THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
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MITT ROMNEY
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April 28, 2005

To the Honorable Senate and House of Representatives:

Today I am filing for your consideration "An Act Reinstating Capital Punishment in the Commonwealth." This legislation will make the death penalty available for the most heinous of crimes.

Specifically, the legislation will allow a jury to impose the death penalty for first degree murders that were committed as an act of political terrorism; that were committed against a police or parole officer, a judge, a juror, a prosecutor, an attorney or a witness for the purpose of obstructing an ongoing criminal proceeding; that involved prolonged torture; that involved a "murder-spree"; or where the defendant already had been convicted of first degree murder or was serving a life sentence without parole.

The legislation will provide unprecedented procedural and substantive safeguards, such as the requirements that the jury have "no doubt" about the defendant's guilt and that there be scientific evidence that connects the defendant to the crime. The legislation also will provide a defendant with at least two lawyers experienced in capital cases, require an independent commission to review the scientific evidence presented at trial before the sentence is imposed, and provide for mandatory review by the Supreme Judicial Court.

The attached legislation is based on the work of the Governor's Council on Capital Punishment, an 11-member panel of scientific and legal experts that made ten recommendations to ensure that any death penalty statute considered in Massachusetts would be as narrow and as foolproof as humanly possible. As a result, the legislation represents a first-in-the-nation approach to capital punishment and provides unmatched protections to the accused while at the same time offering an appropriate punishment for the most atrocious murders.

I urge your prompt and favorable consideration of this legislation.

Respectfully submitted,

Mitt Romney
Governor

The Commonwealth of Massachusetts

IN THE YEAR TWO THOUSAND **FIVE**

AN ACT **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:

SECTION 1. The General Laws are hereby amended by inserting after chapter 279, the following chapter: —

CHAPTER 279A
CAPITAL MURDER AND PUNISHMENT

Section 1. For the purposes of this chapter, the following words shall have the following meanings: —

"An act of political terrorism" means an act committed by the defendant for the purpose of attacking the government of the United States, or any political subdivision thereof.

"Capital-case qualified" shall have the same meaning as is set forth in section 8A of chapter 211D.

"Death qualified jury" is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions

and their oath. A "death-qualified" jury also shall not include any other prospective jurors who fail to meet any other prevailing standards for "death qualification" that are defined by the United States supreme court.

"Gratuitous and depraved manner" means that the defendant inflicted pain in addition to that which necessarily accompanied the act of killing itself, or the particular method of killing was chosen by the defendant for the purpose of inflicting such pain.

"Human evidence" means statements made by individuals, including but not limited to eyewitness testimony, statements made by a defendant while in police custody, and statements made by codefendants or informants.

"Mentally incompetent to be executed" means that due to a mental disease or defect, a defendant, who is convicted of capital murder and sentenced to death, is presently unaware that he or she is to be punished for the crime of capital murder, or that he or she is unaware that the impending punishment for that crime is death.

"Mentally retarded" means that the defendant satisfies the definition of "mental retardation" as promulgated by either the American Psychiatric Association or the American Association on Mental Retardation. A defendant who satisfies any other definition of "mental retardation" that is established by the United States supreme court also shall be considered "mentally retarded."

"Scientific physical or other associative evidence" means evidence that connects the defendant to either the location of the crime scene, the murder weapon, or the victim's body, and that strongly corroborates the defendant's guilt of capital murder. Physical or other associative evidence includes any tangible image, object, or item that can be independently examined for the purpose of obtaining useful investigative information, or for rendering an interpretation relevant

to a fact at issue in the particular capital murder case. Such physical or other associative evidence that may be capable of providing conclusive associations of suspects, victims, crime scenes, or the implements of crime, may include, but are not limited to DNA, photographs, video and audiotapes, fingerprints, and certain impression evidence such as footwear impressions, tire impressions, tool marks, firearms-related impressions, and other physical pattern matches. In addition to these categories, other categories of scientific evidence may also satisfy, either now or in the future, the requirement of conclusive physical or other associative evidence.

"Torture" means the infliction of extreme physical or psychological pain against a victim whom the defendant knew was conscious.

Section 2. Murder in the first degree is capital murder when:

(A). The defendant committed the murder through:

(1) The defendant's own conduct;

(2) The conduct of another person acting under the defendant's direction or control; or

(3) The conduct of another person pursuant to an agreement between that person and the defendant to commit the murder; and

(B). The defendant committed the murder with deliberately premeditated malice aforethought with respect to the victim's death; and

(C). The defendant was at least 18 years old at the time that the defendant either:

(1) Engaged in the conduct that caused the victim's death;

(2) Directed or controlled another person to commit the murder; or

(3) Entered into an agreement with another person for that person to commit the murder; and

(D). One or more of the following additional elements is present:

(1) The defendant committed the murder as an act of political terrorism;

(2) The defendant committed the murder for the purpose of influencing, impeding, obstructing, hampering, delaying, harming, punishing, or otherwise interfering with a criminal investigation, grand jury proceeding, trial, or other criminal proceeding of any kind, including a possible future proceeding, or in retaliation for the victim's role in the investigation or adjudication of a prior criminal case, including the implementation of the defendant's sentence, against:

(a) A victim whom the defendant knew or believed to have played an official role within the criminal justice system, such as a police officer, parole or probation officer, judge, juror, court official, prosecutor, criminal defense attorney, expert witness or employee of a correctional institution; or

(b) A victim whom the defendant knew or believed to have been (i) a witness to a crime committed on a prior occasion, or (ii) an immediate family member of such a witness, including but not limited to a husband, wife, father, mother, daughter, son, brother, sister, stepparent, stepchild, grandparent, or grandchild.

(3) The defendant intentionally tortured the victim, for a prolonged period of time and in a gratuitous and depraved manner, during or immediately prior to the murder;

(4) The defendant committed murder in the first degree against two or more victims, and each of the murders satisfied elements (A) through (C) herein;

(5) The defendant has a previous conviction for murder in the first degree or the closest equivalent, as defined by the law of the relevant jurisdiction, and the previous murder also satisfied elements (A) through (C) herein;

(6) At the time that the defendant engaged in the conduct described in element (A) herein, the defendant was subject to a sentence of imprisonment for life, without the possibility of parole, as the result of a previous conviction for murder in the commonwealth or elsewhere in the United States.

(E). The punishment for capital murder shall be imprisonment for life without the possibility of parole or the death penalty.

Section 3. (A). It shall be an affirmative defense to capital murder that the defendant is mentally retarded. This affirmative defense may be raised by the defendant before the commencement of the trial, in which case the determination of mental retardation will be made by the superior court; or during the guilt-innocence stage of the trial, in which case the fact-finder will make the determination of mental retardation. Nothing in this section shall prevent the defendant from raising the issue of possible mental retardation as a mitigating circumstance at the sentencing stage of the trial.

(B). If a defendant intends to rely upon the affirmative defense of mental retardation at trial, whether or not there was pretrial litigation on the matter, he shall, within the time provided for the filing of pretrial motions by rule 13 of the rules of criminal procedure or at such later time as the judge may allow, notify the district attorney in writing of such intention. The defendant shall file a copy of the notice with the superior court clerk. The superior court may for good cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate. The notice shall state: (a) whether the defendant intends to offer testimony of expert witnesses on the issue of mental retardation; and (b) the names and addresses of expert witnesses whom the defendant expects to call. Such expert witnesses, whether appointed or retained by the defendant, shall have access to any

available psychiatric or psychological report previously submitted to the court with respect to the mental condition of the defendant, including, if applicable, any reports regarding the defendant's competency to stand trial or the defendant's criminal responsibility.

(C). For the purposes of adjudicating the affirmative defense of mental retardation, a defendant indicted for capital murder shall be presumed not to be mentally retarded.

(1) If the defendant makes a pretrial motion alleging mental retardation, it shall be the defendant's burden to rebut that presumption and to establish, by a preponderance of the evidence, that he is mentally retarded.

(2) If the defendant raises the issue of mental retardation in his defense at the capital murder trial, whether or not there was pretrial litigation on the matter, the defendant shall have the burden to produce some evidence tending to show that he is mentally retarded. Where the defendant produces such evidence, which fairly puts mental retardation in issue, then the commonwealth, must prove, beyond a reasonable doubt, that the defendant is not mentally retarded.

(3) If the defendant raises the issue of possible mental retardation as a mitigating circumstance at the sentencing stage of the trial, no presumption regarding mental retardation shall apply.

(D). At a reasonable time prior to the commencement of the trial of a defendant indicted for capital murder, the defendant may, upon a written motion alleging probable cause to believe the defendant is mentally retarded, apply for an order directing that a mental retardation hearing be conducted prior to trial. If, upon review of the defendant's motion and any response thereto, the superior court finds probable cause to believe the defendant is mentally retarded, the court shall promptly conduct a hearing without a jury to determine whether the defendant is mentally

retarded. In the event the court finds, after the hearing, that the defendant is not mentally retarded, the court must, prior to commencement of trial, enter an order so stating, but nothing in this section shall preclude a defendant from presenting evidence of mental retardation at the guilt-innocence or the sentencing stages of the trial. If the court finds that probable cause is lacking to support the allegation that the defendant is mentally retarded, the court shall dismiss the matter without a hearing.

(E). If the court determines that probable cause exists to believe that the defendant is mentally retarded, the court shall hold a hearing to inquire into the defendant's alleged mental retardation and shall give immediate notice of the inquiry to the district attorney and to the defendant's counsel. The defendant shall have the right to present evidence and cross-examine any witnesses at the hearing. The court may appoint one or more psychiatrists or psychologists to examine the defendant. The court shall issue any ruling in the matter no later than 30 days from the date the hearing on the matter concludes.

(F). If the court appoints a psychiatrist or psychologist to examine the defendant, the court shall inform the psychiatrist or psychologist of the location of the defendant and of the purpose of the examination. The examiner shall have access to any available psychiatric or psychological report previously submitted to the court with respect to the mental condition of the defendant, including, if applicable, any reports regarding the defendant's competency to stand trial or the defendant's criminal responsibility. The examiner also shall have access to any available current mental health and medical records of the defendant.

(G). If the court appoints a psychiatrist or psychologist to examine the defendant, the examiner shall conduct a thorough examination of the defendant and shall submit a report to the court within 30 days of the examiner's appointment. The report shall contain the examiner's

findings as to whether or not the defendant is mentally retarded and the facts, in reasonable detail, upon which the findings are based.

(H). In the event the court finds, after the hearing, that the defendant is mentally retarded, the court must, prior to commencement of trial, enter an order so stating. The commonwealth may appeal such an order as of right without seeking leave. Upon entering such an order the court must afford the commonwealth a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order finding that the defendant is mentally retarded. The taking of an appeal by the commonwealth stays the effectiveness of the court's order and any order setting a date for trial. If an appeal is taken, it shall be entered directly on the docket of the supreme judicial court. No costs or attorney's fees shall be assessed against the commonwealth in connection with an interlocutory appeal of an order which finds that the defendant is mentally retarded unless the defendant prevails and the supreme judicial court determines that the appeal was frivolous. Unless the order is reversed on an appeal, the capital portion of the murder indictment shall be dismissed, the indictment charging first-degree murder shall remain, and the jury shall not be death-qualified.

Section 4. (A). The district attorneys shall develop a uniform set of protocols for the exercise of prosecutorial discretion in potential capital murder cases in the commonwealth. These protocols shall address both the substantive factors that should influence this exercise of prosecutorial discretion, and the procedures that should be followed in connection with this exercise of prosecutorial discretion.

(B). The attorney general, pursuant to section 27 of chapter 12, shall review all exercises of prosecutorial discretion by district attorneys in potential capital murder cases, and shall take appropriate actions to ensure the consistent application of the death penalty throughout the

commonwealth. The attorney general shall develop a set of protocols for this review, which will address both the substantive factors that should influence this review and the procedures that should be followed in connection with this review.

Section 5. (A). An indigent defendant indicted for capital murder shall be provided with at least two court appointed defense attorneys to represent him at trial. A non-indigent defendant indicted for capital murder who can afford only one privately retained defense attorney shall be provided with a second, court appointed defense attorney to represent him at trial. Both of the defense attorneys at the trial of a capital murder case, whether such attorneys are appointed or privately retained, shall be required to be certified as capital-case qualified, unless the superior court allows the defendant's request for a waiver of certification on the ground, or the court determines as a matter of discretion, that such waiver is consistent with the need for high-quality defense representation at trial in the particular capital murder case. An expedited certification procedure shall be established so that a defense attorney who meets the standards for certification as capital-case qualified, but who is not yet so certified, may obtain certification in order to represent the defendant in a particular capital murder case.

(B). A defendant indicted for capital murder may waive his constitutional right to counsel, and represent himself. If, after a hearing, the trial judge permits a defendant to waive his constitutional right to counsel, the court shall appoint at least two attorneys to serve as standby counsel. All such standby counsel shall be required to be certified as capital-case qualified, unless the trial judge approves the appointment of a non-certified standby counsel on the ground that such appointment is consistent with the need for high-quality performance as standby counsel during trial in the particular capital murder case.

(C). An indigent defendant who is convicted of capital murder and sentenced to death, shall be provided with an appointed defense attorney to represent him at all post-trial proceedings, including the direct appeal as well as any state or federal post-conviction proceedings. This appointed defense attorney, for post-trial proceedings, shall not be one of the same attorneys who represented the defendant at his capital murder trial, unless a single justice of the supreme judicial court approves the defendant's request for waiver of this requirement on the ground that such waiver is consistent with the need for high-quality defense representation in post-trial proceedings in the particular capital murder case.

(D). Any defense attorney who represents, in a post-trial proceeding, a defendant who has been convicted of capital murder and sentenced to death, whether such defense attorney is appointed or privately retained, shall be required to be certified as capital-case qualified, unless a single justice of the supreme judicial court approves the defendant's request for a waiver of certification on the ground, or the single justice determines as a matter of discretion, that the particular defense attorney meets the standards for certification, and that such waiver is consistent with the need for high-quality defense representation in post-trial proceedings in the particular capital murder case.

Section 6. (A)(1). Before the trial of a defendant indicted for capital murder, the superior court shall examine carefully the aggravating circumstances that were identified by the commonwealth as a basis for the capital murder indictment, and the court may dismiss the capital portion of the murder indictment if such aggravating circumstances are not supported by legally sufficient evidence.

(2). In the event that the capital portion of the murder indictment is dismissed, the commonwealth may appeal that decision as of right without seeking leave. Upon entering such

an order, the court must afford the commonwealth a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order dismissing the capital portion of the murder indictment. The taking of an appeal by the commonwealth stays the effectiveness of the court's order and any order setting a date for trial. If an appeal is taken, it shall be entered directly on the docket of the supreme judicial court. No costs or attorney's fees shall be assessed against the commonwealth in connection with an interlocutory appeal of an order allowing a motion to dismiss the capital portion of the murder indictment unless the defendant prevails and the supreme judicial court determines that the appeal was frivolous.

(3). In the event that the capital portion of the murder indictment is dismissed or such a dismissal is affirmed on appeal, the indictment charging first-degree murder shall remain, and the jury shall not be death-qualified.

(B). At a trial for capital murder, the trial judge shall impanel a jury that is death-qualified unless the defendant elects, prior to jury selection in the guilty-innocence stage of the trial, to impanel a new jury for the sentencing phase of the trial pursuant to section 7 of this chapter. The death-qualified jury shall sit for both the guilt-innocence and the sentencing stages of the trial, unless the defendant elects to choose a second jury for the sentencing stage. If the defendant elects to have a new jury impaneled for the sentencing stage, that jury shall also be death-qualified. It shall be within the discretion of the trial judge to impanel a second jury for the sentencing stage before the start of the guilt-innocence stage. Should a second jury be so impaneled, the trial judge shall take whatever steps necessary, including sequestration, to ensure that the second jury remains impartial throughout the guilt-innocence stage.

(D). In the event that the defendant waives his right to a jury trial at either the guilt-innocence or the sentencing stage of a capital murder trial, any reference in this chapter to the word jury should be understood to mean the superior court acting as a fact-finder.

(E). If the commonwealth's capital murder indictment requires proof of prior criminal activity as described in sections 2(D)(5) or (6) of this chapter, the evidence shall be introduced in two phases of the guilt-innocence stage. In the first phase, the jury shall be presented with evidence relevant to the proof of sections 2(A), 2(B), 2(C) and 2(D)(1), (2), (3), or (4), and the jury shall not be presented with evidence relating to prior crimes. Upon the conclusion of the commonwealth's evidence relevant to the first phase, and any defense thereto, the parties shall be permitted to present an argument to the jury, the trial judge will provide the jury with appropriate instructions, and the jury will be asked to deliberate and make findings on sections 2(A), 2(B) 2(C) and 2(D)(1), (2), (3), or (4). If the jury finds that the commonwealth has established beyond a reasonable doubt the existence of sections 2(A), 2(B), and 2(C), the second phase of the guilt-innocence stage of trial shall commence with the presentation of evidence relevant to sections 2(D) (5) or (6), and any defense thereto, followed by argument, instructions, and deliberations. If the jury finds that the commonwealth has failed to carry its burden of proof as to sections 2(A), 2(B), or 2(C), the capital murder portion of the murder indictment shall be dismissed, and the indictment charging first-degree murder shall remain.

Section 7. If, at the end of the guilt-innocence stage of the trial, the defendant is convicted of capital murder, the defendant shall have the right to request the selection of a new jury for the sentencing stage. If the defendant exercises this right, then the defendant will be deemed to have waived the issue of residual or lingering doubt about guilt, and the trial judge shall prohibit the defendant from raising or arguing that issue during the sentencing stage. The

defendant may exercise this right prior to jury selection in the guilty-innocence stage of the trial, but the exercise of that right shall be binding on the defendant once the empanelment process begins.

Section 8. (A). At the guilt-innocence stage of the capital murder trial, and again at the sentencing stage, unless the issue of residual or lingering doubt is waived by the defendant, the jury may, if requested by the defense, be instructed about the following known limitations of human evidence, to the extent that such human evidence has been introduced in the particular case: (1) eyewitness testimony, even from a confident eyewitness, may be unreliable, especially in connection with extremely emotional events such as a murder, and should therefore be evaluated with great care; (2) cross-racial eyewitness identifications are often particularly unreliable; (3) statements made by a defendant while in police custody are not always inherently reliable, and should therefore be evaluated with care; (4) ideally, statements made by the defendant while in police custody should be contemporaneously audio- or video-recorded in their entirety, and the lack of such a recording should be considered when evaluating the reliability of such a statement; and (5) statements made by codefendants or informants, especially when the codefendant or informant receives or hopes to receive any benefit from the commonwealth, may be unreliable, and should therefore be evaluated with great care.

(B). Whether to give an instruction in any of the categories listed in section 8(A) of this chapter, and the particular wording of any such instruction, shall lie within the discretion of the trial judge.

Section 9. (A). The sentencing stage of the capital murder trial shall be for the presentation and consideration of mitigating evidence. The commonwealth shall not relitigate the existence of aggravating factors proved at the trial or otherwise present evidence, except,

subject to the rules governing admission of evidence in the trial of a criminal action, in rebuttal of the defendant's evidence. Subject to the rules governing the admission of evidence in the trial of a criminal action, the defendant may present any evidence relevant to mitigation, and the defendant shall not be precluded from introducing reliable hearsay evidence that is not otherwise precluded.

(B). At the beginning of the sentencing stage, where a new death-qualified jury has been selected, the prosecution shall be permitted to present otherwise admissible evidence to the new jury to the extent reasonably necessary to inform the new jury about the nature and circumstances of the crime, including each of the elements set forth in sections 2(A) through 2(D) of this chapter that were found by the original jury at the guilt-innocence stage, and to allow the new jury to determine the appropriate weight to be given to these facts in deciding the sentence. The new jury shall be instructed that each of the elements of capital murder that were found by the original jury at the guilt-innocence stage shall be deemed established beyond a reasonable doubt for purposes of the sentencing stage, but that any additional facts elicited by the prosecution at the sentencing stage that are not essential to the verdict of guilty of capital murder shall not be deemed established beyond a reasonable doubt. The new jury shall not be instructed or informed on the issue of whether or not the defendant contested guilt during the guilt-innocence stage.

(C). Notwithstanding section 3(p) of chapter 258B, only after the jury determines that the defendant should be sentenced to death, may a representative or representatives of the victim's family and friends present a statement regarding the impact of the crime on the family and friends. The impact statement shall be given in the presence of the defendant.

Section 10. (A). At the sentencing stage of the capital murder trial, as a prerequisite to the imposition of the death penalty, and unless the issue of residual or lingering doubt has been waived by the defendant pursuant to section (7)(A) of this chapter, the jury shall be required to find that there is "no doubt" about the defendant's guilt of capital murder. In connection with this requirement, the jury shall be instructed that, even after finding the defendant guilty of capital murder beyond a reasonable doubt, it is possible that one or more jurors may still harbor a residual or lingering doubt about the defendant's guilt, and that the existence of such doubt, whether held individually or collectively, is sufficient to preclude the imposition of the death penalty.

(B). At the sentencing stage of the capital murder trial, as a prerequisite to the imposition of the death penalty, and regardless of whether or not the defendant has waived the issue of residual or lingering doubt, the jury is required to find that there is conclusive scientific physical or other associative evidence reaching a high level of scientific certainty.

(C). The jury may not direct the imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, and unanimously determines that the penalty of death should be imposed. Any member or members of the jury who find a mitigating factor to exist may consider such a factor regardless of the number of jurors who concur that the factor exists.

(D). If the court determines during the sentencing stage of the capital murder trial, because of a reasonable lapse of time or otherwise, that the deliberating jury is deadlocked as to the imposition of a death sentence, and it is apparent to the court that further instruction and

deliberations would not assist in the return of a verdict, the court shall dismiss the jury, and impose a sentence of imprisonment for life without the possibility of parole.

(E). When the jury has unanimously determined the defendant's sentence it must be recorded on the docket and read to the jury, and the jurors must be collectively asked whether such is their sentence. Even though no juror makes any declaration in the negative, the jury must, if either party makes such an application, be polled and each juror separately asked whether the sentence announced by the foreman is in all respects his or her sentence. If, upon either the collective or the separate inquiry, any juror answers in the negative, the court must refuse to accept the sentence and must direct the jury to resume its deliberation. If no disagreement is expressed, the jury must be discharged from the case.

Section 11. (A). There is hereby established, as an independent commission in the judicial branch of the commonwealth, an independent scientific review advisory committee, hereinafter referred to as the advisory committee. The advisory committee shall consist of five members who shall be appointed by a majority vote of the supreme judicial court from a list of eight nominees submitted by the governor. Each such nominee shall be a recognized expert in the evaluation of forensic evidence. Advisory committee members shall each serve a term of three years, and the chief justice of the supreme judicial court shall designate one member as chairman. The advisory committee shall initiate a formal process to ensure the independent scientific review of physical or other associative evidence, as defined in section 10(B) of this chapter, in every capital murder case in which a sentence of death is imposed.

(B). The advisory committee shall have the responsibility for drafting, adopting, and updating general policies relating to independent scientific review, establishing criteria for independent scientific review in particular cases, selecting independent forensic-science experts

to conduct case-specific independent scientific review, and monitoring the ongoing effectiveness of independent scientific review. If the state police crime laboratory or the Boston police crime laboratory employs any appointed member of the advisory committee, that employee shall not participate in any independent scientific review or independent scientific review panel selection in any capital murder case with which the employee's laboratory had any involvement.

(C). The advisory committee shall consider policies to require that all crime laboratories, medical-examiner offices, and forensic-service providers who are involved in any death-eligible homicide investigation or homicide trial in the commonwealth must be accredited by the appropriate accrediting organization, if available. The advisory committee shall also promulgate rules or regulations with respect to the qualifications of individuals who work for crime laboratories, medical-examiner offices, and forensic-service providers in connection with any death-eligible homicide investigation or homicide trial in the commonwealth. With respect to any rule or regulation that relates to the accreditation of medical-examiner offices, and the certification of individuals who work for such offices, the advisory committee shall work in coordination with members of the commission on medicolegal investigation as constituted under section 184 of chapter 6.

(D). Notwithstanding the above, counsel for a defendant indicted for capital murder shall not be prohibited from utilizing any person, otherwise qualified, as an expert in connection with the investigation, hearing, or trial of a criminal case.

(E). At the conclusion of any capital murder trial where the defendant is convicted and sentenced to death, the advisory committee shall appoint an independent scientific review panel hereinafter referred to as the panel. The panel shall consist of not less than three and not more than five members. The panel shall include independent members from each forensic-science

sub-discipline relevant to the particular case. Members of the panel shall be selected from among recognized experts not employed by the commonwealth's or city crime laboratories. The panel may be comprised of independent experts employed by federal or state laboratories outside the commonwealth, academics, or other suitable experts.

(F). The panel shall conduct a thorough review of the collection, handling, evaluation, analysis, preservation, and interpretation of, and testimony and all other matters relating to, physical or other associative evidence in the particular case. This review shall be conducted pursuant to the policies, rules, and regulations adopted by, and using the review criteria established by, the advisory committee. This review shall, at a minimum, address the following questions: (1) whether the integrity of the evidence was sufficient to allow for consideration of subsequent procedures; (2) whether the appropriate guidelines and standards of practice were followed for the crime scene and autopsy procedures; the recognition, documentation, recovery, packaging, and preservation of the evidence; the examination and comparison of evidence; the interpretation and reporting of results; and the reconstruction by experts relying on other examinations and reports; (3) whether any new research or novel science played a role, and if so, was it appropriately documented and provided for review under the relevant legal standard; and (4) whether the retrospective independent scientific review process, using contemporary standards, revealed any specific scientific or technical issues requiring additional information, or suggesting that errors may have been made. At the conclusion of its review, the panel shall issue a written report that contains, at a minimum, the panel's answers to each of the four questions listed above. A copy of the panel's report shall be provided, in a timely fashion, to the trial judge, the district attorney who prosecuted the defendant or his successor, the defense attorneys, the attorney general, and to the supreme judicial court.

Section 12. (A). After the trial of a defendant convicted of capital murder and sentenced to death, the trial judge may exercise the authority granted by rule 25(b)(2) of the rules of criminal procedure to set aside the verdict of guilt of capital murder and the corresponding death sentence, and direct the entry of a verdict of guilt of first-degree murder, whenever the trial judge finds the death sentence to be inappropriate on any basis in fact or law, including the trial judge's disagreement with the exercise of capital sentencing discretion by the jury.

(B). All cases in which the death sentence is imposed shall be subject to mandatory appellate review by the supreme judicial court. The defendant may not waive such appellate review. As part of this mandatory appellate review, in addition to the review of any legal issues properly raised, the supreme judicial court shall exercise the substantive review authority granted by section 33E of chapter 278 to set aside the verdict of guilt of capital murder and the corresponding death sentence, or direct the entry of a verdict of guilt of first-degree murder, whenever the supreme judicial court finds that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require. The supreme judicial court shall exercise this substantive review authority, and set aside the death sentence, whenever it determines that the death sentence is inappropriate on any basis in fact or law, including the court's disagreement with the exercise of capital sentencing discretion by the jury.

Section 13. (A). Immediately upon the pronouncing of the sentence of death upon a person convicted of capital murder, the execution of that death sentence shall automatically be stayed pending mandatory appellate review by the supreme judicial court under section 33E of chapter 278, and under section 12(B) of this chapter. Unless otherwise ordered by the supreme judicial court, where the court has affirmed the conviction of capital murder and the sentence of

death, the stay shall remain in effect only until the supreme judicial court issues its rescript, pursuant to section 8 of chapter 211, whereupon the stay shall be automatically revoked.

(B). Immediately upon the pronouncing of the sentence of death upon a person convicted of capital murder, and immediately upon the revocation of the stay of execution of such a sentence under section 4 of chapter 279, section 13(A) or section 17(D) of this chapter, the clerk shall make, sign, and deliver to the sheriff of the county where the conviction is had a warrant under the seal of the court stating the conviction and sentence, and that a stay of execution of the sentence has been granted under section 4 of chapter 279, section 13(A) or section 17(D) of this chapter, and that such stay has been revoked under these sections, and shall at the same time transmit to the superintendent of the state prison a certified copy of the warrant. Such warrant shall be directed to the superintendent commanding him to cause execution to be done in accordance with the provisions of such sentence. The clerk of the court shall, upon revocation under section 4 of chapter 279, section 13(A) or section 17(D) of this chapter, of the stay of execution of the sentence, make out and deliver to the governor a certified copy of the whole record of the conviction and sentence, including any rescripts from the supreme judicial court.

Section 14. The sheriff of the county in a jail where a prisoner convicted of capital murder and sentenced to death is confined, or a deputy designated by the sheriff, within ten days after receipt by the sheriff of the warrant for the execution of such sentence shall, at a time chosen by the sheriff, convey such prisoner to the state prison and deliver him, with the warrant in either case, to the superintendent thereof or to the officer performing his duties and such prisoner shall be placed in a cell provided for the purpose. Within 30 days thereafter, the superintendent or officer performing his duties shall cause the prisoner to be examined by a psychiatrist for the purpose of rendering a written and signed opinion as to whether or not the

prisoner is psychologically fit to be transferred from special confinement to confinement with the general prison population, and in the case of a female, to the general prison population woman's correctional facility, with full participation in the educational and work programs, within the prison, afforded prisoners under a sentence other than death. Upon receipt of the psychiatric opinion, and other pertinent information, the superintendent or officer performing his duties may transfer the prisoner to confinement with the general prison population with the right of full participation in the privileges afforded other prisoners under a sentence other than death. If the superintendent, or officer performing his duties, does not so transfer the prisoner, he shall notify the prisoner of his decision forthwith, whereupon the prisoner may appeal the decision within 14 days of the notification by giving notice to the superintendent, or officer performing his duties, on a form provided him at the time of the receipt of the notification of the adverse decision. Upon receipt of such notice, the superintendent or officer performing his duties shall notify the commissioner of correction forthwith whereupon the commissioner shall hold a hearing on the appeal within 20 days of receipt of notice that such appeal has been made. The commissioner or his appointee shall conduct the hearing and shall render a decision granting or denying the appeal within five days following the date of the hearing. A prisoner who is denied such transfer by the superintendent, or officer performing his duties, shall remain in a cell for the purpose of the execution of his sentence, and shall thereafter be kept therein, unless an appeal made by him of the adverse decision is granted, until the sentence of death is executed upon him, and no person shall be allowed access to him without an order of the court, except the officers and employees of the prison, his counsel, such physicians, priest, or minister of religion as the superintendent may approve and members of the prisoner's family who are identified to the satisfaction of the superintendent. Any prisoner confined to a cell for the purpose of the execution of his sentence

shall have his record reviewed annually for the purpose of determining whether or not the prisoner should be placed in the general population, and shall be entitled to a hearing, as provided above, on each adverse decision. Notwithstanding the foregoing, the superior court may make any order relative to the custody of a prisoner confined in the state prison under this section if the prisoner is granted a new trial.

Section 15. The sentence of death shall be executed by the superintendent of the state prison, or by a person acting under his direction, not earlier than 20 days nor later than 30 days after service upon the superintendent, or officer performing his duties, of a certificate of the clerk of the court that the stay of the execution of the sentence has been revoked under section 4 of chapter 279, section 13(A) or section 17(D) of this chapter, unless the governor pardons the crime, commutes the punishment therefor or respites the execution or the execution is otherwise delayed by process of law. If the execution is respited or stayed by process of law, the sentence of death shall be executed within the week beginning on the day next after the day on which the term of respite or stay expires. The sentence of death shall be executed upon such day within the limits of time provided in this section as the superintendent elects; but no previous announcement thereof shall be made, except to such persons as may be permitted to be present in accordance with section 20 of this chapter.

Section 16. The punishment of death shall be executed by the administration of a continuous intravenous injection of a lethal substance or substances in a quantity sufficient to cause death until a licensed physician, according to accepted standards of medical practice, pronounces death. The commissioner of correction shall determine the lethal substance or substances to be administered, and qualified personnel selected by the superintendent of the facility where the execution occurs shall administer them. The punishment of death shall be

executed within an enclosure or building for that purpose at a state prison facility. Notwithstanding any general or special law or regulation to the contrary, administration of the injection does not constitute the practice of medicine, nursing or pharmacy, and the superintendent may obtain and employ the drugs necessary to carry out the provisions of this section.

Section 17. (A). A defendant convicted of capital murder and sentenced to death shall be presumed to be mentally competent to be executed. It shall be the defendant's burden to rebut that presumption and to establish, by a preponderance of the evidence, that he is mentally incompetent to be executed.

(B). If, at any time prior to execution, a defendant convicted of capital murder and sentenced to death, appears to be mentally incompetent to be executed, the superintendent of the prison or the sheriff having custody of the defendant, the defendant's legal counsel, or a psychiatrist or psychologist who has examined the defendant, shall give notice of the apparent mental incompetence to be executed to the superior court in the county where the defendant was tried.

(C). Upon receiving notice pursuant to section 17(B) of this chapter, the superior court shall determine, based on the notice and any supporting information, any information submitted by the district attorney who prosecuted the defendant, or by that district attorney's successor, and the record in the case, including previous hearings and orders, whether probable cause exists to believe that the convict is mentally incompetent to be executed. If the court finds that probable cause exists to believe that the defendant is mentally incompetent to be executed, the court shall hold a hearing to determine whether the defendant is mentally incompetent to be executed. If the

court does not find that probable cause of that nature exists, the court may dismiss the matter without a hearing.

(D). If, after receiving notice under section 17(B) of this chapter, the court finds probable cause to believe that the defendant is mentally incompetent to be executed, the court shall hold a hearing to inquire into the defendant's mental incompetence and shall give immediate notice of the inquiry to the district attorney who prosecuted the case, or that district attorney's successor, and to the defendant's counsel. If the defendant does not have counsel, the court shall appoint an attorney to represent the defendant in the inquiry. The defendant shall have the right to present evidence and cross-examine any witnesses at the hearing. The court may appoint one or more psychiatrists or psychologists to examine the defendant. The court shall issue any ruling in the matter no later than 90 days from the date of the notice given under section 17(B) of this chapter. Execution of the defendant's sentence shall be stayed pending completion of the inquiry, and until such time as the court decides the matter. If the defendant is found not to be mentally incompetent to be executed, the stay of his sentence shall be revoked immediately.

(E). If the court appoints a psychiatrist or psychologist to examine the defendant, the court shall inform the psychiatrist or psychologist of the location of the defendant and of the purpose of the examination. The examiner shall have access to any available psychiatric or psychological report previously submitted to the court with respect to the mental condition of the defendant, including, if applicable, any reports regarding the defendant's competency to stand trial or the defendant's criminal responsibility. The examiner also shall have access to any available current mental health and medical records of the defendant.

(F). If the court appoints a psychiatrist or psychologist to examine the defendant, the examiner shall conduct a thorough, in person examination of the defendant and shall submit a

report to the court within 30 days of the examiner's appointment. The report shall contain the examiner's findings as to whether the defendant has the mental capacity to understand the nature of the death penalty and why it was imposed upon the defendant and the facts, in reasonable detail, upon which those findings are based.

(G). If, at the conclusion of a hearing pursuant to section 17(D) of this chapter, the court determines that the defendant is not mentally incompetent to be executed, the court shall enter an order recording that determination. A copy of the order shall be delivered to the clerk of the superior court and to superintendent of the prison or the sheriff having custody of the defendant. Upon receipt of the order, the clerk shall notify the defendant and the district attorney that the stay of the defendant's sentence has been revoked and his execution may be carried out in accordance with the warrant.

(H). If, at the conclusion of a hearing pursuant to section 17(D) of this chapter, the court determines that the defendant is mentally incompetent to be executed, the court shall suspend the execution until further order. The court shall enter an order recording the determination. A copy of that order shall be delivered to the clerk of the superior court and to superintendent of the prison or the sheriff having custody of the defendant. The court shall also send an order suspending the defendant's sentence to the commissioner of correction, and to the superintendent of the prison or the sheriff having custody of the defendant. Any time thereafter when the superior court is provided sufficient reason to believe that the defendant is no longer mentally incompetent to be executed, the court shall again determine, pursuant to section 17(D) of this chapter, whether the defendant is mentally incompetent to be executed. Proceedings pursuant to this section may continue to be held at such times as the superior court orders for the remainder of the defendant's life. Any defendant, who is found not mentally competent to be executed,

shall be imprisoned in an appropriate correctional facility to be determined by the commissioner of correction.

(I). The commonwealth and the defendant shall have the right to appeal any adverse order which determined the defendant's competency to be executed. Upon entering such an order the court must afford the parties a reasonable period of time, which shall not be more than ten days, to determine whether to take an appeal from such an order. The taking of an appeal by either party stays the effectiveness of the court's order. If an appeal is taken, it shall be entered directly on the docket of the supreme judicial court. No costs or attorney's fees shall be assessed against the commonwealth in connection with any appeal of such an order unless the defendant prevails and the supreme judicial court determines that the appeal was frivolous.

(J). If a person convicted of a capital murder and sentenced to death is, at the time when the death sentence is to be imposed, after examination by a physician, found by the superior court to be pregnant, the court shall stay the execution of the sentence upon her until it finds that she is no longer pregnant. When the defendant is no longer pregnant, the stay shall be revoked, and her execution shall be carried out in accordance with this chapter.

Section 18. The governor may from time to time respite the execution of a sentence of death for stated periods so long as he may consider it necessary to afford him an opportunity to investigate and consider the facts of the case for the purpose of considering whether or not to pardon the defendant or commute his death sentence.

Section 19. The supreme judicial court, or a single justice thereof, may stay the execution of a sentence of death from time to time for stated periods, pending the final determination of any judicial question arising in or out of the case in which the sentence is

imposed, or to address a recommendation from the death penalty review commission that the execution of a death sentence should be stayed.

Section 20. There shall be present at the execution of the sentence of death, in addition to the superintendent, deputy and such officers of the state prison as the superintendent deems necessary, the commissioner of correction or his representative, the person performing the execution under the direction of the superintendent, if any, the prison physician, the chief medical examiner, and one other physician to be selected by the superintendent. The physicians present shall be the legal witnesses of the execution. There may also be present, upon the request of the prisoner who is to be executed, the immediate members of the prisoner's family. There may also be present, upon the request of the prisoner, a priest, minister, rabbi or other representative of the prisoner's religion. There may also be present the sheriff of the county where the prisoner was convicted, or his deputy, and, with the approval of the superintendent, not more than five other persons.

Section 21. There shall be a post mortem examination by the chief medical examiner, or his designee, of the body of every prisoner executed in conformity with the sentence of a court.

Section 22. When the superintendent has executed the sentence of death upon a prisoner in obedience to a warrant from the superior court, he shall forthwith make return thereof under his hand, with the doings thereon, to the office of the clerk of the superior court.

Section 23. (A). There is hereby established, as an independent commission in the executive branch of the commonwealth, a death penalty review commission, hereinafter called the commission, to consist of seven ex officio members or their designees: the attorney general, the secretary of public safety, the chief counsel to the committee for public counsel services, the chief medical examiner, the chief justice for administration and management, the president of the

Massachusetts Association of Criminal Defense Attorneys, and the Massachusetts District Attorneys' Association, or their designees. The commission shall also include four additional persons to be appointed by the governor, including one of whom is a fellow or member of the American Academy of Forensic Sciences. The governor shall designate one member as chairman, who shall serve as chairman for three years unless sooner removed at the pleasure of the governor. The members appointed to the commission by the governor shall serve terms of three years and shall serve at the pleasure of the governor.

(B). The purpose of death penalty review commission shall be to: (1) investigating any claim of substantive error made by any person subject to a death sentence, *i.e.*, any claim either that the person did not commit the capital murder for which the death sentence was imposed, or that the person was legally ineligible for the death penalty; and (2) investigating the causes of any such substantive errors that may be found to have occurred at trial in any capital murder case.

(C). A defendant convicted of capital murder and sentenced to death may file a petition requesting the commission to review his case and sentence at any time up and until seven days before the date of the defendant's scheduled execution. A copy of the record, the briefs, and appendices submitted to the supreme judicial court on appeal shall accompany the petition.

(D). A defendant who has not been sentenced to death, or whose death sentence has not been upheld on appeal, shall not be eligible to petition the commission for review of his case and sentence. For the purposes of 28 U.S.C. section 2244(d)(2), a properly filed petition, by an eligible defendant, requesting the commission to review his case and sentence, may be considered an application for state post-conviction or other collateral review with respect to the

pertinent judgment or claim. The filing of a petition by such a defendant requesting that the commission review his case and sentence does not, by itself, stay the execution of his sentence.

(E). Upon receiving a petition from a defendant convicted of capital murder and sentenced to death, the commission shall review the request to determine if the defendant has made a prima facie showing of any claim contained in section 23(B)(1) of this chapter. If a majority of the commission concludes that the defendant has made such a prima facie showing to warrant further review, the chairman shall issue a written decision to that effect. The commission's decision shall also include a recommendation on whether or not the execution of the defendant's sentence should be stayed pending the commission's full review. The chairman shall give immediate notice of the commission's decision and recommendation to the district attorney who prosecuted the case, or that district attorney's successor, and to the defendant's counsel. When the commission recommends that a stay be granted, the defendant may request, from a single justice of the supreme judicial court, that the execution of his sentence be stayed pending the commission's full review. The defendant's request shall be accompanied by the commission's decision under section 23(E) of this chapter, and the commission's recommendation for a stay.

(F). If a majority of the commission determines that the defendant's petition seeking the commission's review of his case and sentence fails to make a prima facie showing of any claim contained in section 23(B)(1) of this chapter, the chairman shall issue a written decision to that effect, and deny the defendant's request for review. The chairman shall give immediate notice of that decision to the district attorney who prosecuted the case, or that district attorney's successor, and to the defendant's counsel. If the commission grants further review, and upon further review, a majority of the commission finds that the defendant has not demonstrated the existence

of any claim contained in section 23(B)(1) of this chapter, the chairman shall issue a decision to that effect with the same notice as provided for in this section. Upon the issuance of such a decision, any stay granted by a single justice of the supreme judicial court under section 23(E) of this chapter shall automatically be revoked without further proceedings.

(G). In connection with the investigation of a claim of substantive error in a capital murder case, the commission is authorized to hire all necessary staff, including experts; to inspect evidence and other tangible materials connected with the crime; to issue subpoenas; and to request the assistance of the state or local police to carry out searches or make arrests. If the commission concludes that any capital murder case may involve a substantive error, the commission shall refer the case to the superior court with a recommendation for further judicial review. In conjunction with its referral to the superior court, the commission shall issue a public report detailing its findings, including, when appropriate, recommendations for reforms to the commonwealth's capital punishment system.

(H). If a defendant submits a second or subsequent request, or requested amendment to a prior request, for the commission's review that raises a claim that the commission has previously reviewed and denied, or one that it has previously reviewed and referred to the superior court, the commission shall deny the request for review in the same manner it would deny a request under section 23(F) of this chapter, where the defendant's petition fails to make a prima facie showing of any claim contained in section 23(B)(1) of this chapter. If the defendant's second or subsequent request for the commission's review, or a request to amend a prior request, raises a claim that would fall within the requirements of 23(B)(1), but is one that could have been presented in a prior petition had the defendant or his counsel exercised due diligence, the commission shall deny the request for review in the same manner it would deny a request under

section 23(F) of this chapter, where the defendant's petition fails to make a prima facie showing of any claim contained in section 23(B)(1).

SECTION 2. Section 8 of chapter 211D of the General Laws, as appearing in the 2002 Official Edition, is hereby amended by inserting, after section 8, the following section: —

Section 8A. (1). A list of "capital-case qualified" defense attorneys shall be established and maintained by the committee, pursuant to policies and procedures established by the supreme judicial court. This list should include only those defense attorneys who meet rigorous standards of experience, capital-case training, and proven exemplary performance.

(2). A "capital-case qualified" defense attorney shall have, at a minimum, the following experience, unless the superior court determines, after a hearing, that any of the below criteria should be waived or modified.

(a) Eight years or more of criminal litigation experience;

(b) Experience with plea bargaining in homicide cases;

(c) Experience with expert testimony and scientific evidence (including medical, forensic, psychiatric, pathological, and DNA evidence);

(d) Experience with all aspects of criminal litigation (including pre-trial, trial, appellate, and post-conviction);

(e) Lead counsel in at least ten felony jury trials in the past ten years, five of which involved homicide indictments, that resulted in a verdict, decision or hung jury;

(f) Prior capital murder case experience.

SECTION 3. Section 9 of chapter 211D of the General Laws, as appearing in the 2002 Official Edition, is hereby amended by inserting, after section 9, the following section: —

Section 9A. The committee shall establish standards for the public and private counsel divisions for training in the defense of capital murder cases, which shall include but not be limited to:

(1) All relevant state, federal, and international law;

(2) Investigative techniques and strategies;

(3) Investigative support, including investigation of mitigation evidence;

(4) Arrest, interrogation, evidence-collection, evidence-handling, evidence-testing, and chain-of-custody issues;

(5) Issues relating to human evidence, including the special problems of line-ups, eyewitness testimony, informant testimony, and defendant statements resulting from interrogation;

(6) Issues relating to expert testimony and scientific evidence, including medical, forensic, psychiatric, pathological, and DNA evidence;

(7) Issues relating to exculpatory evidence in possession of the prosecution;

(8) Issues relating to the defendant's prior criminal history;

(9) Issues relating to "tunnel vision" and "confirmatory bias";

(10) Pleading and motion practice;

(11) Pre-trial strategies;

(12) Capital murder jury selection;

(13) Trial preparation;

(14) Coordination of guilt-innocence and sentencing strategies;

(15) Preserving issues for appellate and federal habeas review;

(16) Presentation of mitigating evidence;

(17) Communicating effectively with the defendant, his family and friends; and

(18) Dealing with a potentially disruptive or recalcitrant defendant.

SECTION 4. Section 4 of chapter 279 of the General Laws, as appearing in the 2002 Official Edition, is hereby amended by striking out, in line 3, the words "section sixty-one in case of a capital crime." and replacing them with the following: —

"sections 13(A), 17(D) and 23(E)of chapter 279A in the case of a conviction for capital murder where the defendant has been sentenced to death."

SECTION 5. In addition to the provisions of section 6, cl. (11) of chapter 4, in the event that the death penalty in this chapter is held to be unconstitutional by the supreme judicial court or by the United States supreme court, any person convicted of capital murder and sentenced to death shall be sentenced to life in prison without the possibility of parole.

SECTION 6. Sections 57 through 71 of chapter 279 and section 6 of chapter 113 are hereby repealed.