University of Dayton Law Review

Volume 45 | Number 3 Article 3

7-1-2020

Open Discovery: The Unsung Legacy of Thomas Moyer

Jo Ellen Cline

Barry W. Wilford

OPEN DISCOVERY: THE UNSUNG LEGACY OF THOMAS MOYER

Jo Ellen Cline & Barry W. Wilford***

I. INTRODUCTION

Ten years ago, history was made. Effective July 1, 2010, Ohio enacted a form of "open discovery" in criminal prosecutions requiring prosecutors to give expansive pretrial disclosure of their investigative information to charged defendants.[1] The occasion marked a transformative change in the everyday functioning of the Ohio criminal justice system—a change long sought by criminal justice reform advocates and fiercely opposed by prosecutors and law enforcement agencies across the state. Ten years later, this Article describes and analyzes the long and twisting route to that reform which occurred under the two-decade reign of Supreme Court of Ohio Chief Justice Thomas Moyer, a journey marked by political calculations at every turn. It also pays tribute to Chief Justice Moyer's personal contribution that proved vital in the realization of this reform, but who did not survive to witness the fruition of his many labors.

* Jo Ellen Cline is an attorney currently serving as Chief of Staff of the Franklin County Auditor. She previously served as Government Relations Counsel to the Supreme Court of Ohio (2002–2015) and as Assistant State Public Defender and Legislative Liaison for the Ohio Public Defender (2000–2002).

** Barry Wilford is an attorney in private criminal post-conviction law practice in Columbus, Ohio. He previously served as the Public Policy Director of the Ohio Criminal Defense Lawyers Association (2001–2019) and was a member of the *ad hoc* defense lawyer-prosecuting attorney working committee that submitted the agreed open discovery reform proposal to the Supreme Court of Ohio's Commission on Rules of Practice and Procedure. Please note that this article discusses historical events based upon the perspective of the authors as both observers and participants in the process leading to enactment of the reform discussed in this article.

[1] OHIO R. CRIM. P. 16 (amended July 1, 2010).

II. BACKGROUND TO REFORM: 1973–2008

A. The Original Sin: Rule 16

Successive generations of Ohio criminal defense lawyers hoped and dreamed of discovery reform since the original Rule 16 of the Ohio Rules of Criminal Procedure ("Rule 16") was enacted in 1973.[2] When Rule 16 was initially adopted, there was widespread concern regarding its borrowed provisions from the unpopular federal criminal discovery rule.[3] The federal discovery practice was condemned by defense practitioners as promoting surprise and ambush in criminal trial strategy, in stark contrast to civil law practice, which relied upon extensive pretrial discovery mechanisms.[4] Among the loudest criticisms was that criminal defendants, and their lawyers, had no right to pretrial disclosure of police investigative records such as written or recorded witness statements.[5] Pretrial disclosure of these records was not required at all under the then-existing Rule 16 unless the person who made a pretrial statement testified as a state's witness at trial, and even then, disclosure was not required until after the completion of direct examination by the prosecution.[6] This led to defendants being confronted at trial with previously undisclosed witness testimony, thus hampering their ability to competently cross-examine prosecution witnesses or properly prepare a defense. The non-transparency and restrictiveness under Rule 16 did not end there: use of pretrial witness statements in cross-examination was precluded unless the trial judge ruled that material inconsistencies existed between the pretrial statement and direct testimony.[7] The limited pretrial discovery required by Rule 16 also resulted, for all practical purposes, in mandating exclusive reliance upon prosecutors to self-realize the significance of possibly exculpating information derived from an investigation or prosecution subject to an overriding constitutional duty, established in *Brady v. Maryland*, to disclose favorable information to a criminal defendant.[8] In effect, it was the exclusive province of prosecutors to decide what information was favorable to the defendant and when to disclose it, if it was to be disclosed at all.[9]

---

[2] The original Ohio Rules of Criminal Procedure were enacted on July 1, 1973, which included Rule 16 governing pretrial discovery in criminal prosecutions. *See generally* OHIO R. CRIM. P. 1–60.

[3] *See* James G. France, *Rules of Criminal Procedure: The Background of Draftsmanship*, 23 CLEV. ST. L. REV. 32, 41–43 (1974).

[4] *See generally* OHIO ASS'N OF CRIM. DEF. LAW., BROKEN DUTY: A HISTORICAL GUIDE TO THE FAILURE TO DISCLOSE EVIDENCE BY OHIO PROSECUTORS (2005), http://oacdl.org/aws/OACDL/asset_manager/get_file/16884?ver=7970 (detailing an on-going chronology of documented cases where courts had found prosecutors failed to properly disclose evidence since Rule 16 was enacted in 1973, and further spotlighting those cases where the withheld evidence was favorable evidence to the Defendant).

[5] *See* Charles L. Grove, *Criminal Discovery in Ohio: 'Civilizing' Criminal Rule 16*, 36 U. DAYTON L. REV. 143, 145 (2011).

[6] *See id.*

[7] State v. Daniels, 437 N.E.2d 1186, 1188 (Ohio 1982).

[8] 373 U.S. 83, 83 (1963).

[9] *See* State v. Wickline, 552 N.E.2d 913, 919 (Ohio 1990) (reviewing discovery errors by a trial court under a much more forgiving abuse of discretion standard of appellate review). Disclosure mid-trial was deemed sufficient to convert legal analysis from a constitutional *Brady* violation to a state law discovery

Claims of prosecutorial misconduct in failing to make disclosure of *Brady* material were common grounds raised in post-conviction proceedings, with more than a few resulting in the exoneration of wrongly convicted defendants.[10]

B. The Untimely Reform Campaign of 1995

Drawing upon growing disgruntlement with the trial-by-ambush dynamic fostered by Rule 16, the first campaign for reform was a modest proposal that took place in the mid-1990s, led by then Supreme Court of Ohio Justice J. Craig Wright.[11] This campaign resulted in the first proposed amendment to Rule 16 being recommended by the Supreme Court of Ohio and submitted in the Ohio General Assembly, as required under the 1968 Modern Courts Amendment to the Ohio Constitution.[12] But, in addition to the legislature's history of closely protecting its turf in the joint role it shared with the Supreme Court regarding rule enactments, the timing was not fortuitous. The 1994 election resulted in the arrival of the first Republican majority in the House of Representatives in over two decades—a majority that appeared anxious to brandish its conservative credentials.[13] The 1994 election also brought into office conservative former prosecutor, Betty Montgomery, as the new Ohio Attorney General.[14] Both Montgomery and the new Republican majority played a part in the brutish reception the proposed amendment received in the Ohio General Assembly. A Concurrent

---

issue that could be cured by a trial court's willingness to grant a recess or continuance of the trial proceedings so that any prejudice from non-disclosure could theoretically be cured. *See generally id.*

[10] *See, e.g.*, D'Ambrosio v. Bagley, 527 F.3d 489, 499–00 (6th Cir. 2008), *on remand* 688 F. Supp. 2d 709, 735 (N.D. Ohio 2010), *aff'd*, 656 F.3d 379, 390 (6th Cir. 2011), *cert. denied*, 565 U.S. 1185 (2012); State v. Jamison, 291 F.3d 380, 383 (6th Cir. 2002); State v. Larkins, No. 82325, 2003 Ohio App. LEXIS 5276 (Ohio Ct. App. Nov. 6, 2003), *appeal denied*, 806 N.E.2d 562 (Ohio 2004), *aff'd*, No. 85877, 2006 Ohio App. LEXIS 80 (Ohio Ct. App. Jan. 12, 2006).

[11] Justice J. Craig Wright was a Justice of the Supreme Court of Ohio (1985–1996) and Chairman (designated by Chief Justice Thomas Moyer) of the Task Force on Court Costs and Indigent Defense created by the budget bill of the 119th General Assembly. *See J Craig Wright*, SUP. CT. OF OHIO & OHIO JUD. SYS., http://www.supremecourt.ohio.gov/SCO/formerjustices/bios/wrightJCraig.asp (last visited July 6, 2020). The Task Force recommended a "more uniform and open discovery process." SUP. CT. TASK FORCE ON CT. COSTS & INDIGENT DEF., REPORT OF THE SUPREME COURT TASK FORCE TO STUDY COURT COSTS AND INDIGENT DEFENSE 14 (1992). For the text of the proposed rule see BALDWIN'S OHIO LEGISLATIVE SERVICE, 121ST GENERAL ASSEMBLY R–5 (1995, Supp. no. 1). Perhaps mindful of the challenges that lay ahead in the legislature, the Court had already softened a number of provisions which had been recommended by the Rules Advisory Committee.

[12] OHIO CONST. art. IV, § 5(b) ("The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

[13] *Ohio House of Representatives*, BALLOTPEDIA, https://ballotpedia.org/Ohio_House_of_Representatives (last visited July 6, 2020).

[14] *Past Ohio Attorney's General 1983–2003*, OHIO ATT'Y GEN., https://www.ohioattorneygeneral.gov/About-AG/History/Past-Ohio-Attorney-Generals/1983-2003 (last visited July 6, 2020).

Resolution of Disapproval was introduced in the House of Representatives and Senate.[15] The stiff opposition prompted the Court to significantly scale down the proposal originally submitted to the legislature in an effort to head off what clearly appeared to be looming rejection.[16] Still, it was not enough. Even the diminished reform offering suffered lop-sided defeats in both the House and Senate.[17] It was a bitter defeat for reform advocates and an eye-opening political setback for the Court.

C. The Empty-Handed Campaign of 2005

In 2005, a second determined effort at discovery reform began and was principally led by attorney Anthony Cicero of Dayton, the criminal defense representative on the Supreme Court of Ohio's Commission on Rules of Practice and Procedure ("the Commission").[18] Cicero spearheaded a proposed "open discovery" amendment to Rule 16 based upon an existing Montgomery County Local Rule, enacted years earlier, which one member of the Supreme Court had publicly endorsed as a model for statewide practice in two opinions that were notably un-joined by Chief Justice Moyer.[19] On September 8, 2006, the proposal was strongly endorsed by the membership of the Commission by a vote of 15-3.[20]

Under the Court's administrative rule-making mechanics, the Commission recommended the proposed amendment to the Court, triggering an announcement and public comment period on the published amendment. At the conclusion of public comment period, the Commission deliberated on further revisions and then submitted its final recommendation to the Court for its decision on whether, or in what form, the amendment should be submitted to the General Assembly. Unlike the 1995 campaign, a strong showing of support for reform began developing during the public comment periods by proponents, a movement largely driven by the Ohio Association of Criminal

---

[15] H.R. Con. Res. 16, 121st Gen. Assemb., Reg. Sess. (Ohio 1995); S. Con. Res. 11, 121st Gen. Assemb., Reg. Sess. (Ohio 1995).

[16] *Archives, 121st Gen. Assemb., House Judiciary & Criminal Justice Committee, Revised Proposed Rule Amendment to Rule 16*, OHIO HIST. CONNECTION (Apr. 25, 1995), https://ohiohistory.libguides.com/legislative.

[17] 121st GEN. ASSEMB. OF OHIO, BULLETIN 119, 424 (final ed. 1996).

[18] *Anthony Cicero*, NAT'L TRIAL LAWYERS TOP 100, https://www.thenationaltriallawyers.org/profile-view/Anthony/Cicero/17431/ (last visited July 6, 2020).

[19] "Under [Montgomery County's] 'open discovery' plan, the prosecutor is obliged to deliver an information packet that contains, among other relevant discovery items within the state's possession, custody or control, 'all witness statements' upon the execution of a Demand and Receipt by the defendant." State v. Flanigan, No. 21460, 2007 Ohio App. LEXIS 2909, at *22 (Ohio Ct. App. June 22, 2007) (holding the local rule unenforceable where the duties under its provisions were beyond the duties required under Rule 16). *See also* State v. Lambert, 632 N.E.2d 511, 511 (Ohio 1994) (Pfeifer, J. concurring) (endorsing the Montgomery County Local Rule as effective and suggesting statewide endorsement of the Local Rule); State *ex rel.* Steckman v. Jackson, 639 N.E.2d 83, 90 (Ohio 1994) (noting Justice Pfeifer's criticism of the "hide-the-thimble" dynamic of criminal trial practice under Rule 16).

[20] Meeting Minutes, Ohio Sup. Ct. Comm. on the Rules of Prac. and Proc. (Sept. 8, 2006).

Defense Lawyers ("OACDL").[21] However, as before, the measure drew the vigorous and largely unified statewide opposition of prosecutors, law enforcement groups, victim rights advocates, and some outspoken members of the judiciary.[22] In the end, likely mindful of its previous rule-making battles with the legislature and perhaps sensitive to the approaching statewide elections in the ensuing year (including two Court seats), the Court, without explanation, declined to submit the controversial proposal to the General Assembly.[23] Reform proponents, fully geared up for the fierce battles anticipated in the legislature, were stunned by the Court's abrupt abstention, which was perceived as a disheartening betrayal of the discovery reform movement.

But the drumbeat for reform did not abate.[24] Although the Commission did not formally recommend any amendments to Rule 16 in the next rule-making cycle, the Rule remained on the Commission's pending list of amendments throughout that time period, likely because of widespread recognition of an unabated need for reform.[25]

Now marking the ten-year anniversary of the adoption of the 2010 amendments to Rule 16, a form some label "open discovery," it is time to pause and consider how it is that *this* effort at reform succeeded where past efforts failed.[26] What changes over a five-year interregnum could explain the Court's favorable reception and the legislature's enactment of a boldly transformative rule amendment of which, in 2005, the former displayed cold

---

[21] The much stronger effort of the defense lawyers was the result from a reading of their previous failures which had been detailed in an article delivering a critical post-mortem assessment of the 1996 campaign for discovery reform. OHIO ASS'N OF CRIM. DEF. LAW., *supra* note 4, at A-7. The article was authored by Richard Dove, the Court's legislative liaison who had served as the manager of the 1995 rule proposal that was submitted to the legislature. *Id.*

[22] *Id.* at A-12.

[23] Regina Brett, *Late Supreme Court Chief Justice Thomas Moyer Deserves Credit for Pushing Open Discovery*, CLEVELAND (Apr. 29, 2010), https://www.cleveland.com/brett/blog/2010/04/post_9.html (reporting that the judges voted 4-3 against filing the rule proposal with the legislature).

[24] *See generally* Meeting Minutes, Ohio Sup. Ct. Comm. on the Rules of Prac. and Proc. (Dec. 14, 2007). The commission received over 100 letters asking for it to "reconsider" the amendment to Rule 16.

[25] *Id.*

[26] *Supreme Court Submits 'Open Discovery,' Other Amendments to Rules of Practice and Procedure*, SUP. CT. OF OHIO & OHIO JUD. SYS. (Apr. 28, 2010), http://www.supremecourt.ohio.gov/PIO/news/2010/ruleAmend_042810.asp (describing the reforms in the Supreme Court's public information release at the time of final submission to the legislature). *See also* S. Con. Res. 12, 128th Gen. Assemb., Reg. Sess. (Ohio 2010) (clearing the way for enactment of the amended rule, approving the provision of "*open discovery*") (emphasis added). Although the term "open discovery" is absent from the text of the rule and staff notes, judges have not hesitated to employ the use of it. *See* SUP. CT. OF OHIO, AMENDMENTS TO THE OHIO RULES OF APPELLATE PROCEDURE AND THE OHIO RULES OF CRIMINAL PROCEDURE, http://www.supremecourt.ohio.gov/ruleamendments/documents/2010%20Amendments%20as%20filed%20with%20General%20Assembly%20FINAL%20(with%20staff%20notes).docx; *see also* State v. Boston, 545 N.E.2d 1220, 1237 (Ohio 2020); *In re* D.S., 995 N.E.2d 209, 215 (Ohio 2013) (O'Connor, C.J., dissenting); State v. Smale, 127 N.E.3d 402, 414 (Ohio Ct. App. 2018); State v. Craciun, No. 2017-T-0092, 2018 Ohio App. LEXIS, at *25 (Ohio Ct. App. Dec. 21, 2018) (O'Toole J., dissenting); State v. Boaston, 100 N.E.3d 1002, 1011–12 (Ohio Ct. App. 2017); State v. Fussell, No. 95875, 2011 Ohio App. LEXIS 4095, at *20–21 (Ohio Ct. App. Sept. 29, 2011) (Gallagher J., dissenting); State v. Biro, 945 N.E.2d 581, 587 n.3 (Ohio Ct. App. 2010).

indifference and, in 1995, the latter had exhibited outright hostility? Far from any intervening warm embrace by either institution of "open discovery" as a "Hellenic ideal," the following factors chiefly account for the reversal of fortunes of reform advocates.

III. CHANGE IN POLITICAL LANDSCAPE

By 2008, the Republican party had controlled both Houses of the General Assembly (as well as the two other branches of state government) for many years without interruption.[27] During this one-party reign, the Ohio Prosecuting Attorney Association ("OPAA") enjoyed an entrenched position in the consideration of all criminal justice legislation, a position well earned as a result of its permanent commitment to a vigilant presence in the legislative process, much of the time unopposed by any organized interests. As such, the OPAA enjoyed a valuable supporting role in much of the legislation enacted by the Republican lawmakers, whose bill-sponsors were continually in need of proponent support for their pending criminal justice bills. In return, Republicans often turned a receptive ear to bills the OPAA sought to advance. Within this symbiotic relationship, along with the coordinated support of other law enforcement agencies and the victims' lobby, the OPAA delivered. Wielding this influence with the perpetually solid Republican majorities in the House and Senate, the OPAA was unalterably a formidable obstacle to any controversial effort toward criminal justice reform.[28] Serving as emphatic cases of the OPAA's power were the first failed discovery reform effort in 1996 and possibly the Court's decision in 2006 to decline pursuing the discovery reform measure recommended by the Commission on the Rules of Practice and Procedure.[29]

---

[27] *Ohio House of Representatives*, *supra* note 13.

[28] There could be no better example of the measure of influence of the OPAA in the legislature during this period than its role in the consideration of the earliest bills in the General Assembly creating a post-conviction right of inmates to seek DNA testing to challenge their convictions. The OPAA non-surprisingly favored a highly restricted right over which the local prosecuting attorney retained significant discretion, and initially supported enactment of S.B. 7 during the 124th General Assembly, a Republican-sponsored bill which secured those features. After Senate passage, amendments were adopted by the House Criminal Justice Committee which expanded eligibility for testing to inmates whose convictions resulted from guilty pleas or no contest pleas, and also permitted a right of an inmate to appeal a prosecutor's discretionary decision to deny testing. *See generally* Synopsis of House Committee Amendments, S.B. 7, 124th Gen. Assemb., Reg. Sess. (Ohio 2002), https://www.lsc.ohio.gov/documents/gaDocuments/synopsis 124/s0007.pdf. The amendments resulted in the OPAA (and AG Betty Montgomery) reversing its position and opposing enactment. Although the amended bill was favorably reported by the House Criminal Justice Committee, the OPAA's reversal contributed to the House Republican leadership refusing to bring the bill up for a vote on the House floor, and so like all unpassed bills the legislation died at the end of the legislature's Session. *Id.*

[29] 121ST GEN. ASSEMB. OF OHIO, BULLETIN 119, *supra* note 17, at 424. This discussion of Statehouse political realities should not suggest that "open discovery" in criminal cases ever became a partisan issue. Procedural rules enacted pursuant to the Open Courts Amendment of the Ohio Constitution enjoy a constitutional basis that is not subject to conflicting legislative enactments of the Ohio General Assembly. *See* State v. Greer, 530 N.E.2d 382, 395 (Ohio 1988). Hence, the promulgation of Rule 16 in 1973 basically quarantined discovery practice from legislative change. Since no bills on criminal discovery were introduced in the Ohio legislature between the resolution of disapproval in 1996 and the resolution of

But often overlooked is a quirky provision of the Modern Courts Amendment to the Ohio Constitution that a proposed Rule amendment, once filed by the Court to the legislature, *automatically* becomes law unless it is disapproved by *both* chambers of the legislature.[30] A vivid historical example: The Ohio Rules of Evidence, when initially submitted, were so controversial in the legislature that approval was twice rejected in the 112th Session of the General Assembly.[31] However, it eventually won in the 113th Session of the legislature, and became effective July 1, 1980, simply because the Concurrent Resolution was *never brought up for a vote* of the House, despite the Senate having previously voted against approval.[32] The enactment was therefore achieved simply because the House had not "disapproved" the proposed rules.[33]

With that in mind, a fact of immense significance occurred in the fall of 2008, when Ohio voters "flipped" control of the House of Representatives, and Democrats became the majority party in 2009.[34] The OPAA was thereby thrust into unfamiliar terrain where its influence with House leadership was unknown, untested, and certainly not something upon which it could confidently rely.[35] A new reality thereby emerged: if the House might favor passage of an amendment to Rule 16, or at least not disapprove, the OPAA would not be able to stop a rule change submitted by the Court.

A. The Surprising Voice from Above

There is probably some truth to the observation that criminal defense lawyers are mostly seen, by themselves and others, as loners and outcasts. Fighting on their own, case-by-case, embattled against elected prosecutors and before elected judges, oftentimes on behalf of some of the most unsavory members of their local community, it is hardly surprising that a native institutional disconnect exists between defense attorneys and the legal "power

---

approval in 2010, no basis emerged in the interim to make discovery reform a partisan issue in the General Assembly. On the local level, Democratic-elected prosecuting attorneys were generally just as adamant as their Republican counterparts in resisting calls for change in discovery practice, although local court rules enacted in Montgomery and Cuyahoga counties, generally Democratic strongholds, did implement versions of open discovery practice.

[30] OHIO CONST. art. IV, § 5(B).

[31] 112TH GEN. ASSEMB. OF OHIO, BULLETIN 510 (final ed. 1978). How controversial? Not a single legislator voted in favor of the Rules. *Id.*

[32] *See generally* Paul C. Giannelli, *The Ohio Rules of Evidence: Part I*, 426 CASE W. RES. SCHOLARLY COMMONS 2 (1980), https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1425&context=faculty_publications.

[33] 113TH GEN. ASSEMB. OF OHIO, BULLETIN 148, 515 (final ed. 1980).

[34] *Ohio House of Representatives, supra* note 13.

[35] The OPAA is comprised of prosecutors from Ohio's 88 counties and localities within each. *About OPAA*, OHIO PROSECUTING ATT'Y ASS'N, http://www.ohiopa.org/about.html (last visited July 6, 2020). Historically, a strong majority of Ohio's 88 elected prosecuting attorneys are elected as Republican party-endorsed candidates, which is not surprising since a large majority of Ohio's counties are rural or suburban areas where electorates are traditionally Republican-oriented. This shared party affiliation no doubt contributed to the OPAA's ongoing influence and working ability with the Republican majorities at the Statehouse and with Republican administrations.

structure." With few exceptions, the ranks of the criminal defense bar do not bank their hopes for success in casework on their having "friends in high places."

And few within the criminal defense bar would have described among their "friends" the Honorable Thomas J. Moyer, Chief Justice of the Supreme Court of Ohio. A long-time conservative appellate jurist and, before that, a member of the Republican administration of former law-and-order advocate Governor James Rhodes, Chief Justice Moyer's vote in any appeal was hardly one that criminal defense lawyers likely expected to win for their clients.[36] Scroll through the 22 years of Chief Justice Moyer's archived speeches as Chief Justice and you will find many of his forward-thinking ideas as to the judicial system and administration of justice, but with the exception of juvenile law, are bereft of any mention of injustices within the criminal justice system. As for discovery issues in particular, even more foreboding was that in three decades on the bench, Chief Justice Moyer had never authored a judicial opinion, or joined an opinion of others, that was critical of a justification argued by prosecutors for a need to withhold evidence from pretrial disclosure or sympathetic to the claimed need of defendants for expanded discovery rights.[37] It is even arguable that in his long judicial career, Chief Justice Moyer's most memorable vote in favor of criminal offenders was cast in a *civil case*. In that case he supplied the critical fourth and deciding vote in support of upholding the constitutionality of the highly controversial exercise of executive clemency power by Governor Richard Celeste in multiple commutations granted in the eleventh-hour prior to the expiration of his term of office.[38]

But in the twilight of his extended reign as leader of the state's highest court and figurehead of the Ohio judiciary, prohibited by age from running for re-election when his term expired in 2010, Chief Justice Moyer was perhaps mindful of legacy opportunities to cap a stellar judicial career. One example of his possible pursuit of such a legacy-building opportunity was in his assuming leadership of a relatively long-shot Ohio initiative for the merit

---

[36] *Thomas Joseph Moyer*, SUP. CT. OF OHIO & OHIO JUD. SYS., https://www.supremecourt.ohio.gov/SCO/formerjustices/bios/moyer.asp (last visited July 6, 2020).

[37] *See e.g.*, State v. Scudder, 643 N.E.2d 524, 528 (Ohio 1994); State v. Wiles, 571 N.E.2d 97, 109 (Ohio 1991); State v Heinish, 553 N.E.2d 1026, 1031–32 (Ohio 1990); State v. Finnerty, 543 N.E.2d 1233, 1237 (Ohio 1989); State v Wilson, 507 N.E.2d 1109, 1113 (Ohio 1987) (Holmes, J., dissenting). In fairness, Moyer was nonetheless critical of prosecutors whose non-disclosures independently violated what he perceived as their separate duty of disclosure under the professional ethical rules, even where he did not believe the non-disclosure violated Rule 16. Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 133 (Ohio 2010) (Moyer, C.J. dissenting).

[38] *See* State *ex rel.* Maurer v. Sheward, 644 N.E.2d 369, 380 (Ohio 1994) ("I am reminded of the observation that '[i]f the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.'"). Some death penalty opponents might instead point to Moyer's strong dissenting opinion in favor of vacating a death sentence based upon repeated prior admonitions against inflammatory argument in capital cases. State v. Fears, 715 N.E.2d 136, 155 (Ohio 1999) (Moyer, C.J., and Pfeiffer, J., concurring and dissenting in part).

selection of Ohio's judges, which was part of a national campaign championed by former United States Supreme Court Associate Justice Sandra Day O'Connor.[39] Another legacy opportunity, more relevant to this Article, was to once again address reform of the criminal discovery rule.

Likely mindful of the sensitivity of the Court members to the prosecutors' opposition during the public comment period in the 2005 discovery reform effort and the potency of that opposition with the legislature in its consideration of the 1995 rule proposal, Chief Justice Moyer employed a particularly deft preemptive strategy to alter the dynamics of the previous Rule 16 amendment efforts.[40] In late 2007, Chief Justice Moyer informally communicated, through staff, to the leaders of the OPAA and OACDL his desire for prosecutors and defense lawyers to meet and seek an agreement on changes that could be made to Rule 16, which could then be submitted to the Commission of the Rules of Practice and Procedure in the following year's rule amendment time cycle.[41] Hope for success of this strategy was premised on the strategic gambit that it would be difficult for either side to actively oppose a rule proposal to which they had previously agreed. The strategy also capitalized on the designed impetus for both sides to reach compromise on changes to the discovery rule because of the conveyed risk that, absent mutual agreement, the Court might this time approve submission of a proposed rule amendment to the legislature, unlike in 2005.[42]

By their respective natures, prosecutors are generally unbowed by outside influences, and defense lawyers are fiercely independent. But with too much at stake for prosecutors to lose, and too much to gain for criminal defense lawyers, neither could afford to ignore a directive from the chief justice of the highest court in the state. The OPAA formed a delegation of seasoned prosecutors to participate in this exploratory effort, and a core delegation of criminal defense lawyers from the OACDL joined in scheduled

---

[39] *See Chief Justice Suggests End to Elections*, COLUMBUS DISPATCH (Nov. 21, 2009), https://www.dispatch.com/article/20091121/NEWS/311219830.

[40] *See* Brett, *supra* note 23. With the benefit of his longevity on the bench, Moyer oversaw all three criminal discovery reform efforts as Chief Justice. *Id.*

[41] *See id.* The authors here acknowledge that one co-author (as Government Relations Counsel for the Supreme Court of Ohio) was tasked, as "staff," with communicating Chief Justice Moyer's message to the OPAA and OACDL; the other co-author (as OACDL President) was a recipient of the message. It was no secret at the time. The minutes of the December 14, 2007 meeting of the Commission noted: "The Chief Justice has asked the Ohio Prosecuting Attorneys Association and the Ohio Association of Criminal Defense Lawyers to discuss proposed changes and submit compromise language to the Court." Meeting Minutes, Ohio Sup. Ct. Comm. on the Rules of Prac. and Proc., (Dec. 14, 2007). *See also* Brett, *supra* note 23.

[42] OHIO ASS'N OF CRIM. DEF. LAW., *supra* note 4, at A-14. Moyer's strategy followed the closing recommendation of the previously cited report prepared for the Ohio Supreme Court's Rules Advisory Committee by the Court's legislative liaison Richard Dove that presented a post-mortem analysis of the failed 1995 effort to amend Rule 16: "Any future efforts to examine Criminal Rule 16 should consist of a cooperative effort among the defense bar, prosecutors, and judges to produce mutually agreeable revisions and avoid a prolonged disapproval effort before the General Assembly." *Id.*

informal meetings in Columbus.[43] But after a series of meetings, the progress of negotiations was negligible, and prospects were unpromising. Defense lawyers suspected a "stall game" strategy, in which the prosecutors agreed to meet to discuss changes to the discovery rule, but without any genuine willingness to barter on serious changes.[44]

Importantly, Chief Justice Moyer's oversight of the process did not wane over the course of time, perhaps his greatest contribution to the eventual success of the Rule 16 amendment. When the representatives of the OPAA and OACDL reported a logjam in their discussions towards the end of 2008, Chief Justice Moyer capitalized on the results of the recent elections and the newly changed balance of power at the Statehouse to break it. Informal communications from Chief Justice Moyer, again conveyed through staff, to the prosecutors and defense lawyers became more direct. The messaging conveyed a starker reality from the previous distinct implication that each side risked failure at its own peril: "Get on board or get out of the way."[45]

Against the timetable of an upcoming rule amendment cycle, and with the politically uncertain endgame in the legislature as noted above, this pressure exerted by Chief Justice Moyer was unmistakably responsible for a dramatic change in the negotiating posture of the OPAA representatives in the ensuing meetings in early 2009. The OPAA could no longer be confident of its ability to block a rule change from being proposed by the Court. And once proposed, because of the new political landscape, the OPAA could not be assured of its ability to defeat it in the legislature. With the status quo in serious jeopardy, stalling in the negotiations became a risky strategy with possibly dangerous consequences. Not only did the pace of negotiations quicken, but real bargaining ensued wherein the OPAA delegation showed a willingness to concede ground on issues which they could abide in order to protect their interests on the issues they could not.

The OACDL delegation had their own fears to incentivize them to consider the necessity of compromise in their demands for reform (and their resistance to a new suggestion that would bolster the defendant's duty to make

---

[43] The OPAA prosecution members included: Martin Frantz (Wayne Co.); Mathias Heck (Montgomery Co.); Dean Holman (Medina Co.); John Murphy (OPAA Executive Director); Ron O'Brien (Franklin Co.); Nick Selvaggio (Champaign Co.); Victor Vigluicci (Portage Co.); Sheri Bevan Walsh (Summit Co.); David Yost (Delaware Co.). The defense lawyer participants: Russ Bensing (Cleveland); Anthony Cicero (Dayton); Mark DeVan (Cleveland); Daniel Hannon (Batavia); Michael Hennenberg (Cleveland); Ian Friedman (OACDL President); Michael Hoague (Delaware), Mark Stanton (Cleveland); John Martin (Cleveland); Roger Synenberg (Cleveland); Barry Wilford (OACDL Public Policy Director); Tim Young (Director, Ohio Public Defender).

[44] *See* Bruce Cadwallader, *Attorneys Modify Rule for Sharing Trial Documents*, COLUMBUS DISPATCH (May 5, 2009, 3:14 AM), http://www.oacdl.org/aws/OACDL/pt/sd/news_article/22095/_PARENT/layout_details/false. The distrust was no doubt tied to the defense lawyers' recognition of the prosecutors' continued confidence in their prowess at the legislature, where in early 2008, Republicans solidly remained in control of both chambers, and would provide a reliable firewall in the event, as in 1995, the Court filed a discovery reform amendment with the legislature without prosecutors' support. *Id.*

[45] Brett, *supra* note 23.

reciprocal disclosure of information to prosecutors). Primary among these fears: if no amendment to Rule 16 resulted from the process, the detested status quo would continue to prevail. Coupled with this fear was a lack of confidence in the Court, based on past rule-change campaigns, to push hard on its own—if at all—for an "open discovery" proposal. Beyond that, even if the Court muscled the willingness to advance a change to Rule 16, absent an agreement there was no underestimating the respected strength and undoubted resolve of the OPAA to seek its defeat even in a rebalanced General Assembly.

B. The Media Sounds the Message

Beyond the change in the party control of the House and a retiring Ohio chief justice interested in legacies, it is hard to overstate the significance of a number of miscellaneous occurrences, which played into the reform dynamics of the time. It is never easy to predict when or what the media might decide is of interest to their readers, viewers, or listeners, especially when "the story" lies in the dry machinations of the court rule amendment process and arcane legal issues. But there is little doubt that the media played a vital role in achieving the enactment of the "open discovery" proposal by informing and ramping up public opinion about notorious stories of abusive discovery practices in cases of local and national interest, all of which served to keep discovery reform fires burning.

Covering several Cuyahoga County cases in which exculpatory evidence had been withheld by prosecutors, Regina Brett, twice a runner-up finalist for the Pulitzer prize in newspaper commentary for the Cleveland Plain Dealer, was particularly engaged in the grassroots campaign for amendment of the discovery rule in 2006, urging her readers to contact the Supreme Court's Rules Commission.[46] Hundreds did. In 2008, Brett was moved by a public address made by the defense lawyer in the nationally publicized "Duke Lacrosse Case," and began publishing a steady drumbeat of articles spotlighting Ohio cases involving discovery abuse and publicizing the campaign underway to achieve discovery reform.[47] Editorially, the Cleveland Plain Dealer and other media organizations announced their support of "open discovery" in criminal cases.[48] This increased media reporting and editorializing easily dovetailed with other media outlets reporting the continuous announcements of exonerations of imprisoned offenders—sometimes for ancient convictions—by legal organizations like the Innocence

[46] *See* Regina Brett, *Open Discovery in Ohio will Keep Wheels of Justice Turning*, CLEVELAND.COM (Feb. 18, 2010), https://www.cleveland.com/brett/blog/2010/04/post_9.html.

[47] *See* Ian Friedman, *A New Day in Ohio's Criminal Justice System*, 24 OHIO LAW 23, 24 (2010); Regina Brett, *Open Discovery Needed*, OHIO ASS'N OF CRIM. DEF. LAW. (July 9, 2008), http://www.oacdl.org/aws/OACDL/pt/sd/news_article/22084/_PARENT/layout_details/false.

[48] Brett, *supra* note 47.

Project.[49] The coverage spawned the logical question in the mind of the public: how the innocent people could have been convicted in the first place of crimes they never committed?

This media coverage also provided an extremely fertile ground for other seeds of "open discovery" support to take root and sprout. For example, in 2009, the criminal defense bar in Cuyahoga County, with much credit due to OACDL President Ian Friedman, recommended and obtained the support of the Cuyahoga County Common Pleas judiciary (the largest court system in Ohio) in enacting, with fanfare, a local court rule which required "open discovery" in criminal cases.[50] For the first time, it appeared that Ohio was actually trending towards "open discovery," which only added to the momentum at the state level.

The charged atmosphere that resulted from these events made it easier to gain the attention and earn the support of many non-criminal justice oriented legal groups and non-legal public interest groups, who separately endorsed petitions or announced official positions calling for "open discovery" in criminal cases.[51] This growing momentum for reform helped to drown out the hypothetical concern, historically argued by prosecutors, that expanded pretrial disclosure of evidence would result in the intimidation of victims and witnesses, a fear loudly denounced by "open discovery" advocates as a "Boogeyman" supposition that had never been credibly documented.[52] The sustained media attention on discovery reform, and the seeming groundswell of public opinion that emanated from it, only heightened the political uncertainty surrounding the OPAA's ability to block an "open discovery" rule proposal in the legislature—a political calculation of intense interest not only for the negotiators, but likely the Court members as well.

C. Jolly Good Fellows: Who Knew?

Getting natural adversaries to sit and reason together on a collaborative exercise is a daunting challenge under the best of circumstances. Even if prosecutors and defense lawyers can demonstrate good-natured collegial relations as fellow courthouse warriors, when the discussion turns to a fundamental change affecting their entrenched roles in the criminal justice system, distrust spreads like a virus. Add to the delicate balance that one adversary (happy with the status quo) resents being bullied into participation in an undesired conversation with their distrusted foes over what is perceived

---

[49] *See e.g., Ohio Innocence Project at Cincinnati Law*, OHIO INNOCENCE PROJECT, https://law.uc.edu/real-world-learning/centers/ohio-innocence-project-at-cincinnati-law.html (last visited July 6, 2020).

[50] CUYAHOGA CTY. CT. COM. PL. LOCAL R. 23.1.

[51] *See Ohio's Open Discovery*, OHIO ASS'N OF CRIM. DEF. LAW., http://oacdl.org/aws/OACDL/pt/sd/news_article/22086/_PARENT/layout_details/false (last visited July 6, 2020).

[52] *See* Benjamin Weiser, *A Trial that Raises the Issue of the Dangers in Discovery*, N.Y. TIMES (July 31, 2008), https://www.nytimes.com/2008/07/31/nyregion/31discovery.html.

as wildly exaggerated claims of the need for change, the other who reactively seethes at the perception of their opponents' smug dismissiveness, the mutual chafing of rivals results in predictable dysfunction in achieving any consensus.

After six months of meetings, which commenced in May 2008, the *ad hoc* teams of prosecutors and defense lawyers had achieved no movement in a handful of negotiating sessions and could barely agree on whether or when to meet again.[53] Desperate to jump-start some progress, the OACDL delegation had suggested using a mediator from the Ohio Judicial Conference or the Ohio Bar State Association, or alternatively that a stenographer make a record of the meetings. Both were rejected by the OPAA delegation.[54] Progress was at a standstill.

But blending with the other changing dynamics brought on by the altered balance of power at the Statehouse was another new dynamic: new leadership. The OPAA had a leadership structure that resulted in an upward rotation of a number of vice-presidents on an annual basis, and the currently installed president played a direct role on the negotiating team. Whereas the members of the OACDL delegation largely remained intact from beginning to end of the *ad hoc* committee's work, fresh faces appeared on the prosecution team's roster, none more important than then Champaign County Prosecuting Attorney (now Common Pleas Court Judge) Nick Selvaggio, president-elect of the OPAA.[55]

Given the other altered circumstances discussed above, the change in the group chemistry achieved from new participants resulted in a refreshing new dynamic that gradually emerged in the serial meetings: good faith. Each of the two groups of professional adversaries stumbled onto a constructive framework of identifying and seeking the means to address the issues and concerns of the other side, all towards the shared goal of getting a rule drafted that each side could live with. As the OACDL delegation began to witness apparent good faith of the OPAA representatives, and vice versa, a sense of trust materialized from which the art of compromise became possible. Towards the end of the drafting process, unresolved text language was projected upon a wall where 12 or so committee members sat around a table with the members of both sides interspersed, each intently scrutinizing the projected image before them, and extemporaneously voicing competing opinions on how best to refine the legal concept.[56] To an outside observer, it would have appeared there were not two camps; there were just a dozen

[53] Friedman, *supra* note 47, at 23.

[54] *Id.*

[55] Press Release, OACDL, Open Discovery Press Release (Apr. 30, 2009), http://www.oacdl.org/aws/OACDL/pt/sd/news_article/22094/blank/blank/true.

[56] Friedman, *supra* note 47, at 25.

obsessive-compulsive wordsmiths parsing language to get it just right.[57] In the words of one observer, it was "an extraordinary cooperative process."[58]

That sense of trust was to be tested and proved vital to the ultimate success. Both prosecutors and defense lawyers had legitimate interests to address and safeguard because the criminal justice system is rife with various aligned interests: those of witnesses, experts, victims, and investigators; as well as prosecutors, defendants, and judges. At one impasse after another, the members of each delegation adjourned to decide how to navigate the particular troublesome issue at hand, seeking to recognize and consider how to address the arguable interest expressed by the opposing camp. Dozens of impasses were encountered and then traversed in this laborious manner. This included the only two "drop-dead" moments during the thick of negotiations, issues upon which no more compromise was forthcoming, and one side communicated directly to the other: "agree with what we have (or want), or 'drop dead,' we're done." Due in no small part to the resilience of their members, each camp was able to overcome their one "drop dead" moment. To show for it, there is now, albeit restricted, pretrial discovery of victim statements in child sex abuse cases.[59] Additionally, now there are limitations on the pretrial duty of the State to disclose witness statements where the State can demonstrate that the disclosure would result in a serious risk of harm or witness intimidation.[60]

There is nothing like good faith in negotiations to fuel productivity. Soon there was difficulty keeping pace with demand for preparatory work to be done in advance of the next scheduled meeting, and the committee was quickly running out of time due to the rigid time constraints of the upcoming rule cycle in which proposed amendments to rules needed to be submitted. The *ad hoc* committee concluded its work in a marathon eight-hour session on April 30, 2009, where finally, at approximately 9:00 p.m., bleary-eyed participants signaled their approval, one by one, that they had agreed on a proposed rule amendment. Like a war-time armistice, it was a momentous occasion and an emotional moment for the weary participants. The room was filled with goodwill and handshakes.

---

[57] *Id.*

[58] *Supreme Court Submits 'Open Discovery,' supra* note 26.

[59] OHIO R. CRIM. P. 16(E)(2). The prosecution team had insisted on no right to inspection of statements of victims less than thirteen years of age yet yielded on an exception regarding access to those statements by a defense expert. *See id.* The compromise has been fairly criticized by one commentator. Grove, *supra* note 5, at 154–58.

[60] OHIO R. CRIM. P. 16(D). The defense team had argued for a longer period preceding the commencement of trial in these circumstances, or alternatively, a defendant's right to continuance expressed in the text, yet yielded based on the availability of judicial review of the exercise of the prosecutorial discretion.

IV. CONCLUSION

Whether the vision or mere hope of Chief Justice Thomas Moyer, the agreement between the OPAA and OACDL delegations turned out to be the key ingredient in avoiding the pitfalls that befell the preceding discovery reform efforts. Their agreed draft was submitted and accepted by the Commission published by the Court for the public comment period. Critics remained, but the volume of public commentary paled in comparison to the tumultuous public comment periods in connection to previous reform efforts. The obvious difference: the absence of competing politicized interest groups.

The result was that the rule provisions submitted by the Commission to the Court were unchanged from that which had been submitted by the OPAA-OACDL *ad hoc* committee. The members of the Supreme Court voted unanimously to accept the rule provisions, which were then filed with the General Assembly on January 14, 2010.[61] Although five clarifying revisions were subsequently recommended to the Court by the Commission following the final public comment period, which automatically ensues upon rule amendments being submitted to the legislature, the Court declined to adopt and submit the recommended revisions.[62]

On May 12, 2010, Senate Concurrent Resolution 12 was introduced in the 128th General Assembly, and it urged for the approval of the proposed amendment in stark contrast to its predecessor resolution from 1995.[63] The committee hearings that followed were marked by the same lack of controversy reflected in the passive public comment period during the Court's preceding rule amendment process, and the resolution of approval was *unanimously* passed by the Senate on June 24, 2010, thus securing the amendment's successful promulgation on July 1, 2010.[64]

The only discordant note that must be added to this transformative chapter of Ohio criminal justice history is that the reform's benefactor did not survive to witness the culmination of his behind-the-scenes machinations. Chief Justice Thomas Moyer unexpectedly died on April 2, 2010, three months shy of the effective date for the new Rule 16 and the birth of "open discovery" in Ohio criminal prosecutions.[65] His crucial role in the two-decade long reform effort, foremostly played out behind the scenes and removed from the public spotlight, was not completely unheralded. His longtime colleague

---

[61] Grove, *supra* note 5, at 144.

[62] Meeting Minutes, Ohio Sup. Ct. Comm. on the Rules of Prac. and Proc. (Mar. 26, 2010); Ohio R. Crim. P. 16 (Staff Notes). The Court's decision to ignore the recommended revisions was likely to avoid the possibility of disturbing the delicate balance which underlay the agreement between prosecutors and defense lawyers in the original framing of the rule proposal and might threaten to derail the peaceful considerations achieved to date.

[63] S. Con. Res. 12, 128th Gen. Assemb., Reg. Sess. (Ohio 2010).

[64] *See* Grove, *supra* note 5, at 143.

[65] *Ohio Chief Justice Thomas J. Moyer Dies*, COLUMBUS DISPATCH (Apr. 2, 2010, 12:01 AM), https://www.dispatch.com/article/20100402/NEWS/304029580.

on the bench, Justice Paul Pfeifer, took the occasion of the final filing of the amendment to Rule 16 with the Ohio General Assembly to offer this poignant posthumous remembrance:

> The patience and spirit of cooperation required to realize these important and necessary changes to the discovery process speak volumes about Chief Justice Moyer's collaborative, collegial nature. . . . His vision and persistence and, finally, his stubbornness in supporting a just cause, led to this remarkable achievement for our legal system. For well over a decade, he worked for this change, and we have been through numerous starts and stops. But today, we stand in a great place—the proposed Crim.R. 16 emerged from this court by a unanimous vote, has the support of prosecutors and defense attorneys, and, we think, bipartisan support in the General Assembly. All of that is the direct result of Tom's stewardship.[66]

Following the death of the second-longest serving Chief Justice in the Supreme Court of Ohio's history, Chief Justice Thomas Moyer was accorded the high honor of lying in state for public viewing within the Ohio Judicial Center, and duly received many public remembrances and accolades for the numerous accomplishments of his long judicial career.[67] It is lamentable, but understandable, that none paid tribute to the towering achievement of his quiet and essential leadership role in a momentous reform that would not realize enactment for another three months.

[66] *Supreme Court Submits 'Open Discovery,' supra* note 26.

[67] *Memorial Tribute: The Honorable Thomas J. Moyer Chief Justice*, SUP. CT. OF OHIO & OHIO JUD. SYS., https://www.supremecourt.ohio.gov/Memorial/ (last visited July 6, 2020).