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To: The Honorable Dontavius L. Jarrells
Ohio House of Representatives

From: Sarah A. Maki, Attorney *SAM*

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Subject: Analysis of I_135_1193

SUMMARY

Newly discovered evidence

New trial

- Provides that a person may be granted a new trial based on newly discovered evidence if the evidence is relevant and admissible; if the evidence was not proffered at trial or any pretrial proceedings; and if the consideration of the evidence would result in a reasonable likelihood of acquittal.
- Specifies that a motion for a new trial based on newly discovered evidence may be filed at any time after the verdict is rendered.
- Allows a defendant who files a motion for a new trial based on newly discovered evidence to amend the motion under specified circumstances.
- Requires that within ten days after docketing the motion for a new trial based on newly discovered evidence, or within further time for good time shown, the prosecuting attorney must respond by answer or motion.
- Requires the court to consider a motion for a new trial based on newly discovered evidence and, before granting a hearing, determine whether there are substantive grounds for relief.
- If in making that determination, the court finds there are no substantive grounds for relief or that the motion is patently frivolous, the court must dismiss the motion and make and file findings of fact and conclusions of law.
- Unless the motion for a new trial based on newly discovered evidence is dismissed as described in the preceding dot point, requires the court to hold a hearing on the issues 30 days after the prosecuting attorney is required to respond by answer or motion.

- If the court does not find grounds for granting relief, requires the court to make and file findings of fact and conclusions of law and enter judgment denying relief for a new trial.
- If the court finds grounds for granting relief, requires the court to make and file findings of fact and conclusions of law and enter a judgment that vacates and sets aside the judgment in question, and grant a new trial.
- Requires 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

- Provides that a person may be granted post-conviction relief based on newly discovered evidence if the evidence is relevant and admissible; if the evidence was not proffered at trial or any pretrial proceedings; and if the consideration of the evidence would result in a reasonable likelihood of acquittal.
- 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 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.

DETAILED ANALYSIS

Newly discovered evidence

New trial

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 adds an additional cause for a new trial. When new evidence² is discovered that is relevant and admissible evidence not proffered at trial or in any pretrial proceedings in the

¹ R.C. 2945.79.

² There are two causes for a new trial based on newly discovered evidence; one created by the bill and one that exists in current law. 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.

case, and that were it to be considered at a new trial, would result in a reasonable likelihood of acquittal, the court may grant a new trial.³ The causes may 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

- Irregularity in the proceedings of the court, jury, prosecuting attorney, or 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 of, 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 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

³ R.C. 2945.79(G).

⁴ R.C. 2945.81(B).

⁵ R.C. 2945.79(A) to (F).

⁶ R.C. 2945.80(C).

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 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 allows a defendant who files a motion for a new trial based on newly discovered evidence to amend the motion as follows:⁹

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

Answer

Under the bill, within ten days after docketing the motion for a new trial based on newly discovered evidence, 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. The right to summary judgment must appear on the face of the record.¹⁰

Court consideration

The bill requires that the court consider a motion for a new trial based on newly discovered evidence.¹¹ Before granting a hearing on a motion for a new trial, the court must determine whether there are substantive grounds for relief. In making such a determination, the court must consider, in addition to the motion, the supporting affidavits and the documentary evidence, all the files and records pertaining to the proceedings against the

⁷ R.C. 2945.80(A).

⁸ R.C. 2945.80(B).

⁹ R.C. 2945.811(D).

¹⁰ R.C. 2945.811(B).

¹¹ R.C. 2945.811(C)(1).

defendant, including the indictment, the court’s journal entries, the journalized records of the clerk of the courts, and the court reporter’s transcript. The court reporter’s transcript, if ordered and certified by the court, must be taxed as court costs.¹²

If the court finds that there are no substantive grounds for relief or that the motion is “patently frivolous,” the bill requires the court to dismiss the motion and make and file findings of fact and conclusions of law with respect to that dismissal. If the motion 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 dismissal of the motion and of each claim it contains.¹³

Unless the motion for a new trial is dismissed, the bill requires the court to hold a hearing on the issues 30 days after the prosecuting attorney is required to respond by answer or motion, even if a direct appeal of the case is pending. If the court notifies the parties that it has found substantive grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.¹⁴

If the court does not find grounds for granting relief, the bill requires the court to make and file findings of fact and conclusions of law and to enter judgment denying relief on the motion for a new trial. If the motion 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 motion and of each claim it contains. If no direct appeal is pending or if a pending direct appeal of the case has been remanded to the court and the court finds ground 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 in question, and must grant a new trial.¹⁵

Court-appointed counsel

The bill requires 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.”¹⁶

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.¹⁷

¹² R.C. 2945.811(C)(2).

¹³ R.C. 2945.811(C)(3).

¹⁴ R.C. 2945.811(C)(4).

¹⁵ R.C. 2945.811(E).

¹⁶ R.C. 2945.811(F).

¹⁷ R.C. 2945.811(A).

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.¹⁸

Grounds for post-conviction relief

The bill adds an additional ground for post-conviction relief. Any person who produces relevant and admissible evidence not proffered at trial or in any pretrial proceedings in the case that, were it to be considered at a new trial, would result in a reasonable likelihood of acquittal.¹⁹ Under continuing law, a petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.²⁰

Under current law, the following grounds for post-conviction relief exist:²¹

- 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;
- 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 and 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.

¹⁸ R.C. 2953.21(B)(1)(a).

¹⁹ R.C. 2953.21(B)(1)(a)(v).

²⁰ R.C. 2953.21(B)(1)(b).

²¹ R.C. 2953.21(B)(1)(a)(i) to (iv).

Petition for post-conviction relief

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.²² 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.²³ 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, 2021.²⁴

Under current law, 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.²⁵

The bill allows a petitioner who files a petition for post-conviction relief based on newly discovered evidence to amend the petition as follows:²⁶

- 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.

Answer

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

²² R.C. 2953.21(B)(2)(c).

²³ R.C. 2953.21(B)(2)(a).

²⁴ R.C. 2953.21(B)(2)(b).

²⁵ R.C. 2953.21(B)(6).

²⁶ R.C. 2953.21(H).

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.²⁷

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 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.²⁸

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.²⁹

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.³⁰

²⁷ R.C. 2953.21(F).

²⁸ R.C. 2953.21(E).

²⁹ R.C. 2953.21(G).

³⁰ R.C. 2953.21(I).

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-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.³¹

Definitions

The bill defines “patently frivolous” as offering evidence that, even if true, would not satisfy the standard for post-conviction relief based on newly discovered evidence.³²

Cross references

The bill makes several conforming cross reference changes for R.C. 2953.21.³³

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³¹ R.C. 2953.21(K)(1).

³² R.C. 2953.21(A).

³³ R.C. 181.25(A)(5), 2929.06(A)(1)(e) and (2), and 2953.23(A)(1)(a) and (2).