

By: Moore (100th)

To: Judiciary A;
Appropriations

HOUSE BILL NO. 1378

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 direct appeal
82 of any person under sentence of death in the state, nor engage in
83 lobbying activities for or against the death penalty. Any
84 violation of this provision shall be grounds for termination from
85 employment, in the case of the director, by the Chief Justice, and
86 in the case of other attorneys, by the director, with approval of
87 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 attorney general.

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 and 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 enter into and
105 perform contracts, including but not limited to contracts and
106 agreements necessary to obtain and receive monies, gifts, grants
107 or services from federal and private sources, and to purchase such
108 necessary office supplies and equipment as may be needed for the

109 proper administration of said offices within the funds
110 appropriated for such purpose; and to incur and pay such other
111 expenses as are appropriate and customary to the operations of the
112 office.

113 SECTION 8. The director shall keep a docket of all death
114 penalty cases originating in the courts of Mississippi, which must
115 at all reasonable times be open to the inspection of the public
116 and must show the county, district and court in which the causes
117 have been instituted. The director shall prepare and maintain a
118 roster of all death penalty cases originating in the courts of
119 Mississippi and pending in state and federal courts indicating the
120 current status of each such case, and a history of those death
121 penalty cases filed since 1976, and submit this report to the
122 Supreme Court as frequently as the Chief Justice may direct. The
123 director shall also report monthly to the Chief Justice the
124 activities, receipts and expenditures of the office.

125 SECTION 9. If, at any time during the representation of two
126 (2) or more defendants, the director determines that the interest
127 of those persons are so adverse or hostile that they cannot all be
128 represented by the director or his staff without conflict of
129 interest, or if the director shall determine that the volume or
130 number of representations shall so require, the director, in his
131 sole discretion, notwithstanding any statute or regulation to the
132 contrary, shall be authorize to employ qualified private counsel.

133 Fees and expenses, approved by order of the appropriate court,
134 including investigative and expert witness expenses of such
135 private counsel shall be paid from funds appropriated to a Special
136 Capital Post-Conviction Counsel Fund for this purpose, which fund
137 is hereby created. Monies in this fund shall not lapse into the
138 General Fund at the end of a fiscal year but shall remain in the
139 fund and any interest which accrues to the fund shall remain in
140 the fund.

141 SECTION 10. The director shall be required to obtain,

142 payable to execute a surety bond in the amount of not less than
143 One Hundred Thousand Dollars (\$100,000.00) payable to the state.
144 The cost of such bond shall be paid out of funds appropriated for
145 the operations of the office.

146 SECTION 11. The director is further authorized to solicit
147 and accept monies, gifts, grants or services from any public or
148 private source, for the purpose of funding, operating and
149 executing the duties of the office.

150 SECTION 12. Section 99-19-105, Mississippi Code of 1972, is
151 amended as follows:

152 99-19-105. (1) Whenever the death penalty is imposed, and
153 upon the judgment becoming final in the trial court, the sentence
154 shall be reviewed on the record by the Mississippi Supreme Court.
155 The clerk of the trial court, within ten (10) days after receiving
156 the transcript, shall transmit the entire record and transcript to
157 the Mississippi Supreme Court together with a notice prepared by
158 the clerk and a report prepared by the trial judge. The notice
159 shall set forth the title and docket number of the case, the name
160 of the defendant and the name and address of his attorney, a
161 narrative statement of the judgment, the offense, and the
162 punishment prescribed. The report shall be in the form of a
163 standard questionnaire prepared and supplied by the Mississippi
164 Supreme Court, a copy of which shall be served upon counsel for
165 the state and counsel for the defendant.

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

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

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

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

174 (c) Whether the sentence of death is excessive or

175 disproportionate to the penalty imposed in similar cases,
176 considering both the crime and the defendant; and

177 (d) Should one or more of the aggravating circumstances
178 be found invalid on appeal, the Mississippi Supreme Court shall
179 determine whether the remaining aggravating circumstances are
180 outweighed by the mitigating circumstances or whether the
181 inclusion of any invalid circumstance was harmless error, or both.

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

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

189 (a) Affirm the sentence of death;

190 (b) Reweigh the remaining aggravating circumstances
191 against the mitigating circumstances should one or more of the
192 aggravating circumstances be found to be invalid, and (i) affirm
193 the sentence of death or (ii) hold the error in the sentence phase
194 harmless error and affirm the sentence of death or (iii) remand
195 the case for a new sentencing hearing; or

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

198 (6) The sentence review shall be in addition to direct
199 appeal, if taken, and the review and appeal shall be consolidated
200 for consideration. The court shall render its decision on legal
201 errors enumerated, the factual substantiation of the verdict, and
202 the validity of the sentence.

203 * * *

204 SECTION 13. Section 99-39-5, Mississippi Code of 1972, is
205 amended as follows:

206 99-39-5. (1) Any prisoner in custody under sentence of a
207 court of record of the State of Mississippi who claims:

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

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

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

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

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

220 (f) That his plea was made involuntarily;

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

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

225 (i) That the conviction or sentence is otherwise
226 subject to collateral attack upon any grounds of alleged error
227 heretofore available under any common law, statutory or other
228 writ, motion, petition, proceeding or remedy; may file a motion to
229 vacate, set aside or correct the judgment or sentence, or for an
230 out-of-time appeal.

231 (2) A motion for relief under this chapter shall be made
232 within three (3) years after the time in which the prisoner's
233 direct appeal is ruled upon by the Supreme Court of Mississippi
234 or, in case no appeal is taken, within three (3) years after the
235 time for taking an appeal from the judgment of conviction or
236 sentence has expired, or in case of a guilty plea, within three
237 (3) years after entry of the judgment of conviction. Excepted
238 from this three-year statute of limitations are those cases in
239 which the prisoner can demonstrate either that there has been an
240 intervening decision of the Supreme Court of either the State of

241 Mississippi or the United States which would have actually
242 adversely affected the outcome of his conviction or sentence or
243 that he has evidence, not reasonably discoverable at the time of
244 trial, which is of such nature that it would be practically
245 conclusive that had such been introduced at trial it would have
246 caused a different result in the conviction or sentence. Likewise
247 excepted are those cases in which the prisoner claims that his
248 sentence has expired or his probation, parole or conditional
249 release has been unlawfully revoked. Likewise excepted are
250 filings for post-conviction relief in capital cases which shall be
251 made within one (1) year after conviction.

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

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

257 SECTION 14. Section 99-39-23, Mississippi Code of 1972, is
258 amended as follows:

259 99-39-23. (1) If an evidentiary hearing is required the
260 judge may appoint counsel for a petitioner who qualifies for the
261 appointment of counsel under Section 99-15-15, Mississippi Code of
262 1972.

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

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

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

272 (5) If the court finds in favor of the prisoner, it shall
273 enter an appropriate order with respect to the conviction or

274 sentence under attack, and any supplementary orders as to
275 rearraignment, retrial, custody, bail, discharge, correction of
276 sentence or other matters that may be necessary and proper. The
277 court shall make specific findings of fact, and state expressly
278 its conclusions of law, relating to each issue presented.

279 (6) The order as provided in subsection (5) of this section
280 or any order dismissing the prisoner's motion or otherwise denying
281 relief under this chapter is a final judgment and shall be
282 conclusive until reversed. It shall be a bar to a second or
283 successive motion under this chapter. Excepted from this
284 prohibition is a motion filed pursuant to Section 99-19-57(2),
285 Mississippi Code of 1972, raising the issue of the convict's
286 supervening insanity prior to the execution of a sentence of
287 death. A dismissal or denial of a motion relating to insanity
288 under Section 99-19-57(2), Mississippi Code of 1972, shall be res
289 judicata on the issue and shall likewise bar any second or
290 successive motions on the issue. Likewise excepted from this
291 prohibition are those cases in which the prisoner can demonstrate
292 either that there has been an intervening decision of the Supreme
293 Court of either the State of Mississippi or the United States
294 which would have actually adversely affected the outcome of his
295 conviction or sentence or that he has evidence, not reasonably
296 discoverable at the time of trial, which is of such nature that it
297 would be practically conclusive that had such been introduced at
298 trial it would have caused a different result in the conviction or
299 sentence. Likewise excepted are those cases in which the prisoner
300 claims that his sentence has expired or his probation, parole or
301 conditional release has been unlawfully revoked.

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

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

307 (9) In cases resulting in a sentence of death and upon a
308 determination of indigence, appointment of post-conviction counsel
309 shall be made by the Office of Capital Post-Conviction Counsel
310 upon order entered by the Supreme Court promptly upon announcement
311 of the decision on direct appeal affirming the sentence of death.
312 The order shall direct the trial court to immediately determine
313 indigence and whether the inmate will accept counsel.

314 SECTION 15. Section 99-39-27, Mississippi Code of 1972, is
315 amended as follows:

316 99-39-27. (1) The application for leave to proceed in the
317 trial court filed with the Supreme Court under Section 99-39-7
318 shall name the State of Mississippi as the respondent.

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

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

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

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

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

339 (7) In granting the application the court, in its

340 discretion, may:

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

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

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

350 (9) The dismissal or denial of an application under this
351 section is a final judgment and shall be a bar to a second or
352 successive application under this chapter. Excepted from this
353 prohibition is an application filed pursuant to Section
354 99-19-57(2), Mississippi Code of 1972, raising the issue of the
355 convict's supervening insanity prior to the execution of a
356 sentence of death. A dismissal or denial of an application
357 relating to insanity under Section 99-19-57(2), Mississippi Code
358 of 1972, shall be res judicata on the issue and shall likewise bar
359 any second or successive applications on the issue. Likewise
360 excepted from this prohibition are those cases in which the
361 prisoner can demonstrate either that there has been an intervening
362 decision of the Supreme Court of either the State of Mississippi
363 or the United States which would have actually adversely affected
364 the outcome of his conviction or sentence or that he has evidence,
365 not reasonably discoverable at the time of trial, which is of such
366 nature that it would be practically conclusive that had such been
367 introduced at trial it would have caused a different result in the
368 conviction or sentence. Likewise exempted are those cases in
369 which the prisoner claims that his sentence has expired or his
370 probation, parole or conditional release has been unlawfully
371 revoked.

372 (10) Proceedings under this section shall be subject to the

373 provisions of Section 99-19-42.

374 (11) The provisions of this section shall not apply to
375 post-conviction relief in capital cases.

376 SECTION 16. The following shall be codified as Section
377 99-15-18, Mississippi Code of 1972:

378 99-15-18. (1) Counsel employed by an office funded by the
379 State of Mississippi or any county shall receive no compensation
380 or expenses for representation of a party seeking post-conviction
381 relief while under a sentence of death other than the compensation
382 attendant to his office.

383 (2) Unless employed by such an office, counsel appointed to
384 represent a party seeking post-conviction relief while under a
385 sentence of death shall be paid at an hourly rate not to exceed
386 eighty percent (80%) of the hourly rate allowed in the United
387 States District Courts of the Northern and Southern Districts of
388 Mississippi to attorneys appointed to represent defendants seeking
389 habeas corpus relief. Money shall not be paid to court appointed
390 counsel unless either (a) a petition is timely filed, or (b) of a
391 petition is not filed, a notice is timely filed stating that
392 counsel has reviewed the record and found no meritorious claim.
393 Prior to payment of any fees in a case in excess of Seven Thousand
394 Five Hundred Dollars (\$7,500.00) or expenses of investigation and
395 experts in excess of Two Thousand Five Hundred Dollars
396 (\$2,500.00), the application for such fees and expenses will be
397 submitted to the Supreme Court for review of the award of the
398 convicting court. If counsel believes that the court has failed
399 to allow reasonable compensation, counsel may petition the Supreme
400 Court for review. If counsel is appointed in successive
401 post-conviction proceedings, such counsel shall receive reasonable
402 compensation considering the services performed.

403 (3) The trial court shall also, upon petition by the party
404 seeking post-conviction relief, authorize additional monies to pay
405 for investigative and expert services that are reasonably

406 necessary to adequately litigate the post-conviction claims. The
407 initial petition for such expenses shall present a credible
408 estimate of anticipated expenses, and such estimate shall be
409 updated from time to time as needed to inform the court of the
410 status of such expenses. Payment of such expenses shall be made
411 from funds in the Special Capital Post-Conviction Counsel Fund.

412 SECTION 17. The following shall be codified as Section
413 99-39-28, Mississippi Code of 1972:

414 99-39-28. If application to proceed in the trial court is
415 granted, post-conviction proceedings on cases where the death
416 penalty has been imposed in the trial court and appeals from the
417 trial court shall be conducted in accordance rules established by
418 the Supreme Court.

419 SECTION 18. When judgment of death becomes final and the
420 times for certiorari to the United States Supreme Court have
421 expired, the court shall set an execution date for a person
422 sentenced to the death penalty. Within sixty (60) days following
423 the appointment of post-conviction counsel, upon declaration by
424 counsel that deems post-conviction review to be meritorious and
425 expresses an intention to file an application for post-conviction
426 review, the court may stay execution pending the disposition of
427 the post-conviction proceeding or the expiration of one (1) year.

428 Setting or resetting the date of execution shall be made on
429 motion of the state that all state and federal remedies have been
430 exhausted, or that the defendant has failed to file for further
431 state or federal review within the time allowed by law.

432 SECTION 19. Section 99-19-49, Mississippi Code of 1972,
433 which provides for the setting of a day for the execution of a
434 death sentence, is repealed.

435 SECTION 20. This act shall take effect and be in force from
436 and after July 1, 2000.