IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-KA-01295-COA

HOWARD MONTEVILLE NEAL — APPELLANT

v.

THE STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF LAMAR COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Howard Monteville Neal, appellant.

James W. Craig and Justin L. Matheny, Phelps Dunbar LLP, Jackson, Mississippi, counsel for appellant.

Marvin L. White, Jr., Office of the Attorney General, Jackson, Mississippi, counsel for appellee.

Hal Kittrell, District Attorney, Columbia, Mississippi, counsel for appellee.

The State of Mississippi, appellee.

SO CERTIFIED, this the 30 day of January, 2009.

JUSTIN L. MATHENY
Counsel for Appellant Howard Monteville Neal

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INTRODUCTION

Appellant was accused of a murder committed in February 1981. He was tried and convicted of capital murder on February 4, 1982. At that time, there were only two sentencing options: (1) death; or (2) life imprisonment with the possibility of parole. Appellant was sentenced to death.

Over twenty-five years later, Appellant's sentence was vacated by the trial court after it determined – pursuant to the unanimous conclusion of the State's forensic psychology team – that Appellant is mentally retarded.

The trial court correctly vacated the sentence. However, upon re-sentencing, Appellant was adjudged to serve life without parole based upon the current version of Section 97-3-21 of the Mississippi Code. That section does not apply to Appellant because his crime and conviction occurred before it included the option of life without parole.

The trial court further justified the re-sentencing based upon Section 99-19-107 of the Mississippi Code. But that section does not apply either. Its purpose as enacted in 1977 was to protect Mississippi's death penalty scheme in the event the courts ever held that the scheme was unconstitutional as a whole. In this case, since the death penalty scheme has not been rejected entirely resulting in Appellant's original improper sentence, Section 99-19-107 has no application.

As a result, the Court should vacate Appellant's re-sentence of life without parole and remand this case to the trial court with instructions to enter a sentence of life with possibility of parole.

STATEMENT OF THE ISSUE

This only issue on this appeal presents an important question of constitutional law in a factual scenario unique to this Appellant:

Whether the *Ex Post Facto* and Due Process Clauses of the United States and Mississippi Constitutions bars a punishment of life without parole that was not a viable sentence at the time of Appellant's crime or conviction.

STATEMENT OF THE CASE

Background Facts, Course of Proceedings and Disposition in the Court Below.

On February 6, 1981, Amanda Joy Neal's body was found off of Highway 27 in Lawrence County. Appellant was convicted of capital murder by the Circuit Court of Lamar County, Mississippi – on change of venue from Lawrence County – on February 2, 1982. At the time of Appellant's conviction, MISS. CODE ANN. § 97-3-21 provided two punishment options: (1) life imprisonment with the possibility of parole or (2) death. Appellant was sentenced to death.

In a separate cause, on August 6, 1982, Appellant was convicted of capital murder by the Circuit Court of Jones County, Mississippi, First Judicial District – on a change of venue from Lawrence County – in Cause No. 1147. In that cause, Appellant was sentenced to life imprisonment.

On direct appeal of his death sentence, Appellant argued, in part, that the Eighth Amendment barred the execution of mentally retarded individuals. The Mississippi Supreme Court rejected Appellant's argument and affirmed his conviction and sentence. *Neal v. State*, 451 So. 2d 743, 752 (Miss. 1984). Appellant appealed to the United States Supreme Court, but certiorari was denied. *Neal v. Mississippi*, 469 U.S. 1098, 105 S.Ct. 607 (1984).

Thereafter, in accordance with MISS. CODE ANN. § 99-39-1, Appellant filed a post-conviction petition alleging nine claims of error. The Mississippi Supreme

Court denied eight of those claims and also denied a subsequent request for rehearing. *Neal v. State*, 535 So. 2d 1379 (Miss. 1987). The Court did, however, remand the case for an evidentiary hearing relating to Appellant's claim that he was denied the right to testify by trial counsel.

An evidentiary hearing was conducted on March 30, 1992, and the trial court entered an order denying relief on May 26, 1992. Appellant appealed, but the Mississippi Supreme Court affirmed. A petition for rehearing was later denied and Appellant did not seek further review. *Neal v. State*, 687 So. 2d 1180 (Miss. 1996).

On July 7, 1997, Appellant filed a habeas corpus petition in federal court. United States District Judge Charles Pickering subsequently denied the petition. Appellant then filed a Certificate of Appealability ("COA") in an attempt to obtain review by the Fifth Circuit Court of Appeals. The court granted Appellant's COA, but limited the inquiry to whether "his trial counsel was ineffective for failing to investigate and present evidence of mitigating circumstances." *Neal v. Puckett*, No. 99-60511 (5th Cir. May 2, 2000).

A Fifth Circuit panel affirmed Judge Pickering's habeas corpus denial on January 18, 2001. *Neal v. Puckett*, 239 F.3d 683 (5th Cir. 2001). The court, however, subsequently granted Appellant's request to rehear the decision en banc. *Neal v. Puckett*, 264 F.2d 1149 (5th Cir. 2001). Nonetheless, the en banc court reached the same conclusion and affirmed the panel's denial of habeas corpus on

March 15, 2002. *Neal v. Puckett*, 286 F.3d 230 (5th Cir. 2002). Appellant sought review by the United States Supreme Court, but his certiorari petition was denied. *Neal v. Epps*, 537 U.S. 1104, 123 S.Ct. 963 (2003).

On June 20, 2002, the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In *Atkins*, the Court determined that the execution of mentally retarded individuals violates the Eighth Amendment to the United States Constitution. *Id.* at 321. As a result of *Atkins*, Appellant asked the Mississippi Supreme Court for permission to petition the trial court for removal of his death sentence. On May 20, 2004, the Mississippi Supreme Court granted the request and remanded the case to the trial court. *Neal v. State*, 873 So. 2d 1010 (Miss. 2004).

In the order remanding the case, the Court provided specific instructions: "The trial court shall...make the determination, by a preponderance of evidence, whether Neal is mentally retarded for Eighth Amendment purposes." *Id.* at 1012-13. On February 15, 2006, at the request of the State, the trial court assigned the Mississippi State Hospital to assist in determining Appellant's mental condition. Specifically, the trial court ordered the State hospital to evaluate Appellant according to diagnostic standards[1] set forth in *Foster v. State*, 848 So. 2d 172

[1] Although the *Atkins* Court did not delineate specific standards for diagnosing mental retardation for Eighth Amendment purposes, the Mississippi Supreme Court provided guidance in *Foster v. State*, 848 So. 2d 172 (Miss. 2003) and *Chase v. State*, 873 So. 2d 1013 (Miss. 2004). Read together, the cases mandate that an expert evaluate (1) intellectual functioning; (2) adaptive functioning; (3) onset before the age of 18; and (4) attempts to malinger the tests.

(Miss. 2003) and *Chase v. State*, 873 So. 2d 1013 (Miss. 2004). Five forensic psychology experts then examined Appellant and produced a unanimous report confirming that he is mentally retarded.

On July 20, 2007, after reviewing the State Hospital's report, the State moved to vacate Appellant's death sentence and requested that the trial court re-sentence Appellant to life imprisonment without the possibility of parole. R. 2:183. Appellant responded to this motion and cross-moved for entry of a sentence of life with the possibility of parole. R. 2:195.

On August 14, 2007, the trial court entered an order vacating Appellant's sentence of death and scheduled a re-sentencing hearing for a future date. R. 2:203. On June 27, 2008, the trial court, following a hearing at which Appellant's counsel renewed the objection to a life without parole sentence, issued its re-sentencing order and specifically sentenced Appellant to life imprisonment without eligibility of parole with said sentence to run consecutively to the life sentence with parole imposed upon Appellant in Cause No. 1147. R. 2:209.

Thereafter, on July 17, 2008, Appellant filed his Notice of Appeal to this Court from the final re-sentencing order issued by the trial court. R. 2:214.

SUMMARY OF THE ARGUMENT

The trial court got it right when it vacated Appellant's sentence of death below. However, the court erred when it imposed the sentence of life without

eligibility of parole instead. Appellant's re-sentence should have been rendered as life with the possibility of parole.

Appellant's alleged crime occurred in February 1981. A year later, on February 4, 1982, Appellant was sentenced under MISS. CODE ANN. § 97-3-21 for capital murder. In 1994, § 97-3-21 was revised to include "Life Without Parole," but that option was not available in 1982 when Appellant was sentenced. The only possible sentences available in 1982 were "Death" and "Life With the Possibility of Parole." *See* MISS. CODE ANN. § 97-3-21 (1972).

Allowing the sentence of life without parole to stand would violate the *Ex Post Facto* Clauses of the United States and Mississippi Constitutions. Every law imposed after-the-fact that inflicts a greater punishment than that in place at the time of conviction is unconstitutional.

It is also wrong to resort to MISS. CODE ANN. § 99-19-107 for justification of Appellant's erroneous sentence. The statute mandates that where the death penalty has been held unconstitutional, a person previously sentenced to death shall receive a sentence of "imprisonment for life, and such person shall not be eligible for parole." MISS. CODE ANN. § 99-19-107. But the legislature never intended for this section to be applied to Appellant, or any other persons convicted of capital murder, on a case-by-case basis. Furthermore, its application here would violate Appellant's due process and *ex post facto* rights. At bottom, it has no application

to Appellant in this case because the death penalty has never been held unconstitutional as a whole.

It was correct for the trial court to vacate Appellant's death sentence. But life without parole should not have been imposed on him in its stead. The re-sentencing order of the trial court should be conformed to the only other punishment available at that time: life with the possibility of parole.

ARGUMENT

Appellant's death sentence was properly vacated by the trial court as he was unanimously determined to be mentally retarded under the diagnostic standards set forth by the Mississippi Supreme Court. However – upon the trial court's re-sentencing determination – it was improper to impose a new sentence of life without parole because that punishment was not viable at the time of Appellant's crime or conviction. This court should correct that error.

I. Application of the Current Version of Section 97-3-21 Violated Appellant's *Ex Post Facto* Rights.

Both the United States Constitution and the Mississippi Constitution preclude *ex post facto* application of laws. The United States Constitution guarantees that "[n]o bill of attainder or ex post facto law shall be passed." U.S. CONST., ART. 1, § X. The Mississippi Constitution similarly protects citizens and prohibit after-the-fact application of the law: "[e]x post facto laws or laws

impairing the obligation of contracts shall not be passed." MISS. CONST. ART. 3, § 16.

The *Ex Post Facto* Clause insures that "federal and state legislatures [are] restrained from enacting arbitrary or vindictive legislation." *Miller v. Florida*, 482 U.S. 423, 429, 107 S.Ct. 2446, 2451, 96 L.Ed.2d. 351, 359 (1987). It also provides assurance that statutes "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S.Ct. 960, 964, 67 L.Ed.2d 23 (1981). Indeed, in the realm of criminal constitutional law, it is a long-standing and bedrock principle in our republic that "[e]very law that changes the punishment, than the law annexed to the crime, when committed []" is unconstitutional. *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798).

An *ex post facto* violation occurs when a legislative enactment "'...increases the penalty by which a crime is punishable.'" *Cal. Dep't of Corrs. v. Morales*, 514 U.S. 499, 506 & n. 3, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995) (quoting *Collins v. Youngblood*, 497 U.S. 37, 41 (1990)). And, as the Mississippi Supreme Court has recognized, one convicted of an offense should be sentenced in accordance with the statute existing on the date of his offense to avoid an *ex post facto* problem. *Allen v. State*, 440 So. 2d 544, 545 & n. 2 (Miss. 1983). *See also Puckett v. Abels*, 684 So. 2d 671, 678 (Miss. 1996) (holding application of 85% law to offenses

committed prior to enactment to be a violation of the *ex post facto* clause of the state and federal constitutions).

It is beyond dispute that appellant's purported crime here was committed in February 1981. *Neal v. State*, 451 So. 2d at 748. He was convicted and sentenced on February 4, 1982. *Id.* at 749-50.

Appellant's sentence was issued pursuant Section 97-3-21 of the Mississippi Code. As of February 4, 1982, that section said:

> Every person who shall be convicted of murder shall be sentenced by the court to imprisonment for life in the state penitentiary.
>
> Every person who shall be convicted of capital murder shall be sentenced by the court to death.

MISS. CODE ANN. § 97-3-21 (Rev. 1977).

In 1994, life without parole was added as an option for sentencing. Section 97-3-21 of the Mississippi Code was modified to its present form which states:

> [e]very person who shall be convicted of murder shall be sentenced by the court to imprisonment for life in the State Penitentiary.
>
> Every person who shall be convicted of capital murder shall be sentenced to (a) death; (b) to imprisonment for life in the State Penitentiary without parole; or (c) to imprisonment for life in the State Penitentiary with eligibility for parole as provided in Section 47-7-3(1)(f).

MISS. CODE ANN. § 97-3-21 (effective from and after July 1, 1994).

As a matter of elementary legislative history, the only options for Appellant's sentence – at the time of the crime in 1981 and upon his conviction in February 1982 – was death or life with the possibility of parole.

When Appellant's sentence was vacated in 2007, and he was re-sentenced in 2008, the trial court had only one possible option. It was required to look back at the law in effect in 1981 and re-sentence Appellant to serve life with the possibility of parole. The trial court's failure to do so and sentence of life without parole issued to Appellant was thus improper.

II. Section 99-19-107 Does Not Validate Appellant's Sentence.

The trial court's error in re-sentencing of Appellant to life without parole is not justified by resort to Section 99-19-107 of the Mississippi Code. That statute, the original version of which was first enacted in 1977, now provides that:

> [i]n the event the death penalty is held to be unconstitutional by the Mississippi Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death shall cause such person to be brought before the court and the court shall sentence such person to imprisonment for life, and such person shall not be eligible for parole.

MISS. CODE ANN. § 99-19-107 (Rev. 2000).[2] The statute should not have been applied to Appellant's resentencing because it requires that the death penalty statutes to be deemed wholly unconstitutional before it can be used to impose life

[2] The last sentence of the original statute passed in 1977 stated that the person previously sentenced to death would not be eligible for "...work release or parole." *See* Laws, 1977, ch. 485, § 5. In 1982, the statute was amended to eliminate the term "work release." MISS. CODE ANN. § 99-19-107 (Rev. 1982).

without parole. The death penalty scheme has not been deemed wholly unconstitutional. Rather, the United States Supreme Court and subsequently the Mississippi Supreme Court have determined that Appellant is not eligible to be sentenced to death because of his mental capacity.

Consider other scenarios in which a defendant sentenced to death prior to July 1994 could have had his punishment vacated on appeal or collateral review. Suppose that a reviewing court found that there was insufficient proof of the underlying felony that raised the charge to capital murder. Or that the reviewing court found insufficient evidence that the defendant had the requisite mental state under *Edmund v. Florida*, 458 U.S. 782 (1982), or *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987), to be sentenced to death. On remand, the defendant would not be eligible for the death penalty. Would Section 99-19-107 require that the defendant be sentenced to life without parole? Surely those cases are not within the purview of the statute, because the triggering event – that "the death penalty is held to be unconstitutional" has not occurred. All that has happened is that the proof does not authorize the State to impose capital punishment in that case.

Similarly, Section 99-19-107 has not been triggered here. In fact, it has never been triggered. The trial court should have simply resorted to the version of Section 97-3-21 applicable at the time of Appellant's conviction as explained in Section I, above, and not applied Section 99-19-107.

Appellee will no doubt argue, as it did in the lower court, that *Foster v. State* controls and requires application of Section 99-19-107 to Appellant's re-sentencing. 961 So. 2d 670, 671 (Miss. 2007). In *Foster*, the Court vacated the petitioner's death sentence after the United States Supreme Court determined that the death penalty cannot be imposed upon juvenile offenders. When the petitioner was re-sentenced, he was punished with "life without parole" pursuant to the statute. *Id.* The Court held (in part due to procedural considerations) that it did not matter that at the time of petitioner's conviction – in 1991 – Section 97-3-21 did not provide an option for life without parole because of Section 99-19-107. *Id.* at 672.[3]

Foster expressly overruled the contrary, established precedent in *Abram v. State*, 606 So. 2d 1015, 1039 (Miss. 1992). *Foster*, 961 So. 2d at 671. However, as explained by the dissent in *Foster*, by *Abram*, and other relevant sources of legislative history not distinguished or discussed by the *Foster* majority, the statute was never intended to deprive this Appellee of a sentence of life with possibility of parole. *Foster* should therefore not apply to Appellee's case for at least three reasons.

[3] The facts of this case are also different from *Randall v. State*, 987 So. 2d 453, 454-55 (Miss Ct. App. 2008). *Randall* does not control or have any bearing to this case for the reasons explained below and also because, there, the defendant's trial and sentence took place after the 1994 amendment of Section 97-3-21 and its application was not an *ex post facto* violation. The Court therefore did not need to resort to Section 99-19-107. Here, Appellant's crime and conviction occurred after the 1994 amendment of Section 97-3-21.

First, the legislature's actions analyzed in conjunction with the history of Mississippi's death penalty statues demonstrate clearly that Section 99-19-107 was only intended for use if the Mississippi death penalty statutes were ruled unconstitutional across-the-board as applied to everyone previously sentenced to death.

There is room for construction as to the meaning of Section 99-19-107. Where a statutory provision is ambiguous, the Mississippi Supreme Court looks to the statutory language *and* its historical background, its subject matter and the purposes and objects to be accomplished. *Clark v. State ex rel. Mississippi State Medical Ass'n*, 381 So. 2d 1046, 1048 (Miss. 1980).

Notably, although the *Foster* majority said "[t]he language of the statute is clear," *Foster*, 961 So. 2d at 672, it had, earlier in *Abram*, said that the contrary meaning for the same statute was "fairly obvious." *Abram*, 606 So. 2d at 1039. This stark disagreement – if not contradiction – about the meaning of the words of Section 99-19-107 indicates that those words must be ambiguous.

The historical background and purpose of Section 99-19-107 explains why it should only apply in the event of a wholesale invalidation of Mississippi's death penalty scheme and not after an individual's relief from a single death sentence. In *Furman v. Georgia* decided in 1972, the United States Supreme Court found that the Georgia death penalty statutes, which gave complete discretion to juries in capital cases to decide between the death penalty and life imprisonment, were

unconstitutional. This invalidated all death sentences in Georgia. 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Mississippi's then-existing statute provided:

> Every person who shall be convicted of murder shall suffer death, unless the jury rendering the verdict shall fix the punishment at imprisonment in the penitentiary for the life of the convict; or unless the jury shall certify its disagreement as to the punishment as provided by section 1293 (Code of 1930; s 2536, Code of 1942) in which case the court shall fix the punishment at imprisonment for life.

MISS. CODE ANN. § 2217 (1942 & Rev. 1956). Because this statute was substantially similar to the Georgia statute held unconstitutional in *Furman*, the Mississippi Supreme Court followed suit and invalidated all death sentences in this state. *Peterson v. State*, 268 So. 2d 335, 338 (Miss. 1972).

At that point, those who had been sentenced to death under the now-abrogated statute sought relief. They contended that because the offense and punishment were nonseverable, the invalidation of the death penalty required vacation of their conviction. *See Capler v. State*, 268 So. 2d 338, 339 (Miss. 1972). In the alternative, they argued that their cases were controlled by Mississippi Code 1942 Annotated section 2562 (1956), which provided:

> that offenses for which a penalty is not provided elsewhere by statute shall be punishable by a fine of not more than five hundred dollars $500.00) and imprisonment in the county jail for not more than six (6) months.

Id. In *Capler*, however, the Mississippi Supreme Court held that these defendants should be sentenced to life imprisonment. *Id.*

The Mississippi Legislature then amended Section 97-3-21, the Mississippi capital sentencing statute, to read: "Every person who shall be convicted of capital murder shall be sentenced to death." By eliminating any jury discretion, it was thought that the new statute would satisfy *Furman*. *Stevenson v. State*, 325 So. 2d 113, 116 (Miss. 1975).

In 1976, the United States Supreme Court refused to allow enforcement of "mandatory" capital punishment statutes in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978 (1976). The same day, however, the Court affirmed death sentences in non-mandatory "guided discretion" statutes. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Plainly, the new Mississippi statute was a mandatory death penalty statute of the type condemned by *Woodson*. But the Mississippi Supreme Court held that "the dominant intent of the [L]egislature in 1974 was to enact a death penalty statute that would meet what were then considered to be constitutional requirements." *Jackson v. State*, 337 So. 2d 1242, 1251 (Miss. 1976). The Court went on to re-interpret the mandatory statute as providing the "guided discretion" allowed in *Gregg*. In its next session, the Mississippi Legislature then responded by revising the statutory scheme to conform to constitutional requirements in the manner of *Jackson*.

In that same legislative session, Section 99-19-107 was enacted. The Legislature legitimately feared the consequences of another wrong guess -- some future, unpredictable, U.S. Supreme Court decision holding the most recent statutory scheme of capital punishment to be unconstitutional. *See* Steve Cannizaro, *On Death Row: A Long Wait May Be Only Sure Thing*, THE CLARION-LEDGER, April 5, 1977, at A1 (copy attached).

That was the motivating factor behind what is now Section 99-19-107. But, as explained by the leading treatise on Mississippi law, the 1977 statutory scheme has not been held unconstitutional:

> [t]he current capital punishment statutes were enacted by the legislature in 1977, in response to the 1976 decisions of the United States Supreme Court and the Mississippi Supreme Court. Mississippi, like many other states, had a adopted a mandatory death penalty statute in the wake of the 1972 decision in *Furman v. Georgia.* The Mississippi Supreme Court later held the mandatory portions of the statute unconstitutional and judicially construed the statute to be constitutional by adding a bifurcated sentencing proceeding that required the presentation of aggravating and mitigating circumstances on which the jury would base its sentencing decision. After these decisions the legislature enacted a statute which narrowly defined the crimes for which the death penalty could be imposed and a number of statutes to govern sentencing and judicial review of any death sentence imposed.[4]
>
> The Mississippi Supreme Court has upheld the constitutionality of the Mississippi capital punishment scheme as a whole against repeated attacks over the years. Various challenges to specific portions of the statute have also been rejected.

[4] Citing Miss. Code Ann. § 99-19-101 to 99-19-107.

MARVIN L. WHITE, JR., 4 THE ENCYCLOPEDIA OF MISSISSIPPI LAW § 27:1 (Jeffrey Jackson & Mary Miller, eds., Supp. 2008) (internal citations omitted except where noted).

Indeed, passage of the entire death penalty scheme (Sections 99-19-101 to -107) in 1977 was a carefully crafted reaction to the United States Supreme Court's denouncement of Mississippi's death penalty scheme. *Id.* And since then, the courts have "upheld the constitutionality of the Mississippi capital punishment scheme **as a whole** against repeated attacks over the years." *Id.* (emphasis added). The resulting – and only logical – conclusion is that Section 99-19-107 has thus never been triggered because it only applies "**[i]n the event the death penalty is held to be unconstitutional.**" MISS. CODE ANN. § 99-19-107 (emphasis added).

In short, the legislature put Section 99-19-107 on the books to ensure that if the entire death penalty statutory scheme was held unconstitutional, like it was held briefly from 1972-1976, then all persons convicted of capital murder would be re-sentenced to life without parole. The reason for vacating Appellant's *death sentence* (lack of requisite mental ability) was entirely personal to him and not the result of a complete abrogation of the *death penalty*. The history and purpose of Section 99-19-107 is inconsistent with its use to justify a life without parole sentence for Appellant here.

The second reason, related to the first, is that *Foster* incorrectly interprets Section 99-19-107 and ignores the previously decided *Abram* opinion. As

explained by the dissent in *Foster*, the only previous opinion addressing the scope of the statute was in *Abram* where the Court specifically found:

> [a]lthough there are no cases addressing the precise application of § 99-19-107, we think it fairly obvious that it is reserved for that event when either this Court or the United States Supreme Court makes a wholesale declaration that the death penalty in general, and/or our own statutory death penalty scheme in particular, is unconstitutional.

Foster, 961 So. 2d at 673 (Diaz, J., dissenting) (quoting *Abram*, 606 So. 2d 1015, 1039 (Miss. 1992)). In *Abram*, the Court declined to apply Section 99-19-107 because the defendant's death sentence had been vacated as mandated by the United States Supreme Court's decision in *Edmund v. Florida*, 458 U.S. 782 (1982), based on a lack of intent to kill. *Abram*, 606 So. 2d at 1039. *Edmund* did not invalidate a statutory scheme or result in wholesale abrogation of the death penalty. Accordingly, the Court held that Section 99-19-107 is not intended for use on a "case-by-case" basis to impose a sentence of life without parole to individual offenders for whom the death penalty cannot be applied for one specific unconstitutional reason or another. *Abram*, 606 So. 2d at 1039.[5]

Third, application of *Foster* to justify Appellant's re-sentence directly violates the due process protections, as well as the *Ex Post Facto* Clause, of the state and federal constitutions. The original version of Section 99-19-107 was passed in 1977. After it had been in place for fifteen years – including the time

[5] Indeed, prior to *Foster*, the statute was never used to impose a sentence of life without possibility of parole on anyone convicted of capital murder who later saw the conviction overturned. *Foster*, 961 So. 2d at 673 (Diaz, J., dissenting) (collecting authorities).

during which the Lawrence County murders occurred -- *Abram* held that it was reserved only for a scenario where the death penalty as a whole, or Mississippi's entire statutory scheme, is found to be unconstitutional. 606 So. 2d at 1039.

In other words, in 1977, the statute was understood to require wholesale abrogation of the death penalty to impact anyone's sentence. This was confirmed by the Mississippi Supreme Court in 1992. But it was not until 2007, when the *Foster* court imposed its new interpretation of the statute and fundamentally changed its meaning and application.

The act of the *Foster* court in throwing out *Abram* was the same thing as if it had amended the statute or passed a new law. The United States Supreme Court has explained this was an act the *Foster* court could not constitutionally accomplish:

> [i]f a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. The fundamental principle that the required criminal law must have existed when the conduct in issue occurred, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect.

Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964) (internal citations and quotes omitted). Thus, Section 99-19-107, as it was intended when passed and

confirmed by *Abram*, could not be expanded to mean this Appellant must serve life without parole without violating his due process and *ex post facto* rights.

In sum, the *Foster* court judicially enlarged the punishment applicable to Appellant. If this court applies *Foster* to justify Appellant's re-sentence of life without parole, then it would deprive him of his fundamental constitutional rights.

CONCLUSION

Appellant should have been sentenced to life with possibility of parole after his death sentence was vacated. His original crime and conviction took place before the sentencing statutes included the option of life without parole. Imposition of life without parole on Appellant's re-sentencing violated his constitutional right to be free of an *ex post facto* application of the law.

Furthermore, the unjust result of life without parole is not justified by Section 99-19-107, a statute the legislature never intended to apply to Appellant and that would further deprive Appellant of due process and his right to be free from an *ex post facto* law. Appellant therefore respectfully requests that the Court vacate his sentence of life without parole and remand his case with instruction to the trial court to re-sentence Appellant to life with possibility of parole.

This the 30 day of January, 2009.

Respectfully submitted,

BY: _____

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the Brief of Appellant was served via U.S. Mail, properly addressed and postage prepaid, to the following persons:

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This the 30 day of January, 2009.

Justin L. Matheny

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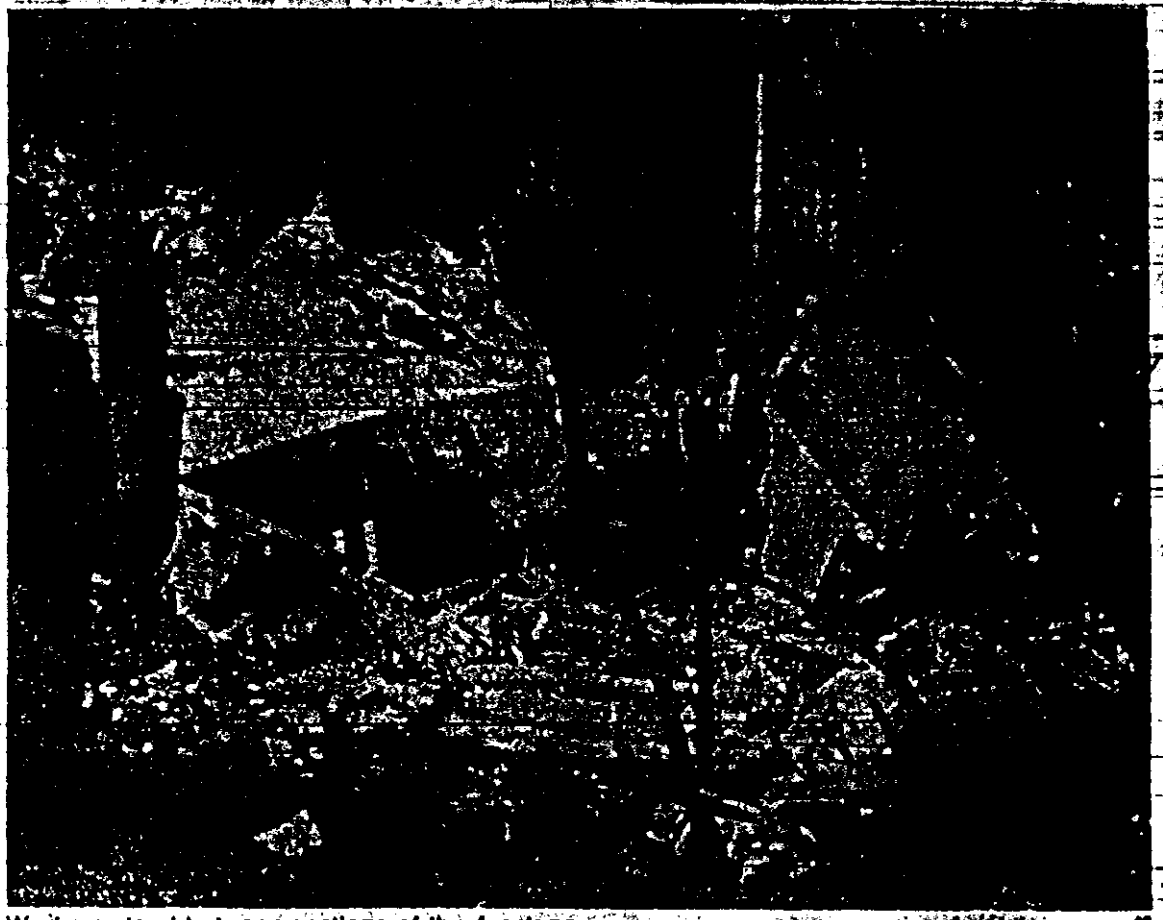

Workers stand between sections of the fuselage of the Southern Airways DC9 that crashed Monday afternoon.

DC-9 Cra Kills 66 In Georg

The Associated Press

NEW HOPE, Ga. — A DC-9 jet [illegible] crashed and exploded into flames Monday, killing at least 66 persons as the pilot tried to make an emergency landing on a country road.

The plane, flight 242, carried 81 passengers and a crew of five. It touched down near a school, zigzagged along the road, striking several cars and a country store, and then exploded in a wooded area.

Moments before the crash, the pilot reported that his windshield was cracked and that both engines were out, according to the Federal Aviation Administration (FAA).

He was trying to get to Dobbins Air Force Base at Marietta to make an emergency landing but didn't make it, the FAA said.

The dead included the daughter and two grandchildren of the store owners and a teenaged mother and her infant child who were killed by flying wreckage, the Paulding County sheriff's office said. It earlier reported that 72 persons were killed.

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Flooding Expected To Continue

By SHARON PETERS
Clarion-Ledger Staff Writer

Widespread flooding resulting from the heaviest rainfall to hit the state so far this year is forecast for today and Wednesday by the National Weather Service.

Although skies are expected to clear over most of the state today, the four to six inches of rain dumped Monday on ground already saturated from a weekend of rain will produce flooding at least through Wednesday throughout the state, a spokesman for the National Weather Service in Jackson said Monday.

Severe thunderstorms, accompanied by high winds, heavy rain and hail, ravaged Mississippi from daybreak until after noon Monday. Central Mississippi, particularly the five-county area surrounding Jackson, was apparently the hardest hit, according to the National Weather Service.

FUNNEL CLOUDS were spotted in several areas of Mississippi — some at treetop level. One

families. Marble-sized hail pelted towns throughout the state.

Much of the state was under tornado and flash flood watches all day. The National Weather Service issued several severe thunderstorm and tornado warnings throughout the day.

At least three funnel clouds were sighted over the Jackson area and the Weather Service tracked

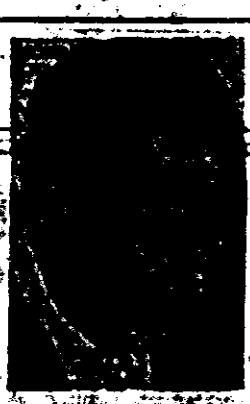
Hinds County Emergency Operations Center (EOC), said the EOC dispatcher knew funnel clouds over the Jackson area because [illegible] noted.

Two of the funnel clouds dipped over the Hawkins Field-Industrial Park area. The third, she said, was the Florence funnel cloud spotted on radar by the weather service.

The EOC sounded the tornado alarm six times — three times for one funnel cloud that moved closer to the ground as it continued north from the Hawkins Field-Industrial Park area to the outskirts of Jackson, she said.

None of the funnel clouds touched down, she said.

FLOODING was the most serious problem Monday in Jackson. At least 75 people were evacuated by boat by personnel from the city's police and fire departments and emergency-disaster REACT team, they said.



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Workers stand between sections of the fuselage of the Southern Airways DC9 that crashed Monday afternoon.

plane reporting that the commuter was crashed and that both engines were out, according to the Federal Aviation Administration (FAA).

He was trying to get to Dobbins Air Force Base at Marietta to make an emergency landing but didn't make it, the FAA said.

The dead included the daughter and two grandchildren of the plane owners and a teenaged mother and her infant child who were killed by flying wreckage, the Paulding County sheriff's office said. It was later reported that 73 persons were killed.

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Severe thunderstorms, accompanied by high winds, heavy rain and hail, ravaged Mississippi from daybreak until after noon Monday. Central Mississippi, particularly the five-county area surrounding Jackson, was apparently the hardest hit, according to the National Weather Service.

FUNNEL CLOUDS were spotted in several areas of Mississippi — some at treetop level. One tornado touched down in Macon about 9 a.m., injuring at least one person, destroying a house, damaging several buildings and uprooting trees.

Flash floods made many roads impassible and forced evacuation of dozens of Central Mississippi families. Marble-sized hail pelted towns throughout the state.

Much of the state was under tornado and flash flood watches all day. The National Weather Service issued several severe thunderstorm and tornado warnings throughout the day.

At least three funnel clouds were sighted over the Jackson area and the Weather Service tracked two funnel clouds — one in southwest Jackson and one in northwest Florence — on radar shortly after 10 a.m.

DORIS USRY, spokeswoman for the Jackson-Hinds County Emergency Operations Center (EOC), said the EOC confirmed three funnel clouds over the Jackson area between 10 a.m. and noon.

Two of the funnel clouds touched over the Hawkins Field-Industrial Park area. The third, she said, was the Florence funnel cloud spotted on radar by the weather service.

The EOC sounded the tornado sirens six times — three times for one funnel cloud that moved closer to the ground as it continued north from the Hawkins Field-Industrial Park area to the outskirts of Jackson, she said.

None of the funnel clouds touched down, she said.

FLOODING was the most serious problem Monday in Jackson. At least 75 people were evacuated by boat by personnel from the city's police and fire departments and emergency-disaster REACT team, Usry said.

The Hawkins Field area, twice threatened by possible tornadoes, also was the site of some of the heaviest flooding in the city.

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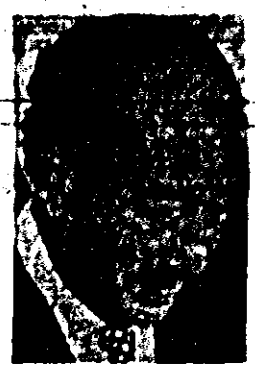

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On Death Row

A Long Wait May Be Only Sure Thing

By STEVE CANNIZARO
Clarion-Ledger Staff Writer

When the U.S. Supreme Court ruled last year that mandatory death sentences were unconstitutional, it seemed that more than 20 Mississippi men condemned to die under a 1974 mandatory death-penalty law would have to be given lesser sentences.

It hasn't worked out that way though. And it isn't immediately known what will happen to the men involved — except that in some cases long court fights may be expected.

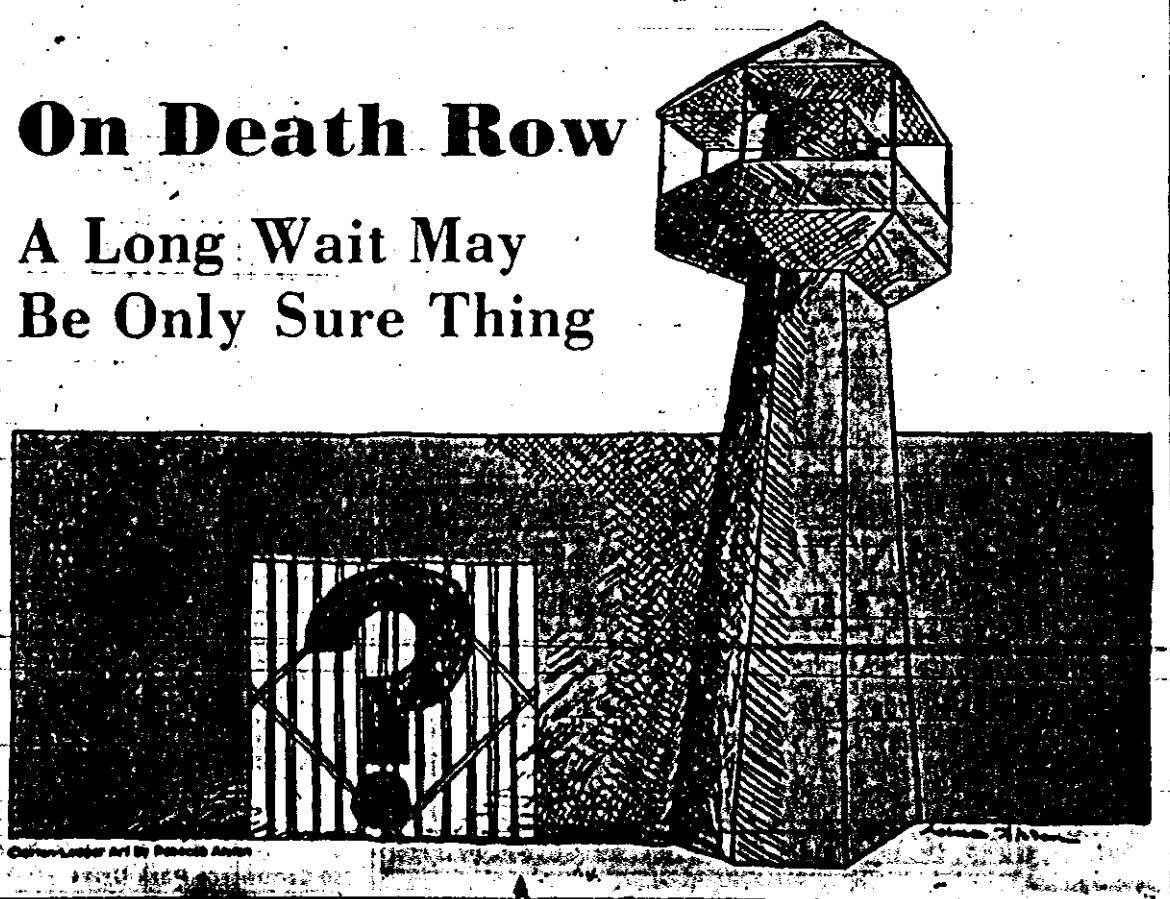
The Mississippi Legislature this year enacted a new capital punishment statute, which supporters say conforms to the July 1976 ruling by the Supreme Court.

THE NEW LAW sets up a two-stage (bifurcated) system of trying persons charged with offenses that can bring the death penalty. In the first part, the trial phase, guilt or innocence is decided. If a person is convicted, his or her punishment then is determined in a second phase.

But the new law does not apply to the 22 men now on Death Row in Mississippi. Eighteen of those 22 men were convicted under the 1974 law.

The issue of what to do with the condemned men, who range in age from their late teens to almost 50, has been clouded by a state Supreme Court ruling in October 1976 that, in effect, rewrote the state's 1974 death penalty statute to conform to what the U.S. Supreme Court said in July.

©See Death, Page 14



Clarion-Ledger Art by Rebecca Anson

...vere ar... to help ...ost of ...them don't know what to do."

The plane first touched down about 100 feet from an elementary school that had been dismissed for the day, he said. The plane went on and off the road about 500 yards and ended about 200 yards from a volunteer fire station.

Another witness said bodies were thrown more than 200 feet from the ...

...e were ...es laid ...said one of the rescuers, who was not identified. He said the survivors were out of the wreckage when he got there, so he helped remove the bodies.

It was impossible to tell whether the victims died on impact or in the fire, he said.

"The bodies were completely burned," he said.

...ent Ca... ...bout pr... ...sultation or even prior notice to Congress."

...officials have said ... would not be the basis for a final decision after a pro-Tenn-Tom hearing in Columbus last week. Obviously not accepting that comment, congressional officials here held the Monday hearings for the public, the press . . . and, most of all, the President. The hearings

...f Mi... ...n, sta... ...else ... in any other state makes more than we in Mississippi.

"We are people who are willing to make sacrifices to help lift ourselves up by our own bootstraps." He said Mississippi had taken a $40-million bond issue to support Tenn-Tom and said the federal government had a commitment to carry out its part of the bargain.

He introduced a new report by the

Af... pres... ...i to t... House subcommittee, member Rep. Jamie Whitten, D-Miss., said he did not think Carter "can afford to break faith with his own people."

Carter's decision will come by April 15, but not before, Carter people said after meeting with the governors.

Walt Schumacher of the Office of Management and Budget said his office had "no particular comment" about the meeting which he labeled

..."Oh, ... Carro... ...mented when he got to the committee room and found the committee had recessed temporarily, "they know how I feel anyway." He departed immediately.

The Mississippi group included 21 reporters who flew with the governor on an Air National Guard transport. A bus met reporters at the airport Sunday night and delivered them back Monday.

...l Death

Continued from Page 1

In a 5-4 decision, the state's high court ruled in October that Mississippi's capital punishment statute at the time was not unconstitutional, providing several key changes were made in its application.

THE COURT, saying it had broad powers to interpret laws, eliminated mandatory death sentences for the state and set out a two-stage system under which persons could be tried for capital offenses.

Over strong objections by four dissenting justices, the court said it would require that all persons convicted under mandatory sentences in Mississippi be returned to the county in which they were sentenced to await further action by local authorities.

The court declined to order the men resentenced to life prison terms, and thus left open the possibility that they could be retried and given the death penalty again if a jury decided it was warranted.

...since October, Richard Gerald Jordan of Petal, who was convicted and condemned to die for the 1978 kidnap-slaying of a Gulfport banker's wife, has been retried on the same charge and again given the death penalty. Jordan is the only man on Death Row at the time of the state Supreme Court decision who has been retried.

THREE MEN, Frank Jackson of Copiah County, and Danny Ivey and Karl Wansley, both of Hinds County, have benefitted from the state Supreme Court's decision to send them back for further action by local authorities.

Jackson, late in 1976, was allowed to plead guilty to a manslaughter charge, rather than going to trial again, and he was sentenced to 20 years in the state penitentiary.

Wansley, a Jackson teen-ager whom prosecutors contended was the gunman in the November 1974 robbery-murder of an elderly Jackson couple, pleaded guilty to simple murder last week and was sentenced to life in prison.

Ivey, who was convicted of a separate capital murder in Jackson in November 1974, pleaded guilty to manslaughter two weeks ago and was sentenced to 20 years.

TWO OTHER Jackson men who received death sentences under the old mandatory sentencing law, Calvin Joe Rogers and Terrance Upshaw, also have been offered reduced sentences in return for pleading guilty to lesser charges, the Clarion-Ledger has learned.

Neither man has pleaded guilty to date, and Rogers is scheduled for a retrial in Hinds County Circuit Court.

Hinds District Attorney Ed Peters said he made the decision to offer the four men reduced sentences after conferring with the state Attorney General's office.

But Peters said that from now on his office will seek the death penalty under the newly enacted capital punishment statute. "In the future," he said, "we will go for it because that's what the statute says."

IT MAY BE too early to tell if there will be a pattern of local authorities offering reduced sentences to men who were on Death Row in Mississippi when the state Supreme Court ruled last October.

Atty. Gen. A.F. Summer last week said his office has not suggested that local district attorneys seek guilty pleas rather than new trials.

"We don't make recommendations like that," Summer said. Such a suggestion could only come out of a casual conversation between a district attorney and the attorney general's office regarding a specific case, Summer said.

"Someone may ask us what we think," Summer said, "but the final decision is up to the individual district attorney."

DISTRICT Attorney Albert Necaise of Gulfport, with eight men on Death Row from his district of Harrison and Stone counties, leads the state in number of death penalty convictions.

He is a strong believer in the death penalty. "Capital punishment is one of our deterrents to crime," he says.

Necaise said he intends to retry, as he did Jordan, all eight of the cases in which he initially succeeded in getting the death penalty.

"I'm preparing them for retrial as I get the cases back," he said.

NECAISE said he thinks the state Supreme Court had the authority to send death penalty cases back for possible retrial. He feels it was the best thing to do.

The constitutional rights of the men involved have not been violated by the court's decision, he said. On retrial, he said, a man "might not be convicted" or might not recieve the death penalty again.

A defense attorney representing one of the Death Row inmates prosecuted by Necaise described the district attorney's attitude as "death, death, death — give me death."

But Necaise disputes that, saying, "What I say is let 12 people (a jury) decide it. That's 12 people compared to my one.

"IF WE'RE going to have a death penalty," Necaise said, "let's see what the people think. If they don't impose the death penalty then we know that the people of Mississippi are not in favor of it."

The state Supreme Court's new interpretation of the old mandatory death law now is being appealed to the U.S. Supreme Court. But court observers say it could take well over a year before a decision is issued, even if the nation's highest court decides to review the state court's action.

The appeal, filed on behalf of a Calhoun City teen-ager convicted in the rape-murder of an elderly woman, challenges the state court's authority to rewrite the state's death penalty law.

It claims that no one under the sentence of death at the time of the decision should be subject to the death penalty again.

UNDER THE two-stage system, which the state Supreme Court set up in October, four persons, including Richard Jordan, have been given the death penalty.

It isn't clear at this time if any of the men will appeal their convictions and death sentences on grounds that the state high court's new interpretation of the old mandatory death law should have been used in their trials.

Correction

...Pollock was incorrectly identified instead of the urban renewal ... in Biloxi in the April 4 edition of The Clarion-Ledger.

...Lamey is the executive ... of urban renewal in Biloxi and Pollock is a staff member of the agency. The Clarion-Ledger regrets the error.