

A large, stylized white graphic on a black background. It features a scale of justice with a single pan hanging from a horizontal beam. Below the scale, there is a sunburst or starburst shape with several sharp points radiating outwards. A large, thin white arc curves around the left side of the scale and the sunburst.

Report and Recommendations

*The Task Force on
Conviction Integrity and
Postconviction Review*

JULY 2022



Report and Recommendations of the Task Force on Conviction Integrity and Postconviction Review

July 2022

Maureen O'Connor

CHIEF JUSTICE

Sharon L. Kennedy

Patrick F. Fischer

R. Patrick DeWine

Michael P. Donnelly

Melody J. Stewart

Jennifer Brunner

JUSTICES

Stephanie E. Hess

INTERIM ADMINISTRATIVE DIRECTOR

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Letter from the Chair

The concept of innocent until proven guilty is a foundational cornerstone of our American judicial system. From this concept flows the various protections our system of justice promises, with the goal that should someone accused be convicted, there is certainty the conviction is reliable.

But what of those individuals who were convicted of crimes for whom it can be demonstrated did not, in fact, commit the crime? This Task Force was created to look at wrongful convictions in Ohio, analyze current practices in postconviction proceedings, and make recommendations to improve the system's ability to achieve justice in this area.

The work of the Task Force was wide-ranging. It included (1) reviewing national data on the causes of wrongful convictions, (2) analyzing current Ohio postconviction statutes and criminal rules with an eye toward how they impact the way wrongful convictions cases are handled, (3) hearing from national experts in this field so as to educate the Task Force on how other jurisdictions address wrongful convictions, and (4) examining the models that courts and states have adopted to address the handling of requests for redress after a wrongful conviction.

Our report contains recommendations for changes to the Ohio Revised Code and the Rules of Criminal Procedure and Professional Conduct, as well as recommendations on training and education of practitioners to reduce the likelihood of wrongful convictions. The Task Force is also recommending the adoption of a statewide model for wrongful-conviction practice to supplement the postconviction practice in Ohio. The recommendations submitted in this report follow a lengthy and robust discussion from the excellent Task Force members assembled. The broad section of interests found in the criminal-justice system were well represented, contributing to professional and energizing debate. All meetings were conducted by Zoom, and with the exception of the original meeting, have been recorded and archived. The Task Force conducted vigorous discussion and debate on many proposals and ideas, which resulted in specific proposals being voted on by the Task Force as reflected in this report.

I fervently believe the Task Force report and recommendation provides our state with a patchwork of improvements that, if fully realized, would reduce the possibility of wrongful convictions and create procedural safeguards for the prompt adjudication of wrongful-conviction claims, thereby improving the manner in which justice is dispensed in Ohio.

I wish to publicly express my thanks and gratitude to Chief Justice Maureen O'Connor, whose vision and drive to improve the manner and method of Ohio court functions resulted in the creation of this Task Force. I am incredibly humbled by the Chief Justice's request to me to serve and chair this Task Force.

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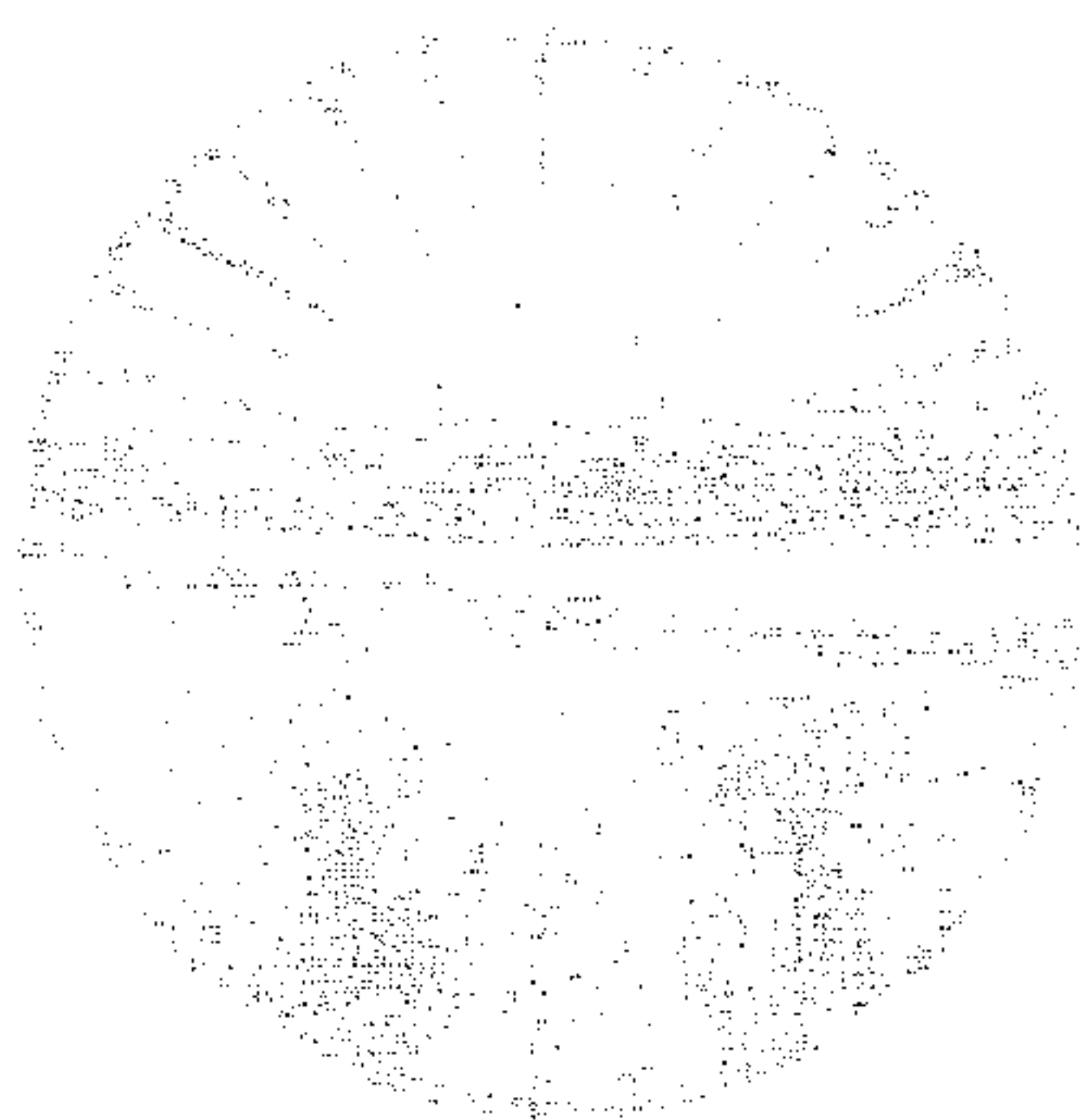
I am equally honored to have had the pleasure and opportunity to work with an incredibly talented group of individuals with a diverse array of interests, all of whom demonstrated their experience, dedicated professionalism, and willingness to explore innovative approaches. A special thanks to Justice Michael P. Donnelly, as ex officio member, who attended meetings of the Task Force and provided invaluable insight and comments on the issues and recommendations that were discussed and vetted.

I would likewise be remiss if did not also publicly acknowledge and thank the staff of the Ohio Supreme Court, who assisted the Task Force by providing guidance, resources, and support for the Task Force and its work. These professionals kept the Task Force "on task" by helping frame where we were, where we are, and where we are going. Quite frankly, the Task Force could not have completed its work without such vital assistance. I thank you, again!

Finally, I must publicly recognize three members whose commitment and competence assisted me and the Task Force above and beyond expectations. Thank you to Justin Kudela, Esq. the initial Staff Liaison; Kathryn Patterson, former Assistant Staff Liaison; and Bryan Smeenck, Esq., the current Staff Liaison. Though Justin and Kathryn have each moved on to bigger and better career opportunities, their early guidance helped establish the framework for the Task Force, shaped how we proceeded, and proved to be the right mix for productive, though-provoking meetings, which led to the recommendations found in this report. As for Bryan, who came on board midstream, he proved you can change a horse in midstream – though I would not recommend it – and he picked up the reins seamlessly, so as not to delay the productive work of the Task Force, culminating in this report and recommendation. All three worked tirelessly on the Task Force in addition to fulfilling their regular duties as staff members of the Ohio Supreme Court, always prepared to help and offer suggestions. Many thanks to Justin, Kathryn, and Bryan!

Sincerely,

Judge Gene Zmuda



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TASK FORCE ON CONVICTION INTEGRITY
AND POSTCONVICTION REVIEW

Judge Gene Zmuda

CHAIR

Sara Andrews

Judge Pierre Bergeron

Judge Rocky Coss

Douglas Dumolt, Esq.

NONVOTING DESIGNEE

Senator Theresa Gavarone

Mark Godsey, Esq.

Representative David Leland

John Martin, Esq.

Judge Stephen McIntosh

Elizabeth Miller, Esq.

NONVOTING DESIGNEE

Judge Lindsay Navarre

Pierce Reed, Esq.

NONVOTING DESIGNEE

Sheriff Tom Riegenbach

Joanna Sanchez, Esq.

NONVOTING DESIGNEE

Judge Nick Selvaggio

Andy Wilson, Esq.

Attorney General Dave Yost

Timothy Young, Esq.

Justice Michael Donnelly

EX OFFICIO MEMBER

Justin Kudela, Esq.

INITIAL STAFF LIAISON

Bryan M. Smeenk, Esq.

FINAL STAFF LIAISON

Kathryn Patterson

ASSISTANT STAFF LIAISON

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Changes to Rules and Statutes

Adopt Crim.R. 33.1

- To allow for a new trial based on evidence not proffered at trial or in any pretrial proceedings.
- To specify there is no time limit to file such a motion.
- To provide for the procedural requirements of such a motion, including discovery and hearing-related requirements.
- To identify types of evidence that may satisfy the requirements for a new trial.
- To require rulings to include written findings of fact and conclusions of law.
- To provide that rulings on such motions are final, appealable orders.

Amend R.C. 2953.21 and 2953.23 (Postconviction-Relief Petitions)

- To extend the possibility of obtaining discovery to non-death-sentenced defendants.
- To import federal habeas corpus principles for second and successive petitions.
 - Specifically, the amended statute would incorporate cause-and-prejudice and manifest-injustice exceptions.
- To confirm that review of petitions for postconviction relief are viewed in the light most favorable to the petitioner.
- To expand the time in which a petitioner may amend the petition.
- To establish an *ex parte* process in which a non-death-sentenced petitioner may obtain appointed counsel.

Amend R.C. 181.25 (Data Collection)

- To request that the Ohio Criminal Sentencing Commission collect more detailed data on felony criminal appeals under R.C. 2953.08 and post-conviction-relief proceedings.
- To remove the requirement for collecting data on the cost of criminal appeals.

Amend Ohio Admin.Code 120-1-10 (Appointment Systems and Attorney Qualifications)

- To require appointed attorneys doing postconviction-relief work to complete four hours of CLE related to postconviction practice, investigation, or contributing factors to wrongful convictions.
- To apply to both juvenile and adult postconviction-relief appointments.

Amend Prof.Cond.R. 3.8 (Special Responsibilities of a Criminal Prosecutor)

- Probable cause and a good-faith belief in a defendant's guilt would be required to continue a prosecution.
- Would require prosecutors to take specific actions when they learn of previously undisclosed, credible, and material evidence that creates a reasonable likelihood that the defendant is not guilty.
- Would require a prosecutor who knows of clear and convincing evidence of innocence to seek to remedy the conviction.

Create a Statewide Independent Innocence Inquiry Commission

- The General Assembly should create an Innocence Inquiry Commission similar to North Carolina's.
- The commission should be independent, neutral, investigatory in nature, and properly funded.
- The commission should have broad investigatory powers, including subpoena power to compel the production of evidence and testimony.
- The commission should have the power to possess, examine, and test physical evidence.
- Commissioners should be drawn from a cross-section of the criminal-justice system and community.
- Commission staff should be independent, nonpartisan professionals who are insulated from political pressure.
- The commission's proceedings should be confidential until a hearing is called or inculpatory or exculpatory evidence is discovered.
- Matters should be heard and decided by three-judge panels composed of sitting appellate-court judges from outside the appellate district in which the case was prosecuted.

Work of the Task Force

Participants

Initially, the Task Force roster included multiple county prosecutors and the head of a county's conviction-integrity unit. At the outset, the Task Force sought to be inclusive, but nearly all county prosecutors declined to participate in any meetings, discussions, or recommendations¹. On behalf of Ohio prosecutors, the Executive Director of the Ohio Prosecuting Attorneys Association (OPAA) issued a news release in August 2020, indicating the Association's participation would be limited to its submission of adopted "best practices for conviction review" and a "propose[d] change to Rule 3.8 of the Ohio Rules of Professional Conduct regarding the special responsibilities of a prosecutor." (Appendix A.)

Despite requests to the Association to reconsider its position (Appendix B), and individual invitations to each county's prosecutor, neither the Association nor a majority of county prosecutors participated as part of the Task Force, with the exception of prosecutors from Franklin and Stark Counties.

Timeline and Methodology

Initially, the Task Force was set to issue a report of its findings and recommendations to the chief justice and the justices of the Supreme Court by Dec. 31, 2020. Due to the COVID-19 pandemic, the Task Force did not hold its first meeting until Sept. 17, 2020. All Task Force meetings were held over Zoom, and the deadline for submission of its recommendations was extended. Thus, the Task Force began its work.

The Task Force adopted the following methodology for evaluating Ohio's postconviction processes and recommending changes to improve those processes:

1. Take inventory of the postconviction law in Ohio and the work being done to address wrongful convictions.
2. Compare Ohio's practices to those in other states.
3. Evaluate and recommend potential improvements to Ohio's conviction-integrity processes, e.g., legislation, rule changes.

Issues the Task Force Considered Addressing

The Task Force then brainstormed topics that they wished to address, after

¹ There are two exceptions: David Ingram, Chief Counsel of Special Units for Franklin County Prosecutor Gary Tyack attended multiple meetings, and Stark County Prosecutor Kyle Stone attended the October 1, 2021 Task Force meeting.

thorough consideration and discussion of potential issues. These topics were organized and addressed within broad subject "models" as follows:

Wrongful-Conviction-Review Models

General (CIU, Statewide CIU, Innocence Commission)

- Identify the key facets of an effective Conviction Integrity Unit (CIU) in terms of promoting justice, transparency, and public trust.
- Examine and define the necessary components of an "effective" CIU (instead of creating one just to say "we have one").
- Address the fact that legitimate claims of innocence are disregarded because they are not raised in a timely fashion and consider having an independent board review these types of cases.
- Include representatives from the victim/survivor community and people with expertise in forensic science.
- Evaluate and address the impact of faulty science in wrongful-conviction cases.
- Create a vetting process for postconviction motions for a new trial that identifies and prioritizes claims of actual innocence and further identify those motions that clearly and logically warrant a full hearing to determine their merits.
- Evaluate the potential benefit of an independent, freestanding innocence commission similar to the commission enacted in North Carolina.
- Expand postconviction access to evidence for testing.
- Establish independent conviction-review units (CRU) with the involvement of experienced prosecutors and investigators who were not involved with an offender's case at the trial level or on appeal
- Clearly define the purpose of a conviction-review process. Define what qualifies as a wrongful conviction. Define the review process. Set standards of review for applications that are accepted for investigation.
- Establish multijurisdictional agreements between established conviction-review units and jurisdictions where the creation of an independent unit is not feasible.
- Improve retention of good public defenders and prosecutors.

Misconduct

- Address official misconduct, primarily by prosecutors and police, which accounts for 54% of wrongful convictions.

Modifications of Statutes and Rules

General

- Contemplate whether statutory revision is necessary for data and information collection, evaluation, and fiscal-impact assessment.
- Amend current evidentiary rules, which often allow junk science to continue to be used in courtrooms and incentivize decision making that falls short of achieving justice.
- End cash bail to reduce the risk of people pleading guilty to crimes they did not commit and to prevent incarceration due only to inability to pay. Bail being improperly used as a means to effectuate a safety hold prevents individuals who are factually innocent from being able to effectively assist in their own defense.
- Consider whether a motion alleging witness recantation should cause a hearing to be mandated with de novo review applied by the court to determine if the new testimony is both credible and outcome determinative.
- Create ethical rules to prohibit “dark pleas” – when the state offers the defendant the opportunity for freedom in exchange for dropping the motion for a new trial before a court hearing is held or ruling is released.
- Assess potential statutory change to allow claimants to raise new arguments to address advancements in scientific forensic evidence that would undermine the state’s theory of guilt that was used to convict the defendant prior to the acceptance of such scientific developments.
- Evaluate whether the proposed rule changes provided by the OPAA are in compliance with the current Model ABA Rules governing a prosecutor’s ethical obligations and identify any states that have adopted stronger measures.
- Examine the process of how crimes are investigated by law enforcement, reviewed by county prosecutors, presented to grand juries, prosecuted postindictment, and defended through the trial process.
- Examine the plea process under Crim.R. 11 to ensure that guilty or no contest pleas are not contributing to wrongful convictions. Does Marsy’s Law impede plea bargaining?
- Determine if, in multidefendant cases, present joinder and severance provisions are adequate (Crim.R. 8, 14). Is Evid.R. 404(B) contributing to wrongful convictions? Is Evid.R. 807 (child-abuse hearsay exception) contributing to wrongful convictions?
- Amend the Ohio Supreme Court Rules of Practice so that raising an issue on appeal to the Supreme Court of Ohio will no longer be a requirement

for exhaustion in state court prior to initiating federal habeas corpus litigation.

- Create a right to discovery at the postconviction level and ban local rules precluding contacting jurors after a verdict.
- Revise the postconviction-relief statutes, e.g., R.C. 2953.21, to expand relief. Time for filing? Bases for relief (e.g., new Supreme Court of Ohio decision)? Actual innocence as an independent basis for relief? Eliminate ban on successor petitions?
- Create specific statutory relief for actual-innocence cases and/or recognition of a writ of coram nobis at the trial-court level. Should statutory provisions regarding immunity for law-enforcement officers and/or prosecutors be amended?
- Address major obstacles posed by Crim.R. 33 for counsel representing clients asserting innocence and wrongful-conviction claims during postconviction proceedings.
- Consider proposing a change to Crim.R. 33(B) to make clear that there is no time limit in which to file a motion for new trial.
- Consider whether counsel for people raising innocence claims would be served better by a clear deadline of two years from the date on which the convicted person discovered new evidence, without need to explain the delay. For claims outside of the two-year window, there should be a balancing test in which the state can object based on prima facie showing of prejudice, at which point the convicted person must establish that the delay was unavoidable and the need for the delay outweighs the prejudice to the state.
- Include language in Crim.R. 33(A)(6) that expressly provides for shifting-science claims to be brought in a motion for a new trial.
- Evaluate a motion for a new trial in a criminal case in Ohio under the "reasonable probability" standard, rather than "strong probability."
- Expand postconviction access to evidence for testing.

Postconviction-Relief Petitions

- Consider whether the postconviction process would be aided by the use of magistrates.
- Address the fact that legitimate claims of innocence are disregarded because they are not raised in a timely fashion and consider having an independent board review these types of cases.
- Establish a stand-alone actual-innocence claim, through which a person may obtain relief based on their innocence (and not tied to either newly discovered evidence or a violation of their constitutional rights).

- Create a vetting process for postconviction motions for a new trial that identify and prioritize claims of actual innocence and further identify those motions that clearly and logically warrant a full hearing to determine the motion's merits.

Right to Counsel

- Create a right to counsel in nonfrivolous postconviction cases.
- Create a program for junior lawyers to take on postconviction cases pro bono, with training provided by the Ohio Public Defender (OPD), Ohio Innocence Project (OIP), or a more senior lawyer.
- Increase defense representation at both trial and postconviction stages.
- Increase funding for defense investigators and experts.
- Create a schedule of compensation for wrongfully convicted individuals without artificial distinctions regarding the reason or procedural step causing the wrongful conviction.
- Create a schedule of attorney fees allowable in the Ohio Court of Claims to assist in bringing these claims on behalf of the wrongfully convicted.

Misconduct

- Consider requiring all interrogations to be videotaped and creating increased protections regarding interrogations of juvenile suspects.
- Consider establishing stronger discovery sanctions for failure to turn over exculpatory evidence prior to trial.
- Address official misconduct, primarily by prosecutors and police, which accounts for 54% of wrongful convictions.
- Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h), requiring the prosecution to disclose exculpatory evidence discovered after conviction and requiring the prosecutor to remedy a conviction where there is clear and convincing evidence the defendant is innocent.
- Prohibit the trial prosecutor from litigating postconviction petitions, motions for new trial, and other posttrial motions where it has been alleged they violated Brady or engaged in other prosecutorial misconduct.
- Eliminate use of the Reid technique (and similar interrogation techniques).
- Require the presence of an attorney before a juvenile may be interviewed or interrogated.

Training and Education Initiatives and Data Collection

General

- Create program for junior lawyers to take on postconviction cases pro bono, with training provided by OPD, OIP, or a more senior lawyer.
- Create process for data collection and subsequent evaluation to achieve, at minimum, the statutory obligations in R.C. 181.25(A)(2)(c) and R.C. 181.25(A)(5).
- Include representatives from the victim/survivor community and people with expertise in forensic sciences.
- Address and eradicate the prevalent myth that "everyone" who is convicted in the criminal-justice system eventually claims that they are actually innocent.
- Examine the process of how crimes are investigated by law enforcement, reviewed by county prosecutors, presented to grand juries, prosecuted postindictment, and defended through the trial process.
- Require training for law-enforcement officers on the importance of preserving and memorializing evidence that appears nonconsequential.
- Increase training for law-enforcement officers and prosecutors on investigatory bias, cultural bias, including eyewitnesses and investigators, confirmation bias.
- Consider whether training is needed with respect to patient interviewing to ensure reliability with respect to descriptions of persons and places (as opposed to the reporting of medical symptoms).
- Evaluate to what extent social agencies and law-enforcement agencies investigating the same matter be allowed to share information. Are social workers adequately trained with respect to bias? To what extent should social agencies have to comply with a defendant's privilege against self-incrimination and right to counsel?
- Increase training on the meaning of exculpatory evidence for prosecutors and their support staff.
- Evaluate whether juries receive adequate training on bias. Are courts employing informal procedures for excusing potential jurors in advance and affecting jury demographics?
- Consider creation of a specific continuing-legal-education prerequisite to be on a court-appointed list. Should there be more emphasis on *Brady* training? Should there be a mentoring system as prerequisite to appointments? Do the experience requirements for appointments need to be changed?

- Mandate forensic-evidence training (e.g., eyewitness identification, pattern evidence, ballistics, gunshot residue, fire investigation, etc.).
- Mandate implicit-bias training, including discussion of how implicit bias impacts the legal system and the overrepresentation of people of color among those who have been wrongfully convicted.
- Mandate confirmation-bias training with an emphasis on techniques to reduce or eliminate tunnel vision and confirmation bias.
- Improve retention of good public defenders and prosecutors.
- Mandate training on the prevalence of false confessions, risk factors, and appropriate interrogation techniques.

Misconduct

- Mandate *Brady* training to ensure prosecutors and police officers understand their duty to disclose exculpatory or impeachment evidence. Training should include discussion of official misconduct as a cause of wrongful convictions.
- Mandate *Brady* lists (lists of law-enforcement officers, lab examiners, and other agents of the State with credibility, honesty, or misconduct issues)

To fully address these issues and begin to improve the postconviction-relief system, the Task Force members knew that they must first fully understand it. Consistent with the second step of the methodology the Task Force adopted, the participants examined practices across the country. To that end, the Task Force reviewed a summary of wrongful-conviction task forces that exist nationwide following a presentation by then-staff liaison Justin Kudela. (Appendix C.)

Justice Michael Donnelly tasked interns Elliot Nash and Jordan Rowland with preparing and distributing to the members a memorandum providing background and analysis of Ohio's postconviction-review process. Additionally, Supreme Court Law Library research librarians, Michelle Graff and Rachel Dilley, researched and drafted a 50-state survey of the nation's postconviction-review processes. (Appendix D.) Task Force members examined these processes and organizations before delving into the improvement phase.

To begin the improvement phase of its work, the Task Force sought preliminary postconviction-review best practices from nationwide experts.

Presentations

John Hollway, Criminal-Justice Root Cause Analysis Expert (Oct. 22, 2020)

The first such expert was John Hollway, Associate Dean and Executive Director of the Quattrone Center for the Fair Administration of Justice at the University