: (1) claims that a person was wrongly held responsible for a crime which did occur; and (2) claims that no crime occurred at all. The second category is a smaller subset but can also be considered innocence claims. Claims of innocence in domestic relations cases involving conflicting testimony are somewhat common, but OPD's Wrongful Conviction Project and OIP do not take on such cases because they do not usually meet the standard of proof they require.

    - Judge Zmuda said he believes the good faith language proposed by Judge Coss would eliminate false claims of innocence in these domestic cases. Judges could also effectively use their own discretion to keep these cases from advancing as claims of actual innocence under the new language.

- Judge Zmuda asked that Judge Coss share his previously-referenced local rule with the group to be used as model language. He also requested that Godsey and Young draft proposed language for the group to consider for addition to Rule 33. Judge Zmuda then explained to members that they could use the Task Force's newly created Google Drive to add their suggested language and comments to the Google Docs containing the relevant rules and statutes.

Shifting Science as a Ground for Relief

- Godsey started the discussion of shifting science by explaining to members that the United States is currently going through a transition period based on scientific advances. There are many people in prison based on certain sciences and forensic methods that are no longer viewed by the scientific community as legitimate, he said. Invalidated science has been commonly used as the primary basis for conviction in arson and shaken baby syndrome cases.

- Identifying invalidated science cannot be the sole ground for relief in OIP's innocence cases, Godsey said, OIP must also be convinced of a person's innocence based on a full investigation. Even so, in his experience, Ohio has been particularly resistant to recognizing invalidated science and new expert testimony as new evidence under Rule 33. Godsey pointed to Texas and California as examples of states that created new statutes or amended existing rules to recognize shifting science as grounds for an innocence claim. Other states' courts have accepted changes in science as new evidence without changing their laws.

- Godsey referenced proposed language to be added to Rule 33 that OIP sent in its September 2020 letter to the Task Force:

    - **(A) Grounds.** A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

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      (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. <u>New evidence shall include relevant scientific evidence or expert testimony that the court determines (i) is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence, and (ii) discloses a reasonable probability that it will change the result if a new trial is granted. In making a finding as to whether the relevant evidence was not ascertainable through the exercise of reasonable diligence, the court shall consider whether the field of scientific knowledge or technical expertise, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence used to convict the defendant is based has changed since trial.</u>

- Judge Zmuda then opened the floor to discussion of Godsey and OIP's proposed language.

- Joanna Sanchez said she agreed with Mark's points, but added that the language should account for the fact that science progresses over time, sometimes over decades. To that say one was unavoidably prevented from finding any expert testimony to support their innocence in the past may be too high of a standard. The language should take into account when certain changes to scientific methods became widely accepted by the scientific community as a whole, she said.

    - Judge Zmuda asked if Sanchez had language she would like to propose in addition to Godsey and OIP's proposed language. Sanchez said she would look at similar statutes in other states and use them to draft language with Young and Godsey.

- Dumolt pointed to Ohio's postconviction DNA testing statute as an example of language that addresses shifting science. He added that the group should be careful to craft language to create a proper threshold for new scientific standards. Just as one might have been able to find a single expert to support any position in the past, it is possible to find a single expert to support any position now. Shifting science as a ground for relief should be based on consensus in the scientific community – not on the testimony of any one expert, he said.

- Dumolt also stated that he saw OIP's proposed language as somewhat divorced from actual innocence and relying too heavily on the concept of undermining confidence in a conviction. He felt this would open the flood gates to cases other than those of actual innocence whenever a modest scientific advancement is made.

    - Sanchez responded that she didn't see a huge concern with this because a defendant would have to prove a strong probability of a different outcome in order to be granted a new trial under the potential new language, which she sees as the closest approximation of innocence possible in some cases. Simply pointing to a scientific advancement would not be enough to meet the standard for new trial, she said.

    - Judge Coss agreed with Dumolt that the new language should be coupled with actual innocence. He referenced a recent scientific advancement that brought evidence from a 1980s case up for reanalysis. The DNA evidence was found to be accurate in this case, but there was overwhelming evidence of guilt even without it. Judge Coss said he does not think the courts should be bogged down with relitigating such cases.

- Judge Stephen McIntosh asked Godsey if his proposed language was borrowed from any existing rule or statute.

    - Godsey responded that he used some Texas and California language as models.

    - Judge Zmuda told Judge McIntosh and other members that support staff would locate any analogous language and forward it to them.

- Martin expressed concern with the placement of the new language within the current structure of Rule 33(A).

- Judge Zmuda responded that he thought Section A would need to be restructured to include new subsections, one of which could contain the proposed language. He asked Representative Leland and Senator Theresa Gavarone if they agreed with this approach.

- Representative Leland responded that he agreed with potentially restructuring Section A.

- Dumolt said he felt this language should not be added to Section A, but included in the previously agreed upon new section that solely addresses cases of actual innocence.

- Judge Zmuda reminded members that their suggestions on how specific language should be added to Rule 33 can be added to the shared Google Doc after the meeting.

Right of Counsel

- Judge Zmuda moved the discussion forward to establishing a right of counsel, which several members mentioned in their brainstorming submissions to the Task Force in September. He asked Judge Bergeron to begin the discussion.

- Judge Bergeron said that in his experiences in private practice, he saw a high demand for pro-bono cases for young lawyers seeking experience. While new lawyers may not be fully capable of handling wrongful conviction cases on their own, this is something look into when considering how to provide counsel in these cases, he said. In his experiences as a judge, he saw the difference that access to counsel made in innocence petitions. Judge Bergeron said he did not think that providing funded counsel would be too high of an expenditure if it was limited to cases of actual innocence, as some other states have done.

    - Judge Nick Selvaggio acknowledged that the concept of establishing the right to funded counsel has merit, but worried that less experienced attorneys lacked the ability to effectively handle postconviction innocence cases. He suggested that maybe a better solution would be to direct those cases to OIP and OPD's Wrongful Conviction Project while providing funding to those organizations. Judge Selvaggio then asked for an explanation of how cases matriculate to OIP and OPD to help facilitate the discussion.

    - Representative Leland agreed with Judge Selvaggio that assigning private attorneys with various levels of experience and expertise to these cases may not be the best approach. He expressed support for instead providing funding to public defenders and/or innocence organizations.

    - Senator Gavarone said she would be interested in working with Representative Leland on potential funding for OPD/OIP but also showed interest in Judge Bergeron's idea involving new lawyers.

    - Judge Zmuda stated that he felt the issue of how to establish the right of counsel should be addressed first and that the issue of who should act as counsel could be worked out in the group's later discussions on training and education.

- Young agreed that directing cases to OIP and OPD would be the most effective method and suggested that training for new lawyers could also be worked into the funding mechanisms for the organizations. He also suggested that the right of counsel could be tied to Judge Coss's proposed language – i.e., funded counsel would be provided after a judge finds that there is a colorable claim of innocence based on a proper investigation. Back-funding should then be provided, Young said, to account for all of the work that went into a case up until that point.

- Sanchez explained to members the process by which cases come to OPD's Wrongful Conviction Project. The project has an application process, she said, which people usually learn of by word of mouth. OPD may also receive letters to their general intake department alleging actual innocence. Those letters are referred to the Wrongful Conviction Project, which sends out an application in response. Applications are also sent out based on calls from family members or referrals from trial lawyers. An investigator vets the applications and those cases that show promise are moved to the investigation stage.

    - Judge Zmuda asked if the Wrongful Conviction Project is organized in such a way that the attorneys are well-qualified and work exclusively wrongful conviction cases.

    - Sanchez responded that the project is a separate unit compromised of one full-time attorney (herself), one part-time attorney, and one full-time investigator.

- Godsey said that OIP has a similar, application-based process. OIP is comprised of four attorneys and Godsey who acts as a supervisor and handles a small caseload. After an application is received, OIP uses public records to research the case. This process is ongoing, Godsey explained, with many cases being researched at once. Cases may be cut at any time if it becomes clear that they are lacking in merit, he said.

- Dumolt questioned if there was any reason to believe that common pleas judges are not currently using their discretion to appoint counsel in cases that they feel are meritorious. In his experience, judges have appointed counsel based on petitions for postconviction relief and motions for new trial that they felt were reasonable. Dumolt suggested that, as opposed to providing a mandatory right to counsel, a clarification that judges to have the discretion to appoint counsel if a case meets certain criteria could be added.

    - Young responded that jurisdictions from which Dumolt drew his experience are the exception, not the rule. Judges very rarely appoint counsel in postconviction cases, he said. Young felt that leaving the discretion to appoint counsel to judges would lead to an equal protection problem. Once a certain threshold of merit is met, he said, the right to counsel should be applied across the board.

- Judge Selvaggio cautioned the group to be sensitive to the fact that many defendants have experienced issues with ineffective assistance of counsel and may have lost complete faith in the system as whole.

- Judge Zmuda saw this as an even more compelling reason for the group to consider establishing a formal right of counsel with an emphasis on proper training and certification. He reminded members that a more substantive discussion of training and education would come after the present discussion of procedural issues.

- Dumolt said that while he disagreed with many of the stated views on the right of counsel, if the group decides to go in that direction, it should be careful to apply it in a way that is clearly limited to actual innocence cases. He worried that defendants would take advantage by tacking an "actual innocence claim" onto a long list of claims in order to obtain funded counsel for the entirety of their case. Appointed counsel, he said, should be limited to arguing actual innocence claims.

    - Judge Coss said that, in his experience, postconviction filers often bring petitions or motions based on an upwards of 40 claims. He recently had a petition remanded back to his court on the grounds that it should have been granted based on three out of around 30 claims. In the hearing, counsel attempted to argue the full list of claims, he said. Thus, he agreed that appointed counsel should be strictly limited to arguing claims of actual innocence.

    - Godsey took issue with creating a separate track for actual innocence claims. He agreed that pro-se filers would attempt to use "actual innocence" as magic words in order to obtain counsel. He also felt this would create issues for many of OIP's cases. OIP often brings cases based on a variety of factors that lead to a belief that a person is innocent. These could be things like invalidated science, witness recantations, etc. They are different from DNA exonerations because there isn't 100% proof of innocence but a totality of evidence that undermines a conviction. Godsey felt that very few cases would fall into the actual innocence category and that the standard should instead be based on new evidence that leads to a reasonable probability of a different outcome at trial.

    - Judge Coss agreed with using the standard described by Godsey.

    - Sanchez added that setting the standard too high would prevent pro-se filers from reaching the point where they could obtain counsel. Thus, the only people who would be able to have counsel appointed would be those who already have an innocence organization working on their behalf.

- Judge Zmuda told members he would work on finding language from other states where right to counsel has been established in postconviction cases to aid the group in crafting its proposed language.

Grounds for New Trial

- Martin pointed out that Criminal Rule 33 is currently being amended based on a Supreme Court case to remove sufficiency of the evidence as a basis for new trial. He then posed the question of

whether language should be considered to establish the right of a trial judge to reverse a jury's verdict if he feels it is against the manifest weight of the evidence. Martin said that the Eighth District Court of Appeals has held that trial judges have the ability to do so and that he has seen it happen after the filing of a motion for new trial under Rule 33.

- Justice Donnelly took issue with allowing judges to exercise such discretion outside of the timeline that is already allowed in Ohio Criminal Rule 29.

- Judge Coss pointed out that the ability of a judge to rule on a motion for acquittal after a verdict has been reached is already established in Rule 29. He questioned whether it would be appropriate to add a similar ability to Rule 33 since the group's focus has primarily been on new evidence rather than trial evidence.

- Judge Zmuda added that, under Rule 33(A), a trial court already has the discretion to rule on a motion for new trial based on the sustainability of a verdict and even substitute a lesser charge. He also felt that what Martin was suggesting may be outside of the scope of the Task Force's work.

- Dumolt agreed with Judge Zmuda that this was outside of the scope of the group's work and did not think it was appropriate to attempt to modify the functions of a judge and jury at trial.

- Judge Zmuda asked Martin to send the Eighth District case he referenced to Staff Liaison Justin Kudela. Since the other task force members were not familiar with the case, they would need to time to look into whether this type discretion for trial court judges is something the group should consider as a Rule 33 modification.

Additional Considerations

- Judge Zmuda asked members if they had any additional concerns they would like to add before ending the discussion portion of the meeting.

- Dumolt reiterated the need for Rule 33 to clarify who has the ability to bring a motion for new trial. With CIUs emerging in the state, there should be a specific vehicle for them to challenge the integrity of a conviction, he said.

- Sanchez said she would like to add a provision that mirrored federal habeas corpus statute establishing the right of a defendant to have their case heard on the merits if a strong argument for innocence is made, even after missing the deadline for filing a motion.

    - Judge Zmuda asked that Sanchez forward the federal language to Kudela so that it could be shared with the group as potential model language.

Task Force Google Drive

- Staff Assistant Kathryn Patterson explained that a Google Drive has been created to help Task Force members collaborate on their suggested changes to Ohio's rules and statutes. The Google Drive hosts multiple Google Docs (similar to a Word document) containing the current language of the relevant rules and statutes. Members will be able to add suggestions and comments directly to language of each rule/statute in real time.

- Patterson gave a brief tutorial of how to access the Drive and make suggestions. If members have any issues with the functionality of the Google Drive, they can contact Patterson or Kudela.

- Judge Zmuda instructed Kudela and Patterson to add OIP's letter to the Task Force, Federal Rule 33, Judge Coss's proposed language, and any other relevant language discussed in the meeting to the Google Drive for members to review and edit before the next meeting.

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

Judge Zmuda designated R.C. 2953.21, Criminal Rule 35, and rules of evidence and statutes on evidence as the topics of discussion for the next meeting.

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