

**HOUSE . . . . . No. 906**

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**The Commonwealth of Massachusetts**

PRESENTED BY:

***James R. Miceli***

*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 adoption of the accompanying bill:

An Act relative to reinstating capital punishment in the Commonwealth.

PETITION OF:

NAME:

DISTRICT/ADDRESS:

*James R. Miceli*

*19th Middlesex*

*Shaunna L. O'Connell*

*3rd Bristol*

**HOUSE . . . . . No. 906**

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By Mr. Miceli of Wilmington, a petition (accompanied by bill, House, No. 906) of James R. Miceli and Shaunna L. O'Connell relative to reinstating capital punishment in the Commonwealth. The Judiciary.

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**The Commonwealth of Massachusetts**

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**In the One Hundred and Ninetieth General Court  
(2017-2018)**  
\_\_\_\_\_

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

3           Section 2A.

4           In all cases of murder in the first degree in which the penalty of death may be authorized  
5 under section 2 of this chapter, and in which the commonwealth seeks to impose the penalty of  
6 death, the indictment or indictments shall specify which of the aggravating circumstances set  
7 forth in section 69 of chapter 279 are alleged to be present. Only so much of the indictment as  
8 alleges the offense of murder in the first degree, and not the aggravating circumstances, shall be  
9 presented to the jury during their deliberation as to the guilt or innocence of the defendant. That  
10 portion of the indictment which sets forth the aggravating circumstances shall be presented to the  
11 jury only during the presentencing proceedings in accord with section 68 of chapter 279.

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

14 Section 60.

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

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

19 Section 17.

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

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

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

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

27 (c) The appointing authority shall:

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

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

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

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

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

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

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

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

47 (F) skills in legal research and in the writing of legal petitions, briefs, and  
48 memoranda; 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  
51 appointed, and delete the name of any attorney who:

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

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

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

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

65 (d) Upon receipt of notice from the appointing authority that an individual entitled  
66 to the appointment of counsel under this section has declined to accept such an appointment, the  
67 court 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  
72 listing attorneys qualified to be appointed for the trial and sentencing stages of capital cases, the  
73 other listing attorneys qualified to be appointed for the appellate or collateral review stages. Each  
74 of the rosters shall be divided into two parts, one listing attorneys qualified to be appointed as  
75 lead 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  
77 stages shall:

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

80 (B) have served as lead counsel or co-counsel at the trial or sentencing stages in  
81 at least 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  
85 in the representation of capital defendants at the trial or sentencing stages as the appointing  
86 authority shall require; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

136 Section 68.

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

151 case the court shall impose the sentence of imprisonment for life as provided in section 2 of  
152 chapter 265.

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

170           Upon the conclusion of evidence and arguments at the presentence hearing, the court  
171 shall instruct the jury orally as to, and shall provide to the jury in writing copies of, any statutory  
172 aggravating circumstance or circumstances which are set forth in the indictment and which it  
173 determines to be warranted by the evidence. The court shall instruct the jury that it may choose

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

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

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

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

198           Section 69.

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

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

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

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

215                   (4) the murder was committed by a defendant who had previously been convicted  
216 of murder in the first or second degree, or of an offense in any other federal, state or territorial

217 jurisdiction of the United States which is the same as or necessarily includes the elements of the  
218 offense of murder in the first or second degree;

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

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

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

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

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

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

242 .

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

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

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

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

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

256 (4) the offense was committed while the capacity of the defendant to appreciate  
257 the criminality of his conduct or to conform his conduct to the requirements of the law was

258 impaired as a result of: (a) a mental disease or defect; (b) organic brain damage; (c) emotional  
259 illness brought on by stress or prescribed medication; or (d) intoxication, or legal or illegal drug  
260 use by the defendant; which was insufficient to establish a defense to the murder but which  
261 substantially affected his judgment;

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

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

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

269 Section 70.

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

280 court determines that a sentence of death should not be imposed under section 71. Where such  
281 findings are not made or not unanimously made or where a sentence of death is not a unanimous  
282 finding by the jury, the court shall sentence the defendant to life imprisonment as provided in  
283 section two of chapter 265.

284 Section 71.

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

294 (b) In any case in which the sentence of death has been imposed, the trial judge  
295 shall conduct a review of the entire record and shall report to the supreme Judicial court any  
296 observations which it deems pertinent to the question of the appropriateness of the sentence,  
297 including the credibility and effectiveness of mitigation evidence offered by the defense; the  
298 strength of the commonwealth's case on the merits including observations with respect to its  
299 reliance on circumstantial or eyewitness testimony and on the possibility, if any, of innocence  
300 being subsequently established, and the possibility of passion or prejudice having affected the  
301 jury's sentencing decision. If, based on the trial court's review of the record, the court determines



302 that despite findings by the jury, the death penalty should not be imposed, the judge may set  
303 aside the sentence of death and impose a sentence of life imprisonment without parole. In such  
304 case the judges shall set forth in writing the findings and reasons which support such  
305 determination. The commonwealth shall have a right to appeal to the supreme judicial court any  
306 such determination, and the supreme judicial court may set aside said determination if it is  
307 unsupported by the record of the case, and may thereafter reimpose the penalty of death.

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

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

316 Section 72.

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

321 (b) The court shall create an Independent Scientific Review (ISR) Advisory  
322 Committee which shall draft policies, processes, and criterion for the ISR Panel for reviewing

323 scientific evidence used in each capital case in which a sentence of capital punishment is  
324 imposed.

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

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

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

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

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

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

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

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

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

360 Section 73.

361 In addition to a review of the entire case pursuant to section 33E of chapter 278, and  
362 section 71 of chapter 279, the supreme Judicial court shall review the sentence of death imposed  
363 pursuant to sections 68, 69, and 70 of chapter 279. If the supreme Judicial court determines that  
364 (1) the sentence of death was imposed under the influence of passion, prejudice or any other  
365 arbitrary factor; or (2) the evidence does not support the jury's finding of a statutory aggravating

366 circumstance or circumstances as defined in section sixty-nine; or (3) the evidence of mitigation  
367 warranted the imposition of a life sentence rather than a sentence of death; or (4) the weight of  
368 the evidence does not warrant a sentence of death the court shall (1) reverse the sentence of death  
369 and remand for a new presentence hearing pursuant to section 68 of chapter 279; or (2) reverse  
370 the sentence of death and remand to the superior court department of the trial court for sentence  
371 of imprisonment in the state prison for life. The court shall also have the authority to affirm the  
372 sentence of death.