

By: Senator(s) Tollison, Fillingane, Watson, To: Judiciary, Division B
Baria, Blount, Turner, Davis (36th)

SENATE BILL NO. 2709

1 AN ACT TO IMPROVE THE PRESERVATION AND ACCESSIBILITY OF
2 BIOLOGICAL EVIDENCE; TO AMEND SECTION 99-39-5, MISSISSIPPI CODE OF
3 1972, TO PROVIDE FOR SUBJECTING BIOLOGICAL EVIDENCE TO ADDITIONAL
4 DNA TESTING UNDER CERTAIN CIRCUMSTANCES; TO AMEND SECTIONS 99-39-7
5 AND 99-39-9, MISSISSIPPI CODE OF 1972, TO MAKE A TECHNICAL
6 CORRECTION TO THE REFERENCES TO THOSE PERSONS PETITIONING FOR
7 RELIEF UNDER THE POST-CONVICTION COLLATERAL RELIEF ACT; TO AMEND
8 SECTION 99-39-11, MISSISSIPPI CODE OF 1972, TO PROMULGATE
9 REQUIREMENTS TO FACILITATE TESTING OF BIOLOGICAL EVIDENCE; TO
10 AMEND SECTION 99-39-23, MISSISSIPPI CODE OF 1972, TO SPECIFY
11 FURTHER EXCEPTIONS TO THE RIGHT TO FURTHER DNA TESTING; TO AMEND
12 SECTION 6, CHAPTER 535, LAWS OF 2008, TO EXTEND THE DISSOLUTION OF
13 THE TASK FORCE FOR THE PRESERVATION AND TESTING OF BIOLOGICAL
14 EVIDENCE UNTIL DECEMBER 31, 2009; AND FOR RELATED PURPOSES.

15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

16 **SECTION 1.** (1) **Legislative intent.** The Legislature finds
17 that:

18 (a) The value of properly preserved biological evidence
19 has been enhanced by the discovery of modern DNA testing methods,
20 which, coupled with a comprehensive system of DNA databases that
21 store crime scene and offender profiles, allow law enforcement to
22 improve its crime-solving potential;

23 (b) Tapping the potential of preserved biological
24 evidence requires the proper identification, collection,
25 preservation, storage, cataloguing and organization of such
26 evidence;

27 (c) Law enforcement agencies indicate that "cold" case
28 investigations are hindered by an inability to access biological
29 evidence that was collected in connection with criminal
30 investigations;

31 (d) Innocent people mistakenly convicted of the serious
32 crimes for which biological evidence is probative cannot prove



33 their innocence if such evidence is not accessible for testing in
34 appropriate circumstances;

35 (e) It is well established that the failure to update
36 policies regarding the preservation of evidence squanders valuable
37 law enforcement resources, manpower hours and storage space; and

38 (f) Simple but crucial enhancements to protocols for
39 properly preserving biological evidence can solve old crimes,
40 enhance public safety and settle claims of innocence.

41 (2) **Definitions.** For the purposes of this section:

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

53 (b) "DNA" means deoxyribonucleic acid.

54 (c) "Custody" means persons currently incarcerated;
55 civilly committed; on parole or probation; or subject to sex
56 offender registration for the period of the registration or for
57 the first five (5) years of the registration, whichever is the
58 shorter period.

59 (d) "Profile" means a unique identifier of an
60 individual, derived from DNA.

61 (e) "State" refers to any governmental or public entity
62 within Mississippi, including all private entities that perform
63 such functions, and its officials or employees, including, but not
64 limited to, law enforcement agencies, prosecutors' offices,
65 courts, public hospitals, crime laboratories, and any other entity



66 or individual charged with the collection, storage or retrieval of
67 biological evidence.

68 (3) **Preservation of evidence procedures.** (a) The state
69 shall preserve all biological evidence:

70 (i) That is secured in relation to an
71 investigation or prosecution of a crime for the period of time
72 that the crime remains unsolved; or

73 (ii) That is secured in relation to an
74 investigation or prosecution of a crime for the period of time
75 that the person convicted of that crime remains in custody.

76 (b) This section applies to evidence that:

77 (i) Was in the possession of the state during the
78 investigation and prosecution of the case; and

79 (ii) At the time of conviction was likely to
80 contain biological material.

81 (c) The state shall not destroy biological evidence
82 should one or more additional co-defendants, convicted of the same
83 crime, remain in custody, and shall preserve the evidence for the
84 period of time in which all co-defendants remain in custody.

85 (d) The state shall retain evidence in the amount and
86 manner sufficient to develop a DNA profile from the biological
87 material contained in or included on the evidence.

88 (e) Upon written request by the defendant, the state
89 shall prepare an inventory of biological evidence that has been
90 preserved in connection with the defendant's criminal case.

91 (f) The state may destroy evidence that includes
92 biological material before the expiration of the time period
93 specified in paragraph (a) of this subsection if all of the
94 following apply:

95 (i) No other provision of federal or state law
96 requires the state to preserve the evidence.

97 (ii) The state sends certified delivery of notice
98 of intent to destroy the evidence to:



99 1. All persons who remain in custody as a
100 result of the criminal conviction, delinquency adjudication, or
101 commitment related to evidence in question;

102 2. The attorney of record for each person in
103 custody;

104 3. The Mississippi Office of Indigent
105 Appeals;

106 4. The district attorney in the county of
107 conviction; and

108 5. The Mississippi Attorney General.

109 (iii) No person who is notified under paragraph
110 (f) (ii) of this subsection does either of the following within
111 sixty (60) days after the date on which the person received the
112 notice:

113 1. Files a motion for testing of evidence
114 under Title 99, Chapter 39, Mississippi Code of 1972; or

115 2. Submits a written request for retention of
116 evidence to the state entity which provided notice of its intent
117 to destroy evidence under paragraph (f) (2) of this subsection.

118 (g) If, after providing notice under paragraph (f) (2)
119 of this subsection of its intent to destroy evidence, the state
120 receives a written request for retention of the evidence, the
121 state shall retain the evidence while the person remains in
122 custody.

123 (h) The state shall not be required to preserve
124 physical evidence that is of such a size, bulk or physical
125 character as to render retention impracticable. When such
126 retention is impracticable, the state shall remove and preserve
127 portions of the material evidence likely to contain biological
128 evidence related to the offense, in a quantity sufficient to
129 permit future DNA testing, before returning or disposing of the
130 physical evidence.



131 (i) Should the state be called upon to produce
132 biological evidence that could not be located and whose
133 preservation was required under the provisions of this statute,
134 the chief evidence custodian assigned to the entity charged with
135 the preservation of said evidence shall provide an affidavit in
136 which the custodian stipulates, under penalty of perjury, an
137 accurate description of the efforts taken to locate that evidence
138 and that the evidence could not be located.

139 (4) Any evidence in a murder, manslaughter or felony sexual
140 assault case in the possession of the state on July 1, 2009,
141 whether biological or not, shall be preserved by the state
142 consistent with the legislative intent expressed in subsection (1)
143 and subject to compliance with subsection (3)(f).

144 (5) **Remedies for noncompliance.** If the court finds that
145 biological evidence was destroyed in violation of the provisions
146 of this section, it may impose appropriate sanctions and order
147 appropriate remedies.

148 **SECTION 2.** Section 99-39-5, Mississippi Code of 1972, is
149 amended as follows:

150 99-39-5. (1) Any person sentenced by a court of record of
151 the State of Mississippi, including a person currently
152 incarcerated, civilly committed, on parole or probation or subject
153 to sex offender registration for the period of the registration or
154 for the first five (5) years of the registration, whichever is the
155 shorter period, may file a motion to vacate, set aside or correct
156 the judgment or sentence, a motion to request forensic DNA testing
157 of biological evidence, or a motion for an out-of-time appeal if
158 the person claims:

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

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



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

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

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

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

180 (g) That his plea was made involuntarily;

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

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

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

189 (2) A motion for relief under this article shall be made
190 within three (3) years after the time in which the petitioner's
191 direct appeal is ruled upon by the Supreme Court of Mississippi
192 or, in case no appeal is taken, within three (3) years after the
193 time for taking an appeal from the judgment of conviction or
194 sentence has expired, or in case of a guilty plea, within three
195 (3) years after entry of the judgment of conviction. Excepted



196 from this three-year statute of limitations are those cases in
197 which the petitioner can demonstrate either:

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

206 (ii) That, even if the petitioner pled guilty or
207 nolo contendere, or confessed or admitted to a crime, there exists
208 biological evidence not tested, or, if previously tested, that can
209 be subjected to additional DNA testing that would provide a
210 reasonable likelihood of more probative results, and that testing
211 would demonstrate by reasonable probability that the petitioner
212 would not have been convicted or would have received a lesser
213 sentence if favorable results had been obtained through such
214 forensic DNA testing at the time of the original prosecution.

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

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

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

226 (5) For the purposes of this article:

227 (a) "Biological evidence" means the contents of a
228 sexual assault examination kit and any item that contains blood,



229 semen, hair, saliva, skin tissue, fingernail scrapings, bone,
230 bodily fluids or other identifiable biological material that was
231 collected as part of the criminal investigation or may reasonably
232 be used to incriminate or exculpate any person for the offense.
233 This definition applies whether that material is catalogued
234 separately, such as on a slide, swab or in a test tube, or is
235 present on other evidence, including, but not limited to,
236 clothing, ligatures, bedding or other household material, drinking
237 cups, cigarettes or other items;

238 (b) "DNA" means deoxyribonucleic acid.

239 **SECTION 3.** Section 99-39-7, Mississippi Code of 1972, is
240 amended as follows:

241 99-39-7. The motion under this article shall be filed as an
242 original civil action in the trial court, except in cases in which
243 the petitioner's conviction and sentence have been appealed to the
244 Supreme Court of Mississippi and there affirmed or the appeal
245 dismissed. Where the conviction and sentence have been affirmed
246 on appeal or the appeal has been dismissed, the motion under this
247 article shall not be filed in the trial court until the motion
248 shall have first been presented to a quorum of the Justices of the
249 Supreme Court of Mississippi, convened for said purpose either in
250 termtime or in vacation, and an order granted allowing the filing
251 of such motion in the trial court. The procedure governing
252 applications to the Supreme Court for leave to file a motion under
253 this article shall be as provided in Section 99-39-27.

254 **SECTION 4.** Section 99-39-9, Mississippi Code of 1972, is
255 amended as follows:

256 99-39-9. (1) A motion under this article shall name the
257 State of Mississippi as respondent and shall contain all of the
258 following:

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



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

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

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

291 (e) A specific statement of the facts which are not
292 within the petitioner's personal knowledge. The motion shall
293 state how or by whom said facts will be proven. Affidavits of the



294 witnesses who will testify and copies of documents or records that
295 will be offered shall be attached to the motion. The affidavits
296 of other persons and the copies of documents and records may be
297 excused upon a showing, which shall be specifically detailed in
298 the motion, of good cause why they cannot be obtained. This
299 showing shall state what the petitioner has done to attempt to
300 obtain the affidavits, records and documents, the production of
301 which he requests the court to excuse.

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

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

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

311 (4) If the motion received by the clerk does not
312 substantially comply with the requirements of this section, it
313 shall be returned to the petitioner if a judge of the court so
314 directs, together with a statement of the reason for its return.
315 The clerk shall retain a copy of the motion so returned.

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

320 **SECTION 5.** Section 99-39-11, Mississippi Code of 1972, is
321 amended as follows:

322 99-39-11. (1) The original motion, together with all the
323 files, records, transcripts and correspondence relating to the
324 judgment under attack, shall be examined promptly by the judge to
325 whom it is assigned.



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

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

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

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

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

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

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

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



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

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

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

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

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

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

384 (b) The testing procedures to be followed;

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

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



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

392 (f) Any combination of these.

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

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

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

407 **SECTION 6.** Section 99-39-23, Mississippi Code of 1972, is
408 amended as follows:

409 99-39-23. (1) If an evidentiary hearing is required, the
410 judge may appoint counsel for a petitioner who qualifies for the
411 appointment of counsel under Section 99-15-15.

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

415 (3) The parties shall be entitled to subpoena witnesses and
416 compel their attendance, including, but not being limited to,
417 subpoenas duces tecum.

418 (4) The court may receive proof by affidavits, depositions,
419 oral testimony or other evidence and may order the petitioner
420 brought before it for the hearing.

421 (5) If the court finds in favor of the petitioner, it shall
422 enter an appropriate order with respect to the conviction or



423 sentence under attack, and any supplementary orders as to
424 arraignment, retrial, custody, bail, discharge, correction of
425 sentence or other matters that may be necessary and proper. The
426 court shall make specific findings of fact, and state expressly
427 its conclusions of law, relating to each issue presented.

428 (6) The order as provided in subsection (5) of this section
429 or any order dismissing the petitioner's motion or otherwise
430 denying relief under this article is a final judgment and shall be
431 conclusive until reversed. It shall be a bar to a second or
432 successive motion under this article. Excepted from this
433 prohibition is a motion filed under Section 99-19-57(2), raising
434 the issue of the convict's supervening mental illness before the
435 execution of a sentence of death. A dismissal or denial of a
436 motion relating to mental illness under Section 99-19-57(2) shall
437 be res judicata on the issue and shall likewise bar any second or
438 successive motions on the issue. Likewise excepted from this
439 prohibition are those cases in which the petitioner can
440 demonstrate either that there has been an intervening decision of
441 the Supreme Court of either the State of Mississippi or the United
442 States which would have actually adversely affected the outcome of
443 his conviction or sentence or that he has evidence, not reasonably
444 discoverable at the time of trial, which is of such nature that it
445 would be practically conclusive that, if it had been introduced at
446 trial, it would have caused a different result in the conviction
447 or sentence. Likewise excepted are those cases in which the
448 petitioner claims that his sentence has expired or his probation,
449 parole or conditional release has been unlawfully revoked.
450 Likewise excepted are those cases in which the petitioner has
451 filed a prior petition and has requested DNA testing under this
452 article, provided the petitioner asserts new or different grounds
453 for relief related to DNA testing not previously presented or the
454 availability of more advanced DNA technology.



455 (7) No relief shall be granted under this article unless the
456 petitioner proves by a preponderance of the evidence that he is
457 entitled to the relief.

458 (8) Proceedings under this section shall be subject to the
459 provisions of Section 99-19-42.

460 (9) In cases resulting in a sentence of death and upon a
461 determination of indigence, appointment of post-conviction counsel
462 shall be made by the Office of Capital Post-Conviction Counsel
463 upon order entered by the Supreme Court promptly upon announcement
464 of the decision on direct appeal affirming the sentence of death.
465 The order shall direct the trial court to immediately determine
466 indigence and whether the inmate will accept counsel.

467 **SECTION 7.** Section 6, Chapter 535, Laws of 2008, is amended
468 as follows:

469 Section 6. **Reporting.** On or before December 1, 2008, the
470 Task Force for the Preservation and Testing of Biological Evidence
471 shall submit a report of its findings and recommendations for
472 future practice. Minority reports may also be issued. These
473 reports shall be presented to the Governor, the Chief Justice, the
474 Speaker of the House, the Lieutenant Governor, and the Chairs of
475 the four (4) judiciary committees of the Legislature. The Task
476 Force for the Preservation and Testing of Biological Evidence
477 shall stand dissolved on December 31, 2009.

478 **SECTION 8.** This act shall take effect and be in force from
479 and after its passage.

