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Statutes require victim notification: when a case moves into the formal-inquiry stage; commission; and with all due diligence after the Commission concludes a hearing. The Commission's guiding principles for working with victims include trauma-informed practices, accessibility with clear and consistent communication, and respectfully keeping victims informed.

## RECOMMENDATIONS IN DETAIL

The Task Force recommends a number of changes to improve conviction integrity and postconviction review in Ohio. The recommendations fall within three specific categories: (1) Changes to Rules and Statutes, (2) Education and Training, and (3) Models for Conviction Review.

The Task Force's process for reviewing and voting on recommendations was uniform. A Task Force member or participant would draft a proposed recommendation; whether a rule, statute, or structure of a to-be-created entity, like an innocence commission. The Task Force members and participants would then discuss both policy- and law-related objectives, thoughts, and concerns. In many cases, the discussion would lead to redrafting and additional discussion. In some cases, the Chairperson created informal subcommittees of volunteers to hash out and vet the specifics of recommendation language. The informal-subcommittee process was reserved for the recommendations that started out as polarizing. Once each recommendation was fully drafted, it was voted on by a roll-call vote of the members present. Not all members were present for every vote, but a quorum was present for every vote. The Task Force would then move on to drafting and addressing the next potential recommendation. All roll-call votes are contained in the meeting minutes, which are available on the Task Force's webpage on the Supreme Court's website.

### Recommendations for Changes to Rules and Statutes

- Expand the grounds for a new trial by adopting Crim.R. 33.1 as a new rule under the Ohio Rules of Criminal Procedure.
- Amend R.C. 2953.21 and 2953.23 to expand access to discovery in noncapital postconviction proceedings, expand the time period in which a defendant may seek postconviction relief, and provide a mechanism for appointing counsel for certain noncapital defendants.
- Amend R.C. 181.25(A) (5) to facilitate the collection of detailed data related to felony appeals under R.C. 2953.08 and appeals of postconviction-relief proceedings.

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**Discussion:**

**Adoption of Crim.R. 33.1**

The Task Force's first recommendation to the Supreme Court is that Crim.R. 33.1 – titled New Trial Based on New Evidence that Produces a Reasonable Likelihood of Acquittal – be adopted in the Ohio Rules of Criminal Procedure.<sup>3</sup>

**RULE 33.1**

**New Trial Based on New Evidence that  
Produces a Reasonable Likelihood of Acquittal.**

- A. Grounds. A new trial may be granted on motion of the defendant if the defendant produces relevant and admissible evidence not proffered at trial or in any pretrial proceedings in the case, which, were it to be considered at a new trial, would result in a reasonable likelihood of acquittal.
- B. Timing. There is no time limit for a motion under this section, and it may be considered by the court at any time.
- C. Procedure.
  - 1. The motion shall set forth specific, nonconclusory facts: (a) identifying the specific new evidence; (b) explaining how that evidence demonstrates entitlement to relief under section (A); (c) explaining why the new evidence was not proffered at trial or any pretrial proceedings; and (d) attaching supporting materials.
  - 2. Unless, after reviewing the petition, the supporting materials, and all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript, the court determines that the defendant's motion is patently frivolous on its face (as defined in subsection (4) of this section), the court may appoint counsel for an indigent movant, and the parties shall be entitled to invoke the processes of discovery available under the Ohio Rules of Criminal Procedure.
  - 3. Once the briefing and any discovery is concluded, the court shall promptly set the matter for hearing.

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<sup>3</sup> As noted on page 1, the Task Force recommends that proposed rules and rule changes be submitted to the relevant Commissions.

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4. The court shall hold an evidentiary 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, even if true, would satisfy the standard in section (A).
- D. Types of evidence to be considered under this Rule include, but are 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; or evidence that was not disclosed and whose disclosure would be required under *Brady v. Maryland*, 373 U.S. 83 (1963).
  - E. The court shall issue written findings of fact and conclusions of law in disposing all motions under this rule.
  - F. Appeal. An order entered on the motion is a final order for purposes of appeal.

Proposed Crim.R. 33.1 began as an effort to amend existing Crim.R. 33. It became a standalone proposal following the Task Force consensus on discarding any proposed amendments to the existing Crim.R. 33. This process spanned multiple meetings and engendered significant debate.

Initially, the Task Force considered adding a subdivision to Crim.R. 33 that would address the purpose of expanding the bases that would support a motion for a new trial and another subdivision identifying the additional bases for a motion for a new trial. Included in the debate over adding those subdivisions was the concern that the purpose-related language might inadvertently limit the bases for new trials exclusively to actual-innocence cases. Additionally, concerns were raised that procedural and time-related bars too often created roadblocks to those deserving of a new trial, and that it was difficult to reach consensus on how finality should be balanced with achieving justice by "getting it right" in the criminal-justice system. The difficulty in marrying the proposed changes with the existing rule led the Task Force to focus on creating Crim.R. 33.1 as a standalone rule.

But proposed Crim.R. 33.1 itself would require several versions and multiple tweaks before the Task Force adopted it. More than one Task Force participant expressed concern during the debate that this proposal strayed too far from an actual-innocence limit and that it overly valued the ability to challenge convictions relative to the important criminal-justice-system value of finality. Another concern was raised on whether the provisions were unconstitutional under the Modern Courts Amendment because the proposal interfered with the General Assembly's authority to create substantive law. The vote to adopt this proposed rule as a Task



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Force recommendation was not unanimous.

The proposed rule is comprehensive in substance and procedure, and the Task Force debated every provision. Subdivision (A) of the proposed rule sets forth the ground on which a new trial may be granted. It requires a defendant to produce relevant, admissible evidence that was not proffered at trial or in pretrial proceedings. Plus, that new evidence must be such that, if introduced in a new trial, it would produce a reasonable likelihood of acquittal.

To remove procedural bars that unreasonably limit the time in which a defendant can seek a new trial and that prevent courts from reaching the merits on motions for new trials, subdivision (B) specifically contains no time limit.

The procedure for pursuing motions for new trials under proposed Crim.R. 33.1 lie in subdivision (C). This includes requirements for motions' contents, provisions for addressing frivolous claims and appointing counsel for nonfrivolous ones, discovery requirements, and a requirement that the court promptly set nonfrivolous matters for hearing.

Subdivision (D) sets forth a nonexclusive set of evidence types that may be considered. It specifically contemplates advances in science, DNA, *Brady* failures, and recantation evidence. Subdivision (E) requires the trial court to issue written findings of fact and conclusions of law when ruling on motions made under the proposed rule, and subdivision (F) makes orders entered on these motions final, appealable orders.

The next recommendation addresses potential statutory amendments.

### **Changes to Ohio Revised Code 2953.21, 2953.23, and 181.25**

- Postconviction Petitions under R.C. 2953.21 and 2953.23

The Task Force's first recommendation for statutory changes consists of amendments to R.C. 2953.21, which addresses postconviction-relief petitions.

R.C. 2953.21

*[Existing language unaffected by the amendments is omitted to conserve space]*

- (e) At any time in conjunction with the filing of a petition for postconviction relief under division (A) of this section ~~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 in accordance with divisions (A)(1)(e), (A)(1)(f), and (C) of this section, 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 under this division. Prior to requesting copies of discovery that was made available under Criminal Rule 16 at the time of trial, petitioner shall first make a good faith effort to obtain such discovery from prior counsel. 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 and subpoenas duces tecum in either of the following circumstances:

*[Existing language unaffected by the amendments is omitted to conserve space]*

- (f) If a person ~~who has been sentenced to death and~~ who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1)(e) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, within ten days after the docketing of the request, or within any other time that the court sets for good cause shown, the prosecuting attorney shall respond by answer or motion to the petitioner's request or the petitioner shall respond by answer or motion to the prosecuting attorney's request, whichever is applicable.
- (g) If a person ~~who has been sentenced to death and~~ who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1)(e) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, upon motion by the petitioner, the prosecuting attorney, or the

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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, including but not limited to the orders described in divisions (A) (1) (h) (i) to (viii) of this section. 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; and if the court makes any such order on that basis, it shall explain in the order the reasons why the discovery would be irrelevant.

*[Existing language unaffected by the amendments is omitted to conserve space]*

(2) (a) ~~Except as otherwise provided in section 2953.23 of the Revised Code, a~~ A petition under division (A) (1) (a) (i), (ii), or (iii) of this section shall be filed no later than three hundred sixty-five 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 supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.

(b) ~~Except as otherwise provided in section 2953.23 of the Revised Code, a~~ A petition under division (A) (1) (a) (iv) of this section shall be filed not later than three hundred sixty-five days after the effective date of this amendment.

(c) A court may consider a petition filed after the time period set forth in division (A) (2) (a) or (b) where one of the following apply:

(i) The petitioner has demonstrated cause for the untimely filing and prejudice from the violation of the petitioner's rights.

(ii) Consideration of the petition is necessary to avoid manifest injustice.

(iii) The United States Supreme Court or Ohio Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(iv) The petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under former



section e of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing 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. As used in this division, "actual innocence" has the same meaning as in division (A)(1)(c)(I) of this section and "former section 2953.82 of the Revised Code" has the same meaning as in division (A)(1)(d) of this section.

*[Existing language unaffected by the amendments is omitted to conserve space]*

- (C) If a person ~~who has been sentenced to death~~ and who files a petition for postconviction relief under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section requests a deposition or the prosecuting attorney in the case requests a deposition, and if the court grants the request under division (A)(1)(e) of this section, the court shall notify the petitioner or the petitioner's counsel and the prosecuting attorney. The deposition shall be conducted pursuant to divisions (B), (D), and (E) of Criminal Rule 15. Notwithstanding division (C) of Criminal Rule 15, the petitioner is not entitled to attend the deposition. The prosecuting attorney shall be permitted to attend and participate in any deposition.
- (D) The court shall consider a petition that is timely filed within the period specified in division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall 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, but not limited to, 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, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect

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to such dismissal. ~~If the petition was filed by a person who has been sentenced to death, the~~ The findings of fact and conclusions of law shall state specifically the reasons for the dismissal of the petition and of each claim it contains.

*[Existing language unaffected by the amendments is omitted to conserve space]*

- (F) Unless the petition and the files and records of the case, viewed in the light most favorable to the petitioner, show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found 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.

With respect to a petition filed under division (A)(1)(a)(iv) of this section, the procedures and rules regarding introduction of evidence and burden of proof at the pretrial hearing that are set forth in divisions (C), (D), and (F) of section 2929.025 of the Revised Code apply in considering the petition. With respect to such a petition, the grounds for granting relief are that the person has been diagnosed with one or more of the conditions set forth in division (A)(1)(a) of section 2929.025 of the Revised Code and that, at the time of the aggravated murder that was the basis of the sentence of death, the condition or conditions significantly impaired the person's capacity in a manner described in division (A)(1)(b) of that section.

- (G) A petitioner who files a petition under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section may amend the petition as follows:

(1) If the petition was filed by a person who has been sentenced to death, at any time that is not later than one hundred eighty days after the petition is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

~~(2) If division (G)(1) of this section 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.~~

~~(3)~~ The petitioner may amend the petition with leave of court at any time after the expiration of the applicable period specified in division (G)(1) ~~or (2)~~ of this section.

(3) If a petitioner amends the petition pursuant to division (G)(1) or (G)(2) after an answer or motion has been filed by the



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prosecuting attorney, the court shall permit the prosecuting attorney to, subsequent to the filing of the amended petition, file an amended answer or motion. The time for filing an amended answer or motion shall be as set forth in division (E) of this section.

- (H) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. ~~If the petition was filed by a person who has been sentenced to death, the~~ The findings of fact and conclusions of law shall state specifically the reasons for the denial of relief on the petition and of each claim it contains. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (F) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, except as otherwise described in this division, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. If the court finds grounds for relief in the case of a petitioner who filed a petition under division (A)(1)(a)(iv) of this section, the court shall render void the sentence of death and order the resentencing of the offender under division (A) of section 2929.06 of the Revised Code. If the petitioner has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the finding of grounds for granting the relief, with respect to each claim contained in the petition. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (F) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

*[Existing language unaffected by the amendments is omitted to conserve space]*

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(J)(1) If a person sentenced to death intends to file a petition under this section, the court shall 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.

(2) The court shall not appoint as counsel under division (J)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (J)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute a separate grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal but can be considered pursuant to division (A)(2)(c)(i).

(3) Division (J) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (J)(2) of this section.

(4) A court shall appoint counsel for an indigent person who has not been sentenced to death upon a motion by the petitioner or their counsel demonstrating that one or more postconviction claims have arguable merit.

(i) A motion made pursuant to division (J)(4) may be filed ex parte.