

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

## A Bill

SENATE BILL 730

4  
5 By: Senators Kennedy, Dowd, Beebe, Gordon, Harriman, Bell, Fitch, Todd, and Gwatney  
6 By: Representative Hale

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

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

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

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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."

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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. Counsel's  
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 of the  
24 court in which the petition is filed shall immediately forward a copy of the  
25 petition to the prosecuting attorney of the county in which the petition was  
26 filed, to the Attorney General, and to the Executive Director of the Arkansas  
27 Public Defender Commission. The filing of the petition does not automatically  
28 stay any sentence of death. Upon the entry of an order pursuant to subsection  
29 (b), a stay of execution shall be granted upon application to the court  
30 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 counsel  
2 must satisfy in order to be appointed under subsection (a). At least one of  
3 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 county wherein the post-conviction petition was filed, in the  
36 manner set forth in Arkansas Code Annotated §§ 16-87-210 through 16-87-211

1 (Supp. 1995) and § 14-20-102 (Supp. 1995), except that all fees and expenses  
2 covered by § 16-87-212(a) (Supp. 1995) that are authorized by the presiding  
3 judge pursuant to this section shall be paid in the manner set forth in  
4 § 16-87-212(a).

5 (g) Not later than fifty days after the filing of the petition, the  
6 judge shall convene a status conference to schedule a hearing on the petition  
7 for post-conviction relief if a hearing is deemed necessary. The hearing must  
8 be conducted within one-hundred-eighty days from the date of the status  
9 conference, unless good cause is shown to justify a continuance.

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

20 (i) The transcription of the testimony and record in capital  
21 post-conviction proceedings shall be completed within sixty (60) days of the  
22 conclusion of the post-conviction hearing and shall immediately be provided to  
23 the parties and the Clerk of the Supreme Court of Arkansas."

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

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30 SECTION 7. All provisions of this act of a general and permanent nature  
31 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code  
32 Revision Commission shall incorporate the same in the Code.

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34 SECTION 8. If any provision of this act or the application thereof to  
35 any person or circumstance is held invalid, such invalidity shall not affect  
36 other provisions or applications of the act which can be given effect without

1 the invalid provision or application, and to this end the provisions of this  
2 act are declared to be severable. In the event that any provision of this act  
3 is found to be an invalid encroachment upon the rule-making authority of the  
4 Supreme Court of Arkansas, that provision shall be deemed to be a resolution  
5 of the General Assembly of the State of Arkansas recommending the adoption of  
6 the provision by court rule.

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

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11 SECTION 10. EMERGENCY. It is found and determined by the General  
12 Assembly of the State of Arkansas that the current system for carrying out a  
13 sentence of death is hopelessly fraught with endless litigation in state and  
14 federal court which undermines the deterrent value of the death penalty and  
15 imposes a needless financial burden on the state's resources, while depriving  
16 death row inmates of the right to obtain speedy relief on any meritorious  
17 constitutional claims. It is further found that the provisions of the federal  
18 Antiterrorism and Effective Death Penalty Act of 1996 provide significant  
19 restrictions on the amount of time federal courts may take to review such  
20 cases if the states provide a mechanism for the appointment, compensation, and  
21 reimbursement of competent counsel for all indigent capital defendants in  
22 state post-conviction proceedings. The most significant delay between  
23 sentencing and execution occurs while capital cases await decision in federal  
24 habeas corpus litigation. From 1990 through 1993, the average time that  
25 prisoners sentenced to death in this state awaited execution was ten years and  
26 two months for those prisoners who pursued federal habeas corpus litigation.  
27 However, if the states comply with the requirements of the Antiterrorism Act,  
28 the average time that prisoners will await execution in federal court will be  
29 reduced to less than three years in most cases. For that reason an emergency  
30 is declared to exist and this act is necessary to permit the state to take  
31 advantage of the provisions which will reduce the time for review in federal  
32 court by providing a mechanism for the appointment, compensation, and  
33 reimbursement of competent counsel for all indigent capital defendants in  
34 state post-conviction proceedings. This act, being immediately necessary for  
35 the preservation of the public peace, health and safety shall become effective  
36 on the date of its approval by the Governor. If the bill is neither approved

1 nor vetoed by the Governor, it shall become effective on the expiration of the  
2 period of time during which the Governor may veto the bill. If the bill is  
3 vetoed by the Governor and the veto is overridden, it shall become effective  
4 on the date the last house overrides the veto.

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