

THE SUPREME COURT *of* OHIO

TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

November 12, 2021
Meeting Minutes

Task Force Members in Attendance

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

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

Sara Andrews
Director, Ohio Sentencing Commission

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

Hon. Pierre Bergeron
First District Court of Appeals

Sheriff Tom Rigganbach
Buckeye Sheriff's Association

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

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

Mark Godsey, Esq.
Ohio Innocence Project

Hon. Nick Selvaggio
Champaign County Common Pleas Court

Rep. David Leland
District 22

Timothy Young, Esq.
Ohio Public Defender

Approval of October 22, 2021 Meeting Minutes

Task Force Chair Judge Gene Zmuda opened the meeting by requesting any modifications to the October 22, 2021 meeting minutes.

Judge Nick Selvaggio and Joanna Sanchez requested that the minutes be revised to exclude their names from the members of the working group who drafted the innocence commission recommendation. The revision was made and no objections were raised to approving the minutes as revised.

Conviction Integrity in the News

Judge Zmuda shared with members a news article about the exoneration of Isaiah Andrews, a Cleveland man who was released from prison in October after 45 years. Andrews was found not guilty of the 1974 murder of his wife in a retrial granted based on the discovery of previously undisclosed evidence.

Mark Godsey, who worked on the case with the Ohio Innocence Project, commented that he was glad to see Andrews finally freed but also felt disappointed that the prosecution chose to retry the ill 83-year-old man, even with substantial evidence of his innocence.

North Carolina Innocence Inquiry Commission Model for Ohio

Draft Recommendation Language

The following draft recommendation was presented to the Task Force:

Recommendation for an Ohio Innocence Commission

The Task Force recommends that the General Assembly create an innocence commission to investigate and adjudicate claims of innocence. An innocence commission would supplement, not replace, existing post-conviction mechanisms for challenging a conviction.

The purpose of an innocence commission is to add to Ohio's justice system an independent body whose only allegiance is to ascertaining the truth. To that end, the commission must be able to independently investigate the facts of a case in an inquisitorial (as opposed to adversarial) setting and follow the evidence, guided by a commitment that neither the guilty should be exonerated nor the innocent remain convicted.

If the General Assembly decides to act upon this recommendation, the Task Force recommends a commission be created with all of the following features:

1. The commission should be an independent, neutral, fact-finding entity empowered to investigate claims of innocence arising out of felony convictions from any court of common pleas.
2. The commission should be comprised of a variety of individuals with past or present professional involvement in the criminal justice system, as well as members of the community.
3. The commission staff should be a professional staff insulated from political pressure aimed at overturning or validating criminal convictions.
4. The commission's authority to review claims should be limited to claims where the claimant has, with the benefit of counsel, waived their Fifth Amendment right and attorney-client privilege reasonably related to the claim of innocence.
5. The commission should be empowered to issue subpoenas for documents, compel the attendance of witnesses, and utilize the methods of discovery available under the rules of Criminal and Civil Procedure.
6. The commission should have the power to inspect, examine, and temporarily take possession of physical evidence for forensic examination or testing.
7. The commission's authority, policies, and practices must be consistent with Article I, Section 10a of the Ohio Constitution (Marsy's Law).
8. The commission should be adequately funded to investigate claims of innocence and comply with the constitutional and statutory rights Ohio affords to crime victims
9. Subject to limited exceptions involving circumstances where exculpatory or inculpatory evidence is discovered during its investigation, as well as in cases where there is sufficient evidence to warrant a public hearing on the claim, the commission's work product should be confidential.
10. In cases where the innocence commission believes a viable claim of innocence has been established, a specially authorized three-judge panel comprised of sitting appellate court judges from outside the appellate district where the case arises should consider the matter. Judicial proceedings should be public and should provide an opportunity for the defendant (through counsel if desired), the prosecutor and the victim to be heard. In the event that a judicial panel finds the defendant to be innocent, the panel shall be authorized to take appropriate remedial measures to vacate the conviction.

Additional considerations

Several topics relating to a potential innocence commission gave rise to significant discussion with the Task Force. Policy decisions on each of these points would affect the fundamental structure and authority of any commission. To that end, the Task Force recommends the General Assembly consider the following issues in the enactment of any legislation establishing an innocence commission.¹

A. *What does it mean to “establish innocence?”*

The question of establishing innocence is fundamental to the mission of any post-conviction extraordinary relief — which is what an innocence commission represents. Some Task Force members, noting that the fact of conviction has already required either a guilty plea or a jury’s verdict, believe that “innocence” requires proof that the defendant was not the perpetrator of either the offense of conviction or another offense related to the criminal event alleged in the underlying case. However, others voiced the difficulty of proving a negative and believe that this standard should also be met when the three-judge panel, considering all evidence presented by the commission, concludes that no reasonable juror would be able to find the defendant guilty of the offense of conviction beyond a reasonable doubt.

The North Carolina Innocence Commission, the only such commission in the United States, is limited by statute to reviewing claims of factual innocence. As defined in North Carolina, a claim of factual innocence means a claim on behalf of a living person convicted of a felony in the General Court of Justice of the State of North Carolina, asserting the complete innocence of any criminal responsibility for the felony for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief. An examination of some exonerations by the North Carolina Commission would suggest that the Commission might utilize a broader definition than a strict reading of the statute would suggest.

B. *Who can refer cases to an innocence commission?*

The Task Force discussed at length practical and philosophical considerations relating to the issue of who can refer cases to an innocence commission. Some Task Force members supported a limitation on the referral of innocence claims to prosecutors and the judiciary. Conversely, other members of the Task Force supported allowing any defendant to directly submit a claim directly to the Commission.

¹ It should be noted that if Task Force members offer testimony with respect to enabling legislation considered in the General Assembly in the future, that testimony represents their individual positions and not those of the Task Force.

It should be noted that North Carolina addressed this issue by bifurcating the submission of claims. Under North Carolina law, only innocence claims for certain serious felony convictions can be directly submitted to the Commission by the claimant. Claims of innocence relating to all other offenses must be referred to the Commission by a court, a State or local agency, or the claimant's counsel.

C. What circumstances will justify an inquiry by the commission?

There was a lack of consensus among the Task Force members about the quantity and quality of information necessary to trigger a commission's review of a conviction. There was agreement that the commission's purpose is not simply to review the same evidence presented at trial and then second-guess a jury's verdict. Similarly, there was agreement that new evidence, unavailable to the defense at trial, which credibly establishes that the defendant was not the perpetrator of any criminal offense (e.g., DNA evidence that identified a different perpetrator who then confessed to the offense) would justify the commission's inquiry. But between these two poles, there was a lack of agreement regarding at least three important questions: first, the extent to which evidence that may have been available at trial but not presented to a factfinder can be the basis for an application to the commission; second, the extent to which evidence of innocence must be verifiable; third, the extent to which evidence of innocence must be completely exculpatory as opposed to compelling a reduction in the offense of conviction.

Discussion

After some minor changes were made to correct typographical errors and "factfinder" was substituted for "jury" in Section C of the "Additional Considerations," Judge Zmuda opened the meeting to discussion of the draft recommendation.

Discussion included the following:

Effect on Postconviction Processes

- Douglas Dumolt felt that lack of consensus led to the creation of a recommendation that is too broad and vague. He said that Attorney General Dave Yost did not have time to fully vet the recommendation but nonetheless took issue with the idea that it could create a broad postconviction statute and an additional postconviction remedy. He suggested that additional time should be taken to consider the recommendation.
- Judge Selvaggio expressed concern about the statement that an innocence commission would "supplement, not replace, existing post-conviction mechanisms for challenging a conviction." If the commission were able to consume evidence that could not be used for other proceedings later, this could not be seen as supplementing those proceedings.

- John Martin responded that the intention of the recommendation is that the innocence commission’s process would begin after the conclusion of any proceedings under the postconviction statute or Criminal Rule 33. He said that the recommendation’s language allowing the commission to take temporary possession of evidence would preclude consumptive testing.
 - Dumolt explained that North Carolina’s Commission usually acts as a “safety valve” to be used after exhausting all other remedies due to its narrow focus. He thought that concerns about the recommendation for Ohio being a duplicate process would be legitimate since it is somewhat broader.
 - Judge Selvaggio suggested that the phrase “run parallel to” be used in place of “supplement.”
 - Judge Zmuda did not think the parallel phrase would work, since it would imply that the processes would run concurrently. In his view, the requirement that an applicant waive their Fifth Amendment rights would ensure that this process would not replace existing postconviction remedies because it would only be used at the conclusion of those other processes.
 - Martin suggested that the word “supplement” could be removed entirely so that the sentence would read “An innocence commission would not replace existing post-conviction mechanisms for challenging a conviction.”
 - Mark Godsey suggested that language could be added to explain that the commission process would serve as a safety valve at the conclusion of postconviction proceedings.
 - After consideration, Judge Selvaggio decided that the current language including “supplement” would work since it implies that the commission process does something completely outside of existing postconviction proceedings.
- In Judge Pierre Bergeron’s view, this recommendation would not interfere with the existing postconviction processes. He thought that spending more time tweaking the exact language would not be useful since the General Assembly would debate these issues at a later date anyway.
 - Judge Zmuda asked for any further objections to the current language of the recommendation. None were raised and it was decided that the Task Force would move forward with this version of the recommendation.

Vote on Modified Recommendation for Ohio Version of North Carolina Innocence Inquiry Commission Model

Dumolt moved to delay the vote on the recommendation so that members could take more time to vet the language. The motion was not seconded.

Judge Bergeron moved to approve the draft Recommendation for an Ohio Innocence Commission for inclusion in the final report and recommendations. Tim Young 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
Meredith O'Brien: Yes
Sheriff Tom Riggenbach: Yes
Judge Nick Selvaggio: Yes
Tim Young: Yes
Judge Gene Zmuda: Yes

Scheduling

Judge Zmuda asked members if they felt there were any issues left to be addressed before beginning to draft the final report and recommendations.

- Dumolt suggested that the Task Force spend more time addressing ineffective assistance of trial counsel since it is a significant contributing factor to wrongful convictions.
 - Godsey and Young responded that they would love to address the lack of funding and lack of training that leads to ineffective assistance of counsel but that these are systemic issues that go far beyond wrongful-conviction cases. They did not feel that it would be within the scope of the Task Force's work to address them.
 - Dumolt suggested that the report could at least make note in the report of the data on ineffective assistance of counsel's impact on wrongful convictions.
 - Judge Selvaggio suggested that the report also compare the data on ineffective assistance of retained counsel versus appointed counsel.
 - Judge Zmuda agreed that these topics could be addressed in the report without making any specific recommendation.

Judge Zmuda explained that he and support staff would now begin drafting the final report. The report will be forwarded to members before the end of the year and a meeting will then be held for discussion and voting.

The date of the next meeting of this Task Force is to be determined.