

1                                   **DEATH PENALTY PROCEDURES AMENDMENTS**

2                                                           2011 GENERAL SESSION

3                                                           STATE OF UTAH

4                                                           **Chief Sponsor: Kay L. McIff**

5                                                           Senate Sponsor: Lyle W. Hillyard

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7 **LONG TITLE**

8 **General Description:**

9                   This bill modifies the Criminal Code and the Judicial Code regarding capital sentencing  
10 procedures.

11 **Highlighted Provisions:**

12                   This bill:

- 13                   ▶ clarifies when a petitioner has a right to funded counsel for successive petitions; and
- 14                   ▶ sets limits on the obtaining of execution stays for successive postconviction

15 petitions.

16 **Money Appropriated in this Bill:**

17                   None

18 **Other Special Clauses:**

19                   None

20 **Utah Code Sections Affected:**

21 AMENDS:

22                   **77-19-8**, as last amended by Laws of Utah 2008, Chapter 3

23                   **78B-9-202**, as last amended by Laws of Utah 2008, Chapter 288 and renumbered and  
24 amended by Laws of Utah 2008, Chapter 3

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26 *Be it enacted by the Legislature of the state of Utah:*

27                   Section 1. Section **77-19-8** is amended to read:

28                   **77-19-8. Judgment of death, when suspended, and by whom.**

29                   (1) Except as stated in Subsection (2), a judge, tribunal, or officer, other than the

30 governor or the Board of Pardons and Parole, may not stay or suspend the execution of a  
31 judgment of death.

32 (2) (a) A court of competent jurisdiction shall issue a temporary stay of judgment of  
33 death when:

34 (i) the judgment is appealed;

35 (ii) the judgment is automatically reviewed;

36 (iii) the person sentenced to death files a first petition for postconviction relief after the  
37 direct appeal under Title 78B, Chapter 9, [~~Post-Conviction~~] Postconviction Remedies Act;

38 (iv) the person sentenced to death requests counsel under Subsection 78B-9-202(2)(a)  
39 to represent [~~him~~] the person in [~~an~~] a first action for postconviction relief under Title 78B,  
40 Chapter 9, [~~Post-Conviction~~] Postconviction Remedies Act; or

41 (v) counsel enters an appearance to represent the person sentenced to death in [~~an~~] a  
42 first action for postconviction relief under Title 78B, Chapter 9, [~~Post-Conviction~~]  
43 Postconviction Remedies Act.

44 (b) A court may not issue a temporary stay of judgment of death when the person  
45 sentenced to death files a petition for postconviction relief under Title 78B, Chapter 9,  
46 Postconviction Remedies Act, after a first petition has been denied or dismissed, unless the  
47 court first finds all of the following:

48 (i) the claims would not be barred under Section 78B-9-106;

49 (ii) the claims are potentially meritorious; and

50 (iii) the petition may not be reasonably disposed of before the execution date.

51 [~~(b)~~] (c) (i) The executive director of the Department of Corrections or a designee  
52 under Section 77-19-202 may temporarily suspend the execution if the person sentenced to  
53 death appears to be incompetent or pregnant.

54 (ii) A temporary suspension under Subsection (2)[~~(b)~~](c)(i) shall end if the person is  
55 determined to be:

56 (A) competent;

57 (B) not pregnant; or

58 (C) no longer incompetent or pregnant.

59 (3) (a) The court must vacate a stay issued pursuant to Subsection (2)(a) when the  
60 appeal, automatic review, or action under Title 78B, Chapter 9, [~~Post-Conviction~~]  
61 Postconviction Remedies Act is concluded.

62 (b) A request for counsel under Section 78B-9-202 does not constitute an application  
63 for postconviction or other collateral review and does not toll the statute of limitations under  
64 Section 78B-9-107.

65 Section 2. Section **78B-9-202** is amended to read:

66 **CHAPTER 9. POSTCONVICTION REMEDIES ACT**

67 **78B-9-202. Appointment and payment of counsel in death penalty cases.**

68 (1) A person who has been sentenced to death and whose conviction and sentence has  
69 been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled  
70 no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter  
71 allowing challenges to the conviction and death sentence and the appointment of counsel for  
72 indigent petitioners.

73 (2) (a) If a petitioner requests the court to appoint counsel, the court shall determine  
74 whether the petitioner is indigent and make findings on the record regarding the petitioner's  
75 indigency. If the court finds that the petitioner is indigent, it shall, subject to the provisions of  
76 Subsection (5), promptly appoint counsel who is qualified to represent petitioners in  
77 postconviction death penalty cases as required by Rule 8 of the Utah Rules of Criminal  
78 Procedure. Counsel who represented the petitioner at trial or on the direct appeal may not be  
79 appointed to represent the petitioner under this section.

80 (b) A petitioner who wishes to reject the offer of counsel shall be advised on the record  
81 by the court of the consequences of the rejection before the court may accept the rejection.

82 (3) Attorney fees and litigation expenses incurred in providing the representation  
83 provided for in this section and that the court has determined are reasonable shall be paid from  
84 state funds by the Division of Finance according to rules established pursuant to Title 63G,  
85 Chapter 3, Utah Administrative Rulemaking Act.

86 (a) In determining whether the requested funds are reasonable, the court should  
87 consider:

88 (i) the extent to which the petitioner requests funds to investigate and develop evidence  
89 and legal arguments that duplicate the evidence presented and arguments raised in the criminal  
90 proceeding; and

91 (ii) whether the petitioner has established that the requested funds are necessary to  
92 develop evidence and legal arguments that are reasonably likely to support postconviction  
93 relief.

94 (b) The court may authorize payment of attorney fees at a rate of \$125 per hour up to a  
95 maximum of \$60,000. The court may exceed the maximum only upon a showing of good  
96 cause as established in Subsections (3)(e) and (f).

97 (c) The court may authorize litigation expenses up to a maximum of \$20,000. The  
98 court may exceed the maximum only upon a showing of good cause as established in  
99 Subsections (3)(e) and (f).

100 (d) The court may authorize the petitioner to apply ex parte for the funds permitted in  
101 Subsections (3)(b) and (c) upon a motion to proceed ex parte and if the petitioner establishes  
102 the need for confidentiality. The motion to proceed ex parte must be served on counsel  
103 representing the state, and the court may not grant the motion without giving the state an  
104 opportunity to respond.

105 (e) In determining whether good cause exists to exceed the maximum sums established  
106 in Subsections (3)(b) and (c), the court shall consider:

107 (i) the extent to which the work done to date and the further work identified by the  
108 petitioner duplicates work and investigation performed during the criminal case under review;  
109 and

110 (ii) whether the petitioner has established that the work done to date and the further  
111 work identified is reasonably likely to develop evidence or legal arguments that will support  
112 postconviction relief.

113 (f) The court may permit payment in excess of the maximum amounts established in

114 Subsections (3)(b) and (c) only on the petitioner's motion, provided that:

115 (i) if the court has granted a motion to file ex parte applications under Subsection  
116 (3)(d), the petitioner shall serve the motion to exceed the maximum amounts on an assistant  
117 attorney general employed in a division other than the one in which the attorney is employed  
118 who represents the state in the postconviction case; if the court has not granted a motion to file  
119 ex parte applications, then the petitioner must serve the attorney representing the state in the  
120 postconviction matter with the motion to exceed the maximum funds;

121 (ii) if the motion proceeds under Subsection (3)(f)(i), the designated assistant attorney  
122 general may not disclose to the attorney representing the state in the postconviction matter any  
123 material the petitioner provides in support of the motion except upon a determination by the  
124 court that the material is not protected by or that the petitioner has waived the attorney client  
125 privilege or work product doctrine; and

126 (iii) the court gives the state an opportunity to respond to the request for funds in  
127 excess of the maximum amounts provided in Subsections (3)(b) and (c).

128 (4) Nothing in this chapter shall be construed as creating the right to the effective  
129 assistance of postconviction counsel, and relief may not be granted on any claim that  
130 postconviction counsel was ineffective.

131 (5) If within 60 days of the request for counsel the court cannot find counsel willing to  
132 accept the appointment, the court shall notify the petitioner and the state's counsel in writing.  
133 In that event, the petitioner may elect to proceed pro se by serving written notice of that  
134 election on the court and state's counsel within 30 days of the court's notice that no counsel  
135 could be found. If within 30 days of its notice to the petitioner the court receives no notice that  
136 the petitioner elects to proceed pro se, the court shall dismiss any pending postconviction  
137 actions and vacate any execution stays, and the state may initiate proceedings under Section  
138 77-19-9 to issue an execution warrant.

139 (6) Subject to Subsection (2)(a) the court shall appoint counsel to represent the  
140 petitioner for the first petition filed after the direct appeal. For all other petitions, counsel may  
141 not be appointed at public expense for a petitioner, except to raise claims:

142           (a) based on newly discovered evidence as defined in Subsection 78B-9-104(1)(e)(i);

143   or

144           (b) based on Subsection 78B-9-104(1)(f) that could not have been raised in any

145   previously filed post trial motion or postconviction proceeding.