

107TH CONGRESS  
2D SESSION

# S. 2442

To ensure that indigent death penalty defendants in State courts receive adequate legal representation, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

MAY 2, 2002

Mr. SPECTER introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To ensure that indigent death penalty defendants in State courts receive adequate legal representation, 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.**

4 (a) SHORT TITLE.—This Act may be cited as the  
5 “Capital Defense Counsel Standards Act of 2002”.

6 **SEC. 2. RIGHT TO LEGAL REPRESENTATION FOR INDIGENT**  
7 **DEFENDANTS.**

8 (a) PRECONVICTION REPRESENTATION.—Notwith-  
9 standing any other provision of law, a defendant in a  
10 criminal action in a State court, which may result in pun-

1 ishment by death, who is or becomes financially unable  
 2 to obtain adequate representation or investigative, expert,  
 3 or other reasonably necessary services at any time—

4 (1) before judgment; or

5 (2) after the entry of a judgment imposing a  
 6 sentence of death, but before the execution of that  
 7 judgment;

8 shall be entitled to the appointment of 1 or more attorneys  
 9 and the furnishing of such other services in accordance  
 10 with the provisions of this Act.

11 (b) **POSTCONVICTION REPRESENTATION.**—In a  
 12 postconviction proceeding in which a defendant seeks to  
 13 vacate or set aside a death sentence, a defendant who is  
 14 or becomes financially unable to obtain adequate represen-  
 15 tation or investigative, expert, or other reasonably nec-  
 16 essary services shall be entitled to the appointment of 1  
 17 or more attorneys and the furnishing of such other serv-  
 18 ices in accordance with the provisions of this Act.

19 **SEC. 3. MINIMUM EXPERIENCE REQUIRED FOR DEFENSE**  
 20 **COUNSEL.**

21 (a) **PREJUDGMENT APPOINTMENT.**—

22 (1) **IN GENERAL.**—If the appointment of legal  
 23 counsel under this Act is made before judgment, at  
 24 least 1 attorney so appointed—

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

4 (B) must have not less than 3 years expe-  
5 rience in the actual trial of felony prosecutions  
6 in that court.

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

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

13 (A) shall be learned in the law applicable  
14 to capital cases; and

15 (B) shall have free access to the accused at  
16 all reasonable hours.

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

19 (A) the recommendation of the State pub-  
20 lic defender organization, community defender  
21 organization, or equivalent organization; or

22 (B) if no such organization exists in the  
23 relevant jurisdiction, the administrative office of  
24 the local court or any governmental entity, bar  
25 association, or organization with knowledge re-

1            regarding the skills and qualifications of local de-  
2            fense counsel.

3            (5) WITNESSES.—The court shall allow a de-  
4            fendant, under this Act, to produce lawful witnesses  
5            to testify in support of the defendant, and shall com-  
6            pel such witnesses to appear at trial in the same  
7            manner that witnesses are compelled to appear on  
8            behalf of the prosecution.

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

12            (1) have been admitted to practice for not less  
13            than 5 years in the appropriate State appellate  
14            court;

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

17            (3) be learned in the law applicable to capital  
18            cases.

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

23          **SEC. 4. ADEQUATE REPRESENTATION.**

24            (a) APPOINTMENT OF SUBSTITUTE COUNSEL.—With  
25          respect to this section, the court, for good cause, may ap-

1 point another attorney whose background, knowledge, or  
2 experience would otherwise enable the attorney to properly  
3 represent the defendant, with due consideration to the se-  
4 riousness of the possible penalty and to the unique and  
5 complex nature of the litigation.

6 (b) SCOPE OF LEGAL REPRESENTATION.—Unless re-  
7 placed by similarly qualified counsel upon the motion of  
8 the attorney or the defendant, each attorney appointed  
9 under this Act shall represent the defendant throughout  
10 every stage of available judicial proceedings, including—

- 11 (1) pretrial motions and procedures;
- 12 (2) competency proceedings;
- 13 (3) trial;
- 14 (4) sentencing;
- 15 (5) executive and other clemency proceedings;
- 16 (6) motions for new trial;
- 17 (7) appeals;
- 18 (8) applications for stays of execution; and
- 19 (9) applications for writ of certiorari to the Su-  
20 preme Court of the United States.

21 (c) ADDITIONAL SERVICES.—

- 22 (1) IN GENERAL.—Upon a finding that inves-  
23 tigative, expert, or other services are reasonably nec-  
24 essary for the representation of the defendant,  
25 whether in connection with issues relating to guilt or

1 the sentence, the court may authorize the attorneys  
2 for the defendant to obtain such services on behalf  
3 of the defendant and, if so authorized, shall order  
4 the payment of fees and expenses for such services  
5 pursuant to section 5.

6 (2) EX PARTE COMMUNICATIONS.—No ex parte  
7 proceeding, communication, or request may be con-  
8 sidered under this section unless a proper showing  
9 is made concerning the need for confidentiality. Any  
10 such proceeding, communication, or request shall be  
11 transcribed and made a part of the record available  
12 for appellate review.

13 **SEC. 5. ATTORNEY FEES AND COSTS.**

14 (a) ATTORNEY FEES.—Compensation shall be paid  
15 to attorneys appointed under this Act at a rate equivalent  
16 to that of attorneys representing defendants in Federal  
17 capital cases under section 408(q)(10)(A) of the Con-  
18 trolled Substances Act (21 U.S.C. 848(q)(10)(A)).

19 (b) ADDITIONAL EXPENSES.—Fees and expenses  
20 paid for investigative, expert, and other reasonably nec-  
21 essary services authorized under this section shall be  
22 equivalent to fees paid in Federal capital cases under sec-  
23 tion 408(q)(10)(B) of the Controlled Substances Act (21  
24 U.S.C. 848(q)(10)(B)).

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

4 **SEC. 6. IRREBUTTABLE PRESUMPTION OF DEFICIENT PER-**  
5 **FORMANCE.**

6 (a) IN GENERAL.—In a proceeding in Federal court  
7 under section 2254 of title 28, United States Code, the  
8 failure to comply with the procedures of this Act shall cre-  
9 ate an irrebuttable presumption that the performance of  
10 the counsel for the petitioner was deficient.

11 (b) ENTITLEMENT TO RELIEF; BURDEN OF PROOF;  
12 STANDARD OF REVIEW.—A petitioner is not entitled to  
13 relief unless the petitioner shows that the result of the  
14 proceeding would have been different if the performance  
15 of the counsel for the petitioner had not been deficient.  
16 The party opposing the petition has the burden of estab-  
17 lishing that the standards in this section have been met.  
18 The court shall conduct a de novo review to settle this  
19 issue.

20 (c) OTHER REMEDIES.—The provisions of this sec-  
21 tion are not intended to limit any other Federal or State  
22 court from enforcing this section by any other appropriate  
23 remedy.

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