
(F) fail to take the following steps when a prosecutor knows of previously undisclosed, credible, and material evidence creating a reasonable likelihood that a convicted defendant is not guilty of the crime for which the defendant was convicted:

(1) if the conviction was obtained in the prosecutor's jurisdiction,

(a) promptly disclose that evidence to an appropriate court or authority, and

(b) promptly disclose that evidence to the defendant and defendant's attorney unless a court authorizes delay, and

(c) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant is innocent of the crime.

(2) if the conviction was obtained outside the prosecutor's jurisdiction, promptly notify the prosecutor's office in the jurisdiction that prosecuted the case, ensuring that the information is transmitted to a prosecuting attorney who is authorized to bring the matter to the attention of the court in that jurisdiction.

(G) fail to seek to remedy a conviction, even if all authorized appeals have concluded, when a prosecutor knows of clear and convincing evidence establishing that a defendant is innocent of the crime for which defendant was prosecuted. If the conviction is not in the prosecutor's jurisdiction the prosecutor shall ensure that the matter is brought to the attention a prosecuting attorney who is authorized to bring the matter to the attention of the court in that jurisdiction.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded justice and that guilt is decided upon the basis of sufficient evidence. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4. A prosecutor also is subject to other applicable rules such as Rules 3.3 (including the responsibility to refrain from false representations and to correct false testimony of a prosecution witness), 3.6, 4.2, 4.3, 5.1, 5.2 and 5.3.

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- [2] Oftentimes prosecutors, particularly in larger counties and municipalities, are subject to multiple layers of supervision. The provisions of Rules 5.1 and 5.2 regarding the respective responsibilities of supervisory and subordinate lawyers apply in these circumstances.
- [3] Division (A) recognizes a continuing obligation on prosecutors not to formally initiate nor prosecute criminal charges that are not supported by probable cause and by the prosecutor's good faith belief in the defendant's guilt for the offense charged. This does not preclude a prosecutor from participating in an investigation in an effort to determine if charges should be brought or maintained.
- [4] The exception in division (D) recognizes that a prosecutor may seek an appropriate order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.
- [5] Division (E) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.
- [6] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

Rule 3.8(A) corresponds to DR 7-103(A) (no charges without probable cause), and Rule 3.8(d) corresponds to DR 7-103(B) (disclose evidence that exonerates defendant or mitigates degree of offense or punishment).

EC 7-13 recognizes the distinctive role of prosecutors:

The responsibility of a public prosecutor differs from that of the usual advocate; his [her] duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he [she] also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubt.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.8 modifies Model Rule 3.8 as follows:

- The introductory phrase of the rule is reworded to state a prohibition, consistent with other rules;
- Division (a) is expanded to prohibit either the pursuit or prosecution of unsupported charges and, thus, would include grand jury proceedings;
- Division (b) is deleted because ensuring that the defendant is advised about the right to counsel is a police and judicial function and because Rule 4.3 sets forth the duties of all lawyers in dealing with unrepresented persons;
- Division (c) is deleted because of its breadth and potential adverse impact on defendants who seek continuances that would be beneficial to their case or who seek to participate in diversion programs;
- Division (d) is modified to comport with Ohio law;
- Division (f) is deleted because a prosecutor, like all lawyers, is subject to Rule 3.6. A new division (f) regarding a prosecutor's post-conviction responsibilities to disclose newly discovered exculpatory evidence has been included.
- Division (g) has been added regarding a prosecutor's post-conviction responsibilities to remedy a conviction of an innocent person.

The most salient changes warrant explanation.

The first such change affects subdivision (A). In addition to the requirement that a prosecutor have probable cause to seek a charge, the working group added that probable cause is required to *maintain* the charge and that the prosecutor must also have a good-faith belief in the defendant's guilt for that charge. These changes acknowledge that probable cause might exist even when a prosecutor does not believe in a defendant's guilt and that circumstances may change over time. A new comment emphasizes that nothing in the rule precludes a prosecutor from further investigating to determine whether charges should be brought or maintained.

Plus, the working group accounted for Prof.Cond.R. 5.1's and 5.2's provisions addressing the responsibilities of supervisory and subordinate lawyers. So while a subordinate attorney may not have a good-faith belief in a defendant's guilt, they may be compelled by a supervisor to pursue the charge. If any disciplinary

action follows, the supervising attorney is responsible. A new comment to the rule further emphasizes this point.

The working group also suggested changes to subdivisions (F) and (G). In particular, those changes require a prosecutor to take specific ameliorative actions when they know of “previously undisclosed, credible, and material evidence creating a reasonable likelihood that a convicted defendant is not guilty of the crime.” They would also require a prosecutor who knows of clear and convincing evidence that the defendant is innocent of the crime to seek to remedy the conviction – irrespective of whether all authorized appeals have concluded. These provisions were broadly uncontroversial, but a participant questioned a provision allowing a prosecutor to delay in turning over evidence if authorized by a court. The explanation given was that this language comes from Model Rule 3.8, and another participant added that courts sometimes authorize delay in disclosures to allow a prosecutor to investigate the credibility of the information.

A Task Force participant also researched professional-conduct rules in other jurisdictions. That research revealed that the added good-faith requirement in division (A) exists elsewhere, but not in a majority of jurisdictions. The postconviction *Brady* responsibilities exist in many states, and they are consistent with the ABA Model Rules. Most other states, however, do not differentiate between in-jurisdiction and out-of-jurisdiction responsibilities.

Ohio also uses its prosecutors in a manner not pervasive in the other states: prosecutors also handle a number of civil issues. Some Task Force participants thought it appropriate to address these prosecutors’ professional responsibilities separately, potentially with a parallel rule. The Task Force did not reach consensus on language for such a parallel rule. But recognizing its circumscribed task and composition, the Task Force largely agreed on a footnote addressing the perceived need for a civil-prosecutor-focused rule.⁵ Support for the footnote was not quite unanimous – one then-present member voted against its inclusion in this Report.

5 The Task Force notes that Rule 3.8 as presently constituted focuses on the responsibilities of the prosecutor in criminal cases; recognizing that, our proposed changes to Rule 3.8 include amending the title of the section to reflect its more limited scope. The Task Force believes that the power and resources of all government attorneys is such that, even in civil matters, the government lawyer, as a representative of the sovereign, has ethical considerations unique to their office due to the responsibility not to use the position or the economic power of the government to harass parties or bring about unjust settlements or results. While the conduct of government in civil lawsuits involving allegations of wrongful convictions is relevant to the work of the Task Force, the Task Force believes that any disciplinary rules involving the role of the government attorney in the civil context is best left to the Supreme Court of Ohio and the Commission on Professionalism (whose membership is more representative of the relevant stakeholders in this regard than is that of this Task Force). Accordingly, we recommend that the Court, through the Commission, consider whether a rule parallel to 3.8 be promulgated for government attorneys in civil matters.

Recommendation for Creation of an Ohio Innocence Commission

Recommendation:

Adopt a Statewide Commission Based on North Carolina Innocence Inquiry Commission

Discussion:

During initial discussions, Task Force participants favorably viewed the innocence-commission model and were receptive to a similar recommendation for Ohio, assuming similar independence, political insulation, and funding. Thus, the Task Force recommends the creation of an Ohio Innocence Commission.

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 postconviction 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.

In conjunction with this recommendation, the General Assembly should consider the following issues:

Ohio's Innocence Commission

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 composed 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.

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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 composed 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. If a judicial panel finds the defendant to be innocent, the panel shall be authorized to take appropriate remedial measures to vacate the conviction.

During the Task Force discussion, one participant thought that such a model would help even the playing field by giving smaller rural counties equal access to conviction-review resources. That person also thought that an independent commission would foster public confidence in the criminal-justice system. That said, one participant expressed some concern about bridging the differences between North Carolina and Ohio law.

Participants also discussed potential financial benefits of such a commission including shortening prison terms for the wrongfully convicted, taking on what would otherwise be county-by-county conviction-integrity units, and likely reducing the number of postconviction petitions to trial courts.

The Task Force Chairperson put together a working group of volunteers to create a draft recommendation. The working group went through multiple drafts before reaching a final product for the full Task Force to vote on. And even the full Task Force discussion before the final vote revealed some deep divisions. Ultimately, the Task Force voted unanimously to recommend that the General Assembly create

a commission resembling North Carolina's – but the Task Force identified three additional considerations it could not reach full consensus on.

Broadly, the Task Force agreed that any such commission should be independent, neutral, investigatory in nature, and properly funded. The investigatory powers should include things like subpoenas to compel the production of documents and attendance of witnesses and other discovery methods available in the Rules of Civil and Criminal Procedure, including taking possession of, examining, and testing physical evidence. Like North Carolina's Commission, Ohio's should draw commissioners from a cross-section of the criminal-justice system and the community. Consistent with independence, commission staff should be professionals insulated from political pressure. The Task Force also endorsed confidentiality until a hearing is called for or inculpatory or exculpatory evidence is discovered. In a tweak to North Carolina's three-judge panels, rather than endorsing panels comprising out-of-county common-pleas judges, the Task Force recommended three sitting appellate-court judges from outside the appellate district that gave rise to the case. That three-judge panel could take remedial action to vacate the conviction, if appropriate.

Despite the broad agreement on these provisions, divisions remained on several topics.

First, the Task Force participants could not agree on precisely what it means to *establish innocence*. Some members felt that because a conviction already required a jury verdict or guilty plea to establish guilt, *innocence* requires proof that the defendant was neither the perpetrator of the offense nor another offense related to the underlying facts. Others objected to the difficulty of proving a negative and thought *innocence* could be established when the three-judge panel concluded that no reasonable juror would be able to find the defendant guilty beyond a reasonable doubt of the offense of conviction.

The discussion noted that statute limits North Carolina's Commission to reviewing claims of factual innocence, i.e., 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 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. But at least one Task Force participant reported that a closer examination of some of that Commission's exonerations suggests that the practical application of this standard is not so narrow as its plain language.

Second, the issue of who could refer cases to the proposed innocence commission engendered great – perhaps the most – disagreement. Some participants fought to

limit the consideration of innocence claims to those referred to the commission by prosecutors and judges. Other participants, particularly those with significant postconviction defense-side experience, thought prosecutors and judges are frequently the largest roadblocks to overturning legitimately wrongful convictions. These participants thought that any defendant should be able to submit a claim. Other participants worried that limiting the referral process so starkly would lead to the uneven application of conviction review across the state.

North Carolina has addressed this issue by limiting claimant-submitted applications to certain serious felony convictions. Less serious convictions must be referred by a court, a state or local agency, or the claimant's counsel.

Finally, the Task Force participants failed to reach consensus on what circumstances would justify an inquiry by the commission. Specifically, they divided over what quantity and quality of evidence should be necessary to trigger review. The purpose of such review is not, of course, to simply second-guess a jury's verdict or judge's finding. Likewise, when new evidence arises posttrial that credibly establishes that the defendant could not be the perpetrator – like DNA evidence – participants broadly agreed that commission review was appropriate. But the participants could not bridge the broad gap between these scenarios. Three primary questions arose:

1. To what extent could the “new” evidence have been available at trial but not presented to the factfinder?
2. To what extent must the evidence of innocence be verifiable?
3. To what extent must the evidence of innocence be completely exculpatory as opposed to reducing the severity of the offense?

Further, the existence of these concerns and points of disagreement led at least one participant to suggest that the recommendation is too broad and vague to be of use to the General Assembly.

CONCLUSION

The Chief Justice of the Supreme Court of Ohio charged the Conviction Integrity and Postconviction Review Task Force with reviewing and analyzing current practices and recommending improvements to Ohio's criminal-justice system. That proved to be no small task. This report and these recommendations reflect the diligent and hard work performed by the Task Force and the informative and excellent presentations of invited guests. The resulting recommendations provide a first step toward meaningful progress and improvement for Ohio's postconviction process. The Task Force members' and participants' work resulted in recommended improvements to every aspect of conviction-integrity and postconviction review that they believe will provide meaningful progress in this area. The Task Force's recommendations benefited from extensive review and debate and impressive consensus building among its members.

The Task Force fully recognizes that significant work remains to be done to implement these recommendations. The Task Force submits this report and recommendations to the Court and requests that the proposals and recommendations be submitted to the Commission on the Rules of Practice & Procedure, the Ohio General Assembly, and any other entities as appropriate for further review and, hopefully, adoption. These recommendations, taken as a whole, provide concrete improvements, and therefore meaningful relief, to improve our system of justice by streamlining postconviction practice and, hopefully, reducing wrongful convictions in Ohio.

