



Ohio Legislative Service Commission

Bill Analysis

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Am. Sub. S.B. 139* 131st General Assembly (As Reported by H. Judiciary)

Sens. Seitz and Williams, Tavares, Brown, LaRose, Eklund, Burke, Coley, Lehner, Manning, Schiavoni, Thomas

BILL SUMMARY

- Requires the clerk of a common pleas court to retain a copy of the original trial file when a death penalty is imposed.
- Specifies that there is no page limit on petitions for postconviction relief in death penalty cases or on notices of appeal, responses, or briefs in appeals of denials of such relief.
- Expands the time within which a person who has been sentenced to death and files a petition for postconviction relief may amend the petition, to any time that is not later than 180 days after the petition is filed, with or without leave or prejudice to the proceedings.
- Provides in specified circumstances for depositions, subpoenas, and discovery in postconviction relief proceedings brought by a person who has been sentenced to death.
- Provides for orders protecting from undue oppression, burden, or expense if a person who has been sentenced to death files a petition for postconviction relief and requests discovery or if the prosecuting attorney in the case requests discovery, and the court finds that justice requires the order.
- Requires a judge hearing a postconviction relief proceeding brought by a person who was sentenced to death to state specifically in the findings of fact and conclusions of law why each claim was either denied or granted.

* This analysis was prepared before the report of the House Judiciary Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

CONTENT AND OPERATION

Retention of copy of record in death penalty case

The bill requires the clerk of a court of common pleas or a panel of three judges of a court of common pleas that imposes a sentence of death to make and retain a copy of the entire record in the case, before delivering the original record to an appellate court or the Supreme Court. Under the bill, as under existing law, the clerk then must deliver the entire record to the appellate court if the aggravated murder that is the basis of the sentence was committed before January 1, 1995, and must deliver the entire record to the Supreme Court if the aggravated murder that is the basis of the sentence was committed on or after January 1, 1995.¹ Currently, the Ohio Supreme Court has exclusive jurisdiction in direct appeals in cases in which a death penalty has been imposed,² but prior to January 1, 1995, courts of appeals and the Supreme Court both were required to review death penalty cases on direct appeal.³

Postconviction relief proceedings

Generally; basis for filing petition

The bill modifies the grounds that may be the basis of a postconviction relief proceeding, which is a type of collateral challenge of a criminal conviction or delinquent child adjudication, in a case in which a person has been sentenced to death. Currently, a person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio or U.S. Constitution may file a petition in the court that imposed sentence asking the court to vacate or set aside the judgment or sentence or grant other appropriate relief. The bill adds a new basis for a postconviction relief petition that specifies that 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 the Ohio or U.S. Constitution *that creates a reasonable probability of an altered verdict* may file a petition requesting the postconviction relief. Continuing law also permits a petition for postconviction relief to be filed for specified DNA-related claims.⁴

¹ R.C. 2929.03(G).

² Article IV, Sections 2(B)(2)(c) and 3(B)(2), Ohio Constitution, and R.C. 2929.05.

³ Former Article IV, Sections 2(B)(2)(a)(ii) and 3(B)(2), Ohio Constitution, and former R.C. 2929.05.

⁴ R.C. 2953.21(A)(1)(a).



No page limit on original petitions in death penalty cases

The bill specifies that, notwithstanding any law or court rule to the contrary, there is no limit on the number of pages in, or on the length of, a petition requesting postconviction relief filed by a person who has been sentenced to death. If any court rule specifies a limit on the number of pages in, or on the length of, a petition requesting postconviction relief or on a prosecuting attorney's response to such a petition by answer or motion and a person who has been sentenced to death files a petition that exceeds the limit specified for the petition, the prosecuting attorney may respond by an answer or motion that exceeds the limit specified for the response.⁵ The Revised Code currently does not impose, or address whether there is, a limit on the number of pages in, or on the length of, such a petition.

Amendment of petition

The bill expands the time within which a person who has been sentenced to death and files a petition for postconviction relief may amend the petition without leave of court or prejudice to the proceedings. Under the bill, such a petitioner may amend the petition at any time that is not later than 180 days after the petition is filed, with or without leave or prejudice to the proceedings. For all other petitioners, as under existing law, the petitioner may amend the petition at any time before the answer or motion is filed, with or without leave or prejudice to the proceedings. In either situation, after the expiration of the applicable period, the petitioner may amend the petition with leave of court at any time.⁶

Depositions, subpoenas, and discovery

Request and governing procedures

The bill enacts procedures governing depositions, subpoenas, and discovery in postconviction relief proceedings brought by a person who has been sentenced to death. It specifies that, at any time in conjunction with the filing of a petition for postconviction relief by a person who has been 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 postconviction 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 as described below, and to any other form of discovery as in a

⁵ R.C. 2953.21(A)(6) and (E).

⁶ R.C. 2953.21(G).



civil action that the court in its discretion permits. The court may limit the extent of the discovery under this provision.⁷

In addition to discovery that is relevant to the claim and was available under Criminal Rule 16 (see "**Background**," below) 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 and subpoenas duces tecum in either of the following circumstances:⁸

(1) For any witness 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 altered verdict, except that this provision does not apply if the witness was unavailable for trial or would not voluntarily be interviewed by the defendant or prosecuting attorney;

(2) For any witness with respect to whom clause (1) 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.

When a person who has been sentenced to death files a petition for postconviction relief and also files a request for postconviction discovery, in addition to the existing duties required with respect to the petition, the clerk of the court in which the request is filed must docket the petition and the request, bring them promptly to the attention of the court, and immediately forward a copy of the request to the prosecuting attorney of the county served by the court. If the request for postconviction discovery is filed by the prosecuting attorney, the clerk of the court immediately must forward a copy of the request to the petitioner or the petitioner's attorney.⁹ Within ten days after the docketing of the request for postconviction discovery, or within any other time that the court sets for good cause shown, the prosecuting attorney must respond by answer or motion to the request if made by the petitioner or the petitioner must respond by

⁷ R.C. 2953.21(A)(1)(d).

⁸ R.C. 2953.21(A)(1)(d).

⁹ R.C. 2953.21(B).

answer or motion to the request if made by the prosecuting attorney, whichever is applicable.¹⁰

If a person who has been sentenced to death and who files a petition for postconviction relief requests a deposition or the prosecuting attorney in the case requests a deposition and if the court grants the request under the criteria described above, the court must notify the petitioner or the petitioner's counsel and the prosecuting attorney. The deposition must be conducted pursuant to Criminal Rule 15(B), (D), and (E) (see "**Background**," below). Notwithstanding division (C) of that Rule, the petitioner is not entitled to attend the deposition. The prosecuting attorney must be permitted to attend and participate in any deposition.¹¹

Protection from undue oppression, burden, or expense

The bill provides that if a person who has been sentenced to death and who files a petition for postconviction relief requests postconviction discovery or if the prosecuting attorney of the county served by the court requests postconviction discovery, upon motion by the petitioner, the prosecuting attorney, or the person from whom discovery is sought, and for good cause, the court may make any order that justice requires to protect a party or person from oppression or undue burden or expense, including the orders described below. The court also may make any such order if, in its discretion, it determines that the discovery sought would be irrelevant to the claims made in the petition; if the court makes any such order on that basis, it must explain in the order the reasons why the discovery would be irrelevant.¹² Before any person moves for an order protecting from undue oppression, burden, or expense, 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 must be accompanied by a statement reciting the effort made to resolve the matter.¹³

If a petitioner, prosecuting attorney, or person from whom discovery is sought makes a motion for an order protecting from undue oppression, burden, or expense and the order is wholly or partially denied, the court, on terms and conditions as are just, may order that any party or person provide or permit discovery. The provisions of Civil Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion (see

¹⁰ R.C. 2953.21(A)(1)(e).

¹¹ R.C. 2953.21(C).

¹² R.C. 2953.21(A)(1)(f).

¹³ R.C. 2953.21(A)(1)(g).



"**Background,**" below), except that in no case may a court require a petitioner who is indigent to pay expenses under those provisions.¹⁴

Orders protecting from undue oppression, burden, or expense that may be made under the bill's provisions include any of the following:¹⁵

(1) That the discovery not be had; that it be had only on specified terms and conditions, including a designation of the time or place; that it be had only by a method of discovery other than that selected by the party seeking discovery; or that it be conducted with no one present except persons designated by the court;

(2) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;

(3) That a deposition after being sealed be opened only by order of the court;

(4) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(5) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Time limit for postconviction discovery

The bill requires any postconviction discovery authorized by the court to be completed not later than 18 months after the start of the discovery proceedings unless, for good cause shown, the court extends that period.¹⁶

Res judicata

The bill specifies that nothing in its provisions described above regarding depositions, subpoenas, and discovery authorizes, or may be construed as authorizing, the relitigation, or discovery in support of relitigation, of any matter barred by the doctrine of *res judicata*.¹⁷

¹⁴ R.C. 2953.21(A)(1)(g).

¹⁵ R.C. 2953.21(A)(1)(g).

¹⁶ R.C. 2953.21(A)(1)(h).

¹⁷ R.C. 2953.21(A)(1)(i).

Nonapplicability of postconviction relief

The bill's postconviction relief granted to any person convicted of a criminal offense and sentenced to death and who claims a denial or infringement of the person's constitutional rights that creates a reasonable probability of an altered verdict does not apply to such person who has unsuccessfully raised the same claims in a petition for postconviction relief.¹⁸

Specific statement of why each claim was either denied or granted

Regarding dismissal of petition

Under continuing law, before granting a hearing on a petition for postconviction relief, the court must determine whether there are substantive grounds for relief. In making the determination, it must consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings, including the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. If the court dismisses the petition, it must make and file findings of fact and conclusions of law with respect to such dismissal.

The bill requires that, if the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law regarding the dismissal must state specifically the reasons for the dismissal of the petition and of each claim it contains.¹⁹

Regarding denial or grant of claim

Under continuing law, unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court must hold a hearing on the issues. If the court does not find grounds for granting relief, it must make and file findings of fact and conclusions of law and enter judgment denying relief on the petition. If the court finds grounds for granting relief, it must make and file findings of fact and conclusions of law and enter a judgment that vacates and sets aside the judgment in question. If the court finds grounds for granting relief, in the case of a petitioner who is in custody, the court must discharge or resentence the petitioner or grant a new trial as the court determines appropriate.

With respect to a denial of the claim, if it was filed by a person who has been sentenced to death, the bill requires that the findings of fact and conclusions of law state

¹⁸ R.C. 2953.21(A)(1)(j).

¹⁹ R.C. 2953.21(D).



specifically the reasons for the denial of relief on the petition and of each claim it contains. With respect to a grant of the relief requested, if the claim was filed by a person who has been sentenced to death, the bill requires that the findings of fact and conclusions of law state specifically the reasons for the finding of grounds for granting the relief, with respect to each claim contained in the petition.²⁰

No page limit on postconviction relief appeal petitions in death penalty cases

The bill specifies that if a postconviction relief petition filed by a person who has been sentenced to death is denied and the person appeals the judgment, notwithstanding any law or court rule to the contrary, there is no limit on the number of pages in, or on the length of, a notice of appeal or briefs related to an appeal filed by the person. If any court rule specifies a limit on the number of pages in, or on the length of, such a notice of appeal or briefs or on a prosecuting attorney's response or briefs with respect to such an appeal and a person who has been sentenced to death files a notice of appeal or briefs that exceed the limit specified for the "petition," the prosecuting attorney may file a response or briefs that exceed the limit specified for the "answer" or briefs. Under continuing law, an order awarding or denying relief sought in a postconviction petition so filed is a final judgment and may be appealed pursuant to R.C. Chapter 2953.²¹ The Revised Code currently does not impose, or address whether there is, a limit on the number of pages in, or on the length of, such a petition.

Background

Criminal Rules

Criminal Rule 15 provides for, and governs the taking of, depositions in criminal cases. Divisions (B), (D), and (E) of the Rule, cited in the bill, provide for: (1) notice to parties of the time and place of a requested deposition, (2) the right of the defendant to have counsel assigned and, in specified circumstances, to have expenses of the deposition paid out of public funds, and (3) the taking of the deposition in the manner provided in civil cases and the right of the prosecution and defense to full examination of witnesses. Division (C) of the Rule, cited in the bill as not applying regarding a deposition under the bill's provisions, provides for the right of the defendant to attend the deposition.²²

²⁰ R.C. 2953.21(F) and (H).

²¹ R.C. 2953.23(B).

²² Criminal Rule 15(B) to (E), not in the bill.

Criminal Rule 16 provides for, and establishes procedures governing, discovery in criminal cases.

Civil Rule 37(A)(4) provides that, if a motion for discovery in a civil action is made: (1) if the motion is granted, the court must require the party or deponent who opposed the motion or the party or attorney advising that conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust, (2) if the motion is denied, the court must require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust, and (3) if the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.²³

HISTORY

| ACTION | DATE |
|-------------------------------|----------|
| Introduced | 04-06-15 |
| Reported, S. Criminal Justice | 09-30-15 |
| Passed Senate (32-0) | 10-07-15 |
| Reported, H. Judiciary | --- |

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²³ Civil Rule 37(A)(4), not in the bill.

