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COUNSEL PROVISIONS UNDERMINED BY RUSH TO IMPLEMENT DEATH PENALTY

It is well known that there are no currently practicing Massachusetts lawyers who are recently trained and experienced in the trial of capital murder cases. After all, it has been over 50 years since the last Massachusetts execution, and over 25 years since the last murder trial carrying a potential death sentence; and the federal constitutional law concerning the punishment of death which has accumulated during those years is extensive and complicated. Therefore, on October 31, 1997, CPCS Chief Counsel William J. Leahy wrote to each of the death penalty bill conferees and urged them "to establish an implementation date for this legislation no sooner than July 1, 1998." Leahy pointed out that it would take "a minimum of six to eight months, assuming the provision of prompt and adequate funding for this purpose, for [CPCS] to train and certify the first group of [capital] murder-qualified attorneys in Massachusetts." He emphasized to the conferees the repeated protestations by death penalty advocates that the counsel provisions in this bill give assurance of "scrupulous fairness in the selection and trial of those defendants charged with murder whom county prosecutors select for possible execution." Also on October 31, Leahy filed an emergency request for a supplemental appropriation of \$2.713 million with the House and Senate Ways and Means Committees, to create a Capital Defense Unit which would enable CPCS to carry out its immense responsibilities under this legislation.

The conferees have failed to include any implementation date for this bill. We can only reiterate the fact that a period of at least six months is the minimum amount of time necessary to allow CPCS to set capital case attorney qualification standards and to recruit, train and support the attorneys who are willing to accept assignments in death penalty cases, all as required by this bill. In New York, which reinstated capital punishment in 1995, six months was granted for these purposes. The failure of the conferees to respond to this reality virtually guarantees a constitutional crisis concerning the right to the effective assistance of counsel at the very outset of a death penalty enactment; and furnishes a powerful reason for representatives who support the death penalty in principle, but also care that it be applied fairly, to oppose enactment today.



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**THIS ACT AUTHORIZES THE EXECUTION
OF FOURTEEN-YEAR OLD CHILDREN**

Every year since 1991, the Governor's death penalty bills have been reserved for persons who had reached the age of 18 at the time of the crime. For example, in their February 28, 1997, transmittal letter introducing this year's bill, then-Governor Weld and then-Lieutenant Governor Cellucci explained that their proposal "permits the imposition of the death penalty only upon individuals aged 18 years or older at the time of the offense[.]" (emphasis supplied). Their bill implemented this promise by limiting death sentences to those individuals who had "attained the age of eighteen years at the time of the murder...." (H. 4310, section 4, lines 9-10.)

This death penalty bill contains no such adults-only restriction. The age limitation which has consistently been proposed by this administration for seven consecutive legislative sessions has simply disappeared, without explanation. Make no mistake: if this bill is enacted into law, it will apply to 14, 15, 16 and 17 year-old children. See G.L. c.119, §72B ("If a

person is found guilty of murder in the first degree committed on or after his fourteenth birthday and before his seventeenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law for the offense.").

Not only are legal minors subject in full to the death penalty under this proposal: their youth is not even an explicit mitigating factor in the life or death sentencing decision. Elderly capital murderers over the age of 75 are afforded an automatic mitigating circumstance for their age; children between the age of 14 and 18 are afforded no such protection.

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**THIS BILL ABANDONS THE
RACIAL JUSTICE SAFEGUARDS
PASSED BY THE SENATE**

In McCleskey v. Kemp, 481 U.S. 279, 319-320 (1987), the United States Supreme Court rejected a challenge by a Georgia death row inmate based on a detailed statistical study of capital prosecutions which showed a significant disparity in life or death sentencing decisions based upon the race of the murder victim. The Court placed responsibility for considering and responding to such studies squarely with the state legislatures.

In S. 1983, the Senate passed a strong provision, which would have been codified as c.265, §2D of the General Laws, requiring pretrial review by a Justice of the Superior Court to ensure that a prosecutor's decision to seek the death penalty in a particular case was free of racial discrimination with respect to the race of either the defendant or the victim.

This meaningful pretrial protection was abandoned by the

conferees. Their substitute was a single line adding to the appellate function of the Supreme Judicial Court a mandate to reverse any sentence of death which "was imposed in a racially discriminatory manner." (See sec. 15(c) of the conference report, proposed G.L. c.279, §72.)

The conference committee provision adds little to the Court's pre-existing responsibility to review the entire case in all first degree murder appeals under G.L. c.278, §33: the Court already has plenary power and responsibility to strike down sentences based on race. More importantly, it guts the comprehensive pretrial judicial review protection passed by the Senate.

In a nutshell, the Senate passed protections against racial disparity in death cases which were meaningful and real. The conferees' proposal is hollow and merely symbolic.

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