

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

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January 28, 2013

The Hon. Governor Rick Perry
Office of the General Counsel
1100 San Jacinto, Suite 412
Austin, TX 78701

Re: Request for 30 day reprieve of sentence of death for Kimberly McCarthy

Sent via facsimile transmission to: 512-463-1932

Dear Governor Perry:

Please accept this letter as a request that you exercise the power granted by Article IV, Section 11 of the Texas Constitution, and Texas Code of Criminal Procedure article 48.01, and enter a thirty-day reprieve of Ms. Kimberly McCarthy's death sentence, currently scheduled to be carried out Tuesday, January 29, 2013, at 6:00 pm.

An invitation to join this request has been sent to Dallas County District Attorney Craig Watkins, based on his recent call for a Texas Racial Justice Act. A copy of that letter is attached.

The unacceptable disparate impact of race on the administration of the death penalty in Texas has become increasingly well established. Studies of the effect of race have understandably focused on Dallas and Harris Counties, as they far outpace the rest in the number of people they send to death row.¹ The following statistics and studies are revealing:

- Dallas County is 22.5% black, and 69.3% white.² Yet of the eighty-one people executed or waiting for execution from Dallas County, forty (49%) are white; thirty-four (42%) are African American, and seventeen (21%) are Latino.³

¹ Dallas County has sent 102 people to death row; Harris County has sent 286 people. See http://www.tdcj.state.tx.us/death_row/dr_number_sentenced_death_county.html.

² See <http://quickfacts.census.gov/qfd/states/48/48113.html>.

³ See http://www.tdcj.state.tx.us/death_row/dr_offenders_on_dr.html;
http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html

- In those eighty-one Dallas County cases, the victims were white in fifty-five (68%) cases, African American in fifteen (19%) cases, and Latino / Hispanic in eight (9%) cases. Of all of those cases, *there is not a single one reflecting the prosecution of a white defendant for the murder of either an African American or a Latino victim.*⁴
- Of the twenty-four men convicted in Dallas County who have been exonerated by DNA, *seventeen (70%) are African American.*⁵
- The United States Supreme Court recognized, detailed and condemned Dallas County's well-documented practice of racial discrimination in jury selection practices in *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Miller-El v. Dretke*, 545 U.S. 231 (2005). The Court noted the history of discrimination, the unique Texas practice that allows blacks to be "shuffled" to the rear of a jury panel, and the different standards of questioning applied to black and white jurors.
- As recently as 2005, the Dallas Morning News documented the continued use of stereotypes to exclude African Americans from Dallas County juries.⁶ Examples included one case in which a juror was asked to show his teeth after a prosecutor attempted to strike him because he had "missing teeth" and looked "disheveled."
- A recent study found that in Harris County death is more likely to be imposed on black defendants than on white defendants and more likely to be imposed in cases with white victims than in cases with black victims.⁷
- A second study found that in Harris County, during the time the notorious Chuck Rosenthal was District Attorney (2001-2008), "death sentences were imposed on behalf of white victims at 2.5 times the rate one would expect if the system were

⁴ This – the race of victim effect – is recognized as one of the most forceful predictors of when a case will be prosecuted capitally, and when a death sentence will be obtained. See U.S. Gen. Acct. Off., GGD 90-57, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* 5-6 (1990) ("The race of victim influence was found at all stages of the criminal justice system process"). Death sentence rates in cases where the defendant is African-American and the victim is white far exceed those in which both the defendant and victim are black and in those in which both the defendant and the victim are white; African-American defendants who kill white victims receive death sentences at the highest rate. John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 166 (2004). A study released in 2000 revealed that while 0.8% of murder victims in Texas were white women, 19.3% of the defendants arriving on Texas' death row between January 1, 1995 and December 31, 1999 were found guilty of killing white women. Amnesty International, *United States of America: Death by Discrimination – The Continuing Role of Race in Capital Cases*, AMNESTY INTERNATIONAL (2003), available at <http://www.amnesty.org/en/library/info/AMR51/046/2003>.

⁵ See www.innocenceproject.org/Content/Dallas_County_Cases_Where_DNA_Has_Proven_Innocence.php

⁶ See McGonigle, Becka, LaFleur and Wyatt, DALLAS MORNING NEWS, *A Process of Juror Elimination* (Aug. 21, 2005); *Jurors' Race a Focal Point for Defense* (Aug. 22, 2005); *Judges Rarely Detect Jury Selection Bias* (Aug. 23, 2005).

⁷ See Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 Hous. L.Rev. 807 (2008)

blind to race, and death sentences were imposed on behalf of white female victims at 5 times the rate one would expect if the system were blind to race and gender.”⁸

These statistics and their import are reflected in the case of Kimberly McCarthy, an African-American woman, who was sentenced to death for the murder of an elderly white woman. In her case, only five non-white people (four African Americans and one Hispanic) made it from the prospective juror panel to the point of individual voir dire – that is, where they were even potentially eligible to serve as jurors. One was excused by agreement of both parties. Thus, of the sixty-four people questioned on individual voir dire *only four* - 6% - were not white. *Only three* – 4% - were African American. None of these numbers are even remotely reflective of Dallas County demographics.

During jury selection, of the four non-white prospective jurors who made it to voir dire, *three* were struck by the state. Of the thirteen jurors seated, all were white except one. The Supreme Court has recognized that even one discriminatory strike violates the Constitution. Nonetheless, this issue in Ms. McCarthy’s case has never been fully explored, and defense counsel did not challenge the prosecutor’s actions. Indeed, the prosecutors’ justifications for these strikes were carefully crafted to avoid such challenge, based on their “concern” that the prospective non-white jurors would not hold *the state* to the requisite burden of proof on the first special issue presented to the jury at the punishment phase of a capital trial.⁹

Anyone familiar with the extensive history of racial discrimination in jury selection practices in Dallas County would not be surprised by these statistics. As early as 1938, the African American president of Wiley Junior College, George Porter, was thrown headfirst down the courthouse steps after refusing to be excused from jury service. In three 1940’s cases out of Dallas County, the Supreme Court found racial bias in the method used by Dallas County for selection of grand jurors.¹⁰ It was not until 1949 that an African American was permitted to serve on a jury trial in Dallas County.¹¹ District Attorney Henry Wade took office in 1951, and institutionalized the now infamous discriminatory jury selection practices recognized in the *Miller El* cases. In 1963, the first of two infamous jury selection training manuals for prosecutors appeared, advising prosecutors “not take Jews, Negroes, Dagos, Mexicans, or a member of any minority race on a jury, no matter how rich or how well educated.”¹² Until 1966, eligibility to serve on a jury was dependent on payment of a poll tax – a required fee for voting – and property ownership – a practice that had an enormously disparate impact.¹³ In 1969, the infamous Sparling memo appeared, admonishing prosecutors, again, to not permit people of color

⁸ See Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 Hous. L. Rev. 131 (2012).

⁹ See, e.g., Tr. Vol. VII at pp. 130-131.

¹⁰ See *Hill v. Texas*, 316 U.S. 400 (1942); *Akins v. Texas*, 325 U.S. 398 (1945); *Cassell v. Texas*, 339 U.S. 282 (1950).

¹¹ See generally McGonigle and Timms, *Race Bias Pervades Jury Selection*, DALLAS MORNING NEWS, March 9, 1986.

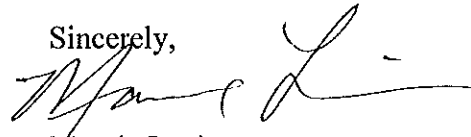
¹² *Miller-El v. Cockrell*, 537 U.S. at 334-335; *Miller-El v. Dretke*, 545 U.S. at 264.

¹³ See McGonigle and Timms, *Race Bias Pervades Jury Selection*, DALLAS MORNING NEWS, March 9, 1986.

on criminal juries.¹⁴ In 1986, as the Dallas Morning News reported, the instructional manual given to prosecutors by the Texas District and County Attorneys Association stated that it was “not advisable to select potential jurors with multiple gold chains around their necks or those who appear to be ‘free thinkers’”.¹⁵ As recently as 2005, a prospective African American juror who the prosecution had struck because he was purportedly missing his front teeth, which the prosecutor called an indication of a “socioeconomic stereotype,” was called back into the courtroom and asked to show his teeth.¹⁶ The Dallas Morning News study that reported that incident concluded that “prosecutors excluded eligible blacks from juries at more than twice the rate they rejected eligible whites. . . .In fact, being black was the most important personal trait affecting which jurors prosecutor rejected. . . . Jurors’ attitudes toward criminal justice issues also played an important role, but even when blacks and whites answered key questions the same way, blacks were rejected at higher rates.”¹⁷

In light of these statistics, and this history, the capital prosecution of an African American woman by a jury with only one non-white juror, where three non-whites were unilaterally excluded by the state despite being fully qualified to serve, a remedy is not only warranted, but demanded. We thus respectfully request that you grant Kimberly McCarthy a 30-day reprieve of her currently scheduled execution.

Sincerely,



Maurie Levin
University of Texas
Capital Punishment Clinic

C. Wayne Huff

Attorneys for Kimberly McCarthy

Cc: Hon. Craig Watkins (w/o enc.)

¹⁴ *Id.*; *Miller-El*, 537 U.S. 322, 335.

¹⁵ *Id.*

¹⁶ McGonigle, Becka, LaFleur and Wyatt, *Jurors’ Race a Focal Point for Defense*,” DALLAS MORNING NEWS, January 24, 2005.

¹⁷ *Id.*