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**NOTE – The opinions and ideas expressed herein are those of the Governor's Council on
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INTRODUCTION

We, the members of the Massachusetts Governor's Council on Capital Punishment, hereby submit our final report and recommendations to Governor Mitt Romney. In this report, we offer a series of ten proposals – many of which are unprecedented in the history of American capital punishment – that, if adopted in their entirety, can allow creation of a fair capital punishment statute for Massachusetts that is as narrowly tailored, and as infallible, as humanly possible. Although the process that led to this report has been long and challenging, we are satisfied that we have completed our work in a manner consistent with the Governor's charge.

We began our work on September 23, 2003, the same day that Governor Romney first met with us and presented us with our charge. Since that day, the Council has met together seven times, and we have corresponded regularly, both by telephone and by e-mail. We have compiled thousands of pages of documents – including research studies, legal and scientific analyses, reports of death-penalty commissions in other states, and relevant documents issued by various federal, state, and non-governmental entities – and we have reviewed numerous death-penalty reform proposals. We have called on experts from outside the Council to make presentations to us, and to consult with us. We have received calls and letters from numerous additional experts and other interested parties, and we have discussed and considered their comments and suggestions, incorporating some of them into our final recommendations. In the end, we are confident that no significant issue, or perspective, has been overlooked.

While our timeline was ambitious, we enjoyed two major advantages over other, previous death-penalty reform commissions. First, we were able to draw heavily on the research, and the collective wisdom, of those earlier efforts. This expedited our information-gathering and facilitated the fundamental legal and scientific analyses necessary to address both empirical questions (“What do we know about this particular aspect of capital punishment?”) and the more important normative ones (“What should we recommend about this particular aspect of capital punishment?”).

Second, we were not constrained in our work by any existing death-penalty laws or practices in Massachusetts – because there are none. We were free to consider any idea that might constitute a “best practice” for a possible death penalty statute, without having to worry about whether such an idea might conflict with procedures or institutions already in place, or encroach on some entrenched or vested interest. This allowed us to focus our attention squarely on the merits of each idea, without the distraction of political considerations.

This report contains ten recommendations. Each of these recommendations represents a consensus view of the entire Council. The fact that such a diverse group – including attorneys with prosecution, defense, and judicial experience; forensic scientists who work with prosecutors and defense attorneys; persons with extensive backgrounds in law enforcement; and legal and medical academics – could reach such a consensus reveals the extent to which personal feelings, as well as differences of opinion about the death penalty itself, were set aside in pursuit of the common goal.

The Council's report should not be interpreted as a criticism of any existing death-penalty system in any other jurisdiction. Each different jurisdiction must make its own decisions about how best to balance the competing values, priorities, demands for resources, and other variables involved in the administration of the death penalty. This report reflects Governor Romney's unprecedented charge to the Council on behalf of the people of Massachusetts, which was to recommend the legal and forensic safeguards that would be necessary before a fair death-penalty statute could be considered in Massachusetts. The goal was to make recommendations to ensure that any death penalty statute that may be considered in Massachusetts would be as narrow, and as foolproof, as possible. We believe that the ten recommendations outlined herein can accomplish this goal.

The Council was not asked to consider or make any recommendation about whether capital punishment legislation should be considered or approved in Massachusetts. That is an issue properly reserved for the citizens of the Commonwealth of Massachusetts and their duly elected representatives. Nevertheless, the entire Council agrees that, if capital punishment legislation is to be considered in Massachusetts according to the standards set by Governor Romney, it should be done on the basis of the recommendations contained in this report.

OVERVIEW

In Governor Romney's charge to the Council, he repeatedly stressed two main themes. First, capital punishment should be limited to a narrowly defined subset of first-degree murders, so that only the "worst of the worst" murders, and murderers, will be eligible for the ultimate punishment. Second, the death penalty should be administered with a strong emphasis on the use of scientific evidence to help establish the defendant's guilt, which will ensure – as much as humanly possible – that no innocent person will ever wrongly be condemned to death. These two main themes dominated the Council's work, and they represent the foundation for this report.

As a starting point for the Council's discussions, we agreed with Governor Romney that the two most important aspects of any death-penalty system in Massachusetts should be to ensure – as much as humanly possible – that (1) no innocent person, nor any person who is guilty but legally ineligible for the death penalty, will ever wrongly be condemned to death, and (2) the death penalty will be applied in a narrow and reasonably consistent manner, reaching only the "worst of the worst" murders and murderers. We also agreed that, in general, the best way to provide such assurances is through multiple layers of review, and that the emphasis should be on those review processes that can exclude problematic cases from the pool of potentially capital cases as early as possible. Finally, we agreed that, given our limited charge, we should avoid proposing major changes to the way that non-capital crimes are investigated, prosecuted, and tried in Massachusetts, but instead should focus primarily on proposals that would apply to potentially capital cases – although reason may suggest that at least some of these same proposed reforms also should be extended, in the future, to non-capital cases.

With this basic substantive framework in place, we developed our specific proposals. These proposals can be outlined as follows:

- (1) a narrowly defined list of death-eligible murders;
- (2) appropriate controls over prosecutorial discretion in potentially capital cases;
- (3) a system to ensure high-quality defense representation in potentially capital cases;
- (4) new trial procedures to avoid the problems caused by the use of the same jury for both stages of a bifurcated capital trial;
- (5) special jury instructions concerning the use of human evidence to establish the defendant's guilt;
- (6) a requirement of scientific evidence to corroborate the defendant's guilt;
- (7) a heightened burden of proof to enhance the accuracy of jury decision-making;
- (8) independent scientific review of the collection, analysis, and presentation of scientific evidence;
- (9) broad authority for trial and appellate courts to set aside wrongful death sentences; and
- (10) the creation of a death-penalty review commission to review claims of substantive error and study the causes of such error.

In the first instance, concerning the narrow definition of capital murder, our proposal takes the form of specific statutory language, capable of being introduced directly into the legislative process. In the remaining instances, our proposals take the form of detailed policy recommendations and suggested actions, which will require the assistance of others to convert into any proposed legislation. We have been mindful throughout of the many published studies and discussions concerning the possible effects of race and ethnicity of defendants and victims, and, by proxy, economic status, on death sentencing. We believe that our recommendations contain important safeguards – most notably, the narrow definition of capital murder – that will help to address such concerns.

There will be increased costs associated with the implementation of the above proposals. Since most of these costs will arise only when the death penalty is sought in a particular case, however, they will be limited by the extremely narrow proposed criteria for death-eligibility, which ensure that, at most, only a small handful of murders will be eligible for the death penalty each year in Massachusetts. Nevertheless, each capital trial will be expensive. Moreover, additional costs inevitably will be incurred due to the proposed creation of new governmental institutions to review scientific evidence and post-trial claims of innocence. The Council strongly believes that, if the death penalty is to be reinstated in Massachusetts, such increased costs simply must be borne. It is not possible to have a death penalty system that is both inexpensive, and at the same time capable of being relied upon to produce accurate and fair results. We are confident that the people of Massachusetts would insist on a death penalty system that is extremely accurate and fair, despite the increased costs.

In most of the aforementioned areas, the proposals made herein break new ground. Taken as a whole, these ten proposals would create a death-penalty system for Massachusetts unlike any such system that has ever existed, or even seriously been considered, before. We believe that such a bold and innovative approach is necessary, if the Governor's uncompromising charge to the Council is to be fulfilled.

RECOMMENDATIONS

(1) A Narrowly Defined List of Death-Eligible Murders

The following new statute should be adopted:

Capital Murder

Murder in the first degree is capital murder when:

- (1) The defendant committed the murder through:**
 - (a) the defendant's own conduct;**
 - (b) the conduct of another person acting under the defendant's direction or control; or**
 - (c) the conduct of another person pursuant to an agreement between that person and the defendant to commit the murder; and**
- (2) The defendant committed the murder with deliberately premeditated malice aforethought, with respect to the victim's death; and**
- (3) The defendant was at least 18 years old at the time that the defendant either:**
 - (a) engaged in the conduct that caused the victim's death;**
 - (b) directed or controlled another person to commit the murder; or**
 - (c) entered into an agreement with another person for that person to commit the murder; and**
- (4) One or more of the following additional elements is present:**
 - (a) The defendant committed the murder as an act of political terrorism;**
 - (b) 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:**
 - (1) 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**
 - (2) 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, such as a husband, wife, father, mother, daughter, son, brother, sister, stepparent, stepchild, grandparent, or grandchild.**
 - (c) 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;**
 - (d) The defendant committed murder in the first degree against two or more victims, and each of the murders satisfied elements (1) through (3) herein;**
 - (e) The defendant has a previous conviction for murder in the first degree in Massachusetts or another American jurisdiction (or the closest equivalent,**

as defined by the law of the relevant jurisdiction), and the previous murder also satisfied elements (1) through (3) herein;

(f) At the time that the defendant engaged in the conduct described in element (1) 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 Massachusetts or another American jurisdiction.

Within the context of this statute:

(1) “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.

(2) “Torture” means the infliction of extreme physical or psychological pain against a victim whom the defendant knew was conscious. “Gratuitous and depraved” means that such pain was 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.

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

It shall be an affirmative defense to capital murder that the defendant is mentally retarded, as defined by either the American Psychiatric Association or the American Association on Mental Retardation. The defendant shall have the burden to produce some evidence with respect to possible mental retardation, but once the issue is properly raised, then the prosecution shall have the burden to prove, beyond a reasonable doubt, that the defendant is not mentally retarded. Nothing in this paragraph shall prevent the defendant from raising the issue of possible mental retardation as a mitigating circumstance at the sentencing stage of a capital murder trial.

Explanatory Notes

(1) The death penalty is limited to defendants who are guilty of murder in the first degree through their own conduct, the conduct of another person under their direction or control, or the conduct of another person acting pursuant to an agreement with the defendant to commit the murder. This would not include mere accomplices or “joint venturers.”

(2) The phrase, “deliberately premeditated malice aforethought,” already appears in Massachusetts G.L. c.265, §1, the statute defining “murder in the first degree,” and has extensive Massachusetts case law interpreting it. The death penalty is limited to defendants who exhibit “deliberately premeditated malice aforethought.” This would exclude defendants who are convicted of murder in the first degree based on the two alternative grounds set forth in Massachusetts G.L. c.265, §1: (1) murders committed with “extreme atrocity or cruelty,” and (2) murders committed while “in the commission or attempted commission of a crime punishable with death or imprisonment for life.”

(3) The death penalty is limited to defendants who commit murder in the first degree after they reach the age of 18. This age limit applies at the time of the defendant’s relevant conduct – either the conduct that caused the victim’s death, the conduct that directed or controlled another person to kill the victim, or the conduct of entering into an agreement with another person pursuant to which that person killed the victim – rather than at the time of the victim’s death.

(4) The specific criteria for eligibility for the death penalty are usually termed “aggravating circumstances.” The aggravating circumstances are defined as a required element of the new crime of capital murder, which means that they must be found by the jury, beyond reasonable doubt, as part of the guilt-innocence stage of the bifurcated capital trial. Because some of the aggravating circumstances provided in this statute involve prior crimes allegedly committed by the defendant, and because others involve matters that may be unfairly prejudicial to the defense, the jury should be required to decide separately whether the prosecution has proven beyond a reasonable doubt the basic requirements for capital murder set forth in elements (1) through (3), and whether the prosecution has proven beyond a reasonable doubt any of the six aggravating circumstances. In many cases, there will be no need for the introduction of new evidence after the jury has found elements (1) through (3), because all relevant evidence concerning the alleged aggravating circumstances already will have been introduced; an additional round of closing arguments and jury instructions will be sufficient. In most cases involving aggravating circumstances (4)(e) and (4)(f), however, evidence about the defendant’s alleged prior crimes should not be introduced until after the jury has found elements (1) through (3).

(4)(a) The first aggravating circumstance is murder committed as “an act of political terrorism,” which is defined as murders that are committed for the purpose of attacking the government of the United States or any political subdivision thereof. The definition does not include acts of terrorism aimed at the general public rather than at the government, because (1) it is difficult, if not impossible, to limit such a broader definition of “terrorism,” so that it would not apply to too many murders, such as street-gang murders designed to intimidate a neighborhood, and (2) in any event, most serious cases of terrorism aimed at the general public would already qualify for the death penalty under (4)(d), (4)(e), or (4)(f). The definition also does not include acts of terrorism designed to attack the governments of other countries, because (1) such a broader definition of “terrorism” might generate undesirable controversy, in the form of politically motivated demands to apply the death penalty to controversial acts by U.S. military or government personnel, and (2) in any event, most such acts are properly punishable either by the countries targeted or under international criminal law.

(4)(b) The second aggravating circumstance is designed to reach murders committed for the purpose of obstructing justice (as defined herein), or in retaliation for the victim’s role in a prior criminal case. It includes both the murders of persons who play official roles within the criminal justice system, such as police, judges, jurors, prosecutors, defense attorneys, expert witnesses and the like, as well as the murders of crime witnesses or their immediate family members, so long as the defendant either knew or believed that the victim belonged to one of these two categories, and so long as the defendant possessed the

prohibited motive for the murder. This aggravating circumstance would not apply, however, to a typical felony-murder case in which a defendant commits a crime such as rape or robbery and then immediately murders the victim to prevent her from identifying him, because such a victim was not a witness to a crime “committed on a prior occasion.”

(4)(c) The third aggravating circumstance is designed to reach a narrower category of torture murders than the current “extreme atrocity or cruelty” language in the Massachusetts statute defining “murder in the first degree.” This aggravating circumstance is limited to (1) the infliction of extreme physical or psychological pain, (2) for a prolonged period of time, (3) during or immediately prior to the murder, (4) against a victim whom the defendant knew was still conscious, (5) that was “intentional,” meaning that the defendant consciously desired to inflict such pain, and (6) that was “gratuitous and depraved,” meaning that such pain went beyond that which necessarily accompanied the act of killing itself, or resulted from the defendant’s intentional choice to use an especially painful method of killing. All six of these sub-elements must be proven in order for the defendant to qualify under this aggravating circumstance. Acts of sexual assault committed against the victim immediately prior to the murder, such as forcible rape or sodomy, may in particular cases qualify as the infliction of “extreme psychological pain.” The limitation to torture “during or immediately prior to the murder” is intended to exclude cases in which the defendant may have “tortured” the victim at a much earlier time (e.g., a spousal murder in which there may have been earlier incidents of severe physical or psychological domestic abuse). The limitation to “a victim whom the defendant knew was conscious” is in direct response to existing Massachusetts case law, which has held the “extreme atrocity or cruelty” language applicable even if the victim was unconscious.

(4)(d) The fourth aggravating circumstance is for single-episode multiple murders. Each of the murders must satisfy the basic requirements for “capital murder” set forth in sections (1) through (3) of this statute. In particular, each of the murders must have been committed by the defendant as a principal and with “deliberately premeditated malice aforethought.” This aggravating circumstance thus would not include, for example, a case in which the defendant’s act kills two victims, but only one of those killings was with “deliberately premeditated malice aforethought.”

(4)(e) The fifth aggravating circumstance is for multiple murders that are not committed in a single episode. Under this aggravating circumstance, the defendant would first have to be prosecuted for one of the murders, and he would have to be convicted of murder in the first degree (or the closest equivalent, if the first prosecution was in an American jurisdiction other than Massachusetts). Then, in order for the defendant to become eligible for the death penalty, the prosecution, in the later case, would have to prove not only that the later murder satisfies the basic requirements for “capital murder” set forth in sections (1) through (3) of this statute, but also that the previous murder satisfied those same basic requirements.

(4)(f) The sixth and final aggravating circumstance is for a defendant who commits murder while he is already subject to a sentence of imprisonment for life without the possibility of

parole for a prior murder in Massachusetts or another American jurisdiction. Regardless of the circumstances of the prior murder, such a defendant must be eligible for the death penalty, because otherwise he would have nothing more to lose. At the same time, the death penalty cannot be mandatory even in such cases; the defendant must be allowed to bring forward mitigating circumstances, and the jury must be allowed to exercise sentencing discretion (see *Sumner v. Shuman*, 483 U.S. 66 (1987), in which the U.S. Supreme Court invalidated Nevada’s attempt to impose a mandatory death penalty in such cases). Within the context of the “capital murder” prosecution, the defendant must be allowed to challenge the validity of his prior murder conviction, or his prior sentence, on any legally permissible ground. This aggravating circumstance would apply without regard to the American jurisdiction where the defendant was previously convicted of murder and sentenced to imprisonment for life without the possibility of parole.

Defendants who are “mentally retarded” may not be convicted of capital murder or sentenced to death, in compliance with the U.S. Supreme Court’s decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). The statutory definition of “mental retardation” is taken directly from *Atkins*, which referenced both the AAMR and APA definitions of “mental retardation.” The issue of the defendant’s mental retardation is an affirmative defense; the defendant bears the burden of production with respect to possible mental retardation, but the prosecution bears the ultimate burden of proof, beyond a reasonable doubt, on the issue. In any event, however, the defendant also may raise possible mental retardation as a mitigating circumstance at the sentencing stage of a capital murder trial.

If one of the goals is to devise a death-penalty system that limits the ultimate punishment to the “worst of the worst” murders and murderers, then one of the most important aspects of such a system must be the statutory list of “aggravating circumstances” that make a particular murder, and murderer, eligible for the death penalty. This statutory list defines the scope of the death penalty in each jurisdiction, because no crime that falls outside the list can be a capital crime.

In many jurisdictions today, the statutory list of “aggravating circumstances” has expanded to the point that it now covers a substantial proportion, perhaps even more than half, of all first-degree murders. In California, for example, there are now 22 “special circumstances” that can lead to the imposition of the death penalty. In Illinois, there are now 21 such “aggravating factors”; the Governor’s Commission in that state recently acknowledged the possibility that, “due to the large number of eligibility factors, nearly every first-degree murder in Illinois could be eligible for the death penalty under one theory or another.”

This expansion of death-eligibility is understandable, but regrettable. It typically occurs because particular heinous murders provoke a public demand for the death penalty, which in turn leads responsive legislators to add new “aggravating circumstances” to the statutory list. This process occurs repeatedly, and it is one-sided – new “aggravating circumstances” are added to the list, but existing ones are never removed from the list.

The main problem with the expansion of death-eligibility is that the statutory list of “aggravating circumstances” is the one and only place, in the entire death-penalty system, where substantive limits can be imposed on the death penalty that are not discretionary. If the statutory list is

overly broad, then the discretionary decisions of prosecutors, judges, and juries must carry the entire burden of ensuring that the death penalty is applied narrowly and reasonably consistently. If the statutory list includes virtually all first-degree murders, then discretionary decision-makers must carry the entire burden of selecting, from such a large pool, the small handful of the “worst of the worst” murders for which the death penalty will be imposed. Moreover, discretionary decision-makers often do not even get to see all of the cases in the pool – juries, for example, see only one case, and thus cannot easily compare that case to other death-eligible crimes.

The same expansion of death-eligibility also contributes directly to the serious and well-documented problem of racial disparity in the application of the death penalty. When various decision-makers within the criminal justice system, and especially the jury (whose decisions are essentially unreviewable), possess too much discretion over capital sentencing within a large pool of death-eligible murders, then overt and hidden prejudices can influence the decision. By narrowly restricting the categories of death-eligibility to a small number of precisely defined and extremely heinous murders, and thereby restricting the discretion of capital-case decision-makers, the problem of racial disparity can be addressed in the most meaningfully possible way.

The Council concluded that the burden of narrowing a large pool of death-eligible murders down to the “worst of the worst” is simply too much to expect discretionary decision-makers to handle effectively. We therefore adopted the following philosophy, with respect to the statutory list of “aggravating circumstances”: *No category of first-degree murders should be placed on the list, and included within the scope of death-eligibility, unless the overwhelming majority of such murders are among the most heinous of all crimes.* In other words, the statutory list of “aggravating circumstances” should include only those categories of first-degree murders in which almost every individual case might be expected to be found by a jury to be among the most heinous of all crimes.

The necessary corollary of this philosophy is that there will be some first-degree murders that should be death-eligible, but will not be – because they fall within a category of first-degree murder that does not comprise an “overwhelming majority” of the most heinous crimes. This kind of inconsistency is inevitable in any death-penalty system, and should not be problematic. If we are to have a narrow death penalty, then we must limit the death penalty by means of narrowly defined “aggravating circumstances.” If this means that some of the most heinous individual crimes will manage to avoid the death penalty, then so be it – because it is far more important to ensure that the death penalty will not be applied too broadly than it is to ensure that every one of the most heinous crimes will be eligible for the death penalty. For some of the most heinous crimes, life imprisonment without the possibility of parole will have to suffice.

In this sense, the “aggravating circumstance” issue is no different from other practices that are widely accepted in the American criminal justice system. No defendant can be convicted of a crime if the admissible evidence of that defendant’s guilt is not sufficiently clear. In our criminal justice system, we choose to err on the side of releasing defendants who may be guilty, and who may deserve criminal punishment, because it is far more important to ensure that criminal punishment will not be applied too broadly than it is to ensure that every deserving defendant will receive criminal punishment. The same can, and should, be said for capital punishment.

The Council proposes to identify the “worst of the worst” murders, and murderers, by defining a new crime of “capital murder.” We propose to define the pool of death-eligible murders by means of a new crime statute, rather than a separate capital sentencing law, because doing so will help to exclude problematic cases earlier in the process. It will also allow the “guilt-innocence” stage of the bifurcated capital trial to focus on the facts of the crime and the possible existence of “aggravating circumstances,” and will reserve the “sentencing” stage for the issue of whether the defendant deserves the death penalty, especially in light of possible “mitigating circumstances.”

We propose to limit the new crime of “capital murder,” and thus the death penalty, to defendants who commit first-degree murder either through their own conduct, or through the conduct of another person whom they directed or controlled, or with whom they entered into an agreement to commit the murder. This would exclude mere accomplices or “joint venturers.” We propose to limit the death penalty to defendants who acted with “deliberately premeditated malice aforethought” (as that term is defined in Massachusetts law). We propose to limit the death penalty to defendants whose relevant conduct occurred after they had already reached the age of 18, and to defendants who are not mentally retarded (as defined by the U.S. Supreme Court in the recent case of *Atkins v. Virginia*, 536 U.S. 304 (2002)).

Finally, we propose further to limit the new crime of “capital murder” to the three categories of death-eligible murders identified by the Governor in his charge to the Council – (1) murder as an act of political terrorism, (2) murder to obstruct justice, and (3) narrowly defined torture-murder – plus three additional categories that, in the view of the Council, manifest the same extreme degree of evil – (4) multiple murder in a single episode, (5) multiple murder in more than one episode, and (6) murder by a defendant who is already subject to a sentence of life imprisonment without possibility of parole for a prior murder.

(2) Appropriate Controls Over Prosecutorial Discretion in Potentially Capital Cases

The District Attorneys’ Association should develop a uniform set of protocols for the exercise of prosecutorial discretion in potentially capital cases in the Commonwealth of Massachusetts. These protocols should 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.

Under the authority granted by Massachusetts G.L. c.12, §27, as construed and affirmed by the Massachusetts Supreme Judicial Court in *Commonwealth v. Kozlowsky*, 238 Mass. 379, 131 N.E. 207 (1921), and subsequent cases, the Attorney General should review all exercises of prosecutorial discretion by District Attorneys in potentially capital cases, and should take appropriate actions to ensure the consistent application of the death penalty throughout the Commonwealth of Massachusetts. The Attorney General should develop a set of protocols for this review, which should address both the substantive factors that should influence this review and the procedures that should be followed in connection with this review.

Just as no death-eligibility statute can be drafted precisely enough to cover every individual crime, or individual defendant, that may deserve the death penalty, neither can such a statute be drafted precisely enough to exclude every individual crime, or individual defendant, that does not deserve the death penalty. This problem is inherent in the nature of legal rules – they are always both over-inclusive and under-inclusive. Even a narrowly tailored death-eligibility statute, such as the one proposed above, is incapable of appropriately restricting the scope of the death penalty without the help of thoughtful exercise of prosecutorial discretion.

In America, prosecutorial discretion is properly considered to be an essential component of justice, moderating and fine-tuning the criminal laws to suit the facts and circumstances of individual cases. Such discretion is generally exercised by local prosecutors, who are directly elected or otherwise politically accountable to local voters, and thus serves also to keep the enforcement of the criminal laws in tune with the basic values of the local community. These advantages of prosecutorial discretion are important, and should not be diminished.

At the same time, in the special context of the death penalty, it is essential to ensure that local prosecutorial discretion is exercised in a reasonably rational and consistent manner, so that – as much as humanly possible – like cases are treated alike, and different cases are treated differently. This basic principle was central to the U.S. Supreme Court’s modern constitutional mandate for capital punishment, as expressed in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), and it remains a constitutional requirement for all capital sentencing systems today.

In addition, because the death penalty is imposed in the name of all of the people of the relevant state, it is essential – as a matter of policy, even if not necessarily of constitutional law – to ensure that the ultimate punishment is administered in a manner that is reasonably consistent across the entire state. In other words, it should be unacceptable for a particular murder to be a capital crime in one part of the state, but not in a different part of the state. Such geographic variations, with respect to the application of a punishment as uniquely controversial as the death penalty, cannot be justified by traditional arguments for local prosecutorial discretion.

We propose to maintain the benefits of local prosecutorial discretion by largely preserving such discretion, but to limit such discretion in two significant ways, in the special context of the death penalty. First, local prosecutors should be required to work together to establish state-wide protocols for both the substantive factors that will guide, and the procedures that will be followed in, the exercise of such discretion. Second, the Attorney General should review all exercises of local prosecutorial discretion in potentially capital cases. This state-level review, which is already specifically authorized by existing Massachusetts statutory and case law, and which should also be conducted pursuant to protocols established for such purpose, can help to ensure the reasonably rational and consistent application of the death penalty.

(3) A System to Ensure High-Quality Defense Representation in Potentially Capital Cases

A list of “capital-case qualified” defense lawyers should be established and maintained by the Committee for Public Counsel Services (CPCS), pursuant to policies and procedures

established by the Supreme Judicial Court of Massachusetts. This list should include only those defense lawyers who meet rigorous standards of experience, capital-case training, and exemplary performance. These rigorous standards should include, at a minimum, the following:

Experience

- (1) Number of years of criminal litigation experience**
- (2) Experience with plea bargaining in homicide cases**
- (3) Experience with expert testimony and scientific evidence (including medical, forensic, psychiatric, pathological, and DNA evidence)**
- (4) Experience with all aspects of criminal litigation (including pre-trial, trial, appellate, and post-conviction)**
- (5) Number of felony jury trials to verdict**
- (6) Number of homicide trials to verdict**
- (7) Prior capital case experience**

Capital-Case Training

- (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) Dealing with "tunnel vision" and "confirmatory bias"**
- (10) Pleading and motion practice**
- (11) Pre-trial strategies**
- (12) Jury selection**
- (13) Trial preparation**
- (14) Coordination of guilt-innocence and sentencing strategies**
- (15) Preserving issues for appellate and habeas review**
- (16) Presentation of mitigating evidence**
- (17) Communicating effectively with the defendant, family, and friends**
- (18) Dealing with a potentially disruptive or recalcitrant defendant**

Exemplary Performance

- (1) Written descriptions of pre-trial strategy and advocacy**
- (2) Trial memoranda of law, appellate briefs, post-conviction petitions**
- (3) Proposed jury instructions prepared by counsel**
- (4) Sentencing transcripts, pre-sentence memoranda, or written descriptions of sentencing strategy and advocacy**
- (5) Written descriptions of effective collaboration with co-counsel or counsel for co-defendant**
- (6) References from prosecutors, other defense counsel, judges**
- (7) Participation in continuing legal education related to capital cases**

These rigorous standards should be developed with an appropriate awareness of the fact that, at the outset, few Massachusetts defense lawyers will have had prior capital-case experience or capital-case training. Such particular requirements, therefore, may need to be phased in over a reasonable time.

An indigent defendant in a potentially capital case should be provided with at least two appointed defense lawyers to represent him at trial. A non-indigent defendant in a potentially capital case who can afford only one privately retained defense lawyer should be provided with a second, appointed defense lawyer to represent him at trial. Both the “first chair” and “second chair” defense lawyers at the trial of a capital case, whether such lawyers are appointed or privately retained, should be required to be certified as “capital-case qualified,” unless the Superior Court approves the defendant’s request for a waiver of certification on the ground that such waiver is consistent with the need for high-quality defense representation at trial in the particular capital case. An expedited certification procedure should be established, so that a defense lawyer 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 case.

A defendant who seeks to waive his constitutional right to counsel, and represent himself, should be discouraged from doing so in the strongest possible terms, consistent with the U.S. Supreme Court’s decision in *Faretta v. California*, 422 U.S. 806 (1975). In all such cases, if the defendant is permitted to waive his constitutional right to counsel, the trial judge should appoint at least two “standby” counsel. All such “standby” counsel should be required to be certified as “capital-case qualified,” unless the Superior Court 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 case.

An indigent defendant who is convicted and sentenced to death should be provided with an appointed defense lawyer 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 lawyer, for post-trial proceedings, should not be one of the same lawyers who represented the defendant at trial, unless a single Justice of the Massachusetts 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 case. Any defense lawyer who represents, in a post-trial proceeding, a defendant who has been convicted and sentenced to death, whether such lawyer is appointed or privately retained, should be required to be certified as “capital-case qualified,” unless a single Justice of the Massachusetts Supreme Judicial Court approves the defendant’s request for a waiver of certification on the ground that the particular defense lawyer meets the standards for certification with the exception of trial-related experience, training, and/or exemplary performance, and that such waiver is consistent with the need for high-quality defense representation in post-trial proceedings in the particular capital case.

The specific policies and procedures for the appointment of defense counsel in post-trial proceedings in capital cases should be developed and applied in such a manner as to satisfy the special requirements set forth in 28 U.S.C. §§ 2261 *et seq.*

All appointed defense lawyers in potentially capital cases, at every stage of the case, should receive adequate compensation, and should be provided with adequate funding for all reasonable expenses relating to the investigation, preparation, and handling of the case, including adequate funding to hire properly certified experts to assist with the defense.

One of the most important, yet frequently overlooked, aspects of the capital case is the quality of defense representation. In the past, many of the problems that have occurred in capital cases, and many of the inaccurate outcomes, can be traced directly to the fact that the defendant was represented at trial by a defense lawyer who was overworked, underpaid, inexperienced, less than fully competent, and/or unprepared to handle such a uniquely complex and stressful case. Indeed, post-trial litigation in capital cases frequently focuses heavily on claims that the defendant’s trial counsel was constitutionally ineffective; such claims tend to predominate partly because many other kinds of legal claims have been severely restricted, especially in the context of federal habeas corpus review, but also partly because (at least until recently) quality defense representation at trial often was the exception, rather than the rule, in capital cases.

In recent years, several states have taken significant steps to reform their systems of defense representation in capital cases. These states have recognized that, although such reform is often expensive, it actually saves significant public money in the long run, by helping to ensure that weak capital cases are excluded from eligibility for the death penalty at an early stage. Some of the states whose recent reform efforts in this regard have been widely praised include New York, Illinois, and Indiana.

We drew heavily upon such recent reforms in designing a high-quality defense representation system for Massachusetts capital cases. We recommend that, with very limited exceptions, every defense lawyer in a capital case – whether appointed or privately retained, or serving as “standby” counsel for a defendant who exercises the *Faretta* right to self-representation at trial – must be certified as “capital-case qualified,” and must appear on a list of such defense lawyers that will be established and maintained by the Committee for Public Counsel Services, pursuant to policies and procedures established by the Supreme Judicial Court of Massachusetts. To be “capital-case qualified,” a defense lawyer must meet rigorous standards of experience (including

capital-case experience), training (specific to capital cases), and exemplary performance. Of course, in the early years of a new death-penalty system, it may be difficult to find enough defense lawyers who have had any experience with, or training about, capital cases; nevertheless, we believe that it is important to require such experience and training, and we are confident that the Massachusetts Supreme Judicial Court can develop appropriate means to phase in such rigorous standards.

We propose to extend the defendant's right to appointed counsel, based on indigency, from the capital trial to all post-trial proceedings in a capital case, including not only the direct appeal but also all state and federal post-conviction proceedings. We also propose that the defendant should receive an appointed defense lawyer, for post-trial purposes, who was not one of the lawyers who represented the defendant at trial. This requirement helps to ensure that the performance of the trial lawyers will be reviewed appropriately during the post-trial proceedings. In addition, this requirement satisfies a key provision of the federal habeas corpus statute, 28 U.S.C. §§2261 *et seq.*, which creates a new and streamlined version of federal habeas corpus review for capital cases, so long as the relevant state has adopted a compliant system to ensure high-quality defense representation in state post-conviction proceedings. We intend for the Massachusetts system of defense representation to be the first in the nation to satisfy this new federal standard.

The defendant in a capital case may request a waiver of the "capital-case qualified" certification requirement, as well as a waiver of the requirement that appointed post-trial defense counsel be different from the lawyers who represented the defendant at trial. The relevant court may approve such requests for waiver, however, only in very limited situations, and only if such waiver is consistent with the need for high-quality defense representation. A similar exception applies to the appointment of "standby" counsel in self-representation cases.

(4) New Trial Procedures to Avoid the Problems Caused by the Use of the Same Jury for Both Stages of a Bifurcated Capital Trial

At the end of the guilt-innocence stage of the capital trial, if the defendant is convicted of capital murder, the defendant should have the right to request the selection of a new jury for the sentencing stage. If the defendant exercises this right, then the defendant should be deemed to have waived the issue of residual or lingering doubt about guilt, and should not be allowed to raise such an issue during the sentencing stage.

At the start of the sentencing stage, if a new 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 (1) through (4) of the capital murder statute 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 should not be told whether the defendant contested his guilt during the guilt-innocence stage.

Capital trials have been bifurcated into a “guilt-innocence” stage and a “sentencing” stage since before the landmark U.S. Supreme Court case of *Furman v. Georgia*, 408 U.S. 238 (1972). In *McGautha v. California*, 402 U.S. 183 (1971), decided a year before *Furman*, the Court expressed support for the idea of bifurcated capital trials, even though it held that bifurcation was not constitutionally required. Bifurcation means that the jury will focus on the defendant’s factual guilt, and on the nature of the crime, during the guilt-innocence stage, and will turn its attention to the defendant’s life history, any mitigating circumstances that may exist, and the deservedness of a death sentence only at the sentencing stage. Bifurcation also presents the defendant with the opportunity, at least in theory, to protest his innocence at the guilt-innocence stage, but to accept responsibility for the crime and express remorse at the sentencing stage. Bifurcation thus helps to ensure both accurate guilt determinations and fair sentencing decisions.

No matter what the theory of bifurcation may hold, however, in an actual capital case the defendant often faces an insurmountable strategic dilemma. If he exercises his constitutional right to contest the prosecution’s case at the guilt-innocence stage, and even more so if he actively protests his innocence, then he seriously undermines the credibility of any efforts to take responsibility or to express remorse at the sentencing stage – because the same jury generally has already observed his denials of responsibility at the guilt-innocence stage. The use of two defense lawyers (one for the guilt-innocence stage, and another for the sentencing stage) slightly mitigates this strategic dilemma, but does not eliminate it.

We propose that, in Massachusetts, if the defendant is found guilty at the guilt-innocence stage, he should have the right to choose whether to proceed to the sentencing stage with the original jury, or to have a new jury selected for the sentencing stage. This would allow the defendant to make a meaningful choice, at the sentencing stage, between two possible strategies: continuing to contest the proof of his guilt (although, after the conviction, this would be limited to the issue of residual or lingering doubt), in which case the defendant would choose to proceed with the original jury; or accepting responsibility and expressing remorse for the crime, in which case the defendant would choose to proceed with a new jury that would be unaware of any denials of responsibility that he, or his lawyer, may have made at the guilt-innocence stage.

If such a new jury is selected for the sentencing stage, then the prosecution must be allowed to present to the new jury at least some of the evidence that was introduced during the guilt-innocence stage of the trial, so that the new jury can appropriately weigh the nature of the crime and the aggravating circumstances against any mitigating circumstances that may be offered by the defendant during the sentencing stage. It is not possible to specify in advance exactly how much of this evidence will need to be presented to the new jury at the sentencing stage; in each particular capital case, this decision must be left to the sound discretion of the trial judge. Such situations are not unusual, however, in other states today; they arise every time a death sentence – but not the underlying conviction – is set aside on appeal or by a habeas corpus court, and the prosecution seeks to convince a new sentencing jury to re-impose the death penalty.

(5) Special Jury Instructions Concerning the Use of Human Evidence to Establish the Defendant's Guilt

At the guilt-innocence stage of the capital trial, and again at the sentencing stage, unless the issue of residual or lingering doubt is waived by the defendant, the jury shall, 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 may be particularly unreliable; (3) statements made by the 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 state (such as reduction of a criminal charge or sentence), may be unreliable, and should therefore be evaluated with great care. If any statement by a codefendant or informant was introduced in the particular case, and if the codefendant or informant received any benefit from the state in exchange for the statement, the jury should be told about the benefit.

Studies of recent mistakes in capital cases, in Illinois and elsewhere, have identified several common themes that were present in many, if not most, of the cases. One of the common themes was the heavy reliance on certain kinds of human evidence, or evidence provided by human witnesses, to establish the defendant's guilt. Although juries often tend to place great emphasis on such human evidence, scientific research, as well as recent experience, has demonstrated that much of this human evidence is not nearly as reliable as juries may think it is.

We therefore propose several limits on the use of human evidence to establish the defendant's guilt in potentially capital cases. These limits consist of explicit warnings to the jury, at both the guilt-innocence and sentencing stages of the trial, that highlight the known problems with such evidence, thereby reducing the tendency of juries to rely too heavily on it.

The first kind of human evidence that should be so limited is eyewitness testimony. Scientific research has documented that such testimony, no matter how confident the eyewitness may seem to be, is often unreliable. We propose that juries in capital cases be instructed that eyewitness testimony may be unreliable, especially in connection with an extremely emotional event such as a murder, and that this is a particularly severe problem for cross-racial eyewitness identifications.

The second kind of human evidence that should be limited is any statement made by the defendant while in police custody. Although such statements are often highly reliable, and may even constitute the best evidence of the defendant's guilt, recent experience also demonstrates that this is not always so. In some cases, perhaps because of the intense desire to solve a heinous murder, either inadvertent or deliberate pressure has been placed on a defendant by the police in

order to secure such a statement. We propose that juries in capital cases be instructed that statements made by the defendant while in police custody are not always inherently reliable. We also propose that juries be instructed that the failure of the police to contemporaneously audio- or video-record the entirety of such a statement should be considered when evaluating the reliability of such a statement. Although a strict requirement of audio- or video-recording would be beyond our purview, we hope to encourage such audio- or video-recording.

The third kind of human evidence that should be limited is any statement made by a codefendant or informant. The main problem with such statements is that they are often made pursuant to a promise, or with the hope, that the state will grant a benefit (such as reduction of a criminal charge or sentence) in exchange for the statement. We recommend that juries in capital cases be instructed that such statements may be unreliable. We also recommend that juries be instructed about any benefit that is received from the state in exchange for such a statement.

(6) A Requirement of Scientific Evidence to Corroborate Guilt

At the sentencing stage of the capital 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 should be required to find that there is conclusive scientific evidence (i.e., physical or other associative evidence), reaching a high level of scientific certainty, 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.

Within the context of this requirement, "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.

Not all "physical or other associative evidence" will be capable of satisfying the requirement of conclusive scientific evidence, reaching a high level of scientific certainty, that adequately connects the defendant to the crime. Moreover, not all individual cases will involve evidence of sufficient quantity and quality to satisfy this requirement. While the current benchmark for the kind of "physical or other associative evidence" that can satisfy this recommendation is a full single-source DNA profile, other categories of "physical or other associative evidence" may be capable of providing conclusive associations of suspects, victims, crime scenes, and/or the implements of crime. These include photographs, video- and audio-tapes, fingerprints, and certain impression evidence (e.g., some footwear impressions, tire impressions, tool marks, firearms-related impressions, and other physical pattern matches). These categories are provided only as illustrative examples; other categories of scientific evidence may also satisfy, either now or in the future, the requirement of conclusive "physical or other associative evidence."

We recommend that, as a prerequisite to the imposition of the death penalty, the defendant's guilt must be corroborated by the reliable and valid collection, analysis, and interpretation of physical or other associative evidence, conclusively linking the defendant to the crime.

This recommendation includes several aspects. First, it means that there can be no serious problems with the collection, analysis, or preservation of such physical or other associative evidence. This aspect of the recommendation should be applied in light of our related proposal, *infra*, that all physical or other associative evidence in a capital case must be evaluated by an Independent Scientific Review panel of independent experts who will examine issues relating to the collection, analysis, and preservation of such evidence.

Second, the physical or other associative evidence must conclusively link the defendant to either the murder scene, the murder weapon, or the victim's body.

Finally, the evidence must "strongly corroborate" the defendant's guilt. The Council is fully mindful of the reality that, in a particular case, even a conclusive, scientifically certain link between the defendant and some aspect of the physical evidence relating to the crime might not necessarily "strongly corroborate" the defendant's guilt. For example, in a case where the defendant and the victim were spouses or otherwise intimates, a link between the defendant and the victim's body may be virtually inevitable, and, therefore, may not "strongly corroborate" the defendant's guilt. In such a case, it may not be possible to impose a death sentence – unless physical or other associative evidence also links the defendant directly to the murder scene, the murder weapon, or another location, object, or person directly related to the crime.

The requirement of physical or other associative evidence "strongly corroborating" guilt would be imposed at the sentencing stage of the trial, after the defendant has already been found guilty of the crime. This means that, in a legal sense, a defendant may be proven guilty of a murder at a sufficient level of certainty (i.e., proof "beyond reasonable doubt") to receive a sentence of life imprisonment without possibility of parole, but not at a sufficient level of certainty to receive a death sentence. Thus, this requirement acknowledges the possibility (hopefully quite remote) that defendants in non-capital criminal cases may be convicted and sentenced to lengthy prison terms even though they are, in fact, innocent. While this is, of course, very troubling, at least in a non-capital case it is always possible for the justice system to correct such mistakes. In capital cases, however, it is absolutely essential to ensure the accuracy of the guilt-innocence determination in the first instance, so that no innocent person ever receives a sentence of capital punishment.

Furthermore, this requirement of conclusive physical evidence would apply to all capital cases, including those in which the defendant has waived the issue of residual or lingering doubt at the sentencing stage. We believe that this particular requirement should not be subject to waiver by the defendant, because society itself has a compelling interest in ensuring that no innocent person ever receives a sentence of capital punishment.

(7) A Heightened Burden of Proof to Enhance the Accuracy of Jury Decision-Making

At the sentencing stage of the capital trial, as a prerequisite to the imposition of the death penalty, and unless the issue of residual or lingering doubt is waived by the defendant, the jury should be required to find that there is “no doubt” about the defendant’s guilt of capital murder. In connection with this requirement, the jury should 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.

Evidentiary limitations and requirements notwithstanding, our system of criminal justice necessarily depends on the wisdom of juries to make accurate decisions about guilt or innocence. We know, however, that in at least some recent capital cases, juries have made mistakes. For this reason, we propose to add a new and heightened burden of proof at the sentencing stage of a capital trial. Under this heightened burden of proof, even after the jury has found the defendant guilty of capital murder “beyond a reasonable doubt” at the guilt-innocence stage of the trial, it would be required further to find at the sentencing stage, as a prerequisite for a death sentence, that there is “no doubt” about the defendant’s guilt. In other words, before imposing the death penalty, the jury would be required to find the absence of any “residual” or “lingering” doubts about the defendant’s guilt.

The concept of residual or lingering doubt has been discussed in numerous court cases, most notably by the U.S. Supreme Court in *Lockhart v. McCree*, 476 U.S. 162 (1986). There, the Court stated:

“[I]n at least some capital cases, the defendant might benefit at the sentencing phase of the trial from the jury’s ‘residual doubts’ about the evidence presented at the guilt phase.”

Similarly, the U.S. Court of Appeals for the Fifth Circuit, in *Smith v. Balkcom*, 660 F.2d 573 (5th Cir. 1981), explained:

“There may be no reasonable doubt – doubt based on reason – and yet some genuine doubt exists. It may reflect a mere possibility; it may be the whimsy of one juror or several. Yet this whimsical doubt – this absence of absolute certainty – can be real.”

Although at least six states, including California, Connecticut, and Tennessee, currently allow capital-case juries to consider residual or lingering doubt at the sentencing stage of the trial, the U.S. Supreme Court has declined to mandate such consideration as a part of the constitutionally required consideration of mitigating circumstances. We propose, however, to elevate the concept of residual or lingering doubt to the forefront of the jury’s deliberation at the sentencing stage, because of its potential value in preventing substantive mistakes. If any jurors, individually or collectively, harbor such residual or lingering doubt about the defendant’s guilt, then a death sentence may not be imposed.

We acknowledge that it may be confusing for the jury to be asked to apply one burden of proof at the guilt-innocence stage, and then a different burden of proof at the sentencing stage. In addition, after finding the defendant guilty “beyond a reasonable doubt,” the jury may be inclined to downplay (or even to deny outright) the existence of any residual or lingering doubt, because such doubt may seem inconsistent with the guilty verdict the jury has already rendered. For these reasons, we propose to explain forthrightly to the jury, at the sentencing stage, the concept of residual or lingering doubt, so that any jurors who may feel such doubt will know that their feelings are appropriate and worthy of consideration.

(8) Independent Scientific Review of the Collection, Analysis, and Presentation of Scientific Evidence

The Council recommends that the Massachusetts Supreme Judicial Court should initiate a formal process to ensure the Independent Scientific Review (ISR) of physical or other associative evidence in every capital case in which a sentence of capital punishment is imposed. We recommend that the Court first appoint an ISR Advisory Committee, reporting to the SJC, with responsibility for drafting, adopting, and updating general policies relating to ISR, establishing criteria for ISR in particular cases, selecting independent forensic-science experts to conduct case-specific ISR, and monitoring the ongoing effectiveness of ISR. Members of the ISR Advisory Committee should be selected by the SJC, from a list of nominees submitted by the Governor, and should be recognized experts in the evaluation of forensic evidence. If any appointed member of the ISR Advisory Committee is employed by a Commonwealth crime laboratory, s/he should not participate in any ISR review or ISR panel selection in any capital case with which his/her laboratory had any involvement.

We recommend that, as part of its charge, the ISR Advisory Committee 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 Massachusetts must be accredited by the appropriate accrediting organization, if available. The ISR Advisory Committee should also develop policies 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 Massachusetts. Given the wide diversity of areas of expertise, and the unforeseeable types of expertise needed in a particular case, formal certification will not necessarily be possible or required. We recommend that policies with respect to the accreditation of medical-examiner offices, and the certification of individuals who work for such offices, should be developed in coordination with members of the Massachusetts Commission on Medicolegal Investigation. The above recommendations should not prevent legal counsel representing any criminal defendant from utilizing any person, otherwise qualified, as an expert in connection with the investigation, hearing, or trial of a criminal case.

We further recommend that at the end of any capital murder trial, if the defendant is convicted and sentenced to death, the ISR Advisory Committee should then appoint an ISR

Panel that includes independent members from each forensic-science sub-discipline relevant to the particular case. Members of this panel should be selected from among recognized experts not employed by the Commonwealth's state or city crime laboratories. They might include independent experts employed by federal or state laboratories outside the Commonwealth, academics, or other suitable experts. This ISR Panel should 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 should be conducted pursuant to the policies adopted by, and using the review criteria established by, the ISR Advisory Committee. This review should, 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, whether it was appropriately documented and provided for review under the relevant legal standard; and (4) whether the retrospective ISR process, using contemporary standards, revealed any specific scientific or technical issues requiring additional information, or suggesting that errors may have been made. A copy of the ISR Panel's report should be provided, in a timely fashion, to the trial judge, prosecutor, and defense attorney, as well as to the Massachusetts Supreme Judicial Court.

Adequate funding should be available to support all ISR activities, and to provide appropriate compensation for service on either the ISR Advisory Committee or on a case-specific ISR Panel of independent experts.

We wish to emphasize the centrality of forensic-science evidence to our recommendations, which makes it crucial to ensure, as much as humanly possible, that such evidence is collected, handled, evaluated, analyzed, interpreted and preserved according to the highest standards of the medical and scientific community. In the past, unfortunately, these highest standards have not always been met by some of those engaged in the "front lines" of criminal investigation. Serious problems, including both inadvertent errors of omission and commission, as well as deliberate and conscious acts of wrongdoing, have arisen in crime laboratories, medical-examiner offices, and forensic-service providers around the country. This not only undermines the public trust in the criminal justice system, but can contribute significantly to erroneous verdicts in death penalty cases.

We propose to create a process for independently reviewing and evaluating scientific evidence in all capital cases. The key to this new process is that it will operate on a completely independent basis – not only independent of the adversarial forces of the prosecution and defense, but also independent of the existing investigative structures of police crime laboratories, medical-examiner offices, and forensic-service providers.

This new process we recommend would be called "Independent Scientific Review" (ISR). It should be initiated by the Massachusetts Supreme Judicial Court, and should be conducted under the supervision of an Independent Scientific Review Advisory Committee. The ISR Advisory

Committee should adopt general policies with respect to the qualifications of all crime laboratories, medical-examiner offices, and forensic-service providers contracted by the Commonwealth operating in connection with any death-eligible homicide investigations or homicide trials in Massachusetts, and also with respect to the qualifications of all individuals employed by such entities. The ISR Advisory Committee also should establish policies for ISR review in capital cases, and should monitor the operation of the ISR review process over time, so that any necessary changes or adjustments to the process can be made in the most appropriate manner.

At the end of every case that results in the imposition of a death sentence, the ISR Advisory Committee should recommend the appointment of an Independent Scientific Review Panel, containing members with recognized expertise in each field of forensic science relevant to the particular case. Members of the ISR Panel, in turn, should review all issues relating to the collection, analysis, and presentation of scientific evidence, and should make a comprehensive and timely report of their findings to the trial judge, prosecutor, defense counsel, and the Massachusetts Supreme Judicial Court.

The ultimate goal of the ISR review process is not only to evaluate the reliability of scientific evidence in particular capital cases, but also to provide a strong incentive for systematic reforms across the forensic science community. Laboratory accreditation, credentialing of laboratory personnel and investigators, and independent review of scientific evidence will hopefully become a routine part of the overall criminal justice system. The ISR review process can help to ensure that such meaningful reforms are undertaken as quickly as possible.

(9) Broad Authority for Trial and Appellate Courts to Set Aside Wrongful Death Sentences

Before trial, the trial judge should examine carefully the aggravating circumstances that were identified by the prosecution as a basis for the capital murder prosecution, and should dismiss the capital murder charge if such aggravating circumstances are not supported by legally sufficient evidence; in such a case, the charge should be reduced to first-degree murder, and the jury should not be death-qualified.

After trial, the trial judge should exercise the authority granted by Massachusetts Rules of Criminal Procedure, Rule 25(b)(2), 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. This authority under Rule 25(b)(2) should be broadly construed.

All cases in which the death sentence is imposed should be subject to mandatory appellate review by the Massachusetts Supreme Judicial Court. Such appellate review should not be subject to waiver by the defendant.

As part of this mandatory appellate review, in addition to the review of any legal issues properly raised, the Massachusetts Supreme Judicial Court should exercise the substantive review authority granted by Massachusetts GL ch. 278, § 33E, 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 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 Court should exercise this substantive review authority, and set aside the death sentence, whenever the Court finds the death sentence to be inappropriate on any basis in fact or law, including the Court’s disagreement with the exercise of capital sentencing discretion by the jury. This substantive review authority should be broadly construed, and should be exercised by the Court without regard to any procedural default rules or other procedural barriers to review, including the defendant’s failure to raise an issue properly in prior proceedings.

One of the traditional methods to correct any mistakes that may occur at trial is judicial review. Judicial review of a death sentence can take place in many different settings, but the trial judge is certainly in the best position both to prevent an inappropriate case from being tried as a capital case in the first instance, and to act promptly, after trial, to correct any mistakes that may have been made by the jury. Trial judges should be encouraged to act, before trial, to reduce a capital-murder charge to a first-degree murder charge if the evidence is legally insufficient to establish the existence of an aggravating circumstance; this can ameliorate the negative effects of death-qualifying the jury, since the jury should not be death-qualified if the case is not an appropriate capital case. Trial judges also should be encouraged to exercise their existing authority, under Massachusetts Rules of Criminal Procedure, Rule 25(b)(2), 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. See, e.g., *Commonwealth v. Woodward*, 427 Mass. 659, 694 N.E.2d 1277 (1998); *Commonwealth v. Gaulden*, 383 Mass. 543, 420 N.E.2d 905 (1981).

Mandatory appellate review is standard in most state death-penalty systems today. In most states, however, such appellate review generally has been constrained by the need to base any reversal or other remedial action on the finding of a procedural error at trial, as well as by procedural default rules and other procedural barriers that restrict the ability of defendants to assert claims of error if those claims have not been raised properly at an earlier stage of the proceedings. Appellate courts generally have lacked the authority to reverse a death sentence (or any other aspect of a criminal case) simply because they disagree with it on the merits.

But this emphasis on proceduralism, to the near-exclusion of substance, is beginning to change. One of the most important recent reforms to the Illinois death penalty, for example, is the expansion of the authority of the Illinois Supreme Court to set aside a wrongful death sentence on substantive, and not merely procedural, grounds. This reform has been called the “Fundamental Justice Amendment,” because it grants to the Illinois Supreme Court the power to reverse any death sentence that it finds “fundamentally unjust” on the facts and circumstances of the particular case.

The arguments for such broad substantive appellate review authority are many, but perhaps the most important is that such authority places on the appellate court the final responsibility to ensure the appropriateness of a death sentence in a particular case. Such authority also serves to reduce the current incentive for an appellate court to strain procedural law in order to justify reversing a death sentence that the appellate court finds to be substantively unjust. When the appellate court strains in this way to find a procedural error, the systemic effects are far more disruptive than if the court had the power simply to reverse a particular death sentence on the merits.

Fortunately, in Massachusetts, there is no need to propose any major changes in the law with respect to this subject. Since at least 1939, the Massachusetts Supreme Judicial Court has possessed the broad authority to set aside a death sentence on substantive grounds. Massachusetts GL ch. 278, § 33E, specifically provides:

“In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied 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 (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence.”

This substantive review authority, which today is limited by statute to first-degree murder cases, and to review by the Massachusetts Supreme Judicial Court, traditionally has been given a broad reading by the Massachusetts courts. See, e.g., *Commonwealth v. Painten*, 429 Mass. 536, 709 N.E.2d 423 (1999); *Commonwealth v. Lennon*, 399 Mass. 443, 504 N.E.2d 1051 (1987); *Commonwealth v. Bearnse*, 358 Mass. 481, 265 N.E.2d 496 (1970) (earlier version of same statute, providing for substantive review by the appellate court).

We recommend that, pursuant to this broad review authority, the Massachusetts Supreme Judicial Court should review every death sentence imposed in Massachusetts to ensure that such sentences are substantively just. The Court should 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, if it concludes that the death sentence is unjust in light of the facts and circumstances of the particular case. This substantive review authority should operate independently of the review of procedural or other legal claims of error at trial. It should apply without regard to any procedural default rule, or other procedural barrier, that might otherwise preclude the Court from considering the substantive justice of the defendant’s death sentence.

As important as substantive appellate review can be in ensuring a fair and just death-penalty system, it is also important to take affirmative steps to ensure that capital-case juries do not diminish their own sense of responsibility for the capital sentencing decision as a result of the broad availability of judicial review. We therefore recommend that the jury, in every capital case, be instructed in a manner that emphasizes the centrality of the jury’s role in capital sentencing, and that specifically informs the jury that whatever sentence the jury selects is very likely to be the sentence that the defendant ultimately will receive.

We do not find broad availability of judicial review to be inconsistent with the principle of jury decision-making, nor with the jury's traditional role in capital cases as the "conscience of the community." We believe that, in our society, the jury serves primarily to protect the defendant from unfair governmental abuse or over-reaching. Under our proposal, it remains true that no defendant can ever be sentenced to death unless the jury unanimously finds that he deserves such a death sentence (except, of course, for those cases in which the right to jury trial has been waived by the defendant). The expansive role of the trial judge, and of the Massachusetts Supreme Judicial Court, will be limited to reviewing this jury determination and correcting any substantive mistakes that may have been made.

(10) The Creation of a Death-Penalty Review Commission to Review Claims of Substantive Error and Study the Causes of Such Error

We recommend that a Death-Penalty Review Commission be created, as an independent agency within the executive branch, for the purpose of (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 case.

In connection with the investigation of a claim of substantive error in a capital case, the Death-Penalty Review Commission should be 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 police to carry out searches or make arrests. If the Commission concludes that any capital case may involve a substantive error, the Commission should be authorized to refer the case to the judicial system with a recommendation for further judicial review.

In connection with the investigation of the causes of a substantive error at trial in a capital case, the Death-Penalty Review Commission should possess the same powers described above. The Commission should issue a public report detailing its findings, which can become the basis for future reforms of the Massachusetts death-penalty system.

The final step in our multi-layered review process is the creation of a new "Death-Penalty Review Commission" to review all claims of substantive mistake filed by persons on Death Row, and to investigate the causes of any substantive error that may occur. The concept of such a Commission is relatively new to the United States, but is common in other countries, most notably England and Canada. In England, since 1997, the Criminal Case Review Committee, or CCRC, has received more than 3600 petitions, and has reviewed more than 2000 of them. Of those, the CCRC has referred 203 cases back to the judicial system for further review, and in 38 of those cases (or less than 2 percent of all reviewed petitions), the courts have ordered the conviction to be set aside.

We propose that a Death-Penalty Review Commission be created, as an independent agency within the executive branch of the government, and with a role that is limited to capital cases. The Commission would have broad investigative powers, supplemented by the ability to request police assistance where needed. The Commission would not be able to take any remedial action on its own, but would have the authority to refer any problematic case back to the judicial system, with a recommendation for further judicial review.

We also propose that the Commission have the authority to investigate, and issue a public report about, any capital case in which a substantive error is found to have occurred at trial. This public report would describe the causes of such an error, and thus help to promote future trial reforms to ensure that Massachusetts capital trials continue to be as accurate as humanly possible.
