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(ii) As used in division (J) (4) of this section, there is no "arguable merit" if the claim(s) is so lacking in basis or fact that it would not undermine confidence in the verdict.

(iii) Notwithstanding division (J) (4), a court may, in its discretion, appoint counsel for an indigent person who has not been sentenced to death at any time and whether or not a motion requesting counsel has been made.

*[Existing language unaffected by the amendments is omitted to conserve space]*

#### R.C. 2953.23

- (A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a ~~petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for~~ similar relief on behalf of a petitioner unless division (A) (1) or (2) of this section applies:

*[Existing language unaffected by the amendments is omitted to conserve space]*

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Like proposed Crim.R. 33.1, these amendments took shape over several meetings and involved significant discussion. Also like proposed Crim.R. 33.1, these proposed amendments were not unanimously recommended. The debate eventually whittled the proposed changes down to those discussed here.

The primary change to subdivision (A) extends the possibility of postconviction discovery to noncapital defendants. More broadly, the recommended changes as a whole delete most provisions limiting filings to death-sentenced defendants. But the petitioner must first make a good-faith effort to obtain Crim.R. 16-related discovery from prior counsel. This subdivision's revisions conform the time-for-filing requirements found in each subsection, which avoids the necessity of cross-referencing. The additions to R.C. 2953.21(A)(2) adopt procedures found in federal habeas corpus cases to address when petitioners may file second and successive petitions as well as petitioners who were prevented from discovering evidence suppressed by the prosecution or not discovered because of ineffective assistance of counsel. Specifically, the proposed changes borrow cause-and-prejudice and manifest-injustice exceptions from federal habeas corpus law.

One Task Force participant opposed extending discovery to all noncapital defendants. More than that, this participant opposed recommending statutory changes altogether, preferring instead for the Ohio Public Defender's Office and the Ohio Innocence Project to directly lobby the General Assembly. Another would have allowed discovery privileges to be extended only to those serving life sentences. A participant also strongly opposed noncapital discovery on the basis that it would create a lengthy process used to harass victims, witnesses, counsel, and judges. The answer in response was that discovery would only be granted if good cause is shown, and in such cases, the judge would likely appoint counsel. With appointed counsel, a previously pro se petitioner could not use discovery simply to harass others.

Though the discovery provision caused the most disagreement, participants registered concerns with other proposed revisions. For instance, a participant thought it duplicative to recommend codifying the existing right to file a petition based on the United States Supreme Court's or Supreme Court of Ohio's recognition of a new retroactive right. Another member thought it inefficient to introduce federal habeas corpus standards and procedures into state law. That person also expressed concern that this language eliminated meaningful timelines and raised res judicata issues. Among the potential inefficiencies was the lack of a proposed definition for *manifest injustice*, a term the participant thought too subjective.

In subdivision (F), the revision adds that the court must review the petition and related files and records "in the light most favorable to the petitioner" when determining whether relief is clearly inappropriate. And only when such relief is clearly inappropriate under that standard may the court deny a hearing on the

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issues. Conversely, when a petition is frivolous, relief is clearly inappropriate, and no hearing need be had. One participant contended that hearings are infrequent because frivolous petitions are common. For that reason, that person advocated against what they perceived as tipping the scale in the petitioner's favor.

Changes in subdivision (G) expand the time in which a petitioner – particularly a non-death-sentenced defendant – may amend their petition without leave of court. The changes also grant the prosecutor a reciprocal opportunity to respond after the petitioner files any amendment.

During the discussion of the amended-petition-related provisions, one participant expressed concern about extending rights in capital cases to all defendants and wondered whether extending rights should turn on sentence length. Another participant responded that the Ohio Public Defender's Office or other counsel would be unlikely to pursue a postconviction petition absent a lengthy sentence because of the time necessary to secure a remedy. But two other participants noted that irrespective of what counsel might do, plenty of pro se petitioners would still likely file.

Revisions to subdivision (J) would create an ex parte mechanism for appointing counsel for noncapital defendants whose postconviction petitions raise at least one claim with arguable merit or if the court otherwise exercises its discretion to appoint counsel. The ex parte nature of the request allows a defendant to obtain counsel to help develop their case without prematurely sharing that information with the prosecution. The proposal also provides courts with a guidepost for *arguable merit*. A claim lacks *arguable merit* if it "is so lacking in basis or fact that it would not undermine confidence in the verdict."

The discussion of the subdivision did not center on opposition to its provisions but rather on concerns about how to appoint defense attorneys with the specialized knowledge and experience to effectively pursue postconviction claims. Ohio Public Defender Tim Young shared that additional postconviction-training requirements would be recommend to the Ohio Public Defender Commission, which has rulemaking authority. Indeed, the Task Force's proposed revisions to Ohio Adm.Code 120-1-10 appear in Section (II) (A) below.

#### **Data Collection by the Ohio Criminal Sentencing Commission under R.C. 181.25**

In light of the Ohio Criminal Sentencing Commission's findings and experience that collecting accurate and meaningful data on the cost of appeals is unnecessarily difficult and of importance primarily to local interests, like county commissioners, it recommended instead that R.C. 181.25(A) (5) be amended to allow and direct the Commission to collect more detailed data related to felony appeals under R.C. 2953.08 and appeals of postconviction-relief proceedings.



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R.C. 181.25(A)(5)

Collect and maintain data ~~that pertains to the cost to counties~~ of the felony sentence appeal provisions set forth in section 2953.08 of the Revised Code, of the postconviction relief proceeding provisions set forth in division (A)(2) of section 2953.21 of the Revised Code, and of appeals from judgments entered in such postconviction relief proceedings. ~~The data so collected and maintained shall include, but shall not be limited to, the increase in expenses that counties experience as a result of those provisions and those appeals and the number of felony sentence appeals made, postconviction relief proceedings filed, and appeals of postconviction relief proceeding judgments made in each county under those provisions.~~ Data shall be collected by each appellate court and reported annually to the Sentencing Commission on January 15 of each year for the preceding year. Each court shall supply the data for the last full year prior to these amendments (e.g., if this is implemented in November of 2022, courts shall supply this information for 2021). If the last full year is 2020, please provide 2019 information as well.

Courts shall report the following information, per year, for each of the following types of appeals:

- All felony appeals, as set forth in section 2953.08 of the revised code
- Appeals of postconviction relief proceedings

Data points:

- Number of appeals filed
- Percent of total appeals filed
- Details about cases filed:
  - Number of convictions resulting from a trial
  - Number of convictions resulting from a plea
  - Convicted offenses (e.g., murder, robbery, assault, etc.)
  - Basis for postconviction relief
- Number of dispositions by disposition type:
  - Decision or opinion (one decision could contain more than one type)
    - Affirm conviction
    - Reversal of conviction

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- Remand for further proceedings (subset of reversal)
    - Dismissal
    - Stay
    - Other Terminations (specify): (e.g., not a final, appealable order)
  - Reasons for dismissing a postconviction relief appeal (e.g., the claim was procedural, no reliable evidence, application of the doctrine of res judicata, etc.)

Unlike the previous recommendations, this one received universal support and therefore minimal debate. On September 10, 2021, the then-present Task Force members voted unanimously to recommend the Ohio Sentencing Commission's recommended statutory amendment.

## Recommendations on Training and Education

### **Recommendations:**

- Update education requirements for appointment of counsel in postconviction cases under Ohio Adm.Code 120-1-10
- Modify Ohio Rule of Professional Conduct 3.8

### **Discussion:**

#### **Changes to the Public Defender's Administrative Code for Reimbursement**

In light of the Task Force's recommendation that R.C. 2953.21 be amended to include a provision allowing for the appointment of counsel in postconviction cases, participants from the Ohio Public Defender's Office suggested that the education requirements for appointment of counsel needed related updating. These requirements reside in Ohio Adm.Code 120-1-10, which governs appointment systems and attorney qualifications for reimbursement of county expenditures for appointed counsel.

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O.A.C. Rule 120-1-10 Appointment systems and attorney qualifications.

To qualify for reimbursement, attorneys and the systems used to appoint attorneys must meet the requirements of this rule.

*[Existing language unaffected by the amendments is omitted to conserve space]*

(J) Juvenile bindover cases. Where a case originated in juvenile court and was transferred to adult court, counsel must have:

(1) The requisite experience under this rule to be appointed to a juvenile case based upon the highest degree of the charge in the case; and either (2) The the requisite experience under this rule to be appointed to an adult case based upon the highest degree felony charged; or (3) Co-counsel co-counsel who meets the adult-case training and experience requirements must also be appointed.

(K) Juvenile cases.

*[Existing language unaffected by the amendments is omitted to conserve space]*

(6) Bindover and serious youthful offender cases. Where a petition to transfer to common pleas court or a motion for bindover proceeding has been filed, or where a serious youth offender proceeding has been initiated, counsel must have:

(a) The requisite experience under this rule to be appointed to a juvenile case based upon the highest degree of the charge in the case; and either (b) The the requisite experience under this rule to be appointed to an adult case based upon the highest degree felony charged; or (c) Co-counsel co-counsel who meets the adult-case training and experience requirements must also be appointed.

*[Existing language unaffected by the amendments is omitted to conserve space]*

(L) Adult appellate cases. For purposes of this rule, a case in which an Anders brief was filed may not be counted as prior experience.

*[Existing language unaffected by the amendments is omitted to conserve space]*

(6) Bindover and serious youthful offender cases. Where the case involves the appeal of a juvenile case transferred to common pleas



court or a serious youthful offender proceeding, counsel must have:

(a) The requisite experience under this rule to handle the appeal of a juvenile case based upon the highest degree of the charge in the case; and either (b) The the requisite experience under this rule to handle the appeal of an adult case based upon the highest degree of felony charged; or (c) Go-counsel co-counsel who meets the adult-case training and experience requirements must also be appointed.

(M) Juvenile appellate cases. For purposes of this rule, a case in which an Anders brief was filed may not be counted as prior experience.

*[Existing language unaffected by the amendments is omitted to conserve space]*

(3) Bindover and serious youthful offender cases. Where the matter involves the appeal of a case transferred to common pleas court or a serious youth offender proceeding, counsel must have:

(a) The requisite experience under this rule to handle the appeal of a juvenile case based upon the highest degree of the charge in the case; and either (b) The the requisite experience under this rule to handle the appeal of an adult case based upon the highest degree felony charged; or (c) Go-counsel co-counsel who meets the adult-case training and experience requirements must also be appointed.

(N) Adult postconviction. Where the defendant has been convicted of an offense, and counsel is appointed to represent the defendant in any stage of a postconviction relief petition or on appeal of the denial of a postconviction relief petition, within two years prior to the appointment, counsel must have completed a minimum of four hours of continuing legal education, certified by the Ohio supreme court commission on continuing legal education, in postconviction practice, investigation, or contributing factors to wrongful conviction, as well as one of the following:

(1) The requisite experience and training under this rule to serve as trial counsel for the underlying offense; or

(2) The requisite experience and training under this rule to serve as appellate counsel for the underlying offense.

(O) Juvenile postconviction. Where the child has been adjudicated of an offense, and counsel is appointed to represent the child in any stage of a postconviction relief petition or on appeal of the denial

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of a postconviction relief petition, within two years prior to the appointment, counsel must have completed a minimum of four hours of continuing legal education, certified by the Ohio supreme court commission on continuing legal education, in postconviction practice, investigation, or contributing factors to wrongful conviction, as well as one of the following:

(1) The requisite experience and training under this rule to serve as trial counsel for the underlying offense; or

(2) The requisite experience and training under this rule to serve as appellate counsel for the underlying offense.

(P) Adult community control violation. Where the defendant is charged with a violation of community control, counsel must have:

(1) The requisite training and experience under this rule to serve as counsel for the underlying offense; or

(2) Within the last year served as co-counsel in at least three community control violation proceedings; and (3) Within within the last two years, completed a minimum of six hours of continuing legal education, certified by the ~~supreme court~~ Supreme Court of Ohio commission on continuing legal education, in criminal practice and procedure.

(Q) Juvenile community control and supervised release violation. Where the juvenile is charged with a violation of community control or supervised release, counsel must have:

(1) The requisite training and experience under this rule to serve as counsel for the underlying offense; or

(2) Within the last year served as co-counsel in at least three community control or supervised release violation proceedings; and (3) Within within the last two years, completed a minimum of six hours of continuing legal education, certified by the ~~supreme court~~ Supreme Court of Ohio commission on continuing legal education, in juvenile delinquency practice and procedure.



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The primary proposed amendments affect subdivisions (N) and (O), which address adult-postconviction and juvenile-postconviction qualifications, respectively. The essentially identical changes to each subdivision would require that “within two years prior to the appointment, counsel must have completed a minimum of four hours of continuing legal education, certified by the Supreme Court of Ohio Commission on Continuing Legal Education, in postconviction practice, investigation, or contributing factors to wrongful conviction” along with the previously required offense-related trial or appellate experience.

During the discussion of these changes, Task Force participants raised two questions. One, a participant asked how the requirements are enforced. Enforcement takes place locally – the court making the appointment is responsible for ensuring that counsel meets the requirements. But if the Ohio Public Defender’s Office were advised that an attorney is taking appointments outside of their qualifications, the Public Defender would investigate. Two, a participant asked how the Public Defender arrived at four hours of continuing legal education. The Public Defender attempted to strike a balance between providing sufficient education to pursue postconviction claims without becoming cumbersome, especially in light of how difficult it may be to find longer courses that specifically address postconviction relief.

On August 13, 2021, the then-present Task Force members unanimously voted to recommend the changes to Ohio Adm.Code 120-1-10.

### **Changes to Professional Conduct Rule 3.8**

Task Force participants discussed whether to consider that Ohio adopt the American Bar Association’s Model Rule of Professional Conduct 3.8 (Appendix E.) as a modification to Ohio Rule of Professional Conduct 3.8. Model Rule 3.8 governs the special duties of a prosecutor. Ultimately, the Task Force agreed to take up the issue, and it recommends significant revisions above and beyond the ABA’s Model Rule language.

First, the Task Force vetted ABA Model Rule of Professional Conduct 3.8. It received general support. For instance, one participant found the changes to Ohio’s current rule to be minor and to fall within current practices, even if those practices are not currently codified in the rule.

Next, the Task Force reviewed a draft that incorporated portions of Model Rule 3.8 along with significant additions drawn from a law-review article<sup>4</sup> suggesting modifications to Model Rule 3.8. This draft received criticism both for not going

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4 Green, *Prosecutorial Ethics As Usual*, University Of Illinois Law Review (2003) ([www.illinoislawreview.org/wp-content/ilr-content/articles/2003/5/Green.pdf](http://www.illinoislawreview.org/wp-content/ilr-content/articles/2003/5/Green.pdf)) (accessed Dec. 29, 2021).

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far enough and for going too far to protect defendants. To one participant's mind, it did not go far enough to protect a defendant when a prosecutor may have probable cause but not a good-faith belief in guilt. Other participants took issue with establishing a higher duty to disclose information about police-officer witnesses than other witnesses, the subjective standards they felt the rule would establish, and its attempt to forbid common prosecutorial practices like inducing a defendant to waive certain appellate rights as a condition of receiving a plea offer. There was, however, support for adding aspirational ethical considerations. So the Chairperson requested that a small working group craft an alternative draft.

After some initial turbulence, the working group was able to agree on a draft created by directly modifying existing Prof.Cond.R. 3.8. In line with the goal of minimizing the holes in the protections against wrongful convictions, several of these provisions aim at prospectively avoiding wrongful convictions rather than remedying them after the fact. The then-present Task Force members unanimously voted to recommend the draft.

#### RULE 3.8: SPECIAL RESPONSIBILITIES OF A CRIMINAL PROSECUTOR

The prosecutor in a criminal case shall not do any of the following:

- (A) pursue or maintain the prosecution of a charge that the prosecutor *knows* is not supported by probable cause and by the prosecutor's good faith belief in the defendant's guilt for the offense charged.
- (B) [RESERVED]
- (C) [RESERVED]
- (D) fail to make timely disclosure to the defense of all evidence or information *known* to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, fail to disclose to the defense all unprivileged mitigating information *known* to the prosecutor, except when the prosecutor is relieved of this responsibility by an order of the *tribunal*;
- (E) subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes all of the following apply:
  - (1) the information sought is not protected from disclosure by any applicable privilege;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
  - (3) there is no other feasible alternative to obtain the information.