



OHIO LEGISLATIVE SERVICE COMMISSION

Final Analysis

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Am. Sub. S.B. 139 131st General Assembly (As Passed by the General Assembly)

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

Reps. Antonio, Arndt, Boyd, Buchy, Dever, Fedor, Manning, Perales, Rezabek, Rogers, Sheehy, Sweeney

Effective date: April 6, 2017

ACT 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 (PCR) 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 PCR 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 PCR 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 PCR and requests discovery or if the prosecuting attorney in the case requests discovery, and the court finds that justice requires the order.

* This version updates the effective date.

- Requires a judge hearing a PCR 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.

CONTENT AND OPERATION

Retention of copy of record in death penalty case

The act requires the clerk of a court of common pleas in which an offender is sentenced to 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 act, as under preexisting 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 that date.¹ 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 act modifies the grounds that may be the basis of a postconviction relief (PCR) 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. Under continuing law, 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 act retains that basis and adds a new basis for a PCR 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

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, not in the act.

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



Ohio or U.S. Constitution *that creates a reasonable probability of an altered verdict* may file a petition requesting PCR. Continuing law also permits a petition for PCR to be filed for specified DNA-related claims.⁴

No page limit on original petitions in death penalty cases

The act 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 PCR 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 PCR or on a response by a prosecutor (a prosecuting attorney in this type of case) to the 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 prosecutor may respond by an answer or motion that exceeds the limit specified for the response.⁵ As of the date of the act's enactment, the Revised Code 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 act expands the time within which a person who has been sentenced to death and files a petition for PCR may amend the petition without leave of court or prejudice to the proceedings. Under the act, 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 preexisting 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 act enacts procedures governing depositions, subpoenas, and discovery in PCR 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 PCR 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 and the prosecutor to take depositions and

⁴ R.C. 2953.21(A)(1)(a).

⁵ R.C. 2953.21(A)(6) and (E).

⁶ R.C. 2953.21(G).



to issue subpoenas and subpoenas duces tecum as described below, 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 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 prosecutor 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, if the petitioner or prosecutor 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 prosecutor;

(2) For any witness with respect to whom clause (1) does not apply, if the petitioner or prosecutor 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 PCR and also files a request for postconviction discovery, in addition to the duties required under continuing law 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 court's attention, and immediately forward a copy of the request to the prosecutor of the county served by the court. If the request for postconviction discovery is filed by the prosecutor, 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 prosecutor must respond by answer or motion to the request if made by the

⁷ R.C. 2953.21(A)(1)(d).

⁸ R.C. 2953.21(A)(1)(d).

⁹ R.C. 2953.21(B).



petitioner or the petitioner must respond by answer or motion to the request if made by the prosecutor, whichever is applicable.¹⁰

If a person who has been sentenced to death and who files a petition for PCR requests a deposition or the prosecutor 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 prosecutor. The deposition must be conducted pursuant to Criminal Rule 15(B), (D), and (E), described in "**Background**," below. Notwithstanding division (C) of that Rule, the petitioner is not entitled to attend the deposition. The prosecutor must be permitted to attend and participate in any deposition.¹¹

Protection from undue oppression, burden, or expense

The act provides that if a prosecutor or a person who has been sentenced to death and who files a petition for PCR requests postconviction discovery, upon motion by the prosecutor, the petitioner, 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 prosecutor seeking discovery, and a motion for such an order must be accompanied by a statement reciting the effort made to resolve the matter.¹³

If a petitioner, prosecutor, 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 act'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 act 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 act 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 act states that the PCR provisions for any person convicted of a criminal offense and sentenced to death who claims a denial or infringement of the person's constitutional rights do not apply to such a person who has unsuccessfully raised the same claims in a petition for PCR.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 PCR, 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 act 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 for PCR 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 act requires that the findings of fact and conclusions of law state specifically the reasons for the denial of relief on the petition and of each claim it

¹⁸ R.C. 2953.21(A)(1)(j).

¹⁹ R.C. 2953.21(D).



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 act 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 act specifies that if a PCR 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 prosecutor'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 As of the date of the act's enactment, the Revised Code does not impose, or address whether there is, a limit on the number of pages in, or on the length of, such a notice of appeal or briefs.

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 act, 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 act as not applying regarding a deposition under the act'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 act.



Criminal Rule 16 provides for, and establishes procedures governing, discovery in criminal cases.²³

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.²⁴

HISTORY

ACTION	DATE
Introduced	04-06-15
Reported, S. Criminal Justice	09-30-15
Passed Senate (32-0)	10-07-15
Reported, H. Judiciary	11-30-16
Passed House (97-0)	12-06-16
Senate concurred in House amendments (31-0)	12-08-16

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²³ Criminal Rule 16, not in the act.

²⁴ Civil Rule 37(A)(4), not in the act.

