

Stricken language would be deleted from present law. Underlined language would be added to present law.

1 State of Arkansas
2 81st General Assembly
3 Regular Session, 1997
4

As Engrossed: H3/5/97

A Bill

SENATE BILL 392

5 By: Senators Kennedy, Dowd, Beebe, Gordon, Harriman, Bell, Fitch, Todd, Smith, and Gwatney
6 By: Representatives Hale, Willems, Wooldridge, Curran, Cook, Ferguson, Faris, and Rodgers
7

For An Act To Be Entitled

9 "AN ACT TO CREATE THE ARKANSAS EFFECTIVE DEATH PENALTY ACT
10 OF 1997 ; TO PROVIDE FOR THE APPOINTMENT AND COMPENSATION
11 OF COMPETENT COUNSEL IN STATE POST-CONVICTION PROCEEDINGS ;
12 AND TO PROVIDE FOR OTHER PROCEDURAL MATTERS INCLUDING TIME
13 LIMITATIONS IN CAPITAL POST-CONVICTION RELIEF PROCEEDINGS ;
14 AND FOR OTHER PURPOSES"

Subtitle

16 "ARKANSAS EFFECTIVE DEATH PENALTY ACT OF
17 1997"
18

19
20 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
21

22 SECTION 1. This act is known and may be cited as the "Arkansas
23 Effective Death Penalty Act of 1997."
24

25 SECTION 2. It is the express intent of this act to comply with the
26 requirements of the federal Antiterrorism and Effective Death Penalty Act of
27 1996, Pub. L. No. 104-132, 110 Stat. 1214, in an effort to obtain the benefits
28 of that act concerning time limitations in which federal habeas corpus
29 proceedings and appeals must be considered and decided, and for other
30 purposes. Throughout this act, references to "post-conviction" proceedings or
31 petitions refer solely to those proceedings or petitions which are filed
32 pursuant to the state rule or statute in which claims of ineffective
33 assistance of counsel are cognizable, such as Arkansas Rules of Criminal
34 Procedure 37. Specific reference to Rule 37 was avoided only because the
35 General Assembly is aware that the form of relief provided for by that rule
36 may, at some point in the future, be provided for by a different rule or

1 statute. It is the intent of the General Assembly to ensure that this act
 2 applies to Rules 37-type post-conviction proceedings, not to post-conviction
 3 proceedings in which claims of ineffective assistance are not cognizable. It
 4 is the intent of § 16-91-202(e) to allow the appointment of counsel in the
 5 very limited circumstance in which, because of unique training, experience, or
 6 background, an attorney is clearly competent and qualified to represent an
 7 indigent petitioner in a capital post-conviction proceeding, but otherwise
 8 does not meet all of the criteria of § 16-91-202(c). Subsection (e) was
 9 created for the specific purpose of permitting the appointment of experienced
 10 attorneys, including but not limited to, former prosecutors and judges who,
 11 because of the nature of their practice, are uniquely qualified to represent
 12 capital defendants but do not meet the specific defense-related requirements
 13 of subsection (c).

14

15 SECTION 3. Title 16, Chapter 91 of the Arkansas Code is hereby entitled
 16 "Appeal and Post-Conviction."

17

18 SECTION 4. Arkansas Code Annotated §§ 16-91-101 through 16-91-118 are
 19 designated "Subchapter 1 - Appeal."

20

21 SECTION 5. Title 16, Chapter 91 of the Arkansas Code is amended to add
 22 subchapter 2 which shall read as follows:

23 "Subchapter 2 - Post-conviction.

24 16-91-201. Access to files.

25 In the case of a defendant who has been convicted of a capital offense
 26 and sentenced to death, the defendant's prior trial counsel shall make
 27 available to the defendant's state post-conviction counsel the complete files
 28 of the defendant's trial counsel, and the defendant's prior counsel on direct
 29 appeal shall make available to the defendant's state post-conviction counsel
 30 the complete files of the defendant's appellate counsel. The defendant's
 31 post-conviction counsel may inspect and photocopy the files, but the
 32 defendant's prior trial and appellate counsel shall maintain custody of their
 33 respective files for at least five (5) years following completion of the
 34 direct review process in state court, except as to the material which is
 35 admitted into evidence in any trial proceedings.

36 16-91-202. Capital cases.

1 (a)(1) If a capital conviction and sentence are affirmed on direct
2 appeal, the circuit court in which the conviction was obtained shall, within
3 two (2) weeks after the affirmance, conduct a hearing and enter a written
4 order appointing counsel to represent the petitioner in a post-conviction
5 proceeding upon issuance of the mandate by the appellate court, should the
6 petitioner desire to pursue such a post-conviction proceeding. Counsels
7 appointment shall remain effective through any appeal of the post-conviction
8 proceeding in state court. Counsel shall be appointed only after a finding by
9 the court that the petitioner is indigent and that he either accepts the
10 appointment of counsel or is unable to make a competent decision whether to
11 accept or reject the appointment of counsel. The court may decline to appoint
12 counsel for the petitioner only upon a written finding that the petitioner
13 rejects the appointment of counsel and understands the legal consequences of
14 that decision or upon a finding that the petitioner is not indigent.

15 (2) The court may not appoint an attorney as counsel under this
16 subsection if the attorney represented the petitioner at trial or on direct
17 appeal of the conviction under attack unless the petitioner and the attorney
18 request appointment on the record. If counsel is the same attorney who
19 represented the petitioner at trial or on direct appeal, the court shall
20 appoint a second counsel to assist in the preparation of the petition for
21 post-conviction relief. If the petitioner elects to proceed pro se, the
22 waiver of the assistance of counsel shall be made in open court on the record.

23 (b)(1) Upon the filing of a post-conviction petition, the clerk
24 of the court in which the petition is filed shall immediately forward a copy
25 of the petition to the prosecuting attorney of the county in which the
26 petition was filed, to the Attorney General, and to the Executive Director of
27 the Arkansas Public Defender Commission. The filing of the petition does not
28 automatically stay any sentence of death. Upon the entry of an order pursuant
29 to subsection (b), a stay of execution shall be granted upon application to
30 the court wherein the motion for appointment of counsel was filed.

31 (2) The stay granted pursuant to this subsection shall
32 automatically expire if:

33 (A) the petitioner fails to file a timely petition for
34 post-conviction relief; or

35 (B) the petitioner is denied relief in his post-conviction
36 proceeding in circuit court in the manner set forth in subsection (h).

1 (c) The following standards are the exclusive criteria which
2 counsel must satisfy in order to be appointed under subsection (a). At least
3 one of the attorneys appointed to represent the applicant:

4 (1)(A) shall have previously represented a death-sentenced inmate
5 in state or federal post-conviction relief proceedings within the five years
6 immediately preceding the appointment for which he is under consideration; or

7 (B) shall have acted, within the five years immediately
8 preceding the appointment for which he is under consideration, as defense
9 counsel in no less than three state or federal post-conviction relief
10 proceedings arising from felony convictions, at least two of which involved
11 violent crimes, including one murder case; and

12 (2) shall have, within the five years immediately preceding the
13 appointment for which he is under consideration, conducted at least two
14 evidentiary hearings in state or federal post-conviction relief proceedings,
15 which may include any proceeding which satisfies subsections (c)(1)(A) or (B);
16 and

17 (3) shall have been licensed to practice law for no less than five
18 years, and for at least three of those five years shall have been licensed to
19 practice in Arkansas courts; and

20 (4) shall have successfully completed, within the two years
21 immediately preceding the appointment for which he is under consideration, not
22 less than six hours of Arkansas Continuing Legal Education Board approved
23 continuing legal education or professional training primarily involving
24 advocacy in the field of capital trial, capital appellate, or capital
25 post-conviction litigation.

26 Consistent with Arkansas Code Annotated § 16-87-204(b)(8) (Supp.
27 1993), the executive director of the Arkansas Public Defender Commission shall
28 offer annually, to any attorney wishing to attend, no less than two in-state
29 conferences or seminars at each of which no less than six (6) hours of
30 Arkansas Continuing Legal Education Board approved credit, as described in
31 this subsection, is available.

32 (d) Notwithstanding any statutory provision to the contrary,
33 appointments of counsel in capital post-conviction proceedings and in appeals
34 therefrom shall be made from counsel who qualify for appointment under
35 subsection (c) or (e). The presiding judge may contact the Arkansas Public
36 Defender Commission for a list of counsel who meet the criteria of subsection

1 (c) and may appoint counsel from that list. Neither the commission nor any of
2 its components shall possess any supervisory authority over counsel appointed
3 to represent a petitioner in capital post-conviction proceedings or in appeals
4 therefrom. Nothing in this section shall preclude the court from appointing
5 an out-of-state attorney pro hac vice as co-counsel, provided that in-state
6 counsel is appointed consistent with the provisions of this subchapter. Once
7 counsel has been appointed, the presiding judge shall enter a written order
8 specifying the appointed counsel's qualifications which satisfy subsection
9 (c).

10 (e) The court may appoint counsel who does not satisfy all of the
11 criteria of subsection (c) only upon a written finding that the attorney is
12 clearly competent and qualified because of his or her unique training,
13 experience, or background to represent an indigent petitioner in a capital
14 post-conviction proceeding. In all such cases, the attorney shall have been
15 admitted to practice law for not less than five years and shall have had no
16 less than three years experience in the actual handling of capital murder
17 prosecutions or capital murder post-conviction proceedings in Arkansas courts.
18 In addition, such counsel shall have successfully completed, within the two
19 (2) years immediately preceding the appointment for which he is under
20 consideration, not less than six (6) hours of Arkansas Continuing Legal
21 Education Board approved continuing legal education or professional training
22 primarily involving advocacy in the field of capital trial, capital appellate,
23 or capital post-conviction litigation. Prior to appointing such counsel, the
24 court shall conduct a hearing at which the attorney shall demonstrate that his
25 or her experience or other qualifications meet the requirements of this
26 subsection, and the court shall make written findings specifying what unique
27 training, experience, or background qualifies the attorney for appointment
28 under this subsection.

29 (f) Notwithstanding any other provision of law, the court shall fix the
30 compensation to be paid to attorneys appointed under this subchapter, as well
31 as the fees and expenses to be paid for investigative, expert, and other
32 reasonably necessary services authorized by the court at such rates or amounts
33 as the court determines to be reasonably necessary. All compensation and
34 reasonable expenses authorized by the court pursuant to this subchapter shall
35 be paid by the Arkansas Public Defender Commission.

36 (g) Not later than fifty days after the filing of the petition, the

1 judge shall convene a status conference to schedule a hearing on the petition
2 for post-conviction relief if a hearing is deemed necessary. The hearing must
3 be conducted within one-hundred-eighty days from the date of the status
4 conference, unless good cause is shown to justify a continuance.

5 (h) Within thirty days from the receipt of the transcript from the
6 post-conviction hearing, if a hearing was held, or if the judge requests
7 post-trial briefs, within thirty days from the receipt of the post-trial
8 briefs, the judge shall make specific, written findings of fact and shall
9 expressly state the judge's conclusions of law relating to each issue raised
10 in the petition for post-conviction relief. In the event no hearing was held,
11 the judge shall make specific, written findings of fact and conclusions of law
12 within one hundred twenty days after the filing of the petition for
13 post-conviction relief, relating to each issue presented in the petition for
14 post-conviction relief.

15 (i) The transcription of the testimony and record in capital
16 post-conviction proceedings shall be completed within sixty (60) days of the
17 conclusion of the post-conviction hearing and shall immediately be provided to
18 the parties and the Clerk of the Supreme Court of Arkansas."
19

20 SECTION 6. This act applies to all persons under sentence of death,
21 including those whose cases were pending on direct review when this act was
22 passed, who, on or after the effective date of this act, file their initial
23 applications for state post-conviction relief.
24

25 SECTION 7. All provisions of this act of a general and permanent nature
26 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code
27 Revision Commission shall incorporate the same in the Code.
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29 SECTION 8. If any provision of this act or the application thereof to
30 any person or circumstance is held invalid, such invalidity shall not affect
31 other provisions or applications of the act which can be given effect without
32 the invalid provision or application, and to this end the provisions of this
33 act are declared to be severable. In the event that any provision of this act
34 is found to be an invalid encroachment upon the rule-making authority of the
35 Supreme Court of Arkansas, that provision shall be deemed to be a resolution
36 of the General Assembly of the State of Arkansas recommending the adoption of

1 the provision by court rule.

2

3 SECTION 9. All laws and parts of laws in conflict with this act are
4 hereby repealed.

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6 SECTION 10. EMERGENCY. It is found and determined by the General
7 Assembly of the State of Arkansas that the current system for carrying out a
8 sentence of death is hopelessly fraught with endless litigation in state and
9 federal court which undermines the deterrent value of the death penalty and
10 imposes a needless financial burden on the state's resources, while depriving
11 death row inmates of the right to obtain speedy relief on any meritorious
12 constitutional claims. It is further found that the provisions of the federal
13 Antiterrorism and Effective Death Penalty Act of 1996 provide significant
14 restrictions on the amount of time federal courts may take to review such
15 cases if the states provide a mechanism for the appointment, compensation, and
16 reimbursement of competent counsel for all indigent capital defendants in
17 state post-conviction proceedings. The most significant delay between
18 sentencing and execution occurs while capital cases await decision in federal
19 habeas corpus litigation. From 1990 through 1993, the average time that
20 prisoners sentenced to death in this state awaited execution was ten years and
21 two months for those prisoners who pursued federal habeas corpus litigation.
22 However, if the states comply with the requirements of the Antiterrorism Act,
23 the average time that prisoners will await execution in federal court will be
24 reduced to less than three years in most cases. For that reason an emergency
25 is declared to exist and this act is necessary to permit the state to take
26 advantage of the provisions which will reduce the time for review in federal
27 court by providing a mechanism for the appointment, compensation, and
28 reimbursement of competent counsel for all indigent capital defendants in
29 state post-conviction proceedings. This act, being immediately necessary for
30 the preservation of the public peace, health and safety shall become effective
31 on the date of its approval by the Governor. If the bill is neither approved
32 nor vetoed by the Governor, it shall become effective on the expiration of the
33 period of time during which the Governor may veto the bill. If the bill is
34 vetoed by the Governor and the veto is overridden, it shall become effective
35 on the date the last house overrides the veto.

36

/s/Sen.Kennedy et al