HOUSE DOCKET, NO. 585 FILED ON: 1/25/2021

HOUSE . . . . . No. 1552

The Commonwealth of Massachusetts

PRESENTED BY:

Shawn Dooley

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 instituting the death penalty for the murder of law enforcement officers.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
Shawn Dooley	*9th Norfolk*	*1/25/2021*
John Nelson, Massachusetts Coalition of Police	*P.O. Box 768 - Millbury, MA 01527*	*2/4/2021*
Larry Calderone, Boston Patrolmen Union	*295 Freeport Street, Dorchester, MA 02122*	*2/4/2021*
Alyson M. Sullivan	*7th Plymouth*	*2/26/2021*
Kelly W. Pease	*4th Hampden*	*2/26/2021*

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HOUSE . . . . . No. 1552

By Mr. Dooley of Norfolk, a petition (accompanied by bill, House, No. 1552) of Shawn Dooley and others relative to instituting the death penalty for the murder of law enforcement officers. The Judiciary.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. *3769* OF 2019-2020.]

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Second General Court
(2021-2022)

An Act instituting the death penalty for the murder of law enforcement officers.

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. Chapter 211D of the General Laws, as appearing in the 2016 Official Edition, is hereby amended by adding the following section:–

Section 17. (a) The commonwealth shall provide legal services to:

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

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

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

(c) The appointing authority shall:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) appoint 2 attorneys, lead counsel and co-counsel, to represent a client in a capital case after the relevant stage of proceedings, promptly upon receiving notice of the need for the appointment from the relevant state court; and

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

(d) Upon receipt of notice from the appointing authority that an individual entitled to the appointment of counsel under this section has declined to accept such an appointment, the court requesting the appointment shall conduct, or cause to be conducted, a hearing, at which the individual and counsel proposed to be appointed under this section shall be present, to determine

the individual's competency to decline that appointment, and whether the individual has knowingly and intelligently declined it.

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

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

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

(B) have served as lead counsel or co-counsel at the trial or sentencing stages in at least 2 homicide cases tried to a jury;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) Appointed attorneys from the private bar shall receive prompt payment for legal services and reimbursement for expenses and support services upon the submission of periodic

bills, receipts, or other appropriate documentation to the appointing authority or other appropriate state agency. The appointing authority shall promptly resolve any disputes with respect to such bills.

SECTION 2. Section 2 of Chapter 265, as so appearing, is hereby amended by inserting at the end thereof the following:-

(e) Any person who is found guilty of murder in the first degree may be punished by death by lethal injection pursuant to the procedures set forth in sections 68 to 71, inclusive, except in cases where said person was found by the court to be a juvenile offender.

SECTION 3. Chapter 279 of the General Laws, as so appearing, is hereby amended by striking section 60 and inserting in place thereof the following section:–

Section 60. The punishment of death shall be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the prisoner is dead.

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

Section 68. Upon a plea or verdict of guilty of murder committed with deliberately premeditated malice aforethought or murder with extreme atrocity or cruelty by an individual who has attained the age of 18 years at the time of the murder and who is not convicted under the provisions of the felony murder rule, in cases where the commonwealth has alleged in its indictment or indictments the presence of 1 or more of the aggravating circumstances set forth in section 69, a presentence hearing shall be conducted before the jury before which the case was

tried; provided, however, that if in the opinion of the judge presiding at the presentence hearing, it is impossible or impracticable for the trial jury to sit at the presentence hearing, or if the matter of guilt was determined by a plea of guilty rather than by a jury, a new jury shall be impaneled to sit at the presentencing hearing. The selection of that jury shall be according to the laws and rules governing the selection of a jury for the trial of a capital case. A presentence hearing need not be conducted if the commonwealth determines either that it cannot prove beyond a reasonable doubt the existence of the aggravating circumstance set forth in section 69, or that the penalty of death should not be imposed, in which case the court shall impose the sentence of imprisonment for life as provided in section 2 of chapter 265.

During the presentence hearing, the only issue shall be the determination of the punishment to be imposed. During such hearing the jury shall hear all additional relevant evidence in mitigation of punishment including evidence relevant to any statutory mitigating circumstance set forth in paragraph (b) of section 69, and evidence relevant to any other aspect of the defendant's character or record or any of the circumstances of the offense that the defendant or the commonwealth may proffer as a basis for a sentence less than death, regardless of its admissibility under the rules governing the admission of evidence at criminal trials. During such hearing, the jury shall also hear such evidence in aggravation of punishment as is relevant to any statutory aggravating circumstance set forth in paragraph (a) of said section 69, and which is alleged in the indictment; provided, however, that only such evidence in aggravation of punishment as the commonwealth has made known to the defendant prior to his trial shall be admissible, and provided further, that said evidence is otherwise admissible according to the rules governing the admission of evidence at criminal trials. The jury shall also hear arguments by the defendant or his counsel or both and by the commonwealth regarding the punishment to

be imposed. The commonwealth and the defendant or his counsel shall be allowed to make opening statements and closing arguments at the presentence hearing. The order of those statements and arguments and the order of presentation of evidence shall be the same as at trial.

Upon the conclusion of evidence and arguments at the presentence hearing, the court shall instruct the jury orally as to, and shall provide to the jury in writing copies of, any statutory aggravating circumstance or circumstances which are set forth in the indictment and which it determines to be warranted by the evidence. The court shall instruct the jury that it may choose to find that the penalty of death shall be imposed upon the defendant, or it may choose not to find that the penalty of death be imposed on the defendant, but that it may not find that the penalty of death shall be imposed unless it shall first make a unanimous determination of the existence of one or more of the aggravating circumstances set forth in section 69 and the indictment, beyond a reasonable doubt. The jury shall further be instructed that if it finds the existence of such an aggravating circumstance beyond a reasonable doubt, it must then consider all of the evidence presented to it relevant to any of the mitigating circumstances set forth in paragraph (b) of section 69, or to any other mitigating circumstance and determine whether, in view of all the relevant circumstances of the offense and of the defendant, the sentence shall be life imprisonment or death. The jury shall further be instructed that the penalty of death may not be imposed unless it unanimously finds after a review of all of the evidence of mitigation proffered as a basis for a sentence less than death, that the penalty of death should be imposed. If the jury is unable to reach a unanimous verdict, the court shall impose the sentence of imprisonment for life as provided in section 2 of chapter 265.

If its unanimous verdict is to impose the penalty of death, the jury shall designate in writing, signed by the foreperson of the jury, the statutory aggravating circumstance or

circumstances which it unanimously found existed beyond a reasonable doubt, and that the jury after consideration of all of the evidence of mitigation relevant to the circumstances of the defendant and the offense proffered as a basis for a sentence less than death, unanimously found that the death penalty should be imposed.

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

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

Section 69. (a) In all cases in which the death penalty may be authorized, the statutory aggravating circumstance is:

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

(b) In all cases in which the death penalty may be authorized, the statutory mitigating circumstances are:

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

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

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

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

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

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

(7) the defendant was experiencing post-traumatic stress syndrome induced by military service in the United States Army, Navy, Marine Corps, Air Force, or Coast Guard.

Section 70. Where a person is convicted or pleads guilty to a crime which is punishable by death, a sentence of death shall not be imposed unless findings in accordance with section 68 are made. Further, such a sentence shall not be imposed unless the jury finds that there is conclusive scientific evidence, including physical or other associative evidence, enabling it to reach a high level of scientific certainty connecting the defendant to the crime. Physical or other associative evidence may include any tangible image, object, or item that can be independently

examined for the purpose of obtaining pertinent investigative information. The jury may use the scientific, physical or other associative, evidence to corroborate the defendant's guilt and need not rely entirely on human evidence and testimony. Where such findings are made and the jury finds that the death penalty shall be imposed, the court shall sentence the defendant to death unless the court determines that a sentence of death should not be imposed under section 71. Where such findings are not made or not unanimously made or where a sentence of death is not a unanimous finding by the jury, the court shall sentence the defendant to life imprisonment as provided in section two of chapter 265.

Section 71. (a) The supreme judicial court shall establish, by rule, such reports or checklists to be utilized by the trial court, the prosecuting attorney, and defense counsel prior to, during, and after the trial of cases in which the death penalty is sought, as it deems necessary to ensure that all possible matters which could be raised in defense have been considered by the defendant and defense counsel and either asserted in a timely and correct manner or waived in accordance with applicable legal requirements, so that, for purposes of any pretrial review and the trial and post-trial review, the record and transcript of proceedings will be as complete as possible for a review by the sentencing court and the supreme judicial court of challenges to the trial, conviction, sentence and detention of the defendant.

(b) In any case in which the sentence of death has been imposed, the trial judge shall conduct a review of the entire record and shall report to the supreme Judicial court any observations which it deems pertinent to the question of the appropriateness of the sentence, including the credibility and effectiveness of mitigation evidence offered by the defense; the strength of the commonwealth's case on the merits including observations with respect to its reliance on circumstantial or eyewitness testimony and on the possibility, if any, of innocence

being subsequently established, and the possibility of passion or prejudice having affected the jury's sentencing decision. If, based on the trial court's review of the record, the court determines that despite findings by the jury, the death penalty should not be imposed, the judge may set aside the sentence of death and impose a sentence of life imprisonment without parole. In such case the judges shall set forth in writing the findings and reasons which support such determination. The commonwealth shall have a right to appeal to the supreme judicial court any such determination, and the supreme judicial court may set aside said determination if it is unsupported by the record of the case, and may thereafter reimpose the penalty of death.

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

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

Section 72. (a) In addition to a unified review procedure administered by the supreme judicial court, the court shall conduct a formal process to ensure the independent scientific review of all scientific, physical or other associative, evidence in every capital case in which a sentence of capital punishment is imposed.

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

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

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

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

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

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

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

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

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

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

Section 73. In addition to a review of the entire case pursuant to section 33E of chapter 278, and section 71 of chapter 279, the supreme judicial court shall review the sentence of death imposed pursuant to sections 68, 69 and 70 of chapter 279. If the supreme judicial court determines that: (i) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; or (ii) the evidence does not support the jury's finding of a statutory aggravating circumstance or circumstances as defined in section sixty-nine; or (iii) the evidence of mitigation warranted the imposition of a life sentence rather than a sentence of death; or (iv)

the weight of the evidence does not warrant a sentence of death the court shall (1) reverse the sentence of death and remand for a new presentence hearing pursuant to section 68 of chapter 279; or (2) reverse the sentence of death and remand to the superior court department of the trial court for sentence of imprisonment in the state prison for life. The court shall also have the authority to affirm the sentence of death.