

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

- (1) A person who has been sentenced to death and whose conviction and sentence has been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter allowing challenges to the conviction and death sentence and the appointment of counsel for indigent petitioners.
- (2)
 - (a) If a petitioner requests the court to appoint counsel, the court shall determine whether the petitioner is indigent and make findings on the record regarding the petitioner's indigency. If the court finds that the petitioner is indigent, it shall, subject to the provisions of Subsection (5), promptly appoint counsel who is qualified to represent petitioners in postconviction death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.
 - (b) A petitioner who wishes to reject the offer of counsel shall be advised on the record by the court of the consequences of the rejection before the court may accept the rejection.
- (3) Attorney fees and litigation expenses incurred in providing the representation provided for in this section and that the court has determined are reasonable shall be paid from state funds by the Division of Finance according to rules established pursuant to Title 63G, Chapter 3, Utah Administrative Rulemaking Act.
 - (a) In determining whether the requested funds are reasonable, the court should consider:
 - (i) the extent to which the petitioner requests funds to investigate and develop evidence and legal arguments that duplicate the evidence presented and arguments raised in the criminal proceeding; and
 - (ii) whether the petitioner has established that the requested funds are necessary to develop evidence and legal arguments that are reasonably likely to support postconviction relief.
 - (b) The court may authorize payment of attorney fees at a rate of \$125 per hour up to a maximum of \$60,000. The court may exceed the maximum only upon a showing of good cause as established in Subsections (3)(e) and (f).
 - (c) The court may authorize litigation expenses up to a maximum of \$20,000. The court may exceed the maximum only upon a showing of good cause as established in Subsections (3)(e) and (f).
 - (d) The court may authorize the petitioner to apply ex parte for the funds permitted in Subsections (3)(b) and (c) upon a motion to proceed ex parte and if the petitioner establishes the need for confidentiality. The motion to proceed ex parte must be served on counsel representing the state, and the court may not grant the motion without giving the state an opportunity to respond.
 - (e) In determining whether good cause exists to exceed the maximum sums established in Subsections (3)(b) and (c), the court shall consider:
 - (i) the extent to which the work done to date and the further work identified by the petitioner duplicates work and investigation performed during the criminal case under review; and
 - (ii) whether the petitioner has established that the work done to date and the further work identified is reasonably likely to develop evidence or legal arguments that will support postconviction relief.
 - (f) The court may permit payment in excess of the maximum amounts established in Subsections (3)(b) and (c) only on the petitioner's motion, provided that:
 - (i) if the court has granted a motion to file ex parte applications under Subsection (3)(d), the petitioner shall serve the motion to exceed the maximum amounts on an assistant attorney

- general employed in a division other than the one in which the attorney is employed who represents the state in the postconviction case; if the court has not granted a motion to file ex parte applications, then the petitioner must serve the attorney representing the state in the postconviction matter with the motion to exceed the maximum funds;
- (ii) if the motion proceeds under Subsection (3)(f)(i), the designated assistant attorney general may not disclose to the attorney representing the state in the postconviction matter any material the petitioner provides in support of the motion except upon a determination by the court that the material is not protected by or that the petitioner has waived the attorney client privilege or work product doctrine; and
 - (iii) the court gives the state an opportunity to respond to the request for funds in excess of the maximum amounts provided in Subsections (3)(b) and (c).
- (4) Nothing in this chapter shall be construed as creating the right to the effective assistance of postconviction counsel, and relief may not be granted on any claim that postconviction counsel was ineffective.
- (5) If within 60 days of the request for counsel the court cannot find counsel willing to accept the appointment, the court shall notify the petitioner and the state's counsel in writing. In that event, the petitioner may elect to proceed pro se by serving written notice of that election on the court and state's counsel within 30 days of the court's notice that no counsel could be found. If within 30 days of its notice to the petitioner the court receives no notice that the petitioner elects to proceed pro se, the court shall dismiss any pending postconviction actions and vacate any execution stays, and the state may initiate proceedings under Section 77-19-9 to issue an execution warrant.
- (6) Subject to Subsection (2)(a) the court shall appoint counsel to represent the petitioner for the first petition filed after the direct appeal. For all other petitions, counsel may not be appointed at public expense for a petitioner, except to raise claims:
- (a) based on newly discovered evidence as defined in Subsection 78B-9-104(1)(e)(i); or
 - (b) based on Subsection 78B-9-104(1)(f) that could not have been raised in any previously filed post trial motion or postconviction proceeding.

Amended by Chapter 165, 2011 General Session