

By: Representatives Watson, Whittington

To: Judiciary B;
Appropriations

HOUSE BILL NO. 836

1 AN ACT TO PROVIDE THAT PERSONS CONVICTED OF FELONIES MAY FILE
2 AN APPLICATION FOR DNA TESTING; TO PROVIDE FOR THE ADMINISTRATION
3 OF TESTING; TO PROVIDE FOR SERVICE OF THE APPLICATION UPON
4 PROSECUTORS AND LAW ENFORCEMENT AGENCIES; TO PROVIDE FOR STORAGE
5 OF DNA PROFILES WITH THE MISSISSIPPI CRIME LABORATORY; TO PROVIDE
6 FOR PROCEDURES REGARDING TESTING; TO CREATE A SPECIAL FUND FOR
7 TESTING; TO AMEND SECTIONS 45-33-37, 99-39-23 AND 99-39-27,
8 MISSISSIPPI CODE OF 1972, IN CONFORMITY TO THE PROVISIONS OF THIS
9 ACT; AND FOR RELATED PURPOSES.

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

11 **SECTION 1.** (1) (a) Prior to August 31, 2005, a person
12 convicted of a felony may file an application under the provisions
13 of this section for post-conviction relief requesting DNA testing
14 of an unknown sample secured in relation to the offense for which
15 he was convicted. On or after August 31, 2005, a petitioner may
16 request DNA testing under the rules for filing an application for
17 post-conviction relief.

18 (b) Notwithstanding the provisions of subsection
19 (1)(a), in cases in which the defendant has been sentenced to
20 death prior to the effective date of this act, the application for
21 DNA testing under the provisions of this section may be filed at
22 any time.

23 (2) An application filed under the provisions of this
24 article shall comply with the provisions of this act and shall
25 allege all of the following:

26 (a) A factual explanation of why there is an
27 articulable doubt, based on competent evidence whether or not
28 introduced at trial, as to the guilt of the petitioner in that DNA
29 testing will resolve the doubt and establish the innocence of the
30 petitioner.



31 (b) The factual circumstances establishing the
32 timeliness of the application.

33 (c) The identification of the particular evidence for
34 which DNA testing is sought.

35 (d) That the applicant is factually innocent of the
36 crime for which he was convicted, in the form of an affidavit
37 signed by the petitioner under penalty of perjury.

38 (3) In addition to any other reason established by
39 legislation or jurisprudence, and whether based on the petition
40 and answer or after contradictory hearing, the court shall dismiss
41 any application filed pursuant to this section unless it finds all
42 of the following:

43 (a) There is an articulable doubt based on competent
44 evidence, whether or not introduced at trial, as to the guilt of
45 the petitioner and there is a reasonable likelihood that the
46 requested DNA testing will resolve the doubt and establish the
47 innocence of the petitioner. In making this finding the court
48 shall evaluate and consider the evidentiary importance of the DNA
49 sample to be tested.

50 (b) The application has been timely filed.

51 (c) The evidence to be tested is available and in a
52 condition that would permit DNA testing.

53 (4) Relief under this section shall not be granted when the
54 court finds that there is a substantial question as to the
55 integrity of the evidence to be tested.

56 (5) Relief under this section shall not be granted solely
57 because there is evidence currently available for DNA testing but
58 the testing was not available or was not done at the time of the
59 conviction.

60 (6) Once an application has been filed and the court
61 determines the location of the evidence sought to be tested, the
62 court shall serve a copy of the application on the district
63 attorney and the law enforcement agency which has possession of



64 the evidence to be tested, including, but not limited to,
65 sheriffs, the Department of Public Safety, local police agencies,
66 and crime laboratories. If the court grants relief under this
67 section and orders DNA testing the court shall also issue such
68 orders as are appropriate to obtain the necessary samples to be
69 tested and to protect their integrity. The testing shall be
70 conducted by a laboratory mutually agreed upon by the district
71 attorney and the petitioner. If the parties cannot agree, the
72 court shall designate a laboratory to perform the tests which is
73 accredited by the American Society of Crime Laboratory
74 Directors/Laboratory Accreditation Board (ASCLD/LAB) in forensic
75 DNA analysis.

76 (7) If the court orders the testing performed at a private
77 laboratory, the district attorney shall have the right to withhold
78 a sufficient portion of any unknown sample for purposes of his
79 independent testing. Under such circumstances, the petitioner
80 shall submit DNA samples to the district attorney for purposes of
81 comparison with the unknown sample retained by the district
82 attorney. A laboratory selected to perform the analysis shall, if
83 possible, retain and maintain the integrity of a sufficient
84 portion of the unknown sample for replicate testing. If after
85 initial examination of the evidence, but before actual testing,
86 the laboratory decides that there is insufficient evidentially
87 significant material for replicate tests, then it shall notify the
88 district attorney in writing of its finding. If the petitioner
89 and district attorney cannot agree, the court shall determine
90 which laboratory as required by subsection (6) of this section is
91 best suited to conduct the testing and shall fashion its order to
92 allow the laboratory conducting the tests to consume the entirety
93 of the unknown sample for testing purposes if necessary.

94 (8) (a) The results of the DNA testing ordered under this
95 section shall be filed by the laboratory with the court and served
96 upon the petitioner and the district attorney. The court may, in



97 its discretion, order production of the underlying facts or data
98 and laboratory notes.

99 (b) After service of the application on the district
100 attorney and the law enforcement agency in possession of the
101 evidence, no evidence shall be destroyed that is relevant to a
102 case in which an application for DNA testing has been filed until
103 the case has been finally resolved by the court.

104 (c) After service of the application on the district
105 attorney and the law enforcement agency in possession of the
106 evidence, the clerks of court of each county and all law
107 enforcement agencies, including, but not limited to, district
108 attorneys, sheriffs, the Department of Public Safety, local police
109 agencies, and crime laboratories shall preserve until August 31,
110 2005, all items of evidence in their possession which are known to
111 contain biological material that can be subjected to DNA testing,
112 in all cases that, as of August 15, 2001, have been concluded by a
113 verdict of guilty or a plea of guilty.

114 (d) In all cases in which the defendant has been
115 sentenced to death prior to the effective date of this act, the
116 clerks of court of each county and all law enforcement agencies,
117 including, but not limited to, district attorneys, sheriffs, the
118 Department of Public Safety, local police agencies, and crime
119 laboratories shall preserve, until the execution of sentence is
120 completed, all items of evidence in their possession which are
121 known to contain biological material that can be subjected to DNA
122 testing.

123 (e) Notwithstanding the provisions of paragraphs (c)
124 and (d) of this subsection, after service of the application on
125 the district attorney and the law enforcement agency in possession
126 of the evidence, the clerks of court of each county and all law
127 enforcement agencies, including, but not limited to, district
128 attorneys, sheriffs, the Department of Public Safety, local police
129 agencies, and crime laboratories may forward for proper storage



130 and preservation all items of evidence described in paragraph (c)
131 to a laboratory accredited in forensic DNA analysis by the
132 American Society of Crime Laboratory Directors/Laboratory
133 Accreditation Board (ASCLD/LAB).

134 (f) Except in the case of willful or wanton misconduct
135 or gross negligence, no clerk of court or law enforcement officer
136 or law enforcement agency, including, but not limited to, any
137 district attorney, sheriff, the Department of Public Safety, local
138 police agency, or crime laboratory which is responsible for the
139 storage or preservation of any item of evidence in compliance with
140 the requirements of paragraph (c)(3) shall be held civilly or
141 criminally liable for the unavailability or deterioration of any
142 such evidence to the extent that adequate or proper testing cannot
143 be performed on the evidence.

144 (9) The DNA profile of the petitioner obtained under this
145 section shall be sent by the district attorney to the Mississippi
146 Crime Laboratory for inclusion in the State DNA database
147 established pursuant to Section 45-33-37. The petitioner may seek
148 removal of his DNA record.

149 (10) The petitioner, in addition to other service
150 requirements, shall mail a copy of the application requesting DNA
151 testing to the Department of Public Safety. If the court grants
152 relief under this section, the court shall mail a copy of the
153 order to the Department of Public Safety. The Department of
154 Public Safety shall keep a copy of all records set to them
155 pursuant to this subsection and report to the Legislature before
156 January 1, 2003, on the number of petitions filed and the number
157 of orders granting relief.

158 (11) There is hereby created in the State Treasury a special
159 fund designated as the DNA Testing Post-Conviction Relief for
160 Indigents. The fund shall consist of money specially appropriated
161 by the Legislature. Any monies in the fund at the end of a fiscal
162 year shall not lapse into the General Fund but shall remain in the



163 fund and all interest accrued shall remain in the fund. No other
164 public money may be used to pay for the DNA testing authorized
165 under the provisions of this section. The fund shall be
166 administered by the Department of Public Safety. The fund shall
167 be segregated from all other funds and shall be used exclusively
168 for the purposes established under the provisions of this
169 section. If the court finds that a petitioner is indigent, the
170 fund shall pay for the testing as authorized in the court order.

171 **SECTION 2.** Section 45-33-37, Mississippi Code of 1972, is
172 amended as follows:

173 45-33-37. (1) The Mississippi Crime Laboratory shall
174 develop a plan for and establish a deoxyribonucleic acid (DNA)
175 identification system. In implementing the plan, the Mississippi
176 Crime Laboratory shall purchase the appropriate equipment. The
177 DNA identification system as established herein shall be
178 compatible with that utilized by the Federal Bureau of
179 Investigation.

180 (2) From and after January 1, 1996, every individual
181 convicted of a sex offense or in the custody of the Mississippi
182 Department of Corrections for a sex offense as defined in Section
183 45-33-23 shall submit a biological sample for purposes of DNA
184 identification analysis before release from or transfer to a state
185 correctional facility or county jail or other detention facility.

186 (3) From and after January 1, 1996, any person having a duty
187 to register under Section 45-33-25 for whom a DNA analysis is not
188 already on file shall submit a biological sample for purposes of
189 DNA identification analysis within five (5) working days after
190 registration.

191 (4) The Mississippi Crime Laboratory shall store DNA
192 profiles obtained under the provisions of Section 1 of House Bill
193 No. _____, 2002 Regular Session.

194 **SECTION 3.** Section 99-39-23, Mississippi Code of 1972, is
195 amended as follows:



196 99-39-23. (1) If an evidentiary hearing is required the
197 judge may appoint counsel for a petitioner who qualifies for the
198 appointment of counsel under Section 99-15-15, Mississippi Code of
199 1972.

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

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

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

209 (5) If the court finds in favor of the prisoner, it shall
210 enter an appropriate order with respect to the conviction or
211 sentence under attack, and any supplementary orders as to
212 rearraignment, retrial, custody, bail, discharge, correction of
213 sentence, relief sought under Section 1 of House Bill No. _____,
214 2002 Regular Session, or other matters that may be necessary and
215 proper. The court shall make specific findings of fact, and state
216 expressly its conclusions of law, relating to each issue
217 presented.

218 (6) The order as provided in subsection (5) of this section
219 or any order dismissing the prisoner's motion or otherwise denying
220 relief under this article is a final judgment and shall be
221 conclusive until reversed. It shall be a bar to a second or
222 successive motion under this article. Excepted from this
223 prohibition is a motion filed pursuant to Section 99-19-57(2),
224 Mississippi Code of 1972, raising the issue of the convict's
225 supervening insanity prior to the execution of a sentence of
226 death. A dismissal or denial of a motion relating to insanity
227 under Section 99-19-57(2), Mississippi Code of 1972, shall be res
228 judicata on the issue and shall likewise bar any second or



229 successive motions on the issue. Likewise excepted from this
230 prohibition are those cases in which the prisoner can demonstrate
231 either that there has been an intervening decision of the Supreme
232 Court of either the State of Mississippi or the United States
233 which would have actually adversely affected the outcome of his
234 conviction or sentence or that he has evidence, not reasonably
235 discoverable at the time of trial, which is of such nature that it
236 would be practically conclusive that had such been introduced at
237 trial it would have caused a different result in the conviction or
238 sentence. Likewise excepted are those cases in which the prisoner
239 claims that his sentence has expired or his probation, parole or
240 conditional release has been unlawfully revoked.

241 (7) No relief shall be granted under this article unless the
242 prisoner proves by a preponderance of the evidence that he is
243 entitled to such.

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

246 (9) In cases resulting in a sentence of death and upon a
247 determination of indigence, appointment of post-conviction counsel
248 shall be made by the Office of Capital Post-Conviction Counsel
249 upon order entered by the Supreme Court promptly upon announcement
250 of the decision on direct appeal affirming the sentence of death.
251 The order shall direct the trial court to immediately determine
252 indigence and whether the inmate will accept counsel.

253 **SECTION 4.** Section 99-39-27, Mississippi Code of 1972, is
254 amended as follows:

255 99-39-27. (1) The application for leave to proceed in the
256 trial court filed with the Supreme Court under Section 99-39-7
257 shall name the State of Mississippi as the respondent.

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



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

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

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

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

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

280 (a) Where sufficient facts exist from the face of the
281 application, motion, exhibits, the prior record and the state's
282 response, together with any exhibits submitted therewith, DNA
283 testing pursuant to Section 1 of House Bill No. _____, 2002 Regular
284 Session, or upon stipulation of the parties, grant or deny any or
285 all relief requested in the attached motion.

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

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

290 (9) The dismissal or denial of an application under this
291 section is a final judgment and shall be a bar to a second or
292 successive application under this article. Excepted from this
293 prohibition is an application filed pursuant to Section
294 99-19-57(2), Mississippi Code of 1972, raising the issue of the



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

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

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

317 **SECTION 5.** This act shall take effect and be in force from
318 and after July 1, 2002.

