THE SUPREME COURT *of* OHIO

TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

April 16, 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. Rocky Coss
Highland County Common Pleas Court

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

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.
Office of the Governor

Approval of March 19, 2021 Meeting Minutes

Task Force Chair Judge Gene Zmuda opened the meeting by requesting approval of the March 19, 2021 meeting minutes. Justice Michael Donnelly moved to approve the minutes and the motion was seconded by Meredith O'Brien. The minutes were then passed unanimously by a show of hands.

News Related to Wrongful Convictions

Judge Zmuda pointed members to the recent decision in *State v. Sutton*, 8th Dist. Cuyahoga Nos. 108748 and 108750, 2021-Ohio-854, in which the Cuyahoga County Court of Appeals reversed the trial court's decision, vacated the appellants' convictions, and remanded the case for new trial.

He asked Joanna Sanchez, who represented appellants, for any updates on the case.

Sanchez responded that the State had filed a motion for reconsideration, which was denied. The proceedings in the trial court are currently stayed pending the State's possible appeal to the Supreme Court of Ohio, she said.

Discussion on Potential Changes to Rules and Statutes

Discussion included the following:

Proposed Criminal Rule 33.1

- Justice Donnelly presented to the Task Force a new version of Rule 33.1 drafted by him, Judge Pierre Bergeron, and other members.
    - Justice Donnelly explained that this new version of the rule aims to address some concerns raised by members from the Ohio Public Defender and the Ohio Innocence Project at the last meeting about the potential for creating a standard of actual innocence that could not realistically be met. Thus, "clear and convincing evidence" was replaced with "relevant and admissible evidence" and language requiring new evidence only to undermine the theory of guilt used to convict was used to avoid creating a burden to prove innocence.

- Justice Donnelly said the rule would create a path for claims of actual innocence with reduced procedural barriers, provide guidance to trial judges on when a hearing should be held, and allow nonfrivolous claims to be identified, tracked, and heard on their merits.

- Douglas Dumolt stated that he did not feel this version of the proposed rule would receive broad stakeholder support. While the rule would likely be well received by defense attorneys and some members of the judiciary, Dumolt expected the rule to be met with opposition from the Ohio Attorney General and most other law-enforcement-related entities. He said this version of the rule seemed to be too far removed from the concept of actual innocence and would provide an additional "bite of the apple" to those looking to address purely procedural claims.

    - Justice Donnelly acknowledged Dumolt's concerns as valid and said they were considered in the drafting process. Even so, Justice Donnelly felt that this rule provides the mechanisms to weed out non-actual-innocence claims while still reducing barriers for those claims that have merit.

    - Judge Zmuda asked that Dumolt provide specific modifications to the rule to be considered going forward.

Rule 33.1(A)

- Judge Nick Selvaggio expressed concern about the use of the word "undermine" as creating the perception that the rule would provide for a reexamination of reasonable doubt. He felt that the rule should state its purpose as an avenue for claims of actual innocence based on new evidence in order to avoid such confusion.

    - Justice Donnelly agreed with the need to define the rule as a path for claims of actual innocence but felt the language about undermining the theory of guilt was still needed to account for claims such as those based on new scientific standards. Such evidence could not *prove* a person's innocence but would undermine the conviction.

    - Judge Bergeron added that this language was used to satisfy concerns about creating too high a standard of innocence. He recognized, though, the need to balance that concern with the need to create a rule that would not apply to too broad a range of cases.

- Andy Wilson did not agree with the use of "reasonable and admissible evidence." He thought "clear and convincing" was not too high of a standard for new evidence to meet in cases where a person has already been convicted as guilty beyond a reasonable doubt.

    - Mark Godsey said this would create an even higher standard than what currently exists in Ohio. Ohio is already an outlier in its use of "strong probability of a different outcome" when most states use "reasonable likelihood of a different outcome." The addition of "clear and convincing evidence" would actually hurt those seeking actual-innocence claims, he said, which is not what the Task Force set out to do. He added that someone

who successfully moves under this rule would only be granted a new trial and not be declared innocent, so there is no need to create such a high standard.

- John Martin suggested that this section could be revised to read:

  "Grounds. A new trial may be granted on motion of the defendant if the defendant produces relevant and admissible evidence that, had it been introduced at trial, presents a reasonable likelihood that the trier of fact would not have returned a verdict of guilty of the offense of conviction."

  He said this would eliminate the vaguer language that could be interpreted differently by different judges in different cases.

  - Judge Selvaggio suggested that "presents a reasonable likelihood of acquittal" be used instead.

  - Godsey agreed with these suggestions.

- Dumolt suggested the following language be used:

  "Grounds. A new trial may be granted on motion of the defendant if the defendant produces evidence not previously considered, that demonstrates by clear and convincing evidence that the defendant did not commit the offense for which they were convicted."

- Godsey suggested that some language could be inserted requiring an attorney to make a statement of their good-faith belief in their client's innocence in order to satisfy some of the members who were concerned about the rule being used for non-actual-innocence claims. This would not affect the work of OIP, he said, as they do not accept cases except those in which they believe the person is actually innocent. Godsey thought that OPD and others may take issue with such a requirement, though.

  - Dumolt responded that he was not concerned about the cases coming from OIP and OPD but the cases coming from other bad-faith actors. He felt this rule could create a perverse incentive for such people to pressure victims for recantations and employ the help of dishonest experts. Even so, he thought a requirement such as the one Godsey suggested would infringe upon a person's right to file pro se.

Rule 33.1(C)

- Judge Selvaggio was concerned that (C)(2) did not include requirements for the qualifications of appointed counsel. Since cases that would fall under this rule would require the services of an experienced attorney, he suggested that the rule either define the required qualifications or mandate that indigent movants' cases go through OPD or OIP once a judge decides to appoint counsel. For rural counties, Judge Selvaggio said, the second option would be helpful since qualified attorneys may not be available.

- Judge Zmuda responded that the rule simply provides that a judge *may* appoint counsel. In the case of a rural county, the judge may look to OPD and the rule does not prevent them from doing so. In terms of qualifications, OPD sets experience standards for appointed counsel that are tied to reimbursement. Such a standard for this type of case does not yet exist, but that is something that can be pursued outside of the language of this rule, he said.

- Judge Rocky Coss suggested that (C)(2) be merged into (C)(3) so that counsel may be appointed only after the determination has been made that a claim is not patently frivolous.

    - Judge Bergeron and Justice Donnelly agreed with this suggestion.

    - Dumolt suggested that a modification of the following language from the postconviction-petition statute be added to this section so that counsel is only appointed, and a hearing is only granted, after this review:

        > "Before granting a hearing on a petition filed under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs."

Rule 33.1(D)

- Judge Selvaggio requested clarification on Section (D) of the rule:

    > "Evidentiary Hearing. The court shall hold an evidentiary hearing on a motion under this section unless the defendant's motion is patently frivolous on its face. "Patently frivolous" is defined as offering no new evidence which could be tested at a hearing as to its credibility and the degree to which it undermines the theory of guilt used to convict. After the hearing, the court shall promptly issue a decision articulating the court's reasoning that supports the court's decision."

  He felt that it was unclear if the last sentence referred to the decision to declare a claim patently frivolous or the decision on the hearing on the motion for new trial.

    - Judge Zmuda responded that, with the current language, it could be either or both. He suggested that the language be modified to remove "after the hearing" and require that a

court issue findings of fact and conclusions of law with any decision disposing of a motion under the rule.

Rule 33.1(F)

- Judge Selvaggio raised multiple issues with Section (F). He felt that its language would exclude most rural judges who operate in single-judge or two-judge courts. This could create different standards for those who live in rural counties and those who live in larger urban counties. He went on to point out that in cases of bias or conflict, a new judge would be appointed by the Ohio Supreme Court, not by an administrative judge.
    - Judge Stephen McIntosh added that this section would also create an issue for urban counties. The misconception already exists that administrative judges can appoint new judges when parties do not agree with their decisions, he said. Judge McIntosh thought that a motion filed under this rule should be heard by the original judge, unless the judge is not able to be fair and impartial. In which case, the movant could file an Affidavit of Disqualification.
    - Wilson also felt this section was problematic and could create a potential for forum shopping.
    - Dumolt added that the current language of Section (F) simply says a new judge shall be appointed upon motion of the defendant without providing any basis for doing so.
- Judge Zmuda concluded that there seemed to be enough consensus about the issues created by this section of the rule to warrant its complete removal.

Rule 33.1(G)

- Dumolt asked whether a summary dismissal would be considered an appealable order under this rule.
    - Godsey felt that such dismissals should be appealable since judges often dismiss cases without fully considering their merits. This right to appeal is also included in the existing Criminal Rule 33, he said.
    - Sanchez agreed that there needs to be a right to appeal. Based on research done by OPD, a significant number of Ohio's known wrongful conviction cases were initially dismissed without a hearing and later won relief on appeal, she said.

- Dumolt added that the appointment of counsel could also lead to appeals based on ineffective assistance of counsel if the rule does not specifically prohibit them.

- Judge Zmuda asked members if they felt Section (G) should allow for appeal of any order disposing of the motion for new trial, whether that is a summary dismissal, an order entered without a hearing, or an order entered after a hearing, etc.

    - Justice Donnelly responded in the affirmative — any decision disposing of the motion for new trial should be appealable.

    - Dumolt thought a clarification should be added that any decision *on the merits* would be appealable so that dismissals on purely procedural grounds are not appealed if they can simply be filed again.

Proposed Rule 33.1 and Lesser Offenses

- Martin asked for clarification on the rule's application to lesser-included offenses. Would someone who believes they are innocent of the crime of which they were convicted but guilty of a lesser offense be able to pursue a claim under this rule?

    - Dumolt agreed that this should be clarified but added that there could be situations in which the distinction between the two crimes would make no difference in terms of sentencing. In those cases, would it make sense to hold another trial?

    - Judge Selvaggio thought that such cases should fall under the existing Rule 33. Rule 33.1 should exist only as an avenue for those who are totally innocent, not for those who claim some legal issue in the way they were charged and sentenced, he said.

    - Justice Donnelly said that the issue Martin described should be addressed in the direct appeal. An actual innocence case is one in which the person did not commit the act for which they convicted, not one in which they committed the act but were not sentenced correctly.

    - Martin argued that such an issue would not be able to be addressed in the direct appeal if the evidence did not come to light until years later. A person should have the ability to pursue this type of claim without the procedural barriers in Rule 33, he said.

Next Meeting Date – Friday, May 7, 2021 from 10:00 a.m. to 12:00 p.m.

Judge Zmuda told members that he and support staff would modify Proposed Rule 33.1 based this meeting's discussion. The new language will be distributed prior to the May 7 meeting, where a vote will be held.

Judge Zmuda also asked that members submit any language modifications to R.C. 2953.21 and 2953.23 for discussion at the next meeting.

The next meeting of this Task Force is scheduled for May 7, 2021, from 10:00 a.m. to 12:00 p.m.