

**Supreme Court of Ohio/Ohio State Bar Association  
Joint Task Force to Review the Administration of Ohio's Death Penalty**

November 3, 2011

Minutes

**Task Force Members in Attendance:**

Hon. James A. Brogan, Chair  
Sara Andrews  
Prof. Douglas Berman  
Prof. Phyllis L. Crocker  
Joseph Deters  
Hon. Kathleen Keough  
Hon. Linda Jennings  
Hon. Stephen McIntosh  
John P. Parker  
Samuel Porter  
Jon Paul Rion  
Sheriff A. J. Rodenberg  
Hon. John Russo  
Stephen Schumaker  
Sen. Bill Seitz  
Rep. Lynn Slaby  
Sen. Shirley Smith  
Hon. John Solovan  
Dennis Watkins  
Rep. Carlton Weddington  
Hon. Roger Wilson  
Timothy Young

**Guests in Attendance:**

Chief Justice Maureen O'Connor  
Carol Seubert Marx, OSBA President

**Staff in Attendance:**

Ken Brown, Ohio State Bar Association  
Jo Ellen Cline, Supreme Court of Ohio  
Bret Crow, Supreme Court of Ohio  
Jessica Emch, Ohio State Bar Association  
William Weisenberg, Ohio State Bar Association

**Welcome and Brief Remarks from Guests**

Chief Justice Maureen O'Connor and OSBA President Carol Seubert Marx thanked the task force members for participating and explained the purpose of creating the Task Force.

**Task Force Charge**

Judge Brogan shared the task force charge, which is stated below.

“The purpose of the task force is to review the 2007 American Bar Association report titled ‘Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report’ and offer an analysis of its findings; assess whether the death penalty in Ohio is administered in the most fair and judicious manner possible; and determine if the administrative and procedural mechanisms for the administration of the death penalty in Ohio are in proper form or in need of adjustment.

The task force shall not review or report on the issue of whether Ohio should or should not have the death penalty.”

Judge Brogan also explained that the task force should focus on issues such as the role of the prosecutor in seeking the death indictment; disparate sentences based upon geography or race; and expansion of discovery for death penalty cases.

### **Discussion of Topics to be Studied**

Judge Brogan asked task force members to identify issues for the task force to review.

- John P. Parker raised the issue of insufficient resources for defense counsel generally and specifically during mitigation investigations. He questioned whether judges and prosecutors are familiar with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (<http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/deathpenaltyguidelines2003.authcheckdam.pdf>). Under *Wiggins*, these guidelines are used to measure the effectiveness and competence of legal counsel. Mr. Parker suggested providing training for everyone involved in the administration of the death penalty.
- Judge Russo questioned when a judge denies funds requested by defense counsel and when that denial becomes an issue on appeal.
- Tim Young suggested enacting an equivalent Rule 20 standard for prosecutors. Such a Rule would cover prosecutor training, qualifications, and misconduct.
- Joseph Deters explained that in Hamilton County he makes the final decision whether to seek the death penalty and that he will not seek the death penalty unless there is overwhelming proof of guilt. He also shared that only the highest level senior attorneys in his office prosecute death penalty cases. Any attorneys creating a Brady conflict would be dismissed. Additionally, Mr. Deters stated that he does not use the death penalty for plea bargaining purposes.
- Prof. Berman questioned if cost is a legitimate factor in determining whether to seek the death penalty. He suggested creating a subcommittee to review the factors prosecutors consider in determining whether to seek the death penalty and to possibly articulate a set of guidelines for prosecutors to use.
- Judge Brogan questioned whether there is abnormal pressure for prosecutors to win death penalty cases. He suggested considering changing the burden of proof from “any reasonable doubt” to “any doubt”.
- Prof. Berman questioned whether economics is a determining factor for prosecutors in deciding to offer a plea. He also indicated that it would be helpful to know how many cases exist where prosecutors decided not to seek the death penalty.
- Sen. Seitz suggested creating a subcommittee to review Chapters 2, 3, and 4 of the ABA Death Penalty Report and determine what has changed in Ohio since 2007. The subcommittee could consider witness identification, DNA evidence, crime labs and other issues related to law enforcement.
- A review of the clemency power was suggested. Some concern was raised as to whether any recommendations regarding the clemency power would be considered by the governor.
- Prof. Crocker offered that we cannot learn much from discussing individual cases. We need data. She also raised the issue of creating a panel system that would ensure the “worst of the worst” standard is being consistently applied. Additionally, Prof. Crocker suggested the task force host public hearings.
- Sen. Smith shared the bill she plans to introduce and reiterated the importance of creating a subcommittee to review racial disparity.

**Summary List of Topics:** ABA standards for defense counsel; Resources for mitigation; Rule 20 of the Rules of Superintendence for Ohio Courts; Education/training of trial judges; Training for prosecutors; Resources (funding); Review of the death penalty statutes; Use of death penalty as a plea bargaining tool; Identity of the defendant (police line-ups, eyewitness identification); Clemency power; Impact of life without parole on death cases.

**Research and Data Needed:**

- Number of indictments (including the number of cases that could have been indicted as death penalty cases and how many cases indicted as death penalty cases were pled to a lesser penalty)
- All costs involved in the administration of death penalty cases
- Laws in other states

**Subcommittees**

Subcommittee members should plan to meet and present an initial report at the next full task force meeting on January 12, 2012.

**Prosecutorial Issues (training, resources, discretion in seeking death penalty)**

Berman\*, Slaby, Deters, McIntosh

**Defense Services (Sup. R. 20, resources, ABA standards)**

Parker\*, Russo, Crocker, Young

**Law Enforcement Issues (police line-ups, witness identification, DNA evidence, crime labs)**

Seitz\*, Rodenberg, Rion, Wilson

**Racial & Ethnic Minorities (basis for disparity in indictment/conviction)**

Smith\*, Keough, Young

**Next Steps**

1. Establish subcommittees on post conviction proceedings (collateral proceedings), clemency, jury instructions, and judicial role in death penalty cases
2. Identify outside interested parties to serve as resources to subcommittees
3. Discuss possibility of public hearings

**Next Meeting**

Ohio Judicial Center, Room 102  
January 12, 2012 at 10:30 a.m.