

1 **RULE 33. New Trial.**

2
3 **(A) Grounds**

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5 A new trial may be granted on motion of the defendant for any of the following causes
6 affecting materially the defendant's substantial rights:

7
8 (1) Irregularity in the proceedings, or in any order or ruling of the court, or
9 abuse of discretion by the court, because of which the defendant was prevented
10 from having a fair trial;

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12 (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

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14 (3) Accident or surprise which ordinary prudence could not have guarded
15 against;

16
17 (4) That the verdict is contrary to law;

18
19 (5) Error of law occurring at the trial;

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21 (6) When new evidence material to the defense is discovered which the
22 defendant could not with reasonable diligence have discovered and produced at the
23 trial. ~~When a motion for a new trial is made upon the ground of newly discovered~~
24 ~~evidence, the defendant must produce at the hearing on the motion, in support~~
25 ~~thereof, the affidavits of the witnesses by whom such evidence is expected to be~~
26 ~~given, and if time is required by the defendant to procure such affidavits, the court~~
27 ~~may postpone the hearing of the motion for such length of time as is reasonable~~
28 ~~under all the circumstances of the case. The prosecuting attorney may produce~~
29 ~~affidavits or other evidence to impeach the affidavits of such witnesses.~~
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31 **(B) Motion for new trial; form, time**

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33 (1) Application for a new trial shall be made by motion which, except for the cause of
34 newly discovered evidence, shall be filed within fourteen days after the verdict was
35 rendered, or the decision of the court where a trial by jury has been waived, unless it is
36 made to appear by clear and convincing proof that the defendant was unavoidably
37 prevented from filing his motion for a new trial, in which case the motion shall be filed
38 within seven days from the order of the court finding that the defendant was unavoidably
39 prevented from filing such motion within the time provided herein.

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41 (2) Motions for new trial on account of newly discovered evidence shall be filed
42 without leave of court within one hundred twenty days after the day upon which the verdict
43 was rendered, or the decision of the court where trial by jury has been waived. ~~If it is made~~
44 ~~to appear by clear and convincing proof that the defendant was unavoidably prevented from~~
45 ~~the discovery of the evidence upon which he must rely, such motion shall be filed within~~
46 ~~seven days from an order of the court finding that he was unavoidably prevented from~~

47 discovering the evidence within the one hundred twenty day period. Any other motion is
48 untimely.

49
50 (a) Only with leave of court may an untimely motion for new trial on account
51 of new evidence be filed. A motion for leave shall explain both of the following:

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53 (i) Why the new evidence was not proffered at trial:

54
55 (ii) Why the new trial motion was not timely filed.

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57 Leave of court shall be granted unless it is shown that the failure to use the evidence
58 at trial or to timely file a new trial motion was intentionally delayed in an effort to
59 gain a tactical advantage at trial. in the disposition of a motion for new trial. or at a
60 new trial. Before determining whether to allow the defendant leave to file an
61 untimely motion under division (A)(6) of this rule. the court may conduct a hearing
62 and receive affidavits, exhibits, and testimony as to whether an untimely motion
63 may be filed. Notwithstanding Crim.R. 43, a defendant in custody does not have a
64 right to attend such hearing but may, in the discretion of the court, be permitted to
65 attend the hearing in person or by remote presence.

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67 (b) The defendant shall file the motion for new trial within thirty days of a court
68 order granting leave to file.

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70 (C) **Affidavits required Content of motion for new trial**

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72 (1) The causes enumerated in subsection divisions (A)(1), (2), and (3), and (6) of this
73 rule must be sustained by affidavit or other evidence showing their truth, and may be
74 controverted by affidavit.

75
76 (2) Motions filed under division (A)(6) of this rule shall set forth specific,
77 nonconclusory facts that do all of the following:

78
79 (a) Identify the new evidence:

80
81 (b) Explain how the evidence demonstrates entitlement to relief:

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83 (c) Explain why the evidence was not proffered at trial.

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85 (D) Upon the motion of any party or the victim, the court may enter an appropriate protective
86 order, including an order that specified material associated with the motion may be filed under seal
87 or considered only in camera.

88
89 (E) Within thirty days of the filing of a motion under division (B) of this rule, the prosecutor
90 may file a response. Within fifteen days of the filing of the prosecutor's response, if any, the
91 defendant may file a reply. These time limits may be extended for good cause shown.

92

93 **(F) Procedure for motions filed under division (A)(6) of this rule**
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95 When a motion for new trial seeks relief, in whole or in part, under division (A)(6) of this
96 rule, the court and parties shall proceed as follows:
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98 (1) After reviewing the motion and all pleadings, the supporting materials, and
99 as appropriate other files, records, and transcripts of proceedings pertaining to the
100 trial and sentencing, the court shall determine whether the motion for new trial is
101 patently frivolous. No discovery is permitted before the court completes this
102 preliminary review.
103

104 (2) A patently frivolous motion shall be dismissed. However, for good cause
105 shown and within thirty days following the court's dismissal order based on a
106 preliminary review, the motion may be amended once by the movant if amendment
107 is likely to correct any inadvertent omissions.
108

109 (3) If the motion is not dismissed following preliminary review by the court,
110 the court shall promptly establish a schedule for further proceedings. In doing so,
111 and in order to conserve public resources and avoid potentially conflicting court
112 rulings, the court may exercise its discretion and stay further proceedings pending
113 completion of direct appeal, or completion of already ongoing proceedings in state
114 or federal court addressing other post-conviction issues. Unless a stay is issued,
115 the court shall set a case schedule for discovery, briefing, and a final hearing. The
116 time period for discovery shall be no longer than one hundred twenty days with
117 such limitations and terms as the court deems appropriate subject to extension by
118 the court for good cause shown. The court may also appoint counsel for an indigent
119 defendant. At this stage, discovery on the motion shall, ordinarily, be limited to the
120 allegedly newly discovered evidence. In that regard, the parties may conduct
121 depositions consistent with the provisions of Crim. R. 57(B) and Civ. R. 30, except
122 that the defendant may not be deposed without the defendant's written consent.
123 Unless the court orders otherwise for good cause shown, at this stage discovery
124 shall not be directed to witnesses who already testified at trial, seek material exempt
125 under Crim. R. 16, or be directed to the victims unless there is a claim of witness
126 tampering or recantation.
127

128 (4) After discovery has concluded in connection with the motion, the
129 prosecution may file a motion for summary disposition together with all affidavits
130 and other materials in support thereof. The defendant's responsive arguments,
131 together with all affidavits and other materials in opposition, may be submitted and
132 the prosecution may file a reply. The motion for new trial shall be denied if the
133 court determines on the basis of the entirety of the record construed in the light
134 most favorable to the defendant that no genuine issues of material fact exist and
135 that the defendant cannot establish that the defendant is entitled to a new trial under
136 the standard set forth in the Ohio Revised Code or as guaranteed by the
137 Constitutions of the United States or the State of Ohio.
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139 (5) If summary disposition is not sought by the prosecution or is denied, an
140 evidentiary hearing is required. Notwithstanding Crim.R. 43, a defendant in
141 custody shall attend such a hearing in person or by remote presence as the court
142 may direct. If the defendant is indigent and unrepresented by counsel, the court
143 shall appoint counsel for the defendant. Additional discovery may be permitted by
144 the court to supplement that which has already occurred.

145
146 (6) Promptly following an evidentiary hearing on a motion for new trial, the
147 court shall determine whether a new trial shall be granted under the standard for
148 new trial set forth in the Revised Code and conforming with constitutional
149 requirements.

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151 (7) The trial court shall make findings of fact and conclusions of law explaining
152 its ruling, either orally in open court or via written findings and conclusions, which
153 shall be a part of the record.

154
155 (8) Interlocutory decisions on scheduling, discovery, or granting leave to file a
156 motion for new trial are not final for purposes of appeal.

157
158 (9) A decision granting or denying a new trial under division (F) of this rule or
159 dismissing or denying a motion for leave to file a motion for new trial under
160 division (B)(2)(b) of this rule is a final order for purposes of appeal. The trial court
161 may appoint counsel for an indigent defendant for purposes of any appeal and may
162 order a transcript at state's expense.

163
164 **(D)(G) Procedure when new trial granted.** When a new trial is granted by the trial court, or
165 when a new trial is awarded on appeal, the accused shall stand trial upon the charge or charges of
166 which he or she was convicted.

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

170
171 (1) An inaccuracy or imperfection in the indictment, information, or complaint,
172 provided that the charge is sufficient to fairly and reasonably inform the defendant of all
173 the essential elements of the charge against ~~him~~ the defendant.

174
175 (2) A variance between the allegations and the proof thereof, unless the defendant is
176 misled or prejudiced thereby;

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

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

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184 (5) Any other cause, unless it affirmatively appears from the record that the defendant
185 was prejudiced thereby or was prevented from having a fair trial.
186

187 ~~(P)~~**(I)** **Motion for new trial not a condition for appellate review.** A motion for a new trial is
188 not a prerequisite to obtain appellate review.
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191 Proposed Staff Note (July 1, 2024 Amendment)
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193 Motions for a new trial, particularly those based upon allegedly newly discovered evidence, have
194 importance not only to defendants but also to crime victims, lawyers, and courts obligated to address such
195 motions. It is universally agreed that the innocent should never be convicted and incarcerated; and that
196 resolution of postconviction motions should be addressed in a timely manner. Likewise, it is recognized
197 that motions for new trials sometimes are frivolous, may renew emotional harm for victims, and may impose
198 unreasonable demands on prosecutors and the courts. If handled unsatisfactorily, practice regarding
199 motions for a new trial may undermine society's confidence in the fair and timely resolution of cases by the
200 justice system.
201

202 In 2022 the Supreme Court Task Force on Conviction Integrity and Postconviction Review issued
203 a report recommending various steps, including a new Criminal Rule 33.1 to supplement the existing
204 criminal rule on requests for new trials based on newly discovered evidence. After considering comments
205 from the bench and bar, the Rules Commission concluded that an entirely new rule was unnecessary.
206 Instead, the Commission recommended significant revisions to existing Crim. R. 33 to bring procedural
207 clarity and timely resolution of new trial motions alleging newly discovered evidence.
208

209 The 2024 amendments to this rule do not purport to vary the substantive provisions in R.C. 2945.79
210 and 2945.80, which address new trials, or past appellate decisions interpreting them. On the other hand,
211 procedural matters left unaddressed in statutes such as the obligation of trial courts to promptly screen-out
212 frivolous motions or those lacking evidentiary support, to promptly schedule and decide motions that may
213 have merit, and to provide limited, focused discovery and in appropriate cases to appoint counsel, all need
214 clarification. Many filings are made by incarcerated defendants with, at best, modest understanding of
215 steps needed to have a new trial motion addressed by a court or of requirements that must be met to gain
216 relief, further justifying clarification of this process.