

Calendar No. 281

103D CONGRESS
1ST SESSION

S. 1657

A BILL

To reform habeas corpus procedures.

NOVEMBER 10 (legislative day, NOVEMBER 2), 1993

Ordered to be placed on the calendar

Calendar No. 281103^D CONGRESS
1ST SESSION**S. 1657**

IN THE SENATE OF THE UNITED STATES

NOVEMBER 10 (legislative day, NOVEMBER 2), 1993

Mr. DOLE (for Mr. SPECTER) introduced the following bill; which was read
twice and ordered to be placed on the calendar

A BILL

To reform habeas corpus procedures.

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

3 **SEC. 301. SHORT TITLE.**

4 This title may be cited as “A bill to enforce the four-
5 tenth amendment and to reform habeas corpus.”.

6 **SEC. 302. FILING DEADLINES.**

7 (a) IN GENERAL.—Section 2242 of title 28, United
8 States Code, is amended—

9 (1) by amending the heading to read as follows:

1 **“§2242. Filing of habeas corpus petition; time re-**
2 **quirements; tolling rules”;**

3 (2) by inserting “(a)(1)” before the first para-
4 graph, “(2)” before the second paragraph, “(3)” be-
5 fore the third paragraph, and “(4)” before the
6 fourth paragraph;

7 (3) by amending the third paragraph, as des-
8 ignated by paragraph (3), to read as follows:

9 “(3) Leave to amend or supplement the petition shall
10 be freely given, as provided in the rules of procedure appli-
11 cable to civil actions.”; and

12 (4) by adding at the end the following new sub-
13 sections:

14 “(b) An application for habeas corpus relief under
15 section 2254 shall be filed in the appropriate district court
16 not later than 180 days after—

17 “(1) the last day for filing a petition for writ
18 of certiorari in the United States Supreme Court on
19 direct appeal or unitary review of the conviction and
20 sentence, if such a petition has not been filed within
21 the time limits established by law;

22 “(2) the date of the denial of a writ of certio-
23 rari, if a petition for a writ of certiorari to the high-
24 est court of the State on direct appeal or unitary re-
25 view of the conviction and sentence is filed, within

1 the time limits established by law, in the United
2 States Supreme Court; or

3 “(3) the date of the issuance of the mandate of
4 the United States Supreme Court, if on a petition
5 for a writ of certiorari the Supreme Court grants
6 the writ and disposes of the case in a manner that
7 leaves the sentence undisturbed.

8 “(2) The time requirements established by subsection
9 (b) shall not apply unless the State has provided notice
10 to a petitioner under sentence of death of the time require-
11 ments established by this section. Such notice shall be pro-
12 vided upon the final disposition of the initial petition for
13 State post-conviction review.

14 “(3) In a case in which a sentence of death has been
15 imposed, the time requirements established by subsection
16 (b) shall be tolled—

17 “(A) during any period in which the State has
18 failed to appoint counsel for State post-conviction re-
19 view as required in section 2258;

20 “(B) during any period in which the petitioner
21 is incompetent; and

22 “(C) during an additional period, not to exceed
23 60 days, if the petitioner makes a showing of good
24 cause.

1 “(d)(1) Notwithstanding the filing deadline imposed
2 by subsection (b), if a petitioner under a sentence other
3 than death has filed—

4 “(A) a petition for post-conviction review in
5 State court; or

6 “(B) a request for counsel for post-conviction
7 review,

8 before the expiration of the period described in subsection
9 (b), the petitioner shall have 180 days to file a petition
10 under this chapter upon completion of the State court re-
11 view.

12 “(2) The time requirements established by subsection
13 (b) shall not apply in a case in which a sentence other
14 than death has been imposed unless—

15 “(A) the State has provided notice to the peti-
16 tioner of the time requirements established by this
17 section and of the availability of counsel as described
18 in subparagraph (B); such notice shall be provided
19 orally at the time of sentencing and in writing at the
20 time the petitioner’s conviction becomes final, except
21 that in a case in which the petitioner’s conviction be-
22 comes final within 30 days of sentencing, the State
23 may provide both the oral and the written notice at
24 sentencing; in all cases, the written notice to peti-
25 tioner shall include easily understood instructions for

1 filing a request for counsel for State post-conviction
2 review; and

3 “(B)(i) the State provides counsel to the peti-
4 tioner upon the filing of a request for counsel for
5 State post-conviction review; or

6 “(ii) the State provides counsel to the peti-
7 tioner, if a request for counsel for State post-convic-
8 tion review is not filed, upon the filing of a petition
9 for post-conviction review.

10 “(3) The time requirements established by subsection
11 (b) shall be tolled in a case in which a sentence other than
12 death has been imposed—

13 “(A) during any period in which the petitioner
14 is incompetent; and

15 “(B) during an additional period, not to exceed
16 60 days, if the petitioner makes a showing of good
17 cause.

18 “(e) An application that is not filed within the time
19 requirements established by subsection (b) shall be gov-
20 erned by section 2244(b).”.

21 (b) TECHNICAL AMENDMENT.—The chapter analysis
22 for chapter 153 of title 28, United States Code is amended
23 by amending the item relating to section 2242 to read as
24 follows:

“2242. Filing of habeas corpus petition; time requirements; tolling rules.”.

1 **SEC. 303. STAYS OF EXECUTION IN CAPITAL CASES.**

2 Section 2251 of title 28, United States Code, is
3 amended—

4 (1) by inserting “(a)(1)” before the first para-
5 graph and “(2)” before the second paragraph; and

6 (2) by adding at the end the following new sub-
7 sections:

8 “(b) In the case of a person under sentence of death,
9 a warrant or order setting an execution shall be stayed
10 upon application to any court that would have jurisdiction
11 over a habeas corpus petition under this chapter. The stay
12 shall be contingent upon the exercise of reasonable dili-
13 gence by the applicant in pursuing relief with respect to
14 the sentence and shall expire if—

15 “(1) the applicant fails to file for relief under
16 this chapter within the time requirements estab-
17 lished by section 2242;

18 “(2) upon completion of district court and court
19 of appeals review under section 2254, the application
20 is denied and—

21 “(A) the time for filing a petition for a
22 writ of certiorari expires before a petition is
23 filed;

24 “(B) a timely petition for a writ of certio-
25 rari is filed and the Supreme Court denies the
26 petition; or

1 **“§ 2257. Law applicable**

2 “In cases subject to this chapter, all claims shall be
3 governed by the law as it was when the petitioner’s convic-
4 tion became final. A court considering a claim under this
5 chapter shall consider intervening decisions by the Su-
6 preme Court of the United States which establish fun-
7 damental constitutional rights.”.

8 (2) TECHNICAL AMENDMENT.—The chapter
9 analysis for chapter 153 of title 28, United States
10 Code, as amended by section 306(b), is amended by
11 adding at the end the following new item:

“2257. Law applicable.”.

12 (b) STANDARD OF REVIEW.—Section 2254(a) of title
13 28, United States Code, is amended by adding at the end
14 the following: “Except as to Fourth Amendment claims
15 controlled by *Stone v. Powell*, 428 U.S. 465 (1976), the
16 Federal courts, in reviewing an application under this sec-
17 tion, shall review de novo the rulings of a State court on
18 matters of Federal law, including the application of Fed-
19 eral law to facts, regardless of whether the opportunity
20 for a full and fair hearing on such Federal questions has
21 been provided in the State court. In the case of a violation
22 that can be harmless, the State shall bear the burden of
23 proving harmlessness.”.

1 **SEC. 305. LIMITS ON SUCCESSIVE PETITIONS.**

2 Section 2244(b) of title 28, United States Code, is
3 amended to read as follows:

4 “(b)(1) A claim presented in a habeas corpus petition
5 that was not timely presented in a prior petition shall be
6 dismissed unless—

7 “(A) the petitioner shows that—

8 “(i) the failure to raise the claim pre-
9 viously was the result of interference by State
10 officials with the presentation of the claim, in
11 violation of the Constitution or laws of the
12 United States;

13 “(ii) the claim relies on a new rule that is
14 applicable under section 2257 and was pre-
15 viously unavailable; or

16 “(iii) the factual predicate for the claim
17 could not have been discovered previously
18 through the exercise of reasonable diligence;
19 and

20 “(B) the facts underlying the claim, if proven
21 and viewed in light of the evidence as a whole, would
22 be sufficient to—

23 “(i) undermine the court’s confidence in
24 the factfinder’s determination of the applicant’s
25 guilt of the offense or offenses for which the
26 sentence was imposed; or

1 “(ii) demonstrate that no reasonable sen-
2 tencing authority would have found an aggra-
3 vating circumstance or other condition of eligi-
4 bility for a capital or noncapital sentence, or
5 otherwise would have imposed a sentence of
6 death.

7 “(2)(A) Before a successive petition is filed in the dis-
8 trict court, the petitioner must move in the appropriate
9 court of appeals for an order authorizing the district court
10 to consider the petition.

11 “(B) A motion in the court of appeals for an order
12 authorizing the district court to consider a successive peti-
13 tion shall be determined by more than one judge of the
14 court of appeals.

15 “(C) The court of appeals may authorize the filing
16 of a successive petition only if it determines that the peti-
17 tioner has demonstrated that probable cause exists to be-
18 lieve that the petition satisfies the requirements of this
19 section.”.

20 **SEC. 306. NEW EVIDENCE.**

21 (a) IN GENERAL.—Chapter 153 of title 28, United
22 States Code, as amended by section 304(a)(1), is amended
23 by adding at the end the following new section:

1 **“§ 2256. Capital cases; new evidence**

2 “For purposes of this chapter, a claim arising from
3 a violation of the Constitution, laws, or treaties of the
4 United States shall include a claim by a person under sen-
5 tence of death that is based on factual allegations that,
6 if proven and viewed in light of the evidence as a whole,
7 would be sufficient to demonstrate that no reasonable
8 factfinder would have found the petitioner guilty of the
9 offense or that no reasonable sentencing authority would
10 have found an aggravating circumstance or other condi-
11 tion of eligibility for the sentence. Such a claim shall be
12 dismissed if the facts supporting the claim were actually
13 known to the petitioner during a prior stage of the litiga-
14 tion in which the claim was not raised. Notwithstanding
15 any other provision of this chapter, the claim shall not
16 be subject to section 2244(b) or the time requirements es-
17 tablished by section 2242. In all other respects, the claim
18 shall be subject to the rules applicable to claims under this
19 chapter.”.

20 (b) TECHNICAL AMENDMENT.—The chapter analysis
21 for chapter 153 of title 28, United States Code, as amend-
22 ed by section 304(a)(2), is amended by adding at the end
23 the following new item:

“2258. Capital cases; new evidence.”.

1 **SEC. 307. CERTIFICATES OF PROBABLE CAUSE.**

2 The third paragraph of section 2253 of title 28, Unit-
3 ed States Code, is amended by adding at the end the fol-
4 lowing: “However, an applicant under sentence of death
5 shall have a right of appeal without a certificate of prob-
6 able cause, except after denial of a habeas corpus petition
7 filed under section 2244(b).”.

8 **SEC. 308. TIME REQUIREMENTS FOR CONSIDERATION BY**
9 **DISTRICT COURTS OF HABEAS CORPUS PETI-**
10 **TIONS IN CAPITAL CASES.**

11 (a) IN GENERAL.—Chapter 153 of title 28, United
12 States Code, as amended by section 306(a), is amended
13 by adding at the end the following new section:

14 **“§ 2259. Time limitations for consideration by the dis-**
15 **trict courts habeas corpus petitions in**
16 **capital cases**

17 “(a) IN GENERAL.—

18 “(1) FINAL DETERMINATION WITHIN 180
19 DAYS.—A district court shall render a final deter-
20 mination of any petition for a writ of habeas corpus
21 brought under this chapter in a capital case within
22 180 days after the date on which the petition is
23 filed.

24 “(2) DELAY.—(A) A district court may delay
25 the rendering of a determination of a petition be-
26 yond 180 days if the court issues a written order

1 making finding, and stating the reasons for the find-
2 ing, that the ends of justice that would be served by
3 allowing the delay outweigh the best interests of
4 public and the petitioner in a speedy disposition of
5 the petition.

6 “(B) The factors, among others, that a court
7 shall consider in determining whether a delay in dis-
8 position of a petition is permissible are as follows:

9 “(i) Whether the failure to allow the delay
10 would be likely to result in a miscarriage of jus-
11 tice.

12 “(ii) Whether the case is so unusual or so
13 complex, due to the number of defendants, the
14 nature of the prosecution, or the existence of
15 novel questions of fact or law, that it is unrea-
16 sonable to expect adequate briefing within the
17 time limit established by paragraph (1).

18 “(iii) Whether the failure to allow a delay
19 in a case that, taken as a whole, is not so un-
20 usual or so complex as described in clause (ii),
21 would deny the petitioner reasonable time to ob-
22 tain counsel, would unreasonably deny the peti-
23 tioner or the government continuity of counsel,
24 or would deny counsel for the petitioner or the
25 attorney for the government the reasonable

1 time necessary for effective preparation, taking
2 into account the exercise of due diligence.

3 “(C) No delay in disposition shall be permis-
4 sible because of general congestion of the court’s cal-
5 endar or lack of diligent preparation on the part of
6 the attorney for the government.

7 “(D) The court shall transmit a copy of any
8 order issued under subparagraph (A) to the Director
9 of the Administrative Office of the United States
10 Courts for inclusion in the report under subsection
11 (e).

12 “(b) APPLICATION.—The time limitations under sub-
13 section (a) shall apply to—

14 “(1) an initial petition for a writ of habeas cor-
15 pus;

16 “(2) any second or successive petition for a writ
17 of habeas corpus; and

18 “(3) any re-determination of a petition for a
19 writ of habeas corpus following a remand by the
20 court of appeals or the Supreme Court for further
21 proceedings, in which case the limitation period shall
22 run from the date of the remand.

23 “(c) RULE OF CONSTRUCTION.—The time limitations
24 under this section shall not be construed to entitle a peti-
25 tioner to a stay of execution, to which the petitioner would

1 otherwise not be entitled, for the purpose of litigating any
2 petition or appeal.

3 “(d) FAILURE TO RENDER TIMELY DETERMINA-
4 TION.—

5 “(1) NO GROUND FOR RELIEF.—The failure of
6 a court to meet or comply with a time limitation
7 under this section shall not be a ground for granting
8 relief from a judgment of conviction or sentence.

9 “(2) ENFORCEMENT.—The government may
10 enforce a time limitation under this section by apply-
11 ing for a writ of mandamus to the court of appeals.

12 “(e) REPORT.—

13 “(1) IN GENERAL.—The Administrative Office
14 of United States Courts shall submit to Congress an
15 annual report on the compliance by the district
16 courts with the time limitations under this section.

17 “(2) CONTENTS.—The report described in
18 paragraph (1) shall include copies of the orders sub-
19 mitted by the district courts under subsection
20 (a)(2)(D).”.

21 (b) TECHNICAL AMENDMENT.—The chapter analysis
22 for chapter 153 of title 28, United States Code, as amend-
23 ed by section 308(b), is amended by adding at the end
24 the following new item:

“2259. Time limitations for consideration by the district courts of petitions for
habeas corpus in capital cases.”.

1 **SEC. 309. TIME REQUIREMENTS FOR CONSIDERATION BY**
2 **COURTS OF APPEALS OF APPEALS OF DIS-**
3 **TRICT COURT DETERMINATIONS OF HABEAS**
4 **CORPUS PETITIONS IN CAPITAL CASES.**

5 (a) IN GENERAL.—Chapter 153 of title 28, United
6 States Code, as amended by section 306(a), is amended
7 by adding at the end the following new section:

8 **“§ 2260. Time limitations for consideration by courts**
9 **of appeals of district court determina-**
10 **tions of habeas corpus petitions in cap-**
11 **ital cases**

12 “(a) IN GENERAL.—

13 “(1) FINAL DETERMINATION WITHIN 120
14 DAYS.—A court of appeals shall hear and render a
15 final determination of any appeal of an order grant-
16 ing or denying, in whole or in part, a petition
17 brought under this chapter in a capital case within
18 120 days after the date on which the notice of ap-
19 peal is filed.

20 “(2) HEARING EN BANC.—(A) A court of ap-
21 peals shall decide whether to grant a petition for re-
22 hearing en banc within 20 days after the date on
23 which the petition for rehearing is filed unless a re-
24 sponsive pleading is required, in which case the
25 court shall decide whether to grant the petition with-

1 in 20 days after the date on which the responsive
2 pleading is filed.

3 “(B) If a petition for rehearing is granted, the
4 court of appeals shall hear and render a final deter-
5 mination of the appeal within 120 days after the
6 date on which the order granting rehearing is en-
7 tered.

8 “(b) APPLICATION.—The time limitations under sub-
9 section (a) shall apply to—

10 “(1) an initial petition for a writ of habeas cor-
11 pus;

12 “(2) any second or successive petition for a writ
13 of habeas corpus; and

14 “(3) any re-determination of a petition for a
15 writ of habeas corpus or related appeal following a
16 remand by the court of appeals or the Supreme
17 Court for further proceedings, in which case the lim-
18 itation period shall run from the date of the remand.

19 “(c) RULE OF CONSTRUCTION.—The time limitations
20 under this section shall not be construed to entitle a peti-
21 tioner to a stay of execution, to which the petitioner would
22 otherwise not be entitled, for the purpose of litigating any
23 petition or appeal.

24 “(d) FAILURE TO RENDER TIMELY DETERMINA-
25 TION.—

1 “(1) NO GROUND FOR RELIEF.—The failure of
2 a court to meet or comply with a time limitation
3 under this section shall not be a ground for granting
4 relief from a judgment of conviction or sentence.

5 “(2) ENFORCEMENT.—The government may
6 enforce a time limitation under this section by apply-
7 ing for a writ of mandamus to the Supreme Court.

8 “(e) REPORT.—The Administrative Office of United
9 States Courts shall submit to Congress an annual report
10 on the compliance by the courts of appeals with the time
11 limitations under this section.”.

12 (b) TECHNICAL AMENDMENT.—The chapter analysis
13 for chapter 153 of title 28, United States Code, as amend-
14 ed by section 306(b), is amended by adding at the end
15 the following new item:

“2260. Time limitations for consideration by courts of appeal of appeals of dis-
trict court determinations of habeas corpus petitions in capital
cases.”.

16 **SEC. 310. ABOLITION OF EXHAUSTION OF COLLATERAL**
17 **REMEDIES REQUIREMENT IN CAPITAL**
18 **CASES.**

19 Section 2254(b) of title 28, United States Code is
20 amended to read as follows:

21 “(b)(1) Except in a capital case, an application for
22 a writ of habeas corpus in behalf of a person in custody
23 pursuant to the judgment of a State court shall not be
24 granted unless it appears that the applicant has exhausted

1 the remedies available in the courts of the State (including
2 opportunities to petition the Supreme Court for certiorari
3 review on direct appeal and any available collateral review
4 in the State courts), or that there is either an absence
5 of available State corrective process or the existence of cir-
6 cumstances rendering such process ineffective to protect
7 the rights of the prisoner.

8 “(2) In a capital case, an application for a writ of
9 habeas corpus in behalf of a person in custody pursuant
10 to the judgment of a State court shall not be granted un-
11 less it appears that the applicant has exhausted the rem-
12 edies available in the courts of the State (including oppor-
13 tunities to petition the Supreme Court for certiorari review
14 on direct appeal but not including any available collateral
15 review in the State courts), or that there is either an ab-
16 sence of available State corrective proceeds or the exist-
17 ence of circumstances rendering such process ineffective
18 to protect the rights of the prisoner.”.

19 **SEC. 311. PROVISION OF COUNSEL.**

20 (a) IN GENERAL.—Chapter 153 of title 28, United
21 States Code, as amended by section 304(a)(1), is amended
22 by adding at the end the following new section:

23 **“§ 2258. Counsel in capital cases; State court**

24 “(a) FINDING AND DECLARATION.—The Congress
25 finds that inadequate representation in State capital

1 trials, appeals and post-conviction proceedings increases
2 unacceptably the risk of constitutional and factual error.
3 The possibility of such errors puts into question the valid-
4 ity of individual convictions and the conformity of State
5 criminal justice systems with the commands of the Due
6 Process Clause of the Fourteenth Amendment. The Con-
7 gress therefore determines that the following requirements
8 are a necessary and appropriate means, pursuant to its
9 authority under section 5 of that Amendment, of enforcing
10 the Due Process Clause.

11 “(b) COUNSEL.—(1) A State in which a sentence of
12 death may be imposed under State law shall provide legal
13 services to—

14 “(A) indigents charged with offenses for which
15 capital punishment is sought;

16 “(B) indigents who have been sentenced to
17 death and who seek appellate, post-conviction, or
18 unitary review in State court; and

19 “(C) indigents who have been sentenced to
20 death and who seek certiorari review of State court
21 judgments in the United States Supreme Court.

22 “(2) This section shall not apply or form a basis for
23 relief to nonindigents.

24 “(c) COUNSEL CERTIFICATION AUTHORITY.—A
25 State in which a sentence of death may be imposed under

1 State law shall, within 180 days after the date of enact-
2 ment of this subsection, establish a State counsel certifi-
3 cation authority, which shall be comprised of members of
4 the bar with substantial experience in, or commitment to,
5 the representation of criminal defendants in capital cases,
6 and shall be comprised of a balanced representation from
7 each segment of the State's criminal defense bar, such as
8 a statewide defender organization, a capital case resource
9 center, local public defender's offices and private attorneys
10 involved in criminal trial, appellate, post-conviction, or
11 unitary review practice. If a State fails to establish a coun-
12 sel certification authority within 180 days after the date
13 of enactment of this subsection, a private cause of action
14 may be brought in Federal district court to enforce this
15 subsection by any aggrieved party, including a defendant
16 eligible for appointed representation under this subsection
17 or a member of an organization eligible for representation
18 on the counsel certification authority. If the court finds
19 that the State has failed to establish a counsel certification
20 authority as required by this subsection, the court shall
21 grant appropriate injunctive and declaratory relief, except
22 that the court shall not grant relief that disturbs any
23 criminal conviction or sentence, obstructs the prosecution
24 of State criminal proceedings, or alters proceedings arising
25 under this chapter.

1 “(d) DUTIES OF AUTHORITY; CERTIFICATION OF
2 COUNSEL.—The counsel certification authority shall—

3 “(1) establish and publish standards governing
4 qualifications of counsel, which shall include—

5 “(A) knowledge and understanding of per-
6 tinent legal authorities regarding issues in cap-
7 ital cases;

8 “(B) skills in the conduct of negotiations
9 and litigation in capital cases, the investigation
10 of capital cases and the psychiatric history and
11 current condition of capital clients, and the
12 preparation and writing of legal papers in cap-
13 ital cases;

14 “(C) the minimum qualifications required
15 by subsection (e); and

16 “(D) any additional qualifications relevant
17 to the representation of capital defendants;

18 “(2) establish application and certification pro-
19 cedures for attorneys who possess the qualifications
20 established pursuant to paragraph (1);

21 “(3) establish application and certification pro-
22 cedures for attorneys who do not possess all the
23 qualifications established pursuant to paragraph (1)
24 but who possess, in addition to the minimum quali-
25 fications required by subsection (e), additional re-

1 sources (such as an affiliation with a publicly funded
2 defender organization) and experience that enable
3 them to provide quality legal representation com-
4 parable to that of an attorney possessing the quali-
5 fications established pursuant to paragraph (1);

6 “(4) establish application and certification pro-
7 cedures, to be used on a case by case basis, for at-
8 torneys who do not necessarily possess the minimum
9 qualifications required by subsection (e), but who
10 possess other extraordinary experience and resources
11 that enable them to provide quality legal representa-
12 tion comparable to that of an attorney possessing
13 the qualifications established pursuant to paragraph
14 (1);

15 “(5) publish a current roster of attorneys cer-
16 tified pursuant to paragraphs (2) and (3) to be ap-
17 pointed in capital cases;

18 “(6) establish and publish standards governing
19 the performance of counsel in capital cases, includ-
20 ing standards that proscribe abusive practices and
21 mandate sound practices in order to further the fair
22 and orderly administration of justice;

23 “(7) monitor the performance of attorneys cer-
24 tified pursuant to this subsection; and

1 “(8) delete from the roster the name of any at-
2 torney who fails to meet the qualification or per-
3 formance standards established pursuant to this
4 subsection.

5 “(e) MINIMUM COUNSEL STANDARDS.—All counsel
6 certified pursuant to paragraph (2) or (3) of subsection
7 (d) or appointed pursuant to subsection (f) shall possess,
8 in addition to any qualifications required by State or local
9 law, the following minimum qualifications:

10 “(1) familiarity with the performance standards
11 established by the counsel certification authority;

12 “(2) familiarity with the appropriate court sys-
13 tem, including the procedural rules regarding timeli-
14 ness of filings and procedural default; and

15 “(3) in the case of counsel appointed for the
16 trial or sentencing stages, at least 2 of the qualifica-
17 tions listed in subparagraph (A) and 1 of the quali-
18 fications listed in subparagraph (B), or 1 of the al-
19 ternative qualifications listed in subparagraph (C):

20 “(A) QUALIFYING TRIAL EXPERIENCE
21 (MUST HAVE 2).—Prior experience within the
22 last 10 years as—

23 “(i) lead or sole counsel in 12 jury
24 trials, of which no fewer than 5 were crimi-
25 nal jury trials;

1 “(ii) lead or sole counsel in 3 criminal
2 jury trials in which the charge was murder
3 or aggravated murder;

4 “(iii) co-counsel in 5 criminal jury
5 trials in which the charge was murder or
6 aggravated murder;

7 “(iv) lead or sole counsel in no fewer
8 than 5 criminal jury trials involving crimes
9 of violence against persons, punishable by
10 imprisonment of over 1 year,
11 which were tried to a verdict or to a deadlocked
12 jury.

13 “(B) QUALIFYING CAPITAL TRIAL EXPERI-
14 ENCE (MUST HAVE 1).—

15 “(i) lead or sole counsel within the
16 last 5 years in the trial of at least 1 capital
17 case that was tried through sentencing;

18 “(ii) co-counsel in the trial of no fewer
19 than 2 capital cases (1 of which occurred
20 within the last 5 years) that were tried
21 through sentencing;

22 “(iii) successful completion within the
23 preceding 2 years of a training program in
24 capital trial litigation that has been cer-
25 tified by the counsel certification authority

1 or, if the authority has not certified a pro-
2 gram, successful completion of an at least
3 12-hour training program in capital trial
4 litigation for which continuing legal edu-
5 cation (CLE) credit is available, and which
6 the CLE authority in the State has cer-
7 tified as comporting with the objectives
8 and requirements of this section.

9 “(C) ALTERNATIVE QUALIFYING EXPERI-
10 ENCE FOR TRIAL.—Notwithstanding subpara-
11 graphs (A) and (B), an attorney shall be eligi-
12 ble for certification pursuant to paragraph (2)
13 or (3) of subsection (d) or appointment pursu-
14 ant to subsection (g) if the attorney—

15 “(i) has conducted 5 evidentiary hear-
16 ings and has been employed for more than
17 1 year by a capital resource center, a unit
18 or its equivalent that specializes in capital
19 cases within a public defender office, or a
20 public interest law office specializing in
21 capital litigation; or

22 “(ii) has been certified by the State
23 capital litigation resource center as com-
24 petent to be assigned to a capital trial;

1 “(4) in the case of counsel appointed for appel-
2 late or unitary review, at least 1 of the qualifications
3 listed in subparagraph (A) and 1 of the qualifica-
4 tions listed in subparagraph (B), or 1 of the alter-
5 native qualifications listed in subparagraph (C):

6 “(A) QUALIFYING APPELLATE EXPERI-
7 ENCE (MUST HAVE 1).—Prior experience within
8 the past 5 years as—

9 “(i) lead or sole counsel in no fewer
10 than 10 appeals, of which no fewer than 5
11 were criminal appeals;

12 “(ii) lead or sole counsel in at least 6
13 criminal felony appeals;

14 “(iii) lead or sole counsel in 3 crimi-
15 nal or felony appeals, at least 1 of which
16 was an appeal of a murder or aggravated
17 murder conviction,

18 which were fully briefed.

19 “(B) QUALIFYING CAPITAL APPELLATE
20 EXPERIENCE (MUST HAVE 1).—

21 “(i) lead or sole counsel within the
22 last 5 years in the appeal or unitary review
23 of at least 1 capital case;

24 “(ii) co-counsel in the appeal or uni-
25 tary review of no fewer than 2 capital

1 cases, 1 of which occurred within the last
2 5 years;

3 “(iii) successful completion within the
4 preceding 2 years of a training program in
5 the litigation of capital appeals that has
6 been certified by the counsel certification
7 authority or, if the authority has not cer-
8 tified a program, successful completion of
9 an at least 12-hour training program in
10 capital litigation with a focus on appeals
11 for which continuing legal education
12 (CLE) credit is available, and which the
13 CLE authority in the State has certified as
14 comporting with the objectives and the re-
15 quirements of this section.

16 “(C) ALTERNATIVE QUALIFYING EXPERI-
17 ENCE FOR APPEALS.—Notwithstanding sub-
18 paragraphs (A) and (B), an attorney shall be
19 eligible for certification pursuant to paragraph
20 (2) or (3) of subsection (c) or for appointment
21 pursuant to subsection (f) if the attorney—

22 “(i) has been employed for more than
23 1 year by a capital resource center, a unit
24 or its equivalent that specializes in capital
25 cases within a public defender office, or a

1 public interest law office specializing in
2 capital litigation; or

3 “(ii) has been certified by the State
4 capital litigation resource center as com-
5 petent to be assigned to a capital appeal;
6 and

7 “(5) in the case of counsel appointed for post-
8 conviction proceedings, at least 2 of the qualifica-
9 tions listed in subparagraph (A) and at least 1 of
10 the qualifications listed in subparagraph (B), or 1 of
11 the alternative qualifications listed in subparagraph
12 (C):

13 “(A) QUALIFYING POST-CONVICTION EXPE-
14 RIENCE (MUST HAVE 2).—Prior experience with-
15 in the past 10 years as—

16 “(i) lead or sole counsel in no fewer
17 than 3 post-conviction proceedings;

18 “(ii) co-counsel in no fewer than 5
19 post-conviction proceedings;

20 “(iii) 1 of the trial qualifications listed
21 in paragraph (3)(A);

22 “(iv) 1 of the appellate qualifications
23 listed in paragraph (4)(A).

24 “(B) QUALIFYING CAPITAL POST-CONVIC-
25 TION EXPERIENCE (MUST HAVE 1).—

1 “(i) lead or sole counsel within the
2 last 5 years in the trial (through sentenc-
3 ing), appeal, or post-conviction review of at
4 least 1 capital case;

5 “(ii) co-counsel in the trial (through
6 sentencing), appeal, or post-conviction re-
7 view of no fewer than 2 capital cases, 1 of
8 which occurred within the last 5 years;

9 “(iii) successful completion during the
10 preceding 2 years of a training program in
11 the litigation of capital post-conviction pro-
12 ceedings that has been certified by the
13 counsel certification authority or, if the au-
14 thority has not certified a program, suc-
15 cessful completion of an at least 12-hour
16 training program in capital litigation with
17 a focus on post-conviction proceedings for
18 which continuing legal education (CLE)
19 credit is available, and which the CLE au-
20 thority in the State has certified as com-
21 porting with the objectives and require-
22 ments of this section.

23 “(C) ALTERNATIVE QUALIFYING EXPERI-
24 ENCE FOR POST-CONVICTION PROCEEDINGS.—
25 Notwithstanding subparagraphs (A) and (B),

1 an attorney shall be eligible for certification
2 pursuant to paragraph (2) or (3) of subsection
3 (d) or appointment pursuant to subsection (g)
4 if the attorney—

5 “(i) has conducted 3 evidentiary hear-
6 ings and has been employed for more than
7 1 year by a capital litigation resource cen-
8 ter, by a unit or its equivalent that special-
9 izes in capital cases within a public de-
10 fender office, or by a public interest law of-
11 fice specializing in capital litigation; or

12 “(ii) has been certified by the State
13 capital litigation resource center as com-
14 petent to be assigned to a capital post-con-
15 viction proceeding.

16 “(f) APPOINTMENT OF CERTIFIED COUNSEL.—(1)

17 The State court shall appoint at least 2 attorneys to rep-
18 resent an indigent at trial, and at least 1 attorney to rep-
19 resent an indigent at the appellate, unitary or post-convic-
20 tion review stage, including—

21 “(A) a lead counsel who is named on the roster
22 published pursuant to subsection (d)(5);

23 “(B) a defender organization or resource cen-
24 ter, which shall designate appropriate attorneys af-

1 filiated with the organization, including a lead coun-
2 sel who is named on the roster; or

3 “(C) a lead counsel certified pursuant to sub-
4 section (d)(4).

5 “(2) The State court may appoint additional attor-
6 neys upon a showing of need.

7 “(g) APPOINTMENT OF NONCERTIFIED COUNSEL.—

8 (1) If there is no roster of attorneys published pursuant
9 to subsection (d)(5), or if no attorney on the roster can
10 accept the appointment and if no attorney certified pursu-
11 ant to subsection (d)(4) has been appointed, the State
12 court shall appoint at least 2 attorneys to represent an
13 indigent at trial, and at least 1 attorney to represent an
14 indigent at the appellate, unitary or post-conviction review
15 stage, including—

16 “(A) a lead counsel who possesses the minimum
17 qualifications required by subsection (e); or

18 “(B) a defender organization or resource cen-
19 ter, which shall designate appropriate attorneys af-
20 filiated with the organization, including a lead coun-
21 sel who possesses the qualifications required by sub-
22 section (e).

23 “(2) No attorney shall be appointed pursuant to this
24 subsection unless the State court has first conducted an
25 evidentiary hearing on the record in which the court deter-

1 mines, after the attorney gives sworn testimony and pre-
2 sents documentary proof that the attorney possesses each
3 of the qualifications required by subsection (e), that the
4 attorney possesses the requisite qualifications. In making
5 its determination, the court shall, as to each qualification
6 required by subsection (e), make a specific finding on the
7 record that the attorney possesses the qualification.

8 “(h) No attorney may be denied certification pursu-
9 ant to paragraph (2) or (3) of subsection (d) or appoint-
10 ment pursuant to subsection (g) solely because of prior
11 employment as a prosecutor.

12 “(i) Prior to appointing counsel pursuant to this sec-
13 tion, the State court shall inquire as to whether counsel
14 maintains a workload which, by reason of its excessive
15 size, will interfere with the rendering of quality represen-
16 tation or create a substantial risk of a breach of profes-
17 sional obligations.

18 “(j) If a person entitled to an appointment of counsel
19 declines to accept an appointment, the State court shall
20 conduct, or cause to be conducted, a hearing, at which
21 the person and counsel proposed to be appointed shall be
22 present, to determine the person’s competence to decline
23 the appointment, and whether the person has competently
24 and knowingly declined it.

1 “(k) If a State court fails to appoint counsel in a
2 proceeding specified in subsection (b), or if a State court
3 in a proceeding described in subsection (b)—

4 “(1) fails to appoint the number of counsel re-
5 quired in subsection (f);

6 “(2) appoints counsel whose name is not on the
7 roster published pursuant to subsection (d)(5);

8 “(3) appoints counsel who has failed to present
9 a certification issued pursuant to subsection (d)(4);
10 or

11 “(4) when subsection (g) applies, fails to hold
12 the hearing, receive the requisite testimony and
13 proof, or make the determination required by sub-
14 section (g),

15 a Federal court, in a proceeding under this chapter, shall
16 neither presume findings of fact made at such proceeding
17 to be correct nor decline to consider a claim on the ground
18 that it was not raised in such proceeding at the time or
19 in the manner prescribed by State law. In no cir-
20 cumstances other than those described in this subsection
21 shall a determination of noncompliance with this section
22 provide a basis for relief to a petitioner proceeding under
23 this chapter.

24 “(l) No attorney appointed to represent a prisoner
25 in State post-conviction proceedings shall have previously

1 represented the prisoner at trial or on direct appeal in the
2 case for which the appointment is made, unless the pris-
3 oner and attorney expressly request continued representa-
4 tion.

5 “(m) Notwithstanding the rates and maximum limits
6 generally applicable to criminal cases and any other provi-
7 sion of law to the contrary, the highest State court with
8 jurisdiction over criminal cases shall, after notice and com-
9 ment, establish a schedule of hourly rates for the com-
10 pensation of attorneys appointed pursuant to this section
11 that are reasonable in light of the qualifications of attor-
12 neys appointed and the local practices for legal representa-
13 tion in cases reflecting the complexity and responsibility
14 of capital cases. For each attorney appointed pursuant to
15 this section, the State court shall separately order com-
16 pensation at the rates set by the highest State court for
17 the hours the attorneys reasonably expended on the case
18 and for reasonable expenses paid for investigative, expert,
19 and other reasonably necessary services. Any aggrieved
20 party may bring a private cause of action in Federal dis-
21 trict court to enforce the provisions of this subsection for
22 the establishment of a schedule of reasonable hourly rates
23 for the compensation of attorneys. In such an action, the
24 Federal court shall not independently determine the ap-
25 propriate rates, but shall decide whether the hourly rates

1 as scheduled by the State court are within the range of
2 reasonableness consistent with the criteria stated in this
3 subsection. If the hourly rates as scheduled are not within
4 the range of reasonableness, or if no schedule of rates has
5 been established, the court shall grant appropriate injunc-
6 tive or declaratory relief, except that the court shall not
7 grant relief that disturbs any criminal conviction or sen-
8 tence, obstructs the prosecution of State criminal proceed-
9 ings, or alters proceedings arising under this chapter.

10 “(n) The ineffectiveness or incompetence of counsel
11 appointed pursuant to this section during State or Federal
12 post-conviction proceedings shall not be a ground for relief
13 in a proceeding arising under section 2254. This limitation
14 shall not preclude the appointment of different counsel at
15 any phase of State or Federal post-conviction proceedings.

16 “(o) Nothing in this section changes the constitu-
17 tional standard governing claims of ineffective assistance
18 of counsel pursuant to the sixth amendment to the Con-
19 stitution of the United States. A determination of non-
20 compliance with this section (as opposed to the facts which
21 support such a determination) shall not provide a basis
22 for a claim of constitutionally ineffective assistance of
23 counsel.

24 “(p) The requirements of this section shall apply to
25 any appointment of counsel made after the effective date

1 of this section in any trial, direct appeal, or unitary review
2 of a capital indigent. Counsel shall be appointed as pro-
3 vided in this section in any post-conviction proceeding
4 commenced after the effective date of this section. In no
5 case shall counsel appointed for a proceeding commenced
6 before the effective date of this section be subject to the
7 requirements of this section, nor shall any person whose
8 counsel was appointed for any trial, appeal, post-convic-
9 tion or unitary review before the effective date of this sec-
10 tion be entitled to any relief, including application of sub-
11 section (k), based on a claim that counsel was not ap-
12 pointed in conformity with subsection (f) or (g).”.

13 (b) TECHNICAL AMENDMENT.—The chapter analysis
14 for chapter 153 of title 28, United States Code, as amend-
15 ed by section 304(a)(2), is amended by adding at the end
16 the following new item:

“2258. Counsel in capital cases; State court.”.

17 **SEC. 312. CAPITAL LITIGATION FUNDING.**

18 (a) GRANTS FOR CAPITAL HABEAS CORPUS PROS-
19 ECUTIONS.—

20 (1) IN GENERAL.—Subpart 2 of part E of title
21 I of the Omnibus Crime Control and Safe Streets
22 Act of 1968 (42 U.S.C. 3711 et seq.) is amended by
23 adding at the end the following new section:

1 “HABEAS CORPUS LITIGATION

2 “SEC. 511A. Notwithstanding any other provision of
3 this title, the Director shall provide grants to the States,
4 from the funding allocated pursuant to section 511, for
5 the purpose of supporting litigation pertaining to Federal
6 habeas corpus petitions in capital cases. The total funding
7 authorized for such grants within any fiscal year shall be
8 equal to the funding provided to capital resource centers,
9 pursuant to Federal appropriation, in the same fiscal
10 year.”.

11 (2) TECHNICAL AMENDMENT.—The table of
12 contents of title I of the Omnibus Crime Control and
13 Safe Streets Act of 1968 (42 U.S.C. preceding
14 3701) is amended by inserting after the item relat-
15 ing to section 511 the following new item:

“Sec. 511A. Habeas corpus litigation.”.

16 (b) GRANTS FOR STATE CAPITAL LITIGATION.—

17 (1) IN GENERAL.—Title I of the Omnibus
18 Crime Control and Safe Streets Act of 1968 (42
19 U.S.C. 3711 et seq.), as amended by section 103(a)
20 is amended—

21 (A) by redesignating part R as part S;

22 (B) by redesignating section 1801 as sec-
23 tion 1901; and

24 (C) by inserting after part Q the following
25 new part:

1 ance, grant adjustments, accounting, auditing, and
2 fund disbursement.

3 **“SEC. 1803. REVIEW OF STATE APPLICATIONS.**

4 “(a) IN GENERAL.—The Director shall make a grant
5 under section 1801 to carry out the activities described
6 in the application submitted by an applicant under section
7 1802 upon determining that—

8 “(1) the application is consistent with the re-
9 quirements of this part; and

10 “(2) before the approval of the application, the
11 Bureau has made an affirmative finding in writing
12 that the proposed activities have been reviewed in
13 accordance with this part.

14 “(b) APPROVAL.—Each application submitted under
15 section 1802 shall be considered to be approved, in whole
16 or in part, by the Director not later than 45 days after
17 first received unless the Director informs the applicant of
18 specific reasons for disapproval.

19 “(c) DISAPPROVAL NOTICE AND RECONSIDER-
20 ATION.—The Director shall not disapprove any application
21 without first affording the applicant reasonable notice and
22 opportunity for reconsideration.

23 **“SEC. 1804. DISTRIBUTION OF FUNDS.**

24 “For fiscal years 1994, 1995, and 1996, the Federal
25 share of a grant made under this part may not exceed

1 75 percent of the total costs of the activities described in
2 the application submitted under section 1702 for the fiscal
3 year for which the project receives assistance under this
4 part. Thereafter, the Federal share of a grant made under
5 this part may not exceed 50 percent.

6 **“SEC. 1805. EVALUATION.**

7 “(a) IN GENERAL.—(1) A State that receives a grant
8 under this part shall submit to the Director an evaluation
9 not later than March 1 of each year in accordance with
10 guidelines issued by the Director.

11 “(2) The Director may waive the requirement speci-
12 fied in subsection (a) if the Director determines that such
13 evaluation is not warranted in the case of any particular
14 State.

15 “(b) DISTRIBUTION.—A State or local entity may use
16 not more than 5 percent of the funds it receives under
17 this part to develop an evaluation program under this sec-
18 tion.”.

19 (2) TECHNICAL AMENDMENT.—The table of
20 contents of title I of the Omnibus Crime Control and
21 Safe Streets Act of 1968 (42 U.S.C. 3711 et seq.),
22 as amended by section 103(b), is amended by strik-
23 ing the matter relating to part R and inserting the
24 following:

“PART R—GRANTS FOR STATE CAPITAL LITIGATION

“Sec. 1801. Grant authorization.

“Sec. 1802. State applications.
 “Sec. 1803. Review of State applications.
 “Sec. 1804. Distribution of funds.
 “Sec. 1805. Evaluation.

“PART S—TRANSITION; EFFECTIVE DATE; REPEALER

“Sec. 1901. Confirmation of rules, authorities, and proceedings.”.

1 (3) AUTHORIZATION OF APPROPRIATIONS.—

2 Section 1001(a) of title I of the Omnibus Crime
 3 Control and Safe Streets Act of 1968 (42 U.S.C.
 4 3793(a)), as amended by section 103(c), is amend-
 5 ed—

6 (A) in paragraph (3) by striking “and Q”
 7 and inserting “Q, and R”; and

8 (B) by adding at the end the following new
 9 paragraph:

10 “(12) There are authorized to be appropriated \$50
 11 million for each of fiscal years 1995, 1996, and 1997 to
 12 carry out activities under part R.”.

13 **SEC. 313. ABROGATION OF STATE SOVEREIGN IMMUNITY.**

14 Any State, any instrumentality of a State, and any
 15 officer or employee of a State or instrumentality of a State
 16 acting in an official capacity, shall not be immune, under
 17 the Eleventh Amendment to the Constitution of the
 18 United States, from suit in Federal court for a violation
 19 of subsection 2258(c) or (m) of title 28, United States
 20 Code, as added by section 308(a).

1 **SEC. 314. EFFECTIVE DATE.**

2 (a) IN GENERAL.—Except as provided in subsection
3 (b), this title and the amendments made by this title shall
4 take effect on the date that is 180 days after the date
5 of enactment of this Act.

6 (b) SECTION 2258(b) OF TITLE 28, UNITED STATES
7 CODE.—Section 2258(b) of title 28, United States Code,
8 as added by section 308(a), shall take effect on the date
9 of enactment of this Act.

S 1657 PCS—2

S 1657 PCS—3

S 1657 PCS—4