

West's Annotated Mississippi Code [Currentness](#)

Title 99. Criminal Procedure

▣ [Chapter 39](#). Post-Conviction Proceedings ([Refs & Annos](#))

→ [Article 1](#). Mississippi Uniform Post-Conviction Collateral Relief Act

→ **§ 99-39-1. Short title**

This article shall be known and may be cited as the “Mississippi Uniform Post-Conviction Collateral Relief Act.”

### **§ 99-39-3. Purpose**

(1) The purpose of this article is to revise, streamline and clarify the rules and statutes pertaining to post-conviction collateral relief law and procedures, to resolve any conflicts therein and to provide the courts of this state with an exclusive and uniform procedure for the collateral review of convictions and sentences. Specifically, this article repeals the statutory writ of error coram nobis, supersedes Rule 8.07 of the Mississippi Uniform Criminal Rules of Circuit Court Practice and abolishes the common law writs relating to post-conviction collateral relief, including by way of illustration but not limitation, error coram nobis, error coram vobis, and post-conviction habeas corpus, as well as statutory post-conviction habeas corpus. The relief formerly accorded by such writs may be obtained by an appropriate motion under this article. The enactment of this article does not affect any pre-conviction remedies.

(2) Direct appeal shall be the principal means of reviewing all criminal convictions and sentences, and the purpose of this article is to provide prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal.

### **§ 99-39-5. Motion for relief; grounds; limitations; definitions**

(1) Any person sentenced by a court of record of the State of Mississippi, including a person currently incarcerated, civilly committed, on parole or probation or subject to sex offender registration for the period of the registration or for the first five (5) years of the registration, whichever is the shorter period, may file a motion to vacate, set aside or correct the judgment or sentence, a motion to request forensic DNA testing of biological evidence, or a motion for an out-of-time appeal if the person claims:

(a) That the conviction or the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi;

(b) That the trial court was without jurisdiction to impose sentence;

(c) That the statute under which the conviction and/or sentence was obtained is unconstitutional;

(d) That the sentence exceeds the maximum authorized by law;

(e) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(f) That there exists biological evidence secured in relation to the investigation or prosecution attendant to the petitioner's conviction not tested, or, if previously tested, that can be subjected to additional DNA testing, that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.

(g) That his plea was made involuntarily;

(h) That his sentence has expired; his probation, parole or conditional release unlawfully revoked; or he is otherwise unlawfully held in custody;

(i) That he is entitled to an out-of-time appeal; or

(j) That the conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.

(2) A motion for relief under this article shall be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:

(a)(i) That there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence; or

(ii) That, even if the petitioner pled guilty or nolo contendere, or confessed or admitted to a crime, there exists biological evidence not tested, or, if previously tested, that can be subjected to additional DNA testing that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser

sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.

(b) Likewise excepted are those cases in which the petitioner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction.

(3) This motion is not a substitute for, nor does it affect, any remedy incident to the proceeding in the trial court, or direct review of the conviction or sentence.

(4) Proceedings under this article shall be subject to the provisions of [Section 99-19-42](#).

(5) For the purposes of this article:

(a) “Biological evidence” means the contents of a sexual assault examination kit and any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other identifiable biological material that was collected as part of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense. This definition applies whether that material is catalogued separately, such as on a slide, swab or in a test tube, or is present on other evidence, including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups, cigarettes or other items;

(b) “DNA” means deoxyribonucleic acid.

#### **§ 99-39-7. Filing of motions**

The motion under this article shall be filed as an original civil action in the trial court, except in cases in which the petitioner's conviction and sentence have been appealed to the Supreme Court of Mississippi and there affirmed or the appeal dismissed. Where the conviction and sentence have been affirmed on appeal or the appeal has been dismissed, the motion under this article shall not be filed in the trial court until the motion shall have first been presented to a quorum of the Justices of the Supreme Court of Mississippi, convened for said purpose either in termtime or in vacation, and an order granted allowing the filing of such motion in the trial court. The procedure governing applications to the Supreme Court for leave to file a motion under this article shall be as provided in [Section 99-39-27](#).

#### **§ 99-39-9. Contents of motions**

(1) A motion under this article shall name the State of Mississippi as respondent and shall contain all of the following:

(a) The identity of the proceedings in which the petitioner was convicted.

(b) The date of the entry of the judgment of conviction and sentence of which complaint is made.

(c) A concise statement of the claims or grounds upon which the motion is based.

(d) A separate statement of the specific facts which are within the personal knowledge of the petitioner and which shall be sworn to by the petitioner, including, when application is made pursuant to [Section 99-39-5](#), a statement that there exists a reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through DNA testing at the time of the original prosecution; that the evidence to be tested was secured in relation to the offense underlying the challenged conviction and (i) was not previously subjected to DNA testing, or (ii) although previously subjected to DNA testing, can be subjected to additional DNA testing that provides a reasonable likelihood of more probative results; and that the chain of custody of the evidence to be tested established that the evidence has not been tampered with, replaced or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, that the testing itself has the potential to establish the integrity of the evidence. For purposes of this paragraph, evidence that has been in the custody of law enforcement, other government officials, or a public or private hospital shall be presumed to satisfy the chain-of-custody requirement, absent specific evidence of material tampering, replacement or alteration, and that the application for testing is made to demonstrate innocence or the appropriateness of a lesser sentence and not solely to unreasonably delay the execution of sentence or the administration of justice.

(e) A specific statement of the facts which are not within the petitioner's personal knowledge. The motion shall state how or by whom said facts will be proven. Affidavits of the witnesses who will testify and copies of documents or records that will be offered shall be attached to the motion. The affidavits of other persons and the copies of documents and records may be excused upon a showing, which shall be specifically detailed in the motion, of good cause why they cannot be obtained. This showing shall state what the petitioner has done to attempt to obtain the affidavits, records and documents, the production of which he requests the court to excuse.

(f) The identity of any previous proceedings in federal or state courts that the petitioner may have taken to secure relief from his conviction and sentence.

(2) A motion shall be limited to the assertion of a claim for relief against one (1) judgment only. If a petitioner desires to attack the validity of other judgments under which he is in custody, he shall do so by separate motions.

(3) The motion shall be verified by the oath of the petitioner.

(4) If the motion received by the clerk does not substantially comply with the requirements of this section, it shall be returned to the petitioner if a judge of the court so directs, together with a statement of the reason for

its return. The clerk shall retain a copy of the motion so returned.

(5) The petitioner shall deliver or serve a copy of the motion, together with a notice of its filing, on the state. The filing of the motion shall not require an answer or other motion unless so ordered by the court under [Section 99-39-11\(3\)](#).

#### **§ 99-39-11. Judicial examinations of motion and records; testing of biological evidence**

(1) The original motion, together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

(2) If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the petitioner to be notified.

(3) If the motion is not dismissed under subsection (2) of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate and, in cases in which the petitioner's claim rests on the results of DNA testing of biological evidence, order the testing of the biological evidence.

(4) To facilitate DNA testing of biological evidence, if granted under subsection (3) and if the interests of justice require, the judge may order:

(a) The state to locate and provide the petitioner with any document, note, log or report relating to items of physical evidence collected in connection with the case, or to otherwise assist the petitioner in locating items of biological evidence that the state contends have been lost or destroyed;

(b) The state to take reasonable measures to locate biological evidence that may be in its custody and to prepare an itemized inventory of such evidence;

(c) The state to assist the petitioner in locating evidence that may be in the custody of a public or private hospital, public or private laboratory or other facility;

(d) Both parties to reveal whether any DNA or other biological evidence testing was previously conducted without knowledge of the other party; and

(e) Both parties to produce laboratory reports prepared in connection with DNA testing, as well as the underlying data and the laboratory notes, if evidence had previously been subjected to DNA testing.

(5) If the court orders DNA testing of biological evidence under subsection (3) and evidence for such testing is located in accordance with subsection (4), such testing shall be conducted by a facility mutually agreed upon by the petitioner and the state and approved by the court, or, if the parties cannot agree, the court shall designate the testing facility and provide parties with a reasonable opportunity to be heard on the choice of laboratory issue. The court shall impose reasonable conditions on the testing to protect the parties' interests in the integrity of the evidence and the testing process.

(6) If a state or county crime laboratory performs DNA testing of biological evidence under this article, the state shall bear the costs of such testing upon a finding of the petitioner's indigence.

(7) If testing is performed at a private laboratory, the court may require either the petitioner or the state to pay for the testing, as the interests of justice require.

(8) If the state or county crime laboratory does not have the ability or resources to conduct the type of DNA testing to be performed, the state shall bear the costs of testing at a private laboratory that has such capabilities.

(9) The court, in its discretion, may make such other orders as may be appropriate in connection with a granting of testing under subsection (3). These include, but are not limited to, designating:

(a) The type of DNA analysis to be used;

(b) The testing procedures to be followed;

(c) The preservation of some portion of the sample for testing replication;

(d) Additional DNA testing, if the results of the initial testing are inconclusive or otherwise merit additional scientific analysis;

(e) The collection and DNA testing of elimination samples from third parties; or

(f) Any combination of these.

(10) The court may order additional testing, paid for in accordance with subsections (6) through (8), upon a showing by the petitioner that the comparison of a DNA profile derived from the biological evidence at the scene of the crime for which he was convicted could, when compared to the DNA profiles in the SDIS or CODIS database systems, provide evidence that raises a reasonable probability that the trier of fact would have come to a different outcome by virtue of that comparison demonstrating the possible guilt of a third party or parties.

(11) This section shall not be applicable where an application for leave to proceed is granted by the Supreme Court under [Section 99-39-27](#).

(12) Proceedings under this section shall be subject to the provisions of [Section 99-19-42](#).

#### **§ 99-39-13. Affirmative defenses**

The answer shall respond to all of the allegations of the motion and shall assert such affirmative defenses as the state may deem appropriate.

#### **§ 99-39-15. Discovery**

(1) A party may invoke the processes of discovery available under the Mississippi Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

(2) Requests for discovery shall be accomplished by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

#### **§ 99-39-17. Expansion of record**

(1) If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(2) The expanded record may include, without limitation, letters predating the filing of the motion in the court, documents, exhibits and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(3) In any case in which an expanded record is directed, copies of the letters, documents, exhibits and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(4) The court may require the authentication of any material under subsection (1) or (2) of this section.

#### **§ 99-39-19. Hearings; summary judgment**

(1) If the motion is not dismissed at a previous stage of the proceeding, the judge, after the answer is filed and discovery, if any, is completed, shall, upon a review of the record, determine whether an evidentiary hearing is

required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice shall require.

(2) The court may grant a motion by either party for summary judgment when it appears from the record that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.

#### **§ 99-39-21. Waiver; defenses; res judicata; burden of proof**

(1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.

(2) The litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which could have been raised under said factual issue; and any relief sought under this article upon said facts but upon different state or federal legal theories shall be procedurally barred absent a showing of cause and actual prejudice.

(3) The doctrine of res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal.

(4) The term “cause” as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.

(5) The term “actual prejudice” as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.

(6) The burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section.

#### **§ 99-39-23. Evidentiary hearings; counsel; burden of proof**

(1) If an evidentiary hearing is required, the judge may appoint counsel for a petitioner who qualifies for the appointment of counsel under [Section 99-15-15](#).

(2) The hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation.



- (3) The parties shall be entitled to subpoena witnesses and compel their attendance, including, but not being limited to, subpoenas duces tecum.
- (4) The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the petitioner brought before it for the hearing.
- (5) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the conviction or sentence under attack, and any supplementary orders as to arraignment, retrial, custody, bail, discharge, correction of sentence or other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.
- (6) The order as provided in subsection (5) of this section or any order dismissing the petitioner's motion or otherwise denying relief under this article is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this article. Excepted from this prohibition is a motion filed under [Section 99-19-57\(2\)](#), raising the issue of the convict's supervening mental illness before the execution of a sentence of death. A dismissal or denial of a motion relating to mental illness under [Section 99-19-57\(2\)](#) shall be res judicata on the issue and shall likewise bar any second or successive motions on the issue. Likewise excepted from this prohibition are those cases in which the petitioner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the petitioner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are those cases in which the petitioner has filed a prior petition and has requested DNA testing under this article, provided the petitioner asserts new or different grounds for relief related to DNA testing not previously presented or the availability of more advanced DNA technology.
- (7) No relief shall be granted under this article unless the petitioner proves by a preponderance of the evidence that he is entitled to the relief.
- (8) Proceedings under this section shall be subject to the provisions of [Section 99-19-42](#).
- (9) In cases resulting in a sentence of death and upon a determination of indigence, appointment of post-conviction counsel shall be made by the Office of Capital Post-Conviction Counsel upon order entered by the Supreme Court promptly upon announcement of the decision on direct appeal affirming the sentence of death. The order shall direct the trial court to immediately determine indigence and whether the inmate will accept counsel.

**§ 99-39-25. Appeals; stay of judgment; bail**

(1) A final judgment entered under this article may be reviewed by the supreme court of Mississippi on appeal brought either by the prisoner or the state on such terms and conditions as are provided for in criminal cases.

(2) A perfection of appeal by the state shall act as a supersedeas and shall stay the judgment until there is a final adjudication by the supreme court.

(3) When the appeal is brought by the state, the prisoner may be released on bail pending appeal under the terms and conditions provided for in Rule 7.02, Mississippi Uniform Criminal Rules of Circuit Court Practice.

(4) When the appeal is brought by the prisoner, bail shall not be allowed.

(5) The attorney general shall represent the state in all appeals under this article, whether the appeal is brought by the prisoner or by the state.

#### **§ 99-39-27. Leave to proceed in trial court**

(1) The application for leave to proceed in the trial court filed with the Supreme Court under [Section 99-39-7](#) shall name the State of Mississippi as the respondent.

(2) The application shall contain the original and two (2) executed copies of the motion proposed to be filed in the trial court together with such other supporting pleadings and documentation as the Supreme Court by rule may require.

(3) The prisoner shall serve an executed copy of the application upon the Attorney General simultaneously with the filing of the application with the court.

(4) The original motion, together with all files, records, transcripts and correspondence relating to the judgment under attack, shall promptly be examined by the court.

(5) Unless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by those documents are not procedurally barred under [Section 99-39-21](#) and that they further present a substantial showing of the denial of a state or federal right, the court shall by appropriate order deny the application. The court may, in its discretion, require the Attorney General upon sufficient notice to respond to the application.

(6) The court, upon satisfaction of the standards set forth in this article, is empowered to grant the application.

(7) In granting the application the court, in its discretion, may:

(a) Where sufficient facts exist from the face of the application, motion, exhibits, the prior record and the state's response, together with any exhibits submitted with those documents, or upon stipulation of the parties, grant or deny any or all relief requested in the attached motion.

(b) Allow the filing of the motion in the trial court for further proceedings under [Sections 99-39-13](#) through [99-39-23](#).

(8) No application or relief shall be granted without the Attorney General being given at least five (5) days to respond.

(9) The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article. Excepted from this prohibition is an application filed under [Section 99-19-57\(2\)](#), raising the issue of the offender's supervening mental illness before the execution of a sentence of death. A dismissal or denial of an application relating to mental illness under [Section 99-19-57\(2\)](#) shall be res judicata on the issue and shall likewise bar any second or successive applications on the issue. Likewise excepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States that would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence. Likewise exempted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

(10) Proceedings under this section shall be subject to the provisions of [Section 99-19-42](#).

(11) Post-conviction proceedings in which the defendant is under sentence of death shall be governed by rules established by the Supreme Court as well as the provisions of this section.

#### **§ 99-39-28. Death penalty proceedings**

If application to proceed in the trial court is granted, post-conviction proceedings on cases where the death penalty has been imposed in the trial court and appeals from the trial court shall be conducted in accordance with rules established by the Supreme Court.

#### **§ 99-39-29. Stay of execution**

If the prisoner or prisoners shall be under sentence of death and the date fixed for the execution of the sentence shall arrive at a time when proceedings for post-conviction collateral relief are pending, either in the state or the federal courts, the Supreme Court of Mississippi shall have the authority to stay the execution upon a substantial showing of merit pending the determination of said proceeding. If, however, a stay has been

entered either by a state or federal court and post-conviction collateral relief is denied, the Supreme Court of Mississippi shall forthwith fix a day, not more than thirty (30) days distant from the date of said denial or the vacating of any stay entered by any federal court, for the execution of the sentence, and a warrant shall forthwith issue accordingly.

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