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SUMMARY

Newly discovered evidence

New trial

- Allows a new trial, after a verdict of conviction, to be granted for specified causes that materially affect the fairness of the defendant's trial or that demonstrate a miscarriage of justice.
- Creates an additional cause for a new trial when new evidence is discovered that, were it to be considered at a new trial, would establish a strong probability of a different result at trial.
- Specifies that a motion for a new trial based on that newly discovered evidence may be filed at any time after the verdict is rendered.
- Requires that the motion for a new trial based on newly discovered evidence be filed with supporting evidence and documentation.
- Requires the court to review the motion for a new trial based on newly discovered evidence and any supporting evidence, documentation, and other materials related to the case.
- After reviewing the materials, requires the court to dismiss the motion for a new trial based on newly discovered evidence if the court finds that the motion is patently frivolous.
- If the court does not dismiss the motion for a new trial based on newly discovered evidence, allows the parties to obtain discovery.
- After the court reviews the materials and discovery is completed, requires the court to promptly hold a hearing on the motion for a new trial based on newly discovered evidence.

- Requires the court to grant the motion if the court finds that the newly discovered evidence, were it to be considered at trial, would establish a strong probability of a different result at trial.
- Requires the court to deny the motion if the court does not find that the newly discovered evidence, were it to be considered at trial, would establish a strong probability of a different result at trial.
- Allows the court to appoint counsel to represent a person who files a motion for a new trial based on newly discovered evidence upon a finding that the person is indigent, unless the court finds that the motion is patently frivolous.

Post-conviction relief

- Creates an additional ground for post-conviction relief when a person produces newly discovered evidence that, were it to be considered at a new trial, would establish a strong probability of a different result at trial.
- Allows any person filing a petition for post-conviction relief to obtain discovery under the existing Post-Conviction Relief Law, rather than only a person who has been sentenced to death.
- Specifies that a petition for post-conviction relief based on newly discovered evidence may be filed at any time after the expiration of the time for filing an appeal.
- Unless the petition for post-conviction relief based on newly discovered evidence is patently frivolous, requires the court to hold a hearing on the issues 30 days after the prosecuting attorney is required to respond by answer or motion.
- Requires the court to grant the petition and issue findings of fact if the court finds that the newly discovered evidence, were it to be considered at trial, would establish a strong probability of a different result at trial.
- Requires the court to deny the petition and issue findings of fact if the court does not find that the newly discovered evidence, were it to be considered at trial, would establish a strong probability of a different result at trial.
- Requires the court to appoint counsel to represent a person who files a petition for post-conviction relief based on newly discovered evidence upon a finding that the person is indigent, unless the court finds that the motion is patently frivolous.

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DETAILED ANALYSIS

Newly discovered evidence

New trial

The bill allows a new trial, after a verdict of conviction, to be granted on the application of the defendant for specified causes that materially affect the fairness of the defendant’s trial or that demonstrate a miscarriage of justice. Under current law, a new trial, after a verdict of conviction, may be granted on the application of a defendant for specified causes affecting materially the defendant’s substantial rights.¹

Cause for new trial

The bill creates an additional cause for a new trial. When new evidence² is discovered that, were it to be considered at a new trial, would establish a strong probability of a different result at trial, the court may grant a new trial.³ The causes must be sustained by affidavit showing their truth, and may be controverted by affidavit and other documentary evidence in support of the claim for relief.⁴

Under current law, the following causes for new trial exist:⁵

¹ R.C. 2945.79.

² There are two causes for a new trial based on newly discovered evidence; one created by the bill in R.C. 2945.79(G) and one that exists in current law in R.C. 2945.79(F). When the analysis discusses a cause for newly discovered evidence the reference is to the one created by the bill unless otherwise indicated or unless the context clearly indicates otherwise.

³ R.C. 2945.79(G).

⁴ R.C. 2945.81(B).

⁵ R.C. 2945.79(A) to (F).

- Irregularity in the proceedings of the court, jury, prosecuting attorney, or the witnesses for the state, or for any order of the court, or abuse of discretion by which the defendant was prevented from having a fair trial;
- Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
- Accident or surprise which ordinary prudence could not have guarded against;
- That the verdict is not sustained by sufficient evidence or is contrary to the law; but if the evidence shows that defendant is not guilty of the degree of the crime for which the defendant was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and pass sentence on such verdict or finding as modified, provided that this power extends to any court to which the cause may be taken on appeal;
- Error of law occurring at the trial;
- When new evidence is discovered material to the defendant, which the defendant could not with reasonable diligence have discovered and produced at trial. When a motion for new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing of said motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendants to procure such affidavits, the court may postpone the hearing of the motion for such length of time as under all the circumstances of the case is reasonable. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

Motion for new trial

The bill requires that an application for a new trial based on newly discovered evidence that, were it to be considered at a new trial, would establish a strong probability of a different result at trial, be made by written motion and may be filed at any time after the verdict is rendered.⁶

Under current law, a motion for a new trial based on the first five dot points under **“Cause for new trial,”** above, must be filed within three days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing a motion for a new trial in which case it must be filed within three days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided.⁷ An application for new trial based on the final dot point under **“Cause for new trial,”** above, must be filed within 120 days following the day upon which the verdict

⁶ R.C. 2945.80(C).

⁷ R.C. 2945.80(A).

was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which the defendant must rely, such motion must be filed within three days from an order of the court finding that the defendant was unavoidably prevented from discovering the evidence within the 120-day period.⁸

- The bill requires that the motion for a new trial based on newly discovered evidence that, were it to be considered at a new trial, would establish a strong probability of a different result at trial, include all of the following:⁹
- Specific, nonconclusory facts identifying the newly discovered evidence;
- An explanation of how the newly discovered evidence entitles the defendant to relief;
- An explanation of why the newly discovered evidence was not proffered at trial or at any pretrial proceedings in the case;
- Any supporting evidence or documentation.

Court consideration and discovery

The bill requires the court, before granting a hearing on a motion for a new trial based on newly discovered evidence, to review, in addition to the motion and supporting evidence or documentation described under “**Motion for new trial**,” above, the supporting affidavits and the documentary evidence, all the files and records pertaining to the proceedings against the defendant, including the indictment, the court’s journal entries, the journalized records of the clerk of the courts, and the court reporter’s transcript.¹⁰

If, after reviewing the materials described above, the court finds that the motion is “patently frivolous,” the bill requires the court to dismiss the motion for a new trial based on newly discovered evidence.¹¹

If the court does not dismiss the motion for a new trial based on newly discovered evidence, the bill allows the parties to obtain discovery in accordance with the Ohio Rules of Civil Procedure.¹²

After the court reviews the materials described above and after discovery is completed, the bill requires the court to promptly hold a hearing on the motion for a new trial based on newly discovered evidence.¹³

⁸ R.C. 2945.80(B).

⁹ R.C. 2945.811(B).

¹⁰ R.C. 2945.811(C).

¹¹ R.C. 2945.811(D).

¹² R.C. 2945.811(E).

¹³ R.C. 2945.811(F).

If the court finds that the newly discovered evidence, were it to be considered at a new trial, would establish a strong probability of a different result at trial, the bill requires the court to grant the motion for a new trial. If the court does not find that the newly discovered evidence would establish a strong probability of a different result at trial, the bill requires the court to deny the motion for a new trial.¹⁴

Court-appointed counsel

The bill allows the court to appoint counsel to represent a person who files a motion for a new trial based on newly discovered evidence upon a finding that the person is indigent, unless the court, after reviewing the materials described above, finds that the motion is “patently frivolous.”¹⁵

Definitions

The bill defines “patently frivolous” as offering evidence that, even if true, would not satisfy the standard for a new trial based on newly discovered evidence, that were it to be considered at a new trial, would establish a strong probability of a different result at trial.¹⁶

Post-conviction relief

Under current law, a person may file a petition in a court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other relief.¹⁷

Grounds for post-conviction relief

The bill creates an additional ground for post-conviction relief. When a person produces newly discovered evidence that, were it to be considered at a new trial, would establish a strong probability of a different result at trial, the court may grant post-conviction relief.¹⁸ Under continuing law, a petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.¹⁹

Under current law, the following grounds for post-conviction relief exist:²⁰

- Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution or the U.S. Constitution;

¹⁴ R.C. 2945.811(G).

¹⁵ R.C. 2945.811(H).

¹⁶ R.C. 2945.811(A).

¹⁷ R.C. 2953.21(B)(1)(a).

¹⁸ R.C. 2953.21(B)(1)(a)(v).

¹⁹ R.C. 2953.21(B)(1)(b).

²⁰ R.C. 2953.21(B)(1)(a)(i) to (iv).

- Any person who has been convicted of a criminal offense and sentenced to death and who claims that there was a denial or infringement of the person's rights under either of those Constitutions that creates a reasonable probability of an altered verdict;
- Any person who is convicted of a criminal offense that is a felony and who is an offender for whom DNA testing was performed on an eligible offender and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case provided results that establish, by clear and convincing evidence, actual innocence of that felony offense, or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death;
- Any person who has been convicted of aggravated murder and sentenced to death for the offense and who claims that the person had a serious mental illness at the time of the commission of the offense and that as a result the court should render void the sentence of death, with the filing of the petition constituting a waiver.

Discovery

The bill allows any person filing a petition for post-conviction relief to obtain discovery under the existing Post-Conviction Relief Law, described below, rather than only a person who has been sentenced to death.

Depositions, subpoenas, and subpoenas duces tecum

Under existing law, at any time in conjunction with the filing of the petition for post-conviction relief by a person sentenced to death, or with the litigation of a petition so filed, the court, for good cause shown, may authorize the petitioner in seeking the post-conviction relief and the prosecuting attorney of the county served by the court in defending the proceeding, to take depositions and to issue subpoenas and subpoenas duces tecum, and to any other form of discovery as in a civil action that the court in its discretion permits. The court may limit the extent of discovery.

In addition to discovery that is relevant to the claim and was available under Criminal Rule 16 through conclusion of the original criminal trial, the court, for good cause shown, may authorize the petitioner or prosecuting attorney to take depositions and issue subpoenas duces tecum in either of the following circumstances:²¹

- Except for the below, for any witnesses who testified at trial or who was disclosed by the state prior to trial, the petitioner or prosecuting attorney shows clear and convincing evidence that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an

²¹ R.C. 2953.21(B)(1)(e).

altered verdict. This provision does not apply if the witness was unavailable for trial or would not voluntarily be interviewed by the defendant or prosecuting attorney.

- For a witness to whom the above does not apply, the petitioner or prosecuting attorney shows good cause that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict.

If a person files a petition for post-conviction relief and requests post-conviction discovery or if the prosecuting attorney requests post-conviction discovery, within ten days after docketing the request, or within any other time that the court sets for good cause shown, the prosecuting attorney must respond by answer or motion to the petitioner's request or the petitioner must respond by answer or motion to the prosecuting attorney's request, whichever is applicable.²²

If a person who has been sentenced to death and who files a petition for post-conviction relief requests a deposition or the prosecuting attorney in the case requests a deposition, and if the courts grants the request, the court must notify the petitioner of the petitioner's counsel and the prosecuting attorney. The deposition shall be conducted pursuant to Criminal Rule 15.²³

Any post-conviction discovery must be completed by not later than 18 months after the start of the discovery proceedings unless, for good cause shown, the court extends that period for completing the discovery.²⁴

Nothing authorizes or will be construed as authorizing, the relitigation, or discovery in support of relitigation, of any matter barred by the doctrine of res judicata.²⁵

Protective discovery order

Existing law provides that if a person who has been sentenced to death files a petition for post-conviction relief and requests post-conviction discovery or if the prosecuting attorney requests postconviction discovery, upon motion by the petitioner, the prosecuting attorney, or the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from oppression or undue burden or expense. The court may also make any such order if, in its

²² R.C. 2953.21(B)(1)(f).

²³ R.C. 2953.21(D). The bill allows any person filing a petition for post-conviction relief to obtain discovery under the existing Post-Conviction Relief Law, rather than only a person who has been sentenced to death. However, the bill contains a technical error in R.C. 2953.21(D) in which a reference to a person sentenced to death requesting discovery remains in the bill.

²⁴ R.C. 2953.21(B)(1)(i).

²⁵ R.C. 2953.21(B)(1)(j).

discretion, it determines that the discovery sought would be irrelevant to the claims made in the petition, and if the court makes any such order on that basis, it must explain in the order the reasons why the discovery would be irrelevant.²⁶

If a petitioner, prosecuting attorney, or person from whom discovery is sought makes a motion for an order described in the preceding paragraph and the order is denied in whole or in part, the court, on terms and conditions as are just, may order that any party or person provide or permit discovery by taking depositions or issuing subpoenas or subpoenas duces tecum. The provisions of Civil Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion, except that in no case can a court require a petitioner who is indigent to pay expenses under those provisions.²⁷

Before any person moves for an order described in the preceding paragraphs, that person must make a reasonable effort to resolve the matter through discussion with the petitioner or prosecuting attorney seeking discovery. A motion for an order for protection must be accompanied by a statement reciting the effort made to resolve the matter.

The orders that may be made include, but are not limited to, any of the following:²⁸

- That discovery not be had;
- That the discovery may be had only on specified terms and conditions, including a designation of a time or place;
- That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- That certain matters not be inquired into or that the scope of discovery be limited to certain matters;
- That discovery be conducted with no one present except persons designated by the court;
- That a deposition after being sealed be opened only by order of the court;
- That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

²⁶ R.C. 2953.21(B)(1)(g).

²⁷ R.C. 2953.21(B)(1)(h).

²⁸ R.C. 2953.21(B)(1)(h).

Petition for post-conviction relief and answer

The bill requires that a petition for post-conviction relief based on newly discovered evidence may be filed at any time after the expiration of the time for filing the appeal.²⁹

Under current law, a petition for post-conviction relief based on the first three dot points under “**Grounds for post-conviction relief**,” above, must be filed no later than 365 days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the Ohio Supreme Court. If no appeal is taken, the petition must be filed no later than 365 days after the expiration of the time for filing the appeal.³⁰ A petition for post-conviction relief based on the final dot point under “**Grounds for post-conviction relief**,” above, must be filed no later than 365 days after April 12, 2021.³¹

In a petition filed for post-conviction relief based on newly discovered evidence, the bill provides that a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death. Under current law, the same provision applies for a petition for post-conviction relief based on the first three dot points under “**Grounds for post-conviction relief**,” above.³² A person who is sentenced to death who files a petition for post-conviction relief based on the final dot point under “**Grounds for post-conviction relief**,” above may ask the court to render void the sentence of death and order the resentencing of the person.³³

The bill allows a petitioner who files a petition for post-conviction relief based on newly discovered evidence to amend the petition as follows:³⁴

- If the petition was filed by a person who has been sentenced to death, at any time that is not later than 180 days after the petition is filed, the petitioner may amend the petition with or without leave of the court;
- If the above dot point does not apply, at any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings;
- The petitioner may amend the petition with leave of the court at any time after the expiration of the applicable period.

²⁹ R.C. 2953.21(B)(2)(c).

³⁰ R.C. 2953.21(B)(2)(a).

³¹ R.C. 2953.21(B)(2)(b).

³² R.C. 2953.21(B)(3)(a).

³³ R.C. 2953.21(B)(3)(b).

³⁴ R.C. 2953.21(H).

Under current law, a petitioner is required to state in the original or amended petition all grounds for relief claimed by the petitioner. Generally, any ground for relief that is not so stated in the petition is waived.³⁵

The clerk of the court in which a petition for post-conviction relief and, if applicable, a request for post-conviction recovery is filed must docket the petition and the request and bring them promptly to the attention of the court. The clerk of the court in which the petition for post-conviction relief and, if applicable, the request for post-conviction discovery is filed must immediately forward a copy of the petition and a copy of the request if filed to the prosecuting attorney. If the request for post-conviction discovery is filed by the prosecuting attorney, the clerk of the court must immediately forward a copy of the request to the petitioner or petitioner's counsel.³⁶

Under current law, within ten days after the docketing of the petition for post-conviction relief, or within any further time that the court may fix for good cause shown, the prosecuting attorney must respond by answer or motion. Within 20 days from the date the issues are raised, either party may move for summary judgment.³⁷

There is no page limit on the number of pages in, or on the length of, a petition filed by a person who has been sentenced to death. If any court rule specifies a limit on the number of pages in, or the length of, a petition filed or on a prosecuting attorney's response to such a petition that exceeds the limit specified in the petition, the prosecuting attorney may respond by an answer or motion that exceeds the limit specified for the response.³⁸

Court consideration

Under current law, the court must consider a petition that is timely filed even if a direct appeal of the judgment is pending. Before granting a hearing, the court must determine whether there are substantive grounds for relief. In making such a determination, the court must consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, must be taxed as court costs.

If the court dismisses the petition it must make and file findings of fact and conclusions of law with respect to such a dismissal. If the petition was filed by a person who has been

³⁵ R.C. 2953.21(B)(4).

³⁶ R.C. 2953.21(C).

³⁷ R.C. 2953.21(F).

³⁸ R.C. 2953.21(B)(6).

sentenced to death, the findings of fact and conclusions of law must state specifically the reasons for the dismissal of the petition and each claim it contains.³⁹

Under the bill, for a petition for post-conviction relief based on newly discovered evidence, unless the petition and the files and records of the case show that the petition is “patently frivolous,” the court must hold a hearing on the issues 30 days after the prosecuting attorney is required to respond by answer or motion as described above even if a direct appeal of the case is pending. Under current law, for a petition for post-conviction relief based on any other ground, unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court must proceed to a prompt hearing on the issues even if a direct appeal of the case is pending.⁴⁰

Under current law, if the court does not find grounds for granting relief, it must make findings of fact and conclusions of law and must enter judgment denying relief on the petition. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law must state specifically the reasons for the denial of relief on the petition and of each claim it contains. If no direct appeal is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded and the court finds grounds for granting relief, it must make and file findings of fact and conclusions of law and must enter a judgment that vacates and sets aside the judgment, and in the case of a petitioner who is in custody, must discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court may also make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail.⁴¹

Upon a filing of a petition for post-conviction relief by a person sentenced to death, only the Ohio Supreme Court may stay execution of a sentence of death.⁴²

Court-appointed counsel

The bill provides that if a person sentenced to death intends to file a petition for post-conviction relief based on newly discovered evidence, the court must appoint counsel to represent the person upon a finding that the person is indigent and the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel, unless the court finds that the evidence is “patently frivolous.” The court may decline to appoint counsel for the person only upon a finding, after hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent. Additionally, the court must appoint counsel to represent a person who files a petition for post-

³⁹ R.C. 2953.21(E).

⁴⁰ R.C. 2953.21(G).

⁴¹ R.C. 2953.21(I).

⁴² R.C. 2953.21(J).

conviction relief based on newly discovered evidence upon a finding that the person is indigent, unless the court finds that the evidence is “patently frivolous.”

Under current law, if a person sentenced to death intends to file a petition for post-conviction relief based on another ground, the court must appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.⁴³

Definitions

The bill defines “patently frivolous” as offering evidence that, even if true, would not satisfy the standard for postconviction relief based on newly discovered evidence.⁴⁴

Cross references

The bill makes several conforming cross reference changes for R.C. 2953.21.⁴⁵

HISTORY

Action	Date
Introduced	05-15-24

ANHB0594IN-135/ts

⁴³ R.C. 2953.21(K)(1).

⁴⁴ R.C. 2953.21(A).

⁴⁵ R.C. 181.25(A)(5), 2929.06(A)(1)(e) and (2), and 2953.23(A)(1)(a) and (2).