

ENROLLED SENATE
BILL NO. 1220

By: Nichols of the Senate

and

Ericson and Lamons of the
House

An Act relating to criminal procedure; amending 22 O.S. 2001, Sections 1001.1, as amended by Section 1, Chapter 126, O.S.L. 2002, and 1089 (22 O.S. Supp. 2003, Section 1001.1), which relate to stays of execution and capital post-conviction relief; requiring Governor to set new execution date under certain circumstances; clarifying grounds for claim of ineffective counsel; providing exceptions to prohibition of consideration by Court of Criminal Appeals of certain applications; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 22 O.S. 2001, Section 1001.1, as amended by Section 1, Chapter 126, O.S.L. 2002 (22 O.S. Supp. 2003, Section 1001.1), is amended to read as follows:

Section 1001.1 A. The execution of the judgment in cases where sentence of death is imposed shall be ordered by the Court of Criminal Appeals to be carried out thirty (30) days after the defendant fails to meet any of the following time conditions:

1. If a defendant does not file a petition for writ of certiorari in the United States Supreme Court within ninety (90) days from the issuance of the mandate in the original state direct appeal unless a first application for post-conviction relief is pending;

2. If a defendant does not file an original application for post-conviction relief in the Court of Criminal Appeals within ninety (90) days from the filing of the appellee's brief on direct appeal or, if a reply brief is filed, ninety (90) days from the filing of that reply brief, or a petition in error to the Court of Criminal Appeals after remand within thirty (30) days from entry of judgment by the district court disposing of the application for post-conviction relief;

3. If a defendant does not file a writ of certiorari to the United States Supreme Court within ninety (90) days from a denial of state post-conviction relief by the Oklahoma Court of Criminal Appeals;

4. If a defendant does not file the first petition for a federal writ of habeas corpus within sixty (60) days from a denial of the certiorari petition or from a decision by the United States Supreme Court from post-conviction relief;

5. If a defendant does not file an appeal in the United States Court of Appeals for the Tenth Circuit from a denial of a federal writ of habeas corpus within seventy (70) days; or

6. If a defendant does not file a petition for writ of certiorari with the United States Supreme Court from a denial of the appeal of the federal writ of habeas corpus within ninety (90) days.

B. The filing of a petition for rehearing in any federal court shall not serve to stay the execution dates or the time restraints set forth in the above section unless the defendant makes the showing set forth in subsection C of this section. The provisions of subsection A do not apply to second or subsequent petitions or appeals filed in any court. The filing of a second or subsequent petition or appeal in any court does not prevent the setting of an execution date.

C. When an action challenging the conviction or sentence of death is pending before it, the Court of Criminal Appeals may stay an execution date, or issue any order which effectively stays an execution date only upon a showing by the defendant that there exists a significant possibility of reversal of the defendant's conviction, or vacation of the defendant's sentence, and that irreparable harm will result if no stay is issued.

D. Should a stay of execution be issued by any state or federal court, a new execution date shall be set by operation of law sixty (60) days after the dissolution of the stay of execution. The new execution date shall be set by the Court of Criminal Appeals without necessity of application by the state, but the Attorney General, on behalf of the state, shall bring to the attention of the Court of Criminal Appeals the fact of the dissolution of a stay of execution and suggest the appropriateness of the setting of a new execution date.

E. After an execution date has been set pursuant to the provisions of this section, should a stay of execution be issued by any state or federal court, a new execution date shall be set by operation of law thirty (30) days after the dissolution of the stay of execution. The new execution date shall be set by the Court of Criminal Appeals without necessity of application by the state, but the Attorney General, on behalf of the state, shall bring to the attention of the Court of Criminal Appeals the fact of the dissolution of a stay of execution and suggest the appropriateness of setting a new execution date.

F. After an execution date has been set pursuant to the provisions of this section, should a stay of execution be issued by any state or federal court and then vacated by such court, the sentence of death shall be carried out as ordered prior to the issuance of such vacated stay of execution. If the prior execution date has expired prior to the vacation of the stay of execution, a

new execution date shall be set by operation of law thirty (30) days after the vacation of the stay of execution. The new execution date shall be set by the Court of Criminal Appeals without necessity of application by the state, but the Attorney General, on behalf of the state, shall bring to the attention of the Court of Criminal Appeals the fact of a vacation of the stay of execution and suggest the appropriateness of the setting of a new execution date.

G. After an execution date has been set pursuant to the provisions of this section, should the Governor of the State of Oklahoma issue a stay of execution pursuant to the powers articulated in ~~Article 6~~, Section 10 of Article VI of the Oklahoma Constitution, the Governor shall, simultaneous to the granting of the stay, ~~order that the~~ set a new execution date. The sentence of death shall be carried out not more than thirty (30) days after the dissolution of the stay of execution; however, nothing shall prevent the Governor from ordering the new execution date to be on the first day immediately following dissolution of the stay.

SECTION 2. AMENDATORY 22 O.S. 2001, Section 1089, is amended to read as follows:

Section 1089. A. The application for post-conviction relief of a defendant who is under the sentence of death in one or more counts and whose death sentence has been affirmed or is being reviewed by the Court of Criminal Appeals in accordance with the provisions of Section 701.13 of Title 21 of the Oklahoma Statutes shall be expedited as provided in this section. The provisions of this section also apply to noncapital sentences in a case in which the defendant has received one or more sentences of death.

B. The Oklahoma Indigent Defense System shall represent all indigent defendants in capital cases seeking post-conviction relief upon appointment by the appropriate district court after a hearing determining the indigency of any such defendant. When the Oklahoma Indigent Defense System or another attorney has been appointed to represent an indigent defendant in an application for post-conviction relief, the Clerk of the Court of Criminal Appeals shall include in its notice to the district court clerk, as required by Section 1054 of this title, that an additional certified copy of the appeal record is to be transmitted to the Oklahoma Indigent Defense System or the other attorney.

C. The only issues that may be raised in an application for post-conviction relief are those that:

1. Were not and could not have been raised in a direct appeal; and
2. Support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.

The applicant shall state in the application specific facts explaining as to each claim why it was not or could not have been raised in a direct appeal and how it supports a conclusion that the

outcome of the trial would have been different but for the errors or that the defendant is factually innocent.

D. 1. The application for post-conviction relief shall be filed in the Court of Criminal Appeals within ninety (90) days from the date the appellee's brief on direct appeal is filed or, if a reply brief is filed, ninety (90) days from the filing of that reply brief with the Court of Criminal Appeals on the direct appeal. Where the appellant's original brief on direct appeal has been filed prior to November 1, 1995, and no application for post-conviction relief has been filed, any application for post-conviction relief must be filed in the Court of Criminal Appeals within one hundred eighty (180) days of November 1, 1995. The Court of Criminal Appeals may issue orders establishing briefing schedules or enter any other orders necessary to extend the time limits under this section in cases where the original brief on direct appeal has been filed prior to November 1, 1995.

2. All grounds for relief that were available to the applicant before the last date on which an application could be timely filed not included in a timely application shall be deemed waived.

No application may be amended or supplemented after the time specified under this section. Any amended or supplemental application filed after the time specified under this section shall be treated by the Court of Criminal Appeals as a subsequent application.

3. Subject to the specific limitations of this section, the Court of Criminal Appeals may issue any orders as to discovery or any other orders necessary to facilitate post-conviction review.

4. a. The Court of Criminal Appeals shall review the application to determine:
- (1) whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist,
 - (2) whether the applicant's grounds were or could have been previously raised, and
 - (3) whether relief may be granted under this act.
- b. For purposes of this subsection, a ground could not have been previously raised if:
- (1) it is a claim of ineffective assistance of trial counsel ~~which requires factfinding outside the direct appeal record~~ involving a factual basis that was not ascertainable through the exercise of reasonable diligence on or before the time of the direct appeal, or
 - (2) it is a claim contained in an original timely application for post-conviction relief relating to ineffective assistance of appellate counsel

~~and the Court of Criminal Appeals first finds that if the allegations in the application were true, the performance of appellate counsel constitutes the denial of reasonably competent assistance of appellate counsel under prevailing professional norms. If the court makes this finding the court may consider the claim during the post-conviction proceeding or, if appropriate, during the direct appeal.~~

All claims of ineffective assistance of counsel shall be governed by clearly established law as determined by the United States Supreme Court.

If the Court of Criminal Appeals determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement do not exist, or that the claims were or could have been previously raised, or that relief may not be granted under this act and enters an order to that effect, the Court shall make findings of fact and conclusions of law or may order the parties to file proposed findings of fact and conclusions of law for the Court to consider on or before a date set by the Court that is not later than thirty (30) days after the date the order is issued. The Court of Criminal Appeals shall make appropriate written findings of fact and conclusions of law not later than fifteen (15) days after the date the parties filed proposed findings.

5. If the Court of Criminal Appeals determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement do exist, and that the application meets the other requirements of paragraph 4 of this subsection, the Court shall enter an order to the district court that imposed the sentence designating the issues of fact to be resolved and the method by which the issues shall be resolved.

The district court shall not permit any amendments or supplements to the issues remanded by the Court of Criminal Appeals except upon motion to and order of the Court of Criminal Appeals subject to the limitations of this section.

The Court of Criminal Appeals shall retain jurisdiction of all cases remanded pursuant to this act.

6. The district attorney's office shall have twenty (20) days after the issues are remanded to the district court within which to file a response. The district court may grant one extension of twenty (20) days for good cause shown and may issue any orders necessary to facilitate post-conviction review pursuant to the remand order of the Court of Criminal Appeals. Any applications for extension beyond the twenty (20) days shall be presented to the Court of Criminal Appeals. If the district court determines that an evidentiary hearing should be held, that hearing shall be held within thirty (30) days from the date that the state filed its response. The district court shall file its decision together with findings of fact and conclusions of law with the Court of Criminal Appeals within forty-five (45) days from the date that the state

filed its response or within forty-five (45) days from the date of the conclusion of the evidentiary hearing.

7. Either party may seek review by the Court of Criminal Appeals of the district court's determination of the issues remanded by the Court of Criminal Appeals within ten (10) days from the entry of judgment. Such party shall file a notice of intent to seek review and a designation of record in the district court within (10) days from the entry of judgment. A copy of the notice of intent to seek review and the designation of the record shall be served on the court reporter, the petitioner, the district attorney, and the Attorney General, and shall be filed with the Court of Criminal Appeals. A petition in error shall be filed with the Court of Criminal Appeals by the party seeking review within thirty (30) days from the entry of judgment. If an evidentiary hearing was held, the court reporter shall prepare and file all transcripts necessary for the appeal within sixty (60) days from the date the notice and designation of record are filed. The petitioner's brief-in-chief shall be filed within forty-five (45) days from the date the transcript is filed in the Court of Criminal Appeals or, if no evidentiary hearing was held, within forty-five (45) days from the date of the filing of the notice. The respondent shall have twenty (20) days thereafter to file a response brief. The district court clerk shall file the records on appeal with the Court of Criminal Appeals on or before the date the petitioner's brief-in-chief is due. The Court of Criminal Appeals shall issue an opinion in the case within one hundred twenty (120) days of the filing of the response brief or at the time the direct appeal is decided. If no review is sought within the time specified in this section, the Court of Criminal Appeals may adopt the findings of the district court and enter an order within fifteen (15) days of the time specified for seeking review or may order additional briefing by the parties.

8. If an original application for post-conviction relief is untimely or if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent or untimely original application unless ~~the application contains sufficient specific facts establishing that the current claims and issues have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual or legal basis for the claim was unavailable:~~

- a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or
- b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under

this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and

(2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable factfinder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

9. For purposes of this act, a legal basis of a claim is unavailable on or before a date described by this subsection if the legal basis:

- a. was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date, or
- b. is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.

~~For purposes of this subsection, a factual basis of a claim is unavailable on or before a date described by this subsection if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.~~

E. All matters not specifically governed by the provisions of this section shall be subject to the provisions of the Post-Conviction Procedure Act. If the provisions of this act conflict with the provisions of the Post-Conviction Procedure Act, the provisions of this act shall govern.

SECTION 3. This act shall become effective November 1, 2004.

Passed the Senate the 9th day of March, 2004.

Presiding Officer of the Senate

Passed the House of Representatives the 19th day of April, 2004.

Presiding Officer of the House
of Representatives

