

HOUSE No. 00470

The Commonwealth of Massachusetts

PRESENTED BY:

James R. Miceli and

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act to reinstating capital punishment in the Commonwealth..

PETITION OF:

NAME:

DISTRICT/ADDRESS:

.....
James R. Miceli

.....
19th Middlesex

.....
James J. Dwyer

.....
30th Middlesex

HOUSE No. 00470

By Mr. Miceli of Wilmington, petition (accompanied by Bill, House, No. 00470) of [petitioners] relative to reinstating capital punishment in the Commonwealth. Joint Committee on the Judiciary.

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

An Act to reinstating capital punishment in the Commonwealth..

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Be it enacted by the Senate and House of Representatives in General Court assembled, and by
2 the authority of the same, as follows:

3 SECTION 1. Chapter 265 of the General Laws, as appearing in the 2008 Official Edition, is
4 hereby amended by inserting after section 2 the following new section:–

5 Section 2A.

6 In all cases of murder in the first degree in which the penalty of death may be authorized under
7 section 2 of this chapter, and in which the commonwealth seeks to impose the penalty of death,
8 the indictment or indictments shall specify which of the aggravating circumstances set forth in
9 section 69 of chapter 279 are alleged to be present. Only so much of the indictment as alleges the
10 offense of murder in the first degree, and not the aggravating circumstances, shall be presented to
11 the jury during their deliberation as to the guilt or innocence of the defendant. That portion of the

12 indictment which sets forth the aggravating circumstances shall be presented to the jury only
13 during the presentencing proceedings in accord with section 68 of chapter 279.

14 SECTION 2. Chapter 279 of the General Laws, as so appearing, is hereby amended by
15 striking section 60 and inserting in place thereof the following section:—

16 Section 60.

17 The punishment of death shall be inflicted by intravenous injection of a substance or substances
18 in a lethal quantity sufficient to cause death and until such prisoner is dead.

19 SECTION 3. Chapter 211D of the General Laws, as so appearing, is hereby amended by
20 adding the following new section:—

21 Section 17.

22 (a) The commonwealth shall provide legal services to:

23 (1) any persons who are indigent and who have been charged with an offense for which capital
24 punishment is sought; and

25 (2) any persons who are indigent, have been sentenced to death and who seek appellate or
26 collateral review.

27 (b) The committee for public counsel services shall be the appointing authority and shall
28 appoint staff attorneys, members of the private bar or both.

29 (c) The appointing authority shall:

30 (1) solicit applications from all attorneys qualified to be appointed in the proceedings
31 specified in subsection (a).

32 (2) draft and at such times as it may deem necessary, but at least annually, publish rosters
33 of all applicants determined to be qualified attorneys.

34 (3) draft and at such times as it may deem necessary, but at least annually, publish
35 procedures by which attorneys shall be appointed and standards governing the qualifications and
36 performance of such appointed counsel. Such standards of qualification and performance shall
37 include, but need not be limited to:

38 (A) membership in the bar of the commonwealth or admission to practice pro hac vice;

39 (B) knowledge and understanding of pertinent legal authorities regarding the issues in
40 capital cases in general and any case to which an attorney may be appointed in particular;

41 (C) skills in the management and conduct of negotiations and litigation in homicide
42 cases;

43 (D) skills in the investigation of homicide cases, the background of clients, and the
44 psychiatric history and current condition of clients;

45 (E) skills in trial advocacy, including the interrogation of defense witnesses, cross
46 examination, and jury arguments

47 (F) skills in legal research and in the writing of legal petitions, briefs, and memoranda;
48 and

49 (G) skills in the analysis of legal issues bearing on capital cases;

50 (4) Periodically review the rosters, monitor the performance of all attorneys appointed,
51 and delete the name of any attorney who:

52 (A) fails satisfactorily to complete regular training programs on the representation of
53 clients in capital cases;

54 (B) fails to meet performance standards in a case to which the attorney has been
55 appointed; or

56 (C) fails otherwise to demonstrate continuing competency to represent clients in capital
57 cases;

58 (5) conduct or sponsor specialized training programs for attorneys representing clients in
59 capital cases;

60 (6) appoint two attorneys, lead counsel and co-counsel, to represent a client in a capital
61 case after the relevant stage of proceedings, promptly upon receiving notice of the need for the
62 appointment from the relevant state court; and

63 (7) report such appointment or the client's failure to accept counsel in writing to the court
64 requesting the appointment.

65 (d) Upon receipt of notice from the appointing authority that an individual entitled to the
66 appointment of counsel under this section has declined to accept such an appointment, the court
67 requesting the appointment shall conduct, or cause to be conducted, a hearing, at which the
68 individual and counsel proposed to be appointed under this section shall be present, to determine
69 the individual's competency to decline that appointment, and whether the individual has
70 knowingly and intelligently declined it.

71 (e) (1) The appointing authority shall maintain 2 rosters of attorneys: one roster listing
72 attorneys qualified to be appointed for the trial and sentencing stages of capital cases, the other
73 listing attorneys qualified to be appointed for the appellate or collateral review stages. Each of
74 the rosters shall be divided into two parts, one listing attorneys qualified to be appointed as lead
75 counsel, the other listing attorneys qualified to be appointed as co-counsel.

76 (2) An attorney qualified to be appointed lead counsel at the trial or sentencing stages
77 shall:

78 (A) be a trial practitioner with at least 5 years of experience in the representation of
79 criminal defendants in felony cases;

80 (B) have served as lead counsel or co-counsel at the trial or sentencing stages in at least
81 two homicide cases tried to a jury;

82 (C) be familiar with the law and practice in capital cases and with the trial and
83 sentencing procedures in the commonwealth;

84 (D) have completed such training or refresher courses in current developments in the
85 representation of capital defendants at the trial or sentencing stages as the appointing authority
86 shall require; and

87 (E) demonstrate the proficiency and commitment necessary to providing legal services
88 in capital cases.

89 (3) An attorney qualified to be appointed co-counsel at the trial or sentencing stages shall:

90 (A) be a trial practitioner with at least 3 years of experience in the representation of
91 criminal defendants in felony cases; and

92 (B) meet the standards in paragraphs (2)(C), (D) and (E) for lead counsel at the trial or
93 sentencing stages.

94 (4) An attorney qualified to be appointed lead counsel at the appellate or collateral review
95 stages shall:

96 (A) be an appellate practitioner with at least 5 years of experience in the representation
97 of criminal clients in felony cases at the appellate or collateral review stages;

98 (B) have served as lead counsel or co-counsel at the appellate or collateral review
99 stages in at least 3 cases in which the client had been convicted of a felony offense;

100 (C) be familiar with the law and practice in capital cases and with the appellate and
101 collateral review procedures in the courts of the commonwealth and in federal court;

102 (D) have completed such training or refresher courses in current developments in the
103 representation of capital clients at the appellate and collateral review stages as the state
104 appointing authority shall require; and

105 (E) demonstrate the proficiency and commitment necessary to providing legal services
106 in capital cases.

107 (5) An attorney qualified to be appointed co-counsel at the appellate, collateral or unitary
108 review stages shall:

109 (A) be an appellate practitioner with at least 3 years of experience in the representation
110 of criminal clients in felony cases at the appellate or collateral review stages; and

111 (B) meet the standards in paragraphs (4)(C), (D) and (E) for lead counsel at the
112 appellate or collateral review stages.

113 (f) (1) Attorneys appointed from the private bar shall be:

114 (A) compensated for actual time and service, computed on an hourly basis and at a
115 reasonable rate in light of the attorney's qualifications and experience and the local market for
116 legal representation in cases reflecting the complexity and responsibility of capital cases;

117 (B) reimbursed for expenses reasonably incurred in the representation of the client
118 including the costs of law clerks and paralegals reasonably needed in the representation of the
119 client; and

120 (C) reimbursed for the costs of investigators and experts whose services have been
121 approved in advance by the court and are reasonably needed in the representation of the client.

122 (2) Payments under subsection (f)(1):

123 (A) with respect to law clerks and paralegal, shall be computed on an hourly basis
124 reflecting the local market for such services; and

125 (B) with respect to investigators and experts, shall be commensurate with the schedule
126 of fees paid by state authorities for such services.

127 (g) Appointed attorneys from the private bar shall receive prompt payment for legal
128 services and reimbursement for expenses and support services upon the submission of periodic
129 bills, receipts, or other appropriate documentation to the appointing authority or other
130 appropriate state agency. The appointing authority shall promptly resolve any disputes with
131 respect to such bills.

132 SECTION 4. Chapter 279 of the General Laws, as so appearing, is hereby amended by
133 striking sections 68 through 71 and inserting the following new sections:-

134 Section 68.

135 Upon a plea or verdict of guilty of murder committed with deliberately premeditated malice
136 aforethought or murder with extreme atrocity or cruelty by an individual who has attained the
137 age of 18 years at the time of the murder and who is not convicted under the provisions of the
138 felony murder rule, in cases where the commonwealth has alleged in its indictment or
139 indictments the presence of one or more of the aggravating circumstances set forth in section 69
140 of this chapter, a presentence hearing shall be conducted before the jury before which the case
141 was tried; provided, however, that if in the opinion of the judge presiding at the presentence
142 hearing, it is impossible or impracticable for the trial jury to sit at the presentence hearing, or if
143 the matter of guilt was determined by a plea of guilty rather than by a jury, a new jury shall be
144 impaneled to sit at the presentencing hearing. The selection of that jury shall be according to the
145 laws and rules governing the selection of a jury for the trial of a capital case. A presentence
146 hearing need not be conducted if the commonwealth determines either that it cannot prove
147 beyond a reasonable doubt the existence of one or more of the aggravating circumstances set
148 forth in section 69 of this chapter, or that the penalty of death should not be imposed, in which
149 case the court shall impose the sentence of imprisonment for life as provided in section 2 of
150 chapter 265.

151 During the presentence hearing, the only issue shall be the determination of the punishment
152 to be imposed. During such hearing the jury shall hear all additional relevant evidence in
153 mitigation of punishment including evidence relevant to any statutory mitigating circumstance

154 set forth in paragraph (b) of section 69 of this chapter, and evidence relevant to any other aspect
155 of the defendant's character or record or any of the circumstances of the offense that the
156 defendant or the commonwealth may proffer as a basis for a sentence less than death, regardless
157 of its admissibility under the rules governing the admission of evidence at criminal trials. During
158 such hearing, the jury shall also hear such evidence in aggravation of punishment as is relevant
159 to any statutory aggravating circumstance set forth in paragraph (a) of said section 69, and which
160 is alleged in the indictment; provided, however, that only such evidence in aggravation of
161 punishment as the commonwealth has made known to the defendant prior to his trial shall be
162 admissible, and provided further, that said evidence is otherwise admissible according to the
163 rules governing the admission of evidence at criminal trials. The jury shall also hear arguments
164 by the defendant or his counsel or both and by the commonwealth regarding the punishment to
165 be imposed. The commonwealth and the defendant or his counsel shall be allowed to make
166 opening statements and closing arguments at the presentence hearing. The order of those
167 statements and arguments and the order of presentation of evidence shall be the same as at trial.

168 Upon the conclusion of evidence and arguments at the presentence hearing, the court shall
169 instruct the jury orally as to, and shall provide to the jury in writing copies of, any statutory
170 aggravating circumstance or circumstances which are set forth in the indictment and which it
171 determines to be warranted by the evidence. The court shall instruct the jury that it may choose
172 to find that the penalty of death shall be imposed upon the defendant, or it may choose not to find
173 that the penalty of death be imposed on the defendant, but that it may not find that the penalty of
174 death shall be imposed unless it shall first make a unanimous determination of the existence of
175 one or more of the aggravating circumstances set forth in section 69 of this chapter and the
176 indictment, beyond a reasonable doubt. The jury shall further be instructed that if it finds the

177 existence of such an aggravating circumstance beyond a reasonable doubt, it must then consider
178 all of the evidence presented to it relevant to any of the mitigating circumstances set forth in
179 paragraph (b) of section 69 of this chapter, or to any other mitigating circumstance and determine
180 whether, in view of all the relevant circumstances of the offense and of the defendant, the
181 sentence shall be life imprisonment or death. The jury shall further be instructed that the penalty
182 of death may not be imposed unless it unanimously finds after a review of all of the evidence of
183 mitigation proffered as a basis for a sentence less than death, that the penalty of death should be
184 imposed. If the jury is unable to reach a unanimous verdict, the court shall impose the sentence
185 of imprisonment for life as provided in section 2 of chapter 265.

186 If its unanimous verdict is to impose the penalty of death, the jury shall designate in writing,
187 signed by the foreperson of the jury, the statutory aggravating circumstance or circumstances
188 which it unanimously found existed beyond a reasonable doubt, and that the jury after
189 consideration of all of the evidence of mitigation relevant to the circumstances of the defendant
190 and the offense proffered as a basis for a sentence less than death, unanimously found that the
191 death penalty should be imposed.

192 After the jury has made its findings, the court shall set a sentence in accordance with section
193 70.

194 The declaration of a mistrial during the course of the presentence hearing or any error in the
195 presentence hearing determined or otherwise shall not affect the validity of the conviction.

196 Section 69.

197 (a) In all cases in which the death penalty may be authorized, the statutory aggravating
198 circumstances are:

199 (1) the murder was knowingly committed on a victim because of his position as, or while
200 engaged in the performance of his official duties as one or more of the following: police officer,
201 special police officer, parole officer, probation officer, state or federal law enforcement officer,
202 court officer, firefighter, officer or employee of the department of correction, officer or employee
203 of a sheriff's department, officer or employee of a jail or officer or employee of a house of
204 correction;

205 (2) the murder was committed by a defendant who was at the time incarcerated in a jail,
206 or a correctional or penal institution, or the Massachusetts Treatment Center for the Sexually
207 Dangerous or a facility used for the housing or treatment or housing and treatment of prisoners;
208 or while on escape, furlough or work release from such jail, correctional or penal institution or
209 facility;

210 (3) the murder was knowingly committed on a victim because of his position as, or while
211 engaged in the performance of his official duties as a judge, prosecuting attorney, juror, or
212 witness;

213 (4) the murder was committed by a defendant who had previously been convicted of
214 murder in the first or second degree, or of an offense in any other federal, state or territorial
215 jurisdiction of the United States which is the same as or necessarily includes the elements of the
216 offense of murder in the first or second degree;

217 (5) the murder was committed by a defendant who had previously been convicted of two
218 or more federal or state offenses, committed on different occasions, for which a sentence of life
219 in prison or death was authorized by statute;

220 (6) the murder involved torture to the victim or the intentional infliction of extreme pain
221 prior to death demonstrating a total disregard to the suffering of the victim;

222 (7) the murder was committed by means of a destructive device, bomb, or explosive
223 planted, hidden, mailed, delivered, or concealed in any place, area, dwelling, building or
224 structure by the defendant; or the murder was committed by means such that the defendant knew
225 or reasonably should have known that his act or acts would create a grave risk of death or serious
226 bodily injury to more than one person; or the murder was committed by means of a machine gun
227 or other automatic weapon;

228 (8) the murder occurred during the commission of or in furtherance of a violation of the
229 drug trafficking laws of the commonwealth as set forth in section 32E of chapter 94C, or during
230 the commission of or in furtherance of an attempt or conspiracy to violate said drug trafficking
231 laws;

232 (9) the murder was committed as an act of political terrorism, which include murders committed
233 for the purpose of attacking the government of the United States or any political subdivision
234 thereof

235 (10) the murder was knowingly committed on a victim because of his position as, or while
236 engaged in the performance of his official duties as one of the following: governor or governor-
237 elect, lieutenant governor or lieutenant governor elect, secretary of the commonwealth, treasurer
238 of the commonwealth, attorney general, member of the governor's council, district attorney,
239 representative or senator in the general court or mayor

240 .

241 (11) the murder was committed by means of a biological, chemical or nuclear agent or device,
242 including but not limited to an act of terrorism

243 (b) In all cases in which the death penalty may be authorized, the mitigating circumstances shall
244 be any factors proffered by the defendant or the commonwealth which are relevant in
245 determining whether to impose a sentence less than death, including, but not limited to, any
246 aspect of the defendant's character, propensities, or record and any of the circumstances of the
247 murder, including but not limited to the following:

248 (1) the defendant has no significant history of prior criminal convictions;

249 (2) the victim was a co-conspirator or willing participant in the defendant's homicidal
250 conduct, or in the criminal conduct which resulted in the murder;

251 (3) the murder was committed while the defendant was under extreme duress or under the
252 domination or control of another which was insufficient to establish a defense to the murder but
253 which substantially affected his judgment;

254 (4) the offense was committed while the capacity of the defendant to appreciate the
255 criminality of his conduct or to conform his conduct to the requirements of the law was impaired
256 as a result of: (a) a mental disease or defect; (b) organic brain damage; (c) emotional illness
257 brought on by stress or prescribed medication; or (d) intoxication, or legal or illegal drug use by
258 the defendant; which was insufficient to establish a defense to the murder but which substantially
259 affected his judgment;

260 (5) the defendant was over the age of 75 at the time of the murder, or any other relevant
261 consideration regarding the age of the defendant at the time of the murder;

262 (6) the defendant was battered or otherwise physically or sexually abused by the victim in
263 connection with or prior to the murder for which the defendant was convicted and such abuse
264 was a contributing factor in the murder;

265 (7) the defendant was experiencing post-traumatic stress syndrome caused by military
266 service during a declared or undeclared war.

267 Section 70.

268 Where a person is convicted or pleads guilty to a crime which is punishable by death, a
269 sentence of death shall not be imposed unless findings in accordance with section 68 are made.
270 Further, such a sentence shall not be imposed unless the jury finds that there is conclusive
271 scientific evidence, including physical or other associative evidence, enabling it to reach a high
272 level of scientific certainty connecting the defendant to the crime. Physical or other associative
273 evidence may include any tangible image, object, or item that can be independently examined for
274 the purpose of obtaining pertinent investigative information. The jury may use the scientific,
275 physical or other associative, evidence to corroborate the defendant's guilt and need not rely
276 entirely on human evidence and testimony. Where such findings are made and the jury finds that
277 the death penalty shall be imposed, the court shall sentence the defendant to death unless the
278 court determines that a sentence of death should not be imposed under section 71. Where such
279 findings are not made or not unanimously made or where a sentence of death is not a unanimous
280 finding by the jury, the court shall sentence the defendant to life imprisonment as provided in
281 section two of chapter 265.

282 Section 71.

283 (a) The supreme judicial court shall establish, by rule, such reports or checklists to be
284 utilized by the trial court, the prosecuting attorney, and defense counsel prior to, during, and after
285 the trial of cases in which the death penalty is sought, as it deems necessary to ensure that all
286 possible matters which could be raised in defense have been considered by the defendant and
287 defense counsel and either asserted in a timely and correct manner or waived in accordance with
288 applicable legal requirements, so that, for purposes of any pretrial review and the trial and post-
289 trial review, the record and transcript of proceedings will be as complete as possible for a review
290 by the sentencing court and the supreme judicial court of challenges to the trial, conviction,
291 sentence and detention of the defendant.

292 (b) In any case in which the sentence of death has been imposed, the trial judge shall
293 conduct a review of the entire record and shall report to the supreme Judicial court any
294 observations which it deems pertinent to the question of the appropriateness of the sentence,
295 including the credibility and effectiveness of mitigation evidence offered by the defense; the
296 strength of the commonwealth's case on the merits including observations with respect to its
297 reliance on circumstantial or eyewitness testimony and on the possibility, if any, of innocence
298 being subsequently established, and the possibility of passion or prejudice having affected the
299 jury's sentencing decision. If, based on the trial court's review of the record, the court determines
300 that despite findings by the jury, the death penalty should not be imposed, the judge may set
301 aside the sentence of death and impose a sentence of life imprisonment without parole. In such
302 case the judges shall set forth in writing the findings and reasons which support such
303 determination. The commonwealth shall have a right to appeal to the supreme judicial court any
304 such determination, and the supreme judicial court may set aside said determination if it is
305 unsupported by the record of the case, and may thereafter reimpose the penalty of death.

306 (c) In any case in which a sentence of death has been imposed, the trial judge may suspend
307 for a period of time or set aside the penalty of death and impose in its place a sentence of life in
308 prison without possibility of parole at any time, upon a showing that there is newly discovered
309 evidence that casts substantial doubt on the justice of the conviction, or raises the substantial
310 possibility of innocence being subsequently established, even though said evidence is not then
311 sufficient to grant a new trial.

312 (d) Nothing in this section shall limit or restrict review, rights or remedies available
313 through the procedures under Rule 30 of the Massachusetts Rules of Criminal Procedure.

314 Section 72.

315 (a) In addition to a unified review procedure administered by the supreme judicial
316 court, the court shall conduct a formal process to ensure the independent scientific review of all
317 scientific, physical or other associative, evidence in every capital case in which a sentence of
318 capital punishment is imposed.

319 (b) The court shall create an Independent Scientific Review (ISR) Advisory Committee
320 which shall draft policies, processes, and criterion for the ISR Panel for reviewing scientific
321 evidence used in each capital case in which a sentence of capital punishment is imposed.

322 (c) Members of the ISR Advisory Committee shall be appointed by the court from a list
323 of nominees submitted by the governor and shall be recognized experts in the evaluation of
324 forensic evidence. If any appointed member of the committee is employed by a commonwealth
325 crime laboratory, said member shall not participate in the review of any capital case in which
326 said member's laboratory had involvement. The members of the committee shall appoint an
327 independent expert panel to review each forensic-science sub-discipline relevant to each case.

328 (d) At the conclusion of any capital trial in which the defendant has been convicted and
329 a sentence of capital punishment has been imposed, the ISR Committee shall appoint an ISR
330 Panel which shall include independent members from each forensic-science sub-discipline
331 relevant to the particular case. Members of said panel shall be selected from among recognized
332 and accredited experts not employed by the commonwealth's state or city crime laboratories.

333 (e) Once selected, the ISR Panel shall conduct a thorough review of the collection,
334 handling, evaluation, analysis, preservation, and interpretation of, and testimony and all other
335 matters relating to scientific evidence used in the particular case. This review shall be conducted
336 pursuant to the policies drafted and adopted by the ISR Advisory Committee. The panel review
337 shall include, but not be limited to, an examination of the following:

338 (1) whether the integrity of the evidence was sufficient to allow for consideration of subsequent
339 procedures

340 (2) whether appropriate guidelines and standards of practice were followed during crime scene
341 and autopsy procedures; the recognition, documentation, recovery, packaging, and preservation
342 of evidence; the examination and comparison of evidence; the interpretation and reporting of
343 results; and the reconstruction by experts relying on other examinations or reports

344 (3) whether any new research or novel science played a role in the particular case and whether it
345 was appropriately documented and provided for review under the relevant legal standard

346 (4) whether the ISR process revealed any specific scientific or technical issues requiring
347 additional information, or suggesting that errors may have been made.

348 (f) A copy of the ISR Panel's report shall be provided, upon completion, to the trial
349 judge, prosecutor, defense attorney, and the supreme judicial court.

350 (g) If, based on panel's review of the record, the court determines that despite findings
351 by the jury, the death penalty should not be imposed, the judge may set aside the sentence of
352 death and impose a sentence of life imprisonment without parole. In such case, the judges shall
353 set forth in writing the findings and reasons which support such determination.

354 Section 73.

355 In addition to a review of the entire case pursuant to section 33E of chapter 278, and section
356 71 of chapter 279, the supreme Judicial court shall review the sentence of death imposed
357 pursuant to sections 68, 69, and 70 of chapter 279. If the supreme Judicial court determines that
358 (1) the sentence of death was imposed under the influence of passion, prejudice or any other
359 arbitrary factor; or (2) the evidence does not support the jury's finding of a statutory aggravating
360 circumstance or circumstances as defined in section sixty-nine; or (3) the evidence of mitigation
361 warranted the imposition of a life sentence rather than a sentence of death; or (4) the weight of
362 the evidence does not warrant a sentence of death the court shall (1) reverse the sentence of death
363 and remand for a new presentence hearing pursuant to section 68 of chapter 279; or (2) reverse
364 the sentence of death and remand to the superior court department of the trial court for sentence
365 of imprisonment in the state prison for life. The court shall also have the authority to affirm the
366 sentence of death.