

107TH CONGRESS
2D SESSION

S. 2446

To ensure that death penalty defendants have a true opportunity to have their cases considered by the courts, to provide all prisoners with an opportunity to present exculpatory DNA evidence, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 2, 2002

Mr. SPECTER (for himself, Mr. BIDEN, Mr. DURBIN, and Ms. COLLINS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To ensure that death penalty defendants have a true opportunity to have their cases considered by the courts, to provide all prisoners with an opportunity to present exculpatory DNA evidence, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Confidence in Criminal Justice Act of 2002”.

6 (b) TABLE OF CONTENTS.—The table of contents of
7 this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—RIGHT TO REVIEW OF THE DEATH PENALTY UPON
THE GRANT OF CERTIORARI

Sec. 101. Protecting the rights of death row inmates to review of cases granted certiorari.

Sec. 102. Habeas corpus.

TITLE II—POSTCONVICTION DNA TESTING

Sec. 201. Postconviction DNA testing.

Sec. 202. Prohibition pursuant to section 5 of the 14th amendment.

TITLE III—MANDATORY MINIMAL DEFENSE COUNSEL
STANDARDS IN STATE COURTS FOR CAPITAL CASES.

Sec. 301. Right to legal representation for indigent defendants.

Sec. 302. Minimum experience required for defense counsel.

Sec. 303. Adequate representation.

Sec. 304. Attorney fees and costs.

Sec. 305. Irrebuttable presumption of deficient performance.

1 TITLE I—RIGHT TO REVIEW OF
2 THE DEATH PENALTY UPON
3 THE GRANT OF CERTIORARI

4 SEC. 101. PROTECTING THE RIGHTS OF DEATH ROW IN-
5 MATES TO REVIEW OF CASES GRANTED CER-
6 TIORARI.

7 Section 2101 of title 28, United States Code, is
8 amended by adding at the end the following:

9 “(h) Upon notice by a party that has filed a motion
10 for a stay of execution or filed for certiorari with, or has
11 been granted certiorari by, the United States Supreme
12 Court in an appeal from a case in which the sentence is
13 death, the Governor of the State in which the death sen-
14 tence is to be carried out, in a State case, or the Director
15 of the Bureau of Prisons, the Secretary of a military
16 branch, or any other Federal official with authority to

1 carry out the death sentence, in a Federal case, shall sus-
 2 pend the execution of the sentence of death until the
 3 United States Supreme Court enters a stay of execution
 4 or until certiorari is acted upon and the case is disposed
 5 of by the United States Supreme Court.

6 “(i) For purposes of this section, the United States
 7 Supreme Court shall treat a motion for a stay of execution
 8 as a petition for certiorari.

9 “(j) In an appeal from a case in which the sentence
 10 is death, a writ of certiorari shall be issued by the United
 11 States Supreme Court upon the vote of at least 4 qualified
 12 justices.”.

13 **SEC. 102. HABEAS CORPUS.**

14 (a) STATE COURT PROCEEDINGS.—Section 2251 of
 15 title 28, United States Code, is amended—

16 (1) by inserting “(a)” at the beginning of the
 17 text;

18 (2) by inserting “(b)” before the second sen-
 19 tence; and

20 (3) by adding at the end the following:

21 “(c)(1) Notwithstanding any other provision of law,
 22 a justice or judge of the United States before whom a ha-
 23 beas corpus proceeding that involves the death sentence
 24 is pending shall stay the execution of the death sentence
 25 until the proceeding is completed. If the issuance of such

1 a stay requires more than 1 judge to concur or vote on
2 the stay, the court before which the proceeding is pending
3 shall grant the stay.

4 “(2) For purposes of this subsection, a case is pend-
5 ing before a court in the Circuit Court of Appeals if a
6 notice of appeal has been filed and is pending before the
7 United States Supreme Court, if a petition for certiorari
8 has been filed, or if a motion to stay execution has been
9 filed.

10 “(3) A case described in paragraph (2) remains pend-
11 ing before the court until the petition for certiorari is de-
12 nied. If the petition is granted, the case remains pending.

13 “(4) If a higher court is unable or fails to issue a
14 stay pursuant to this subsection, a lower court before
15 which the case had been pending shall issue the stay of
16 execution.

17 “(d) For purposes of this section, a motion to stay
18 execution shall be treated as a petition for certiorari.”.

19 (b) FEDERAL COURT PROCEEDINGS.—Section 2255
20 of title 28, United States Code, is amended by adding at
21 the end the following:

22 “Notwithstanding any other provision of law, a jus-
23 tice or judge of the United States, before whom a habeas
24 corpus proceeding that involves a Federal death sentence
25 is pending, shall stay the execution of the death sentence

1 until the proceeding is completed. If the issuance of such
 2 a stay requires more than 1 judge to concur or vote on
 3 the stay, the court before which the proceeding is pending
 4 shall grant the stay.

5 “If a higher court is unable or fails to issue a stay
 6 pursuant to the preceding paragraph, a lower court before
 7 which the case had been pending shall issue the stay of
 8 execution. For purposes of this section, a motion to stay
 9 execution shall be treated as a petition for certiorari. A
 10 case described in the preceding paragraph—

11 “(1) is pending before a court in the Circuit
 12 Court of Appeals if a notice of appeal has been filed;
 13 and

14 “(2) is pending before the United States Su-
 15 preme Court if—

16 “(A) a petition for certiorari has been filed
 17 and has not been denied; or

18 “(B) a motion to stay execution has been
 19 filed.”.

20 **TITLE II—POST-CONVICTION** 21 **DNA TESTING**

22 **SEC. 201. POST-CONVICTION DNA TESTING.**

23 (a) FEDERAL CRIMINAL PROCEDURE.—

1 (1) IN GENERAL.—Part II of title 18, United
 2 States Code, is amended by inserting after chapter
 3 228 the following:

“CHAPTER 228A—POST-CONVICTION DNA TESTING

“Sec.

“3600. DNA testing.

“3600A. Prohibition on destruction of biological evidence.

4 **“§ 3600. DNA testing**

5 “(a) MOTION.—

6 “(1) IN GENERAL.—An individual imprisoned
 7 because of a conviction of a criminal offense in a
 8 court of the United States (referred to in this sec-
 9 tion as the ‘applicant’) may make a written motion
 10 to the court that entered the judgment of conviction
 11 for the performance of forensic DNA testing on
 12 specified evidence that was secured in relation to the
 13 investigation or prosecution that resulted in the con-
 14 viction.

15 “(2) CONTENTS.—The motion shall—

16 “(A) include an assertion by the applicant,
 17 under penalty of perjury, that the applicant is
 18 actually innocent of the crime for which the ap-
 19 plicant is imprisoned or of uncharged conduct,
 20 if the exoneration of the applicant of such con-
 21 duct would result in a mandatory reduction in
 22 the sentence of the applicant;

1 “(B) identify the specific evidence secured
2 in relation to the investigation or prosecution
3 that resulted in the conviction for which testing
4 is requested;

5 “(C) identify a theory of defense—

6 “(i) the validity of which would estab-
7 lish the actual innocence of the applicant,
8 and explain how the requested DNA test-
9 ing would substantiate that theory; and

10 “(ii) that is not inconsistent with any
11 affirmative defense issued by the applicant
12 in the original prosecution;

13 “(D) make a prima facie showing that the
14 conditions set forth in subsection (c) for
15 issuance of a testing order are satisfied; and

16 “(E) certify that the applicant will provide
17 a DNA sample from the applicant for purposes
18 of comparison.

19 “(3) FILING.—A motion filed under this section
20 is timely if—

21 “(A) it is filed within 60 months of the
22 date of enactment of this section;

23 “(B) the applicant can show that—

1 “(i) the evidence identified pursuant
2 to paragraph (2)(B) is newly discovered;
3 and

4 “(ii)(I) such evidence could not have
5 been discovered through the exercise of due
6 diligence; or

7 “(II) the proximate cause for not hav-
8 ing previously discovered such evidence was
9 the deficient performance of the attorney
10 of the applicant; or

11 “(C) the applicant can show that—

12 “(i)(I) the technology for the re-
13 quested DNA testing was not available at
14 the time of trial;

15 “(II) it was not generally known that
16 such technology was available at the time
17 of trial; or

18 “(III) the failure to request such test-
19 ing using the technology was due to the
20 deficient performance of the attorney of
21 the applicant; and

22 “(ii) if any of the evidence was pre-
23 viously subjected to DNA testing, the test-
24 ing now requested uses a newer technology
25 for DNA testing that is reasonably certain

1 to provide results that are substantially
2 more accurate and probative than any pre-
3 vious DNA testing of the evidence.

4 “(b) NOTICE TO THE GOVERNMENT; PRESERVATION
5 ORDER; APPOINTMENT OF COUNSEL.—

6 “(1) NOTICE TO THE GOVERNMENT.—Upon re-
7 ceipt of a motion under subsection (a), the court
8 shall promptly notify the government of the motion
9 and afford the government an opportunity to re-
10 spond to the motion.

11 “(2) PRESERVATION ORDER.—The court may
12 direct the government to preserve any evidence to
13 which a motion under subsection (a) relates to the
14 extent necessary to carry out proceedings under this
15 section.

16 “(3) APPOINTMENT OF COUNSEL.—The court
17 may appoint counsel for an indigent applicant under
18 this section in accordance with section 3006A of this
19 title.

20 “(c) ORDER FOR DNA TESTING.—The court shall
21 order the DNA testing requested in a motion filed under
22 this section if—

23 “(1) the motion satisfies the requirements of
24 subsection (a);

1 “(2)(A) the identity of the perpetrator was at
2 issue in the trial that resulted in the conviction of
3 the applicant; or

4 “(B) in a case where the applicant pled guilty,
5 the identity of the perpetrator would have been at
6 issue at trial;

7 “(3) the evidence to be tested is in the posses-
8 sion of the government and has been subject to a
9 chain of custody and retained under conditions suffi-
10 cient to ensure that it has not been substituted, con-
11 taminated, tampered with, replaced, or altered in
12 any respect material to the requested DNA testing;

13 “(4)(A)(i) the technology for the requested
14 DNA testing was not available at the time of trial;

15 “(ii) it was not generally known that such tech-
16 nology was available; or

17 “(iii) the applicant can show that the failure to
18 request such testing was due to the deficient per-
19 formance of the attorney of the applicant; and

20 “(B) if any of the evidence was previously sub-
21 jected to DNA testing, the testing now requested
22 uses a newer DNA testing technique which is rea-
23 sonably certain to provide results that are substan-
24 tially more accurate and probative than any previous
25 DNA testing of the evidence;

1 “(5) the proposed DNA testing uses scientif-
2 ically sound methods and is consistent with accepted
3 forensic practice;

4 “(6) the proposed DNA testing is reasonable in
5 scope; and

6 “(7) the court determines, after review of the
7 record of the trial of the applicant and any other rel-
8 evant evidence, that there is a reasonable probability
9 that the results of the proposed DNA testing will en-
10 able the applicant to establish that the applicant is
11 entitled to a new trial under the standard of sub-
12 section (e)(3).

13 “(d) TESTING PROCEDURES; REPORTING OF TEST
14 RESULTS.—

15 “(1) TESTING PROCEDURES.—The court shall
16 direct that any DNA testing ordered under this sec-
17 tion be carried out by—

18 “(A) a laboratory mutually selected by the
19 government and the applicant; or

20 “(B) if the government and the applicant
21 are unable to agree on a laboratory, a labora-
22 tory selected by the court ordering the testing.

23 “(2) LABORATORY APPROVAL.—With respect to
24 DNA testing by a laboratory in accordance with this
25 subsection, other than an FBI laboratory, the court

1 must approve the selection of the laboratory and
2 make all necessary orders to ensure the integrity of
3 the evidence and the testing process and the reli-
4 ability of the test results.

5 “(3) LABORATORY COSTS.—The applicant shall
6 pay the cost of any testing by a laboratory in ac-
7 cordance with this subsection, other than an FBI
8 laboratory, except that the court shall pay, in ac-
9 cordance with section 3006A of this title, the cost if
10 the applicant would otherwise be financially incapa-
11 ble of securing such testing.

12 “(4) DISCLOSURE OF TEST RESULTS.—The re-
13 sults of any DNA testing ordered under this
14 section—

15 “(A) shall be disclosed to—

16 “(i) the court;

17 “(ii) the applicant;

18 “(iii) the government; and

19 “(iv) the appropriate agency under
20 subsection (e)(3)(B)(ii); and

21 “(B) shall be included in the Combined
22 DNA Index System if the conditions set forth
23 in subsection (e)(2) are met.

24 “(e) POSTTESTING PROCEDURES.—

1 “(1) INCONCLUSIVE RESULT.—If the DNA test-
2 ing results are inconclusive, the court may order fur-
3 ther testing, as appropriate, or may deny the appli-
4 cant relief.

5 “(2) POSITIVE RESULT.—If DNA testing re-
6 sults obtained under this section show that the ap-
7 plicant was the source of the DNA identified as evi-
8 dence under subsection (a)(2)(B), the court shall—

9 “(A) deny the applicant relief;

10 “(B) submit the DNA testing results to
11 the Department of Justice for inclusion in the
12 Combined DNA Index System; and

13 “(C) on motion of the government, proceed
14 as provided in paragraph (5)(A).

15 “(3) NEGATIVE RESULT.—If DNA testing re-
16 sults obtained under this section show that the ap-
17 plicant was not the source of the DNA identified as
18 evidence under subsection (a)(2)(B)—

19 “(A) the court shall promptly—

20 “(i) order any further DNA testing
21 needed to clarify the import of the test re-
22 sults, including any testing needed to ex-
23 clude persons other than the perpetrator of
24 the crime as potential sources of the DNA
25 evidence; and

1 “(ii) determine whether the applicant
2 is entitled to relief under paragraph (4);
3 and

4 “(B) the Attorney General shall—

5 “(i) compare the DNA evidence col-
6 lected from the applicant with DNA evi-
7 dence in the Combined DNA Index System
8 that has been collected from unsolved
9 crimes;

10 “(ii) if the comparison yields a DNA
11 match with an unsolved crime, notify the
12 appropriate agency and preserve the DNA
13 sample; and

14 “(iii) if the comparison fails to yield a
15 DNA match with an unsolved crime, de-
16 stroy the DNA sample collected from the
17 applicant.

18 “(4) EXCULPATORY EVIDENCE.—If the DNA
19 testing conducted under this section produces excul-
20 patory evidence—

21 “(A) the applicant may, during the 60-day
22 period beginning on the date on which the ap-
23 plicant is notified of the test results, make a
24 motion to the court that ordered the testing for
25 a new trial based on newly discovered evidence

1 under rule 33 of the Federal Rules of Criminal
2 Procedure, notwithstanding any provision of law
3 that would bar such a motion as untimely; and

4 “(B) upon receipt of a motion under sub-
5 paragraph (A), the court that ordered the test-
6 ing shall consider the motion under rule 33 of
7 the Federal Rules of Criminal Procedure, not-
8 withstanding any provision of law that would
9 bar such consideration as untimely.

10 “(5) FAILURE TO OBTAIN RELIEF.—

11 “(A) IN GENERAL.—If the applicant fails
12 to obtain relief under this subsection, the court,
13 on motion by the government, shall make a de-
14 termination whether the assertion of innocence
15 by the applicant was false.

16 “(B) FALSE ASSERTION.—If the court
17 finds that the assertion of innocence by the ap-
18 plicant was false, the court—

19 “(i) may hold the applicant in con-
20 tempt;

21 “(ii) shall assess against the applicant
22 the cost of any DNA testing carried out
23 under this section; and

24 “(iii) shall forward the finding to the
25 Director of the Bureau of Prisons.

1 “(C) BUREAU OF PRISONS.—On receipt of
2 a finding by the court under this paragraph,
3 the Director of the Bureau of Prisons may
4 deny, wholly or in part, the good conduct credit
5 authorized under section 3624 of this title, on
6 the basis of that finding.

7 “(D) PAROLE COMMISSION.—If the appli-
8 cant is subject to the jurisdiction of the United
9 States Parole Commission, the court shall for-
10 ward its finding under this paragraph to the
11 Parole Commission, and the Parole Commission
12 may deny parole on the basis of that finding.

13 “(E) PENALTY.—In any prosecution of an
14 applicant under chapter 79 of this title, for
15 false assertions or other conduct in proceedings
16 under this section, the court, upon conviction of
17 the applicant, shall sentence the applicant to a
18 term of imprisonment of 1 year, which shall run
19 consecutively to any other term of imprison-
20 ment the applicant is serving.

21 “(f) FINAL ORDER.—An order granting or denying
22 DNA testing under subsection (c), or an order granting
23 or denying a new trial under subsection (e), is a final order
24 for purposes of section 1291 of title 28.

1 “(g) TIME LIMITS INAPPLICABLE; OTHER REMEDIES
 2 UNAFFECTED.—Notwithstanding any time limit otherwise
 3 applicable to motions for new trials based on newly discov-
 4 ered evidence, a court may grant relief under subsection
 5 (e) to an applicant, at any time.

6 “(h) OTHER REMEDIES UNAFFECTED.—This section
 7 does not affect the circumstances under which a person
 8 may obtain DNA testing or postconviction relief under any
 9 other law or rule.

10 **“§ 3600A. Prohibition on destruction of biological**
 11 **material**

12 “(a) PROHIBITION.—

13 “(1) IN GENERAL.—Notwithstanding any other
 14 provision of law, during the period described in
 15 paragraph (2), the government shall not destroy any
 16 biological material preserved if the defendant is serv-
 17 ing a term of imprisonment following conviction in
 18 a case.

19 “(2) PERIOD DESCRIBED.—The period de-
 20 scribed in this paragraph is the period beginning on
 21 the date of enactment of this section and ending on
 22 the later of—

23 “(A) the expiration of the 60-month period
 24 beginning on that date of enactment; or

1 “(B) the date on which any proceedings
2 under section 3600 relating to the case are
3 completed.

4 “(b) SANCTIONS FOR INTENTIONAL VIOLATION.—
5 The court may impose appropriate sanctions, including
6 criminal contempt, for an intentional violation of sub-
7 section (a).

8 “(c) EXCEPTIONS.—The government may dispose of
9 evidence before the expiration of the period of time de-
10 scribed in subsection (a) if—

11 “(1) other than subsection (a), no statute, regu-
12 lation, court order, or other provision of law requires
13 that the evidence be preserved; and

14 “(2)(A)(i) the government notifies any person
15 who remains incarcerated in connection with the in-
16 vestigation or prosecution and any counsel of record
17 for that person (or, if there is no counsel of record,
18 the public defender for the judicial district in which
19 the conviction for that person was imposed), of the
20 intention of the government to dispose of the evi-
21 dence and the provisions of this chapter; and

22 “(ii) the government affords such person not
23 less than 180 days after such notification to make
24 a motion under section 3600(a) for DNA testing of
25 the evidence; or

1 “(B)(i) the evidence must be returned to its
2 rightful owner, or is of such a size, bulk, or physical
3 character as to render retention impracticable; and

4 “(ii) the government takes reasonable measures
5 to remove and preserve portions of the material evi-
6 dence sufficient to permit future DNA testing.”.

7 (2) TECHNICAL AND CONFORMING AMEND-
8 MENT.—The analysis for part II of title 18, United
9 States Code, is amended by inserting after the item
10 relating to chapter 228 the following:

“228A. Postconviction DNA Testing 3600”.

11 (b) APPLICABILITY.—The provisions and amend-
12 ments in this section shall take effect on the date of enact-
13 ment of this Act and shall apply with respect to any of-
14 fense committed, and to any judgment of conviction en-
15 tered, before, on, or after that date of enactment.

16 (c) REPORT BY THE ATTORNEY GENERAL.—

17 (1) TRACKING SYSTEM.—

18 (A) IN GENERAL.—The Attorney General
19 shall establish a system for reporting and track-
20 ing motions under section 3600 of title 18,
21 United States Code.

22 (B) REQUESTED ASSISTANCE.—The judi-
23 cial branch shall provide to the Attorney Gen-
24 eral any requested assistance in operating a re-
25 porting and tracking system and in ensuring

1 the accuracy and completeness of information
2 included in that system.

3 (2) INFORMATION.—Not later than 180 days
4 before the expiration of the time period referenced in
5 section 3600(a)(3)(A) of title 18, United States
6 Code, the Attorney General shall submit a report to
7 Congress containing—

8 (A) a summary of the motions filed under
9 section 3600 of title 18, United States Code;

10 (B) information on whether DNA testing
11 was ordered pursuant to such motions;

12 (C) information on whether the applicant
13 obtained relief on the basis of DNA test results;
14 and

15 (D) information on whether further pro-
16 ceedings occurred following a granting of relief
17 and the outcome of those proceedings.

18 (3) ASSESSMENT.—The report submitted under
19 paragraph (2) may also include—

20 (A) any other information that the Attor-
21 ney General believes will be useful in assessing
22 the operation, utility, or costs of section 3600
23 of title 18, United States Code; and

24 (B) any recommendations that the Attor-
25 ney General may have relating to future legisla-

1 tive action concerning section 3600 of title 18,
2 United States Code.

3 **SEC. 202. PROHIBITION PURSUANT TO SECTION 5 OF THE**
4 **14TH AMENDMENT.**

5 (a) APPLICATION FOR DNA TESTING.—No State
6 shall deny an application for DNA testing made by a pris-
7 oner in State custody who would be eligible for such test-
8 ing under the provisions of sections 3600 and 3600A of
9 title 18, United States Code.

10 (b) DNA TESTING PROCEDURES.—The procedures
11 for DNA testing for a prisoner in State custody shall be
12 substantially similar to the DNA testing procedures estab-
13 lished for Federal courts under sections 3600 and 3600A
14 of title 18, United States Code.

15 (c) REMEDY.—A prisoner in State custody may en-
16 force subsections (a) and (b) in a civil action for declara-
17 tory or injunctive relief, filed either in a State court of
18 general jurisdiction or in a district court of the United
19 States, naming an executive or judicial officer of the State
20 as a defendant.

1 **TITLE III—MANDATORY MINI-**
 2 **MAL DEFENSE COUNSEL**
 3 **STANDARDS IN STATE**
 4 **COURTS FOR CAPITAL CASES**

5 **SEC. 301. RIGHT TO LEGAL REPRESENTATION FOR INDI-**
 6 **GENT DEFENDANTS.**

7 (a) PRECONVICTION REPRESENTATION.—Notwith-
 8 standing any other provision of law, a defendant in a
 9 criminal action in a State court, which may result in pun-
 10 ishment by death, who is or becomes financially unable
 11 to obtain adequate representation or investigative, expert,
 12 or other reasonably necessary services at any time—

13 (1) before judgment; or

14 (2) after the entry of a judgment imposing a
 15 sentence of death, but before the execution of that
 16 judgment;

17 shall be entitled to the appointment of 1 or more attorneys
 18 and the furnishing of such other services in accordance
 19 with the provisions of this title.

20 (b) POSTCONVICTION REPRESENTATION.—In a
 21 postconviction proceeding in which a defendant seeks to
 22 vacate or set aside a death sentence, a defendant who is
 23 or becomes financially unable to obtain adequate represen-
 24 tation or investigative, expert, or other reasonably nec-
 25 essary services shall be entitled to the appointment of 1

1 or more attorneys and the furnishing of such other serv-
 2 ices in accordance with the provisions of this title.

3 **SEC. 302. MINIMUM EXPERIENCE REQUIRED FOR DEFENSE**
 4 **COUNSEL.**

5 (a) PREJUDGMENT APPOINTMENT.—

6 (1) IN GENERAL.—If the appointment of legal
 7 counsel under this title is made before judgment, at
 8 least 1 attorney so appointed—

9 (A) must have been admitted to practice
 10 for not less than 5 years in the court in which
 11 the prosecution is to be tried; and

12 (B) must have not less than 3 years expe-
 13 rience in the actual trial of felony prosecutions
 14 in that court.

15 (2) JUDICIAL APPOINTMENT.—The court before
 16 which the defendant is to be tried, or a judge there-
 17 of, shall promptly, upon the request of the defend-
 18 ant, assign 2 attorneys to the case.

19 (3) EXPERTISE; ACCESSIBILITY.—At least 1 of
 20 the attorneys assigned under paragraph (2)—

21 (A) shall be learned in the law applicable
 22 to capital cases; and

23 (B) shall have free access to the accused at
 24 all reasonable hours.

1 (4) RECOMMENDATION.—In assigning counsel
2 under this section, the court shall consider—

3 (A) the recommendation of the State pub-
4 lic defender organization, community defender
5 organization, or equivalent organization; or

6 (B) if no such organization exists in the
7 relevant jurisdiction, the administrative office of
8 the local court or any governmental entity, bar
9 association, or organization with knowledge re-
10 garding the skills and qualifications of local de-
11 fense counsel.

12 (5) WITNESSES.—The court shall allow a de-
13 fendant, under this title, to produce lawful witnesses
14 to testify in support of the defendant, and shall com-
15 pel such witnesses to appear at trial in the same
16 manner that witnesses are compelled to appear on
17 behalf of the prosecution.

18 (b) POSTJUDGMENT APPOINTMENT.—If the appoint-
19 ment is made after judgment, at least 1 attorney ap-
20 pointed shall—

21 (1) have been admitted to practice for not less
22 than 5 years in the appropriate State appellate
23 court;

24 (2) have not less than 3 years experience in the
25 handling of felony appeals in that court; and

1 (3) be learned in the law applicable to capital
2 cases.

3 (c) LEARNED STANDARD.—In determining whether
4 an attorney is learned in the law of capital cases under
5 this section, the State court shall apply the standard used
6 in the courts of the United States.

7 **SEC. 303. ADEQUATE REPRESENTATION.**

8 (a) APPOINTMENT OF SUBSTITUTE COUNSEL.—With
9 respect to this section, the court, for good cause, may ap-
10 point another attorney whose background, knowledge, or
11 experience would otherwise enable the attorney to properly
12 represent the defendant, with due consideration to the se-
13 riousness of the possible penalty and to the unique and
14 complex nature of the litigation.

15 (b) SCOPE OF LEGAL REPRESENTATION.—Unless re-
16 placed by similarly qualified counsel upon the motion of
17 the attorney or the defendant, each attorney appointed
18 under this title shall represent the defendant throughout
19 every stage of available judicial proceedings, including—

- 20 (1) pretrial motions and procedures;
- 21 (2) competency proceedings;
- 22 (3) trial;
- 23 (4) sentencing;
- 24 (5) executive and other clemency proceedings;
- 25 (6) motions for new trial;

- 1 (7) appeals;
- 2 (8) applications for stays of execution; and
- 3 (9) applications for writ of certiorari to the Su-
- 4 preme Court of the United States.

5 (c) ADDITIONAL SERVICES.—

6 (1) IN GENERAL.—Upon a finding that inves-

7 tigative, expert, or other services are reasonably nec-

8 essary for the representation of the defendant,

9 whether in connection with issues relating to guilt or

10 the sentence, the court may authorize the attorneys

11 for the defendant to obtain such services on behalf

12 of the defendant and, if so authorized, shall order

13 the payment of fees and expenses for such services

14 pursuant to section 304.

15 (2) EX PARTE COMMUNICATIONS.—No ex parte

16 proceeding, communication, or request may be con-

17 sidered pursuant to this section unless a proper

18 showing is made concerning the need for confiden-

19 tiality. Any such proceeding, communication, or re-

20 quest shall be transcribed and made a part of the

21 record available for appellate review.

22 **SEC. 304. ATTORNEY FEES AND COSTS.**

23 (a) ATTORNEY FEES.—Compensation shall be paid

24 to attorneys appointed under this title at a rate equivalent

25 to that of attorneys representing defendants in Federal

1 capital cases pursuant to section 408(q)(10)(A) of the
2 Controlled Substances Act (21 U.S.C. 848(q)(10)(A)).

3 (b) ADDITIONAL EXPENSES.—Fees and expenses
4 paid for investigative, expert, and other reasonably nec-
5 essary services authorized under this section shall be
6 equivalent to fees paid in Federal capital cases pursuant
7 to section 408(q)(10)(B) of the Controlled Substances Act
8 (21 U.S.C. 848(q)(10)(B)).

9 (c) PUBLIC DISCLOSURE.—The amounts paid for
10 services under this section shall be disclosed to the public,
11 after the disposition of the petition.

12 **SEC. 305. IRREBUTTABLE PRESUMPTION OF DEFICIENT**
13 **PERFORMANCE.**

14 (a) IN GENERAL.—In a proceeding in Federal court
15 pursuant to section 2254 of title 28, United States Code,
16 the failure to comply with the procedures of this title shall
17 create an irrebuttable presumption that the performance
18 of the counsel for the petitioner was deficient.

19 (b) ENTITLEMENT TO RELIEF; BURDEN OF PROOF;
20 STANDARD OF REVIEW.—A petitioner is not entitled to
21 relief unless the petitioner shows that the result of the
22 proceeding would have been different if the performance
23 of the counsel for the petitioner had not been deficient.
24 The party opposing the petition has the burden of estab-
25 lishing that the standards in this section have been met.

1 The court shall conduct a de novo review to settle this
2 issue.

3 (c) OTHER REMEDIES.—The provisions of this sec-
4 tion are not intended to limit any other Federal or State
5 court from enforcing this section by any other appropriate
6 remedy.

