

## RULE 33. New Trial

(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

- (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;
- (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he 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 shall pass sentence on such verdict or finding as modified;
- (5) Error of law occurring at the trial;
- (6) Except as provided in Rule 33.1, when new evidence is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial and which produces a reasonable likelihood of a different outcome at trial.
  - a. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the 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 defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case.
  - b. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses;

(B) Motion for new trial; form, time.

- (1) Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen 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 his motion for a new trial, in which case the motion shall be filed within ~~seven~~ twenty-one days

from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

- (2) Motions for new trial pursuant to subsection (A)(6) shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived.

If filed more than one hundred twenty days after the day upon which the verdict was rendered or the decision of the court where trial by jury has been waived, the defendant must first seek leave of the court to file a motion for new trial. Leave of the court shall be granted 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 within the one hundred twenty day period.

Leave of the court shall be granted regardless of any delay between the discovery of the evidence and the filing of a motion seeking leave to file a motion for new trial, unless it is made to appear by clear and convincing proof that the prosecuting attorney was actually prejudiced by the delay. If the prosecuting attorney has established, by clear and convincing proof, that they were actually prejudiced as a result of the delay between the discovery of the evidence and the filing of a motion seeking leave to file a motion for new trial, the court may grant leave to file a motion for new trial only upon a showing that the delay was justifiable.

A motion for new trial shall be filed within twenty-one days from an order of the court granting leave to file a motion for new trial.

- (3) Notwithstanding any other subsection, motions for new trial pursuant to section 33.1 may be made at any time and without first seeking leave of the court.

(C) Affidavits required. The causes enumerated in subsection (A)(2) and (3) must be sustained by affidavit showing their truth, and may be controverted by affidavit.

(D) Procedure when new trial granted. When a new trial is granted by the trial court, or when a new trial is awarded on appeal, the accused shall stand trial upon the charge or charges of which he was convicted. If the court concludes by clear and convincing evidence that the newly discovered evidence would result in a different outcome at trial, the court may vacate the conviction and dismiss the relevant count with prejudice.

(E) Invalid grounds for new trial. No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

(1) An inaccuracy or imperfection in the indictment, information, or complaint, provided that the charge is sufficient to fairly and reasonably inform the defendant of all the essential elements of the charge against him.

(2) A variance between the allegations and the proof thereof, unless the defendant is misled or prejudiced thereby;

(3) The admission or rejection of any evidence offered against or for the defendant, unless the defendant was or may have been prejudiced thereby;

(4) A misdirection of the jury, unless the defendant was or may have been prejudiced thereby;

(5) Any other cause, unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial.

(F) Motion for new trial not a condition for appellate review. A motion for a new trial is not a prerequisite to obtain appellate review.

(G) A movant shall be entitled to invoke the processes of discovery available under Ohio Rules of Criminal Procedure or Civil Procedure, or elsewhere in the usages and principles of law if, and to the extent that, the judge, in the exercise of the judge's discretion and for good cause shown, grants leave to do so, but not otherwise.

[Effective: July 1, 1973.]

RULE 33.1 New Trial Based on Evidence that Undermines the State's Theory of Guilt or the Evidence Used to Convict.

- (A) Grounds. A new trial may be granted on motion of the defendant if the defendant produces clear and convincing evidence not previously considered that undermines in a material way the State's theory of guilt, or that directly contradicts the evidence used to convict, and which produces a reasonable likelihood of a different outcome at trial.
- (B) Timing. There is no time limit for a motion under this section, and it may be considered by the court at any time. Once the briefing is concluded, the court shall promptly set the matter for a hearing.
- (C) Evidentiary Hearing. The court shall hold a hearing on a motion under this section unless the defendant's motion is patently frivolous on its face. "Patently frivolous" is defined as offering no new evidence which could be tested at a hearing as to its credibility and the degree to which it undermines the theory of guilt used to convict. The court shall promptly issue a decision articulating the court's reason that supports the court's decision.
- (D) Discovery. Unless the court determines that the defendant's motion is patently frivolous on its face, the movant shall be entitled to invoke the processes of discovery available under Ohio Rules of Criminal Procedure or Civil Procedure, or elsewhere in the usages and principles of law.
- (E) Type of evidence to be considered under this section includes but is not limited to scientific or expert evidence that discredits the evidence relied on by the State at trial or demonstrates a shift in a field of scientific or expert knowledge; recantation evidence; a witness who did not testify at trial; DNA evidence; evidence that was not disclosed and whose disclosure would be required under *Brady v. Maryland*, 373 U.S. 83 (1963); or any other evidence that undermines the State's theory of guilt or that directly contradicts the evidence used to convict the defendant.
- (F) On motion by the defendant, the administrative judge of the court of common pleas shall appoint a judge who did not preside over the defendant's trial to consider and issue a ruling on the defendant's new trial motion. A motion made under this subsection must be filed contemporaneously with the defendant's motion for new trial.