

**CHAPTER 29-32.1**  
**UNIFORM POSTCONVICTION PROCEDURE ACT**

**29-32.1-01. Remedy - To whom available - Conditions.**

1. A person who has been convicted of and sentenced for a crime may institute a proceeding applying for relief under this chapter upon the ground that:
  - a. The conviction was obtained or the sentence was imposed in violation of the laws or the Constitution of the United States or of the laws or Constitution of North Dakota;
  - b. The conviction was obtained under a statute that is in violation of the Constitution of the United States or the Constitution of North Dakota, or that the conduct for which the applicant was prosecuted is constitutionally protected;
  - c. The court that rendered the judgment of conviction and sentence was without jurisdiction over the person of the applicant or the subject matter;
  - d. The sentence is not authorized by law;
  - e. Evidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interest of justice;
  - f. A significant change in substantive or procedural law has occurred which, in the interest of justice, should be applied retrospectively;
  - g. The sentence has expired, probation or parole or conditional release was unlawfully revoked, or the applicant is otherwise unlawfully in custody or restrained; or
  - h. The conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error available before July 1, 1985, under any common law, statutory or other writ, motion, proceeding, or remedy.
2. Except as provided in subsection 3, an application for relief under this chapter must be filed within two years of the date the conviction becomes final. A conviction becomes final for purposes of this chapter when:
  - a. The time for appeal of the conviction to the North Dakota supreme court expires;
  - b. If an appeal was taken to the North Dakota supreme court, the time for petitioning the United States supreme court for review expires; or
  - c. If review was sought in the United States supreme court, the date the supreme court issues a final order in the case.
3.
  - a. Notwithstanding subsection 2, a court may consider an application for relief under this chapter if:
    - (1) The petition alleges the existence of newly discovered evidence, including DNA evidence, which if proved and reviewed in light of the evidence as a whole, would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted;
    - (2) The petitioner establishes that the petitioner suffered from a physical disability or mental disease that precluded timely assertion of the application for relief; or
    - (3) The petitioner asserts a new interpretation of federal or state constitutional or statutory law by either the United States supreme court or a North Dakota appellate court and the petitioner establishes that the interpretation is retroactively applicable to the petitioner's case.
  - b. An application under this subsection must be filed within two years of the date the petitioner discovers or reasonably should have discovered the existence of the new evidence, the disability or disease ceases, or the effective date of the retroactive application of law.
4. A proceeding under this chapter is not a substitute for and does not affect any remedy incident to the prosecution in the trial court or direct review of the judgment of conviction or sentence in an appellate court. Except as otherwise provided in this chapter, a proceeding under this chapter replaces all other common law, statutory, or other remedies available before July 1, 1985, for collaterally challenging the validity of the judgment of conviction or sentence. It is to be used exclusively in place of them. A

proceeding under this chapter is not available to provide relief for disciplinary measures, custodial treatment, or other violations of civil rights of a convicted person occurring after the imposition of sentence.

**29-32.1-02. Exercise of original jurisdiction in habeas corpus.**

A court in which original jurisdiction in habeas corpus is vested may entertain a habeas corpus proceeding under chapter 32-22 or this chapter. This chapter, to the extent appropriate, governs the proceeding.

**29-32.1-03. Commencement of proceedings - Filing - Service.**

1. A proceeding is commenced by filing an application with the clerk of the court in which the conviction and sentence took place. The state must be named as respondent. No filing fee is required.
2. An application may be filed at any time.
3. If an application is filed before the time for appeal from the judgment of conviction or sentence has expired, the court, on motion of the applicant, may extend the time for appeal until a final order has been entered in the proceeding under this chapter.
4. If an application is filed while an appeal or other review is pending, the appellate court, on motion of either party or on its own motion, may defer further action on the appeal or other review until the determination of the application by the trial court or may order the application certified and consolidated with the pending appeal or other review.
5. Upon receipt of an application, the clerk shall forthwith file it, make an entry in the appropriate docket, and deliver a copy to the state's attorney of the county in which the criminal action was venued.
6. If the applicant is not represented by counsel, the clerk shall notify the applicant that assistance of counsel may be available to persons unable to obtain counsel. The clerk shall also inform the applicant of the procedure for obtaining counsel.
7. The application may be considered by any judge of the court in which the conviction took place.

**29-32.1-04. Application - Contents.**

1. The application must identify the proceedings in which the applicant was convicted and sentenced, give the date of the judgment and sentence complained of, set forth a concise statement of each ground for relief, and specify the relief requested. Argument, citations, and discussion of authorities are unnecessary.
2. The application must identify all proceedings for direct review of the judgment of conviction or sentence and all previous postconviction proceedings taken by the applicant to secure relief from the conviction or sentence, the grounds asserted therein, and the orders or judgments entered. The application must refer to the portions of the record of prior proceedings pertinent to the alleged grounds for relief. If the cited record is not in the files of the court, the applicant shall attach that record or portions thereof to the application or state why it is not attached. Affidavits or other material supporting the application may be attached, but are unnecessary.

**29-32.1-05. Counsel at public expense - Applicant's inability to pay costs and litigation expenses.**

1. If an applicant requests counsel and the court is satisfied that the applicant is indigent, counsel shall be provided at public expense to represent the applicant.
2. Costs and expenses incident to a proceeding under this chapter, including fees for counsel provided at public expense, must be reimbursed in the same manner as are costs and expenses incurred in the defense of criminal prosecutions.

**29-32.1-06. Response by answer or motion.**

1. Within thirty days after the docketing of an application or within any further time the court may allow, the state shall respond by answer or motion.

2. The state may move to dismiss an application on the ground that it is evident from the application that the applicant is not entitled to postconviction relief and no purpose would be served by any further proceedings. In considering the motion, the court shall take account of substance regardless of defects of form.
3. The following defenses may be raised by answer or motion:
  - a. The claim has been fully and finally determined in a previous proceeding in accordance with subsection 1 of section 29-32.1-12; or
  - b. The application constitutes misuse of process in accordance with subsection 2 of section 29-32.1-12.

**29-32.1-07. Amended and supplemental pleadings.**

1. The court may make appropriate orders allowing amendment of the application or any pleading or motion, allowing further pleadings or motions, or extending the time for filing any pleading.
2. At any time before the entry of judgment, the court, for good cause, may grant leave to withdraw the application without prejudice.

**29-32.1-08. Discovery.**

The court, for good cause, may grant leave to either party to use the discovery procedures available in criminal or civil proceedings. Discovery procedures may be used only to the extent and in the manner the court has ordered or to which the parties have agreed.

**29-32.1-09. Summary disposition.**

1. The court, on its own motion, may enter a judgment denying a meritless application on any and all issues raised in the application before any response by the state. The court also may summarily deny a second or successive application for similar relief on behalf of the same applicant and may summarily deny any application when the issues raised in the application have previously been decided by the appellate court in the same case.
2. The court, on its own motion, may dismiss any grounds of an application which allege ineffective assistance of postconviction counsel. An applicant may not claim constitutionally ineffective assistance of postconviction counsel in proceedings under this chapter.
3. The court may grant a motion by either party for summary disposition if the application, pleadings, any previous proceeding, discovery, or other matters of record show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.
4. If an evidentiary hearing is necessary, the court may determine which issues of material fact are in controversy and appropriately restrict the hearing.

**29-32.1-10. Hearing - Evidence.**

1. Evidence must be presented in open court, recorded, and preserved as part of the record of the proceedings.
2. A certified record of previous proceedings may be used as evidence of facts and occurrences established therein, but use of that record does not preclude either party from offering additional evidence as to those facts and occurrences.
3. The deposition of a witness may be received in evidence, without regard to the availability of the witness, if written notice of intention to use the deposition was given in advance of the hearing and the deposition was taken subject to the right of cross-examination.

**29-32.1-11. Findings of fact - Conclusions of law - Order.**

1. The court shall make explicit findings on material questions of fact and state expressly its conclusions of law relating to each issue presented.

2. If the court rules that the applicant is not entitled to relief, its order must indicate whether the decision is based upon the pleadings, is by summary disposition, or is the result of an evidentiary hearing.
3. If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the previous proceedings, and any supplementary orders as to arraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper.

**29-32.1-12. Affirmative defenses - Res judicata - Misuse of process.**

1. An application for postconviction relief may be denied on the ground that the same claim or claims were fully and finally determined in a previous proceeding.
2. A court may deny relief on the ground of misuse of process. Process is misused when the applicant:
  - a. Presents a claim for relief which the applicant inexcusably failed to raise either in a proceeding leading to judgment of conviction and sentence or in a previous postconviction proceeding; or
  - b. Files multiple applications containing a claim so lacking in factual support or legal basis as to be frivolous.
3. Res judicata and misuse of process are affirmative defenses to be pleaded by the state. The burden of proof is also upon the state, but, as to any ground for relief which, by statute or rule of court, must be presented as a defense or objection at a specified stage of a criminal prosecution, the applicant shall show good cause for noncompliance with the statute or rule.

**29-32.1-13. Reimbursement of costs and litigation expenses.**

If an application is denied, the state may move for an order requiring the applicant to reimburse the state for costs and for litigation expenses paid for the applicant from public funds. The court may grant the motion if it finds that the applicant's claim is so completely lacking in factual support or legal basis as to be frivolous or that the applicant has deliberately misused process. The court may require reimbursement of costs and expenses only to the extent reasonable in light of the applicant's present and probable future financial resources.

**29-32.1-14. Review.**

A final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court.

**29-32.1-15. Motion for DNA testing not available at trial.**

1. Without limitation on a court's authority to order discovery under section 29-32.1-08, a person convicted of a crime may make a motion for the performance of forensic DNA testing to demonstrate the person's actual innocence if:
  - a. The testing is to be performed on evidence secured in relation to the trial which resulted in the conviction; and
  - b. The evidence was not subject to the testing because either the technology for the testing was not available at the time of the trial or the testing was not available as evidence at the time of the trial.
2. A person who makes a motion under subsection 1 must present a prima facie case that:
  - a. Identity was an issue in the trial; and
  - b. The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.
3. The court shall order that the testing be performed if:
  - a. A prima facie case has been established under subsection 2;
  - b. The testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence; and

- c. The testing requested employs a scientific method generally accepted within the relevant scientific community. The court shall impose reasonable conditions on the testing designed to protect the state's interests in the integrity of the evidence and the testing process.