

By: Gordon

To: Judiciary;
Appropriations

SENATE BILL NO. 2537

1 AN ACT TO CREATE THE MISSISSIPPI CAPITAL POST-CONVICTION
2 COUNSEL ACT; TO CREATE THE MISSISSIPPI OFFICE OF CAPITAL
3 POST-CONVICTION COUNSEL AND SPECIFY ITS PERSONNEL; TO PROVIDE
4 QUALIFICATIONS FOR ATTORNEYS IN THE OFFICE; TO PRESCRIBE THE
5 DUTIES OF ATTORNEYS IN THE OFFICE; TO PROVIDE FOR COMPENSATION; TO
6 SPECIFY OFFICE HOURS; TO AUTHORIZE THE DIRECTOR TO ACQUIRE OFFICE
7 SPACE, SUPPLIES AND EQUIPMENT; TO REQUIRE THE DIRECTOR TO MAINTAIN
8 A DOCKET; TO AUTHORIZE THE APPOINTMENT OF ATTORNEYS IN SITUATIONS
9 WHERE CONFLICTS ARISE; TO CREATE THE SPECIAL CAPITAL
10 POST-CONVICTION COUNSEL FUND; TO PROVIDE THAT ATTORNEYS APPOINTED
11 TO THE OFFICE SHALL BE FULL TIME; TO AMEND SECTION 99-19-105,
12 MISSISSIPPI CODE OF 1972, TO REVISE THE SETTING OF THE DATE OF
13 EXECUTION OF DEATH SENTENCE; TO AMEND SECTION 99-39-5, MISSISSIPPI
14 CODE OF 1972, TO REVISE THE STATUTE OF LIMITATIONS FOR
15 POST-CONVICTION RELIEF IN CAPITAL CASES; TO AMEND SECTION
16 99-39-23, MISSISSIPPI CODE OF 1972, TO PROVIDE FOR THE APPOINTMENT
17 OF POST-CONVICTION COUNSEL IN CAPITAL CASES; TO AMEND SECTION
18 99-39-27, MISSISSIPPI CODE OF 1972, TO EXCLUDE POST-CONVICTION
19 RELIEF IN CAPITAL CASES; TO CREATE SECTION 99-15-18, MISSISSIPPI
20 CODE OF 1972, TO PROVIDE FOR COMPENSATION OF COUNSEL IN
21 POST-CONVICTION RELIEF CASES INVOLVING THE DEATH PENALTY; TO
22 CREATE SECTION 99-39-28, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT
23 THE SUPREME COURT SHALL PROVIDE RULES FOR POST-CONVICTION
24 PROCEEDINGS IN CAPITAL CASES; TO PROVIDE FOR THE SETTING OF THE
25 DATE FOR EXECUTION OF DEATH SENTENCES; TO REPEAL SECTION 99-19-49,
26 MISSISSIPPI CODE OF 1972, WHICH PROVIDES FOR THE SETTING OF A DAY
27 FOR THE EXECUTION OF A DEATH SENTENCE; AND FOR RELATED PURPOSES.

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

29 SECTION 1. This act may be cited as the "Mississippi Capital
30 Post-Conviction Counsel Act."

31 SECTION 2. There is created the Mississippi Office of
32 Capital Post-Conviction Counsel. This office shall consist of
33 three (3) attorneys, one (1) investigator, one (1) fiscal officer

34 and one (1) secretary/paralegal. One of those attorneys shall
35 serve as director of the office. The director shall be appointed
36 by the Chief Justice of the Supreme Court with the approval of a
37 majority of the justices voting, for a term of four (4) years, or
38 until a successor takes office. The remaining attorneys and other
39 staff shall be appointed by the director of the office and shall
40 serve at the will and pleasure of the director. The director and
41 all other attorneys in the office shall be active members of The
42 Mississippi Bar and shall meet all qualifications necessary to
43 serve as post-conviction counsel for persons under a sentence of
44 death. The director may be removed from office by the Chief
45 Justice upon finding that the director is not qualified under law
46 to serve as post-conviction counsel for persons under sentences of
47 death, has failed to perform the duties of the office or has acted
48 beyond the scope of the authority granted by law for the office.

49 SECTION 3. The Office of Capital Post-Conviction Counsel is
50 created for the purpose of providing representation to indigent
51 parties under sentences of death in post-conviction proceedings,
52 and to perform such other duties as set forth by law.

53 SECTION 4. The Office of Capital Post-Conviction Counsel
54 shall limit its activities to the representation of inmates under
55 sentence of death in post-conviction proceedings and ancillary
56 matters related directly to post-conviction review of their
57 convictions and sentences and other activities explicitly
58 authorized in statute. Representation by the office or by private
59 counsel under appointment by the office will end upon the filing
60 of proceeding for federal habeas corpus review or for appointment
61 of counsel to represent the defendant in federal habeas corpus
62 proceedings. However, the office may continue representation if
63 the office or a staff attorney employed by the office shall be
64 appointed by a federal court to represent the inmate in federal

65 habeas corpus proceedings. In such event, the office or the
66 employee attorney shall apply to the federal court for
67 compensation and expenses and shall upon receipt of payments by
68 the federal court pay all sums received over to the office for
69 deposit in the Special Capital Post-Conviction Counsel Fund as
70 provided in Section 9 of this act, from which all expenses for
71 investigation and litigation shall be disbursed. Representation
72 in post-conviction proceedings shall further include
73 representation of the inmate from the exhaustion of all state and
74 federal post-conviction litigation until execution of the sentence
75 or an adjudication resulting in either a new trial or a vacation
76 of the death sentence. The attorneys appointed to serve in the
77 Office of Capital Post-Conviction Counsel shall devote their
78 entire time to the duties of the office, shall not represent any
79 persons in other litigation, civil or criminal, nor in any other
80 way engage in the practice of law, and shall in no manner,
81 directly or indirectly, participate in the trial or any person
82 charged with capital murder or direct appeal of any person under
83 sentence of death in the state, nor engage in lobbying activities
84 for or against the death penalty. Any violation of this provision
85 shall be grounds for termination from employment, in the case of
86 the director, by the Chief Justice, and in the case of other
87 attorneys, by the director, with approval of the Chief Justice.

88 SECTION 5. The director appointed under this act shall be
89 compensated at no more than the maximum amount allowed by statute
90 for a district attorney, and other attorneys in the office shall
91 be compensated at no more than the maximum amount allowed by
92 statute for an assistant district attorney.

93 SECTION 6. The Director of the Office of Post-Conviction
94 Counsel shall keep the office open Monday through Friday for not
95 less than eight (8) hours each day.

96 SECTION 7. In addition to the authority to represent persons
97 under sentence of death in state post-conviction proceedings, the
98 director is hereby empowered to pay and disburse salaries,
99 employment benefits and charges relating to employment of staff
100 and to establish their salaries, and expenses of the office; to
101 incur and pay travel expenses of staff necessary for the
102 performance of the duties of the office; to rent or lease on such
103 terms as he may think proper such office space as is necessary in
104 the City of Jackson to accommodate the staff; to solicit and
105 accept monies, gifts, grants or services from any public or
106 private sources for the purpose of funding, operating and
107 executing the statutory duties of the office; to enter into and
108 perform contracts, including, but not limited to, contracts and
109 agreements necessary to obtain and receive monies, gifts, grants
110 or services from federal, public and private sources, and to
111 purchase such necessary office supplies and equipment as may be
112 needed for the proper administration of said offices; and to incur
113 and pay such other expenses as are appropriate and customary to
114 the operations of the office. The director shall be required to
115 obtain a surety bond in the amount of not less than One Hundred
116 Thousand Dollars (\$100,000.00) payable to the state. The cost of
117 such bond shall be paid out of funds appropriated for the
118 operations of the office. All salaries and other expenditures
119 shall be paid from funds appropriated for such purposes augmented
120 by funds received as gifts and grants from public and private

121 sources.

122 SECTION 8. The director shall, as prescribed by the Chief
123 Justice, keep a docket of all death penalty cases originating in
124 the courts of Mississippi, which must at all reasonable times be
125 open to the inspection of the public and must show the county,
126 district and court in which the causes have been instituted. The
127 director shall prepare and maintain a roster of all death penalty
128 cases originating in the courts of Mississippi and pending in
129 state and federal courts indicating the current status of each
130 such case, and a history of those death penalty cases filed since
131 1976. Copies of such dockets and rosters shall be submitted to
132 the Supreme Court in such format and with such appropriate
133 information and as frequently as the Chief Justice may direct.
134 The director shall also report monthly to the Chief Justice the
135 activities, receipts and expenditures of the office.

136 SECTION 9. If, at any time during the representation of two
137 (2) or more defendants, the director determines that the interest
138 of those persons are so adverse or hostile that they cannot all be
139 represented by the director or his staff without conflict of
140 interest, or if the director shall determine that the volume or
141 number of representations shall so require, the director, in his
142 sole discretion, notwithstanding any statute or regulation to the
143 contrary, shall be authorized to employ qualified private counsel.
144 Fees and expenses, approved by order of the appropriate court,
145 including investigative and expert witness expenses of such
146 private counsel shall be paid from funds appropriated to a Special
147 Capital Post-Conviction Counsel Fund for this purpose, which fund
148 is hereby created. Monies in this fund shall not lapse into the

149 General Fund at the end of a fiscal year but shall remain in the
150 fund and any interest which accrues to the fund shall remain in
151 the fund.

152 SECTION 10. The director is further authorized to solicit
153 and accept monies, gifts, grants or services from any public or
154 private source, for the purpose of funding, operating and
155 executing the duties of the office.

156 SECTION 11. Section 99-19-105, Mississippi Code of 1972, is
157 amended as follows:

158 99-19-105. (1) Whenever the death penalty is imposed, and
159 upon the judgment becoming final in the trial court, the sentence
160 shall be reviewed on the record by the Mississippi Supreme Court.
161 The clerk of the trial court, within ten (10) days after receiving
162 the transcript, shall transmit the entire record and transcript to
163 the Mississippi Supreme Court together with a notice prepared by
164 the clerk and a report prepared by the trial judge. The notice
165 shall set forth the title and docket number of the case, the name
166 of the defendant and the name and address of his attorney, a
167 narrative statement of the judgment, the offense, and the
168 punishment prescribed. The report shall be in the form of a
169 standard questionnaire prepared and supplied by the Mississippi
170 Supreme Court, a copy of which shall be served upon counsel for
171 the state and counsel for the defendant.

172 (2) The Mississippi Supreme Court shall consider the
173 punishment as well as any errors enumerated by way of appeal.

174 (3) With regard to the sentence, the court shall determine:

175 (a) Whether the sentence of death was imposed under the
176 influence of passion, prejudice or any other arbitrary factor;

177 (b) Whether the evidence supports the jury's or judge's
178 finding of a statutory aggravating circumstance as enumerated in
179 Section 99-19-101;

180 (c) Whether the sentence of death is excessive or
181 disproportionate to the penalty imposed in similar cases,
182 considering both the crime and the defendant; and

183 (d) Should one or more of the aggravating circumstances
184 be found invalid on appeal, the Mississippi Supreme Court shall
185 determine whether the remaining aggravating circumstances are
186 outweighed by the mitigating circumstances or whether the
187 inclusion of any invalid circumstance was harmless error, or both.

188 (4) Both the defendant and the state shall have the right to
189 submit briefs within the time provided by the court, and to
190 present oral argument to the court.

191 (5) The court shall include in its decision a reference to
192 those similar cases which it took into consideration. In addition
193 to its authority regarding correction of errors, the court, with
194 regard to review of death sentences, shall be authorized to:

195 (a) Affirm the sentence of death;

196 (b) Reweigh the remaining aggravating circumstances
197 against the mitigating circumstances should one or more of the
198 aggravating circumstances be found to be invalid, and (i) affirm
199 the sentence of death or (ii) hold the error in the sentence phase
200 harmless error and affirm the sentence of death or (iii) remand
201 the case for a new sentencing hearing; or

202 (c) Set the sentence aside and remand the case for
203 modification of the sentence to imprisonment for life.

204 (6) The sentence review shall be in addition to direct

205 appeal, if taken, and the review and appeal shall be consolidated
206 for consideration. The court shall render its decision on legal
207 errors enumerated, the factual substantiation of the verdict, and
208 the validity of the sentence.

209 * * *

210 SECTION 12. Section 99-39-5, Mississippi Code of 1972, is
211 amended as follows:

212 99-39-5. (1) Any prisoner in custody under sentence of a
213 court of record of the State of Mississippi who claims:

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

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

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

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

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

226 (f) That his plea was made involuntarily;

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

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

231 (i) That the conviction or sentence is otherwise
232 subject to collateral attack upon any grounds of alleged error

233 heretofore available under any common law, statutory or other
234 writ, motion, petition, proceeding or remedy; may file a motion to
235 vacate, set aside or correct the judgment or sentence, or for an
236 out-of-time appeal.

237 (2) A motion for relief under this chapter shall be made
238 within three (3) years after the time in which the prisoner's
239 direct appeal is ruled upon by the Supreme Court of Mississippi
240 or, in case no appeal is taken, within three (3) years after the
241 time for taking an appeal from the judgment of conviction or
242 sentence has expired, or in case of a guilty plea, within three
243 (3) years after entry of the judgment of conviction. Excepted
244 from this three-year statute of limitations are those cases in
245 which the prisoner can demonstrate either that there has been an
246 intervening decision of the Supreme Court of either the State of
247 Mississippi or the United States which would have actually
248 adversely affected the outcome of his conviction or sentence or
249 that he has evidence, not reasonably discoverable at the time of
250 trial, which is of such nature that it would be practically
251 conclusive that had such been introduced at trial it would have
252 caused a different result in the conviction or sentence. Likewise
253 excepted are those cases in which the prisoner claims that his
254 sentence has expired or his probation, parole or conditional
255 release has been unlawfully revoked. Likewise excepted are
256 filings for post-conviction relief in capital cases which shall be
257 made within one (1) year after conviction.

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

261 (4) Proceedings under this chapter shall be subject to the
262 provisions of Section 99-19-42.

263 SECTION 13. Section 99-39-23, Mississippi Code of 1972, is
264 amended as follows:

265 99-39-23. (1) If an evidentiary hearing is required the
266 judge may appoint counsel for a petitioner who qualifies for the
267 appointment of counsel under Section 99-15-15, Mississippi Code of
268 1972.

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

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

275 (4) The court may receive proof by affidavits, depositions,
276 oral testimony or other evidence and may order the prisoner
277 brought before it for the hearing.

278 (5) If the court finds in favor of the prisoner, it shall
279 enter an appropriate order with respect to the conviction or
280 sentence under attack, and any supplementary orders as to
281 rearraignment, retrial, custody, bail, discharge, correction of
282 sentence or other matters that may be necessary and proper. The
283 court shall make specific findings of fact, and state expressly
284 its conclusions of law, relating to each issue presented.

285 (6) The order as provided in subsection (5) of this section
286 or any order dismissing the prisoner's motion or otherwise denying
287 relief under this chapter is a final judgment and shall be
288 conclusive until reversed. It shall be a bar to a second or

289 successive motion under this chapter. Excepted from this
290 prohibition is a motion filed pursuant to Section 99-19-57(2),
291 Mississippi Code of 1972, raising the issue of the convict's
292 supervening insanity prior to the execution of a sentence of
293 death. A dismissal or denial of a motion relating to insanity
294 under Section 99-19-57(2), Mississippi Code of 1972, shall be res
295 judicata on the issue and shall likewise bar any second or
296 successive motions on the issue. Likewise excepted from this
297 prohibition are those cases in which the prisoner can demonstrate
298 either that there has been an intervening decision of the Supreme
299 Court of either the State of Mississippi or the United States
300 which would have actually adversely affected the outcome of his
301 conviction or sentence or that he has evidence, not reasonably
302 discoverable at the time of trial, which is of such nature that it
303 would be practically conclusive that had such been introduced at
304 trial it would have caused a different result in the conviction or
305 sentence. Likewise excepted are those cases in which the prisoner
306 claims that his sentence has expired or his probation, parole or
307 conditional release has been unlawfully revoked.

308 (7) No relief shall be granted under this chapter unless the
309 prisoner proves by a preponderance of the evidence that he is
310 entitled to such.

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

313 (9) In cases resulting in a sentence of death and upon a
314 determination of indigence, appointment of post-conviction counsel
315 shall be made by the Office of Capital Post-Conviction Counsel
316 upon order entered by the Supreme Court promptly upon announcement

317 of the decision on direct appeal affirming the sentence of death.
318 The order shall direct the trial court to immediately determine
319 indigence and whether the inmate will accept counsel.

320 SECTION 14. Section 99-39-27, Mississippi Code of 1972, is
321 amended as follows:

322 99-39-27. (1) The application for leave to proceed in the
323 trial court filed with the Supreme Court under Section 99-39-7
324 shall name the State of Mississippi as the respondent.

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

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

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

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

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

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

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

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

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

356 (9) The dismissal or denial of an application under this
357 section is a final judgment and shall be a bar to a second or
358 successive application under this chapter. Excepted from this
359 prohibition is an application filed pursuant to Section
360 99-19-57(2), Mississippi Code of 1972, raising the issue of the
361 convict's supervening insanity prior to the execution of a
362 sentence of death. A dismissal or denial of an application
363 relating to insanity under Section 99-19-57(2), Mississippi Code
364 of 1972, shall be res judicata on the issue and shall likewise bar
365 any second or successive applications on the issue. Likewise
366 excepted from this prohibition are those cases in which the
367 prisoner can demonstrate either that there has been an intervening
368 decision of the Supreme Court of either the State of Mississippi
369 or the United States which would have actually adversely affected
370 the outcome of his conviction or sentence or that he has evidence,
371 not reasonably discoverable at the time of trial, which is of such
372 nature that it would be practically conclusive that had such been

373 introduced at trial it would have caused a different result in the
374 conviction or sentence. Likewise exempted are those cases in
375 which the prisoner claims that his sentence has expired or his
376 probation, parole or conditional release has been unlawfully
377 revoked.

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

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

383 SECTION 16. The following shall be codified as Section
384 99-15-18, Mississippi Code of 1972:

385 99-15-18. (1) Counsel employed by an office funded by the
386 State of Mississippi or any county shall receive no compensation
387 or expenses for representation of a party seeking post-conviction
388 relief while under a sentence of death other than the compensation
389 attendant to his office.

390 (2) Unless employed by such an office, counsel appointed to
391 represent a party seeking post-conviction relief while under a
392 sentence of death shall be paid at an hourly rate not to exceed
393 eighty percent (80%) of the hourly rate allowed in the United
394 States District Courts of the Northern and Southern Districts of
395 Mississippi to attorneys appointed to represent defendants seeking
396 habeas corpus relief. Money shall not be paid to court appointed
397 counsel unless either (a) a petition is timely filed, or (b) if a
398 petition is not filed, a notice is timely filed stating that
399 counsel has reviewed the record and found no meritorious claim.

400 Prior to payment of any fees in a case in excess of Seven Thousand

401 Five Hundred Dollars (\$7,500.00) or expenses of investigation and
402 experts in excess of Two Thousand Five Hundred Dollars
403 (\$2,500.00), the application for such fees and expenses will be
404 submitted to the Supreme Court for review of the award of the
405 convicting court. If counsel believes that the court has failed
406 to allow reasonable compensation, counsel may petition the Supreme
407 Court for review. If counsel is appointed in successive
408 post-conviction proceedings, such counsel shall receive reasonable
409 compensation considering the services performed.

410 (3) The trial court shall also, upon petition by the party
411 seeking post-conviction relief, authorize additional monies to pay
412 for investigative and expert services that are reasonably
413 necessary to adequately litigate the post-conviction claims. The
414 initial petition for such expenses shall present a credible
415 estimate of anticipated expenses, and such estimate shall be
416 updated from time to time as needed to inform the court of the
417 status of such expenses. Payment of such expenses shall be made
418 from funds in the Special Capital Post-Conviction Counsel Fund.

419 SECTION 16. The following shall be codified as Section
420 99-39-28, Mississippi Code of 1972:

421 99-39-28. If application to proceed in the trial court is
422 granted, post-conviction proceedings on cases where the death
423 penalty has been imposed in the trial court and appeals from the
424 trial court shall be conducted in accordance with rules
425 established by the Supreme Court.

426 SECTION 17. When judgment of death becomes final and a writ
427 of certiorari to the United States Supreme Court has been denied
428 or the time for filing such petition has expired, the court shall

429 set an execution date for a person sentenced to the death penalty.
430 Within sixty (60) days following the appointment of
431 post-conviction counsel, upon declaration by counsel that he deems
432 post-conviction review to be meritorious and that he intends to
433 file an application for post-conviction review, the court may stay
434 execution pending the disposition of the post-conviction
435 proceeding. In the event no application for post-conviction
436 relief is filed within one (1) year of the date of the disposition
437 of the petition for writ of certiorari or the time for certiorari
438 has expired, any stay entered by the court will automatically
439 vacate. The filing of a declaration by counsel that he deems
440 post-conviction review to be meritorious and intends to file an
441 application for post-conviction review shall in no manner
442 constitute the filing of an application for post-conviction review
443 that would toll the running of any statute of limitations.
444 Setting or resetting the date of execution shall be made on motion
445 of the state that all state and federal remedies have been
446 exhausted, or that the defendant has failed to file for further
447 state or federal review within the time allowed by law.

448 SECTION 18. Section 99-19-49, Mississippi Code of 1972,
449 which provides for the setting of a day for the execution of a
450 death sentence, is repealed.

451 SECTION 19. This act shall take effect and be in force from
452 and after July 1, 2000.