URGENT ACTION

RACISM CLAIM AS 500TH TEXAS EXECUTION NEARS

In what would be the 500th execution in Texas since 1977, a 52-year-old woman, Kimberly McCarthy, is due to be put to death at 6pm on 26 June. Her lawyer is seeking a stay of execution from the courts, raising claims of racial discrimination in jury selection.

Kimberly McCarthy was sentenced to death in 1998 in Dallas County, Texas, for the murder of her 71-year-old neighbour Dorothy Booth, who was stabbed to death in her home in 1997. The conviction and death sentence were overturned in 2001 by the Texas Court of Criminal Appeals because the trial judge had allowed the use of evidence that should not have been admitted. Kimberly McCarthy was retried in 2002 and again sentenced to death.

Kimberly McCarthy is black. Dorothy Booth was white. At the 2002 retrial, the jury consisted of 11 whites and one black. In a legal brief filed earlier this month in state court, Kimberly McCarthy's lawyer has sought a stay of execution in order that she can present evidence of racial discrimination by the prosecution during jury selection, and to challenge the failure of Kimberly McCarthy's previous lawyers to raise this claim at trial or on appeal.

The population of Dallas County is about 23 per cent black and 69 per cent white. At Kimberly McCarthy's 2002 trial there were 64 prospective jurors in the pool for individual questioning, of whom only four (six per cent) were black. Three of them were dismissed by the prosecution. Under the 1986 US Supreme Court decision *Batson v Kentucky*, prospective jurors can only be removed for "race neutral" reasons. If the defence makes a *prima facie* case of discrimination by the prosecution, the burden shifts to the state to provide race neutral explanations. Kimberly McCarthy's trial lawyer did not object to the prosecutor's dismissals and did not request a *Batson* hearing.

Kimberly McCarthy's current lawyer points out that the "inexplicable" failure of defence counsel to object to the state's dismissals means that the record is devoid of a *Batson* hearing, including any race neutral reasons asserted by the prosecution or evidence from the defence that such reasons were the pretext for racism. However she argues that there is nevertheless evidence of race-based intent – firstly, the history of racist jury selection tactics by prosecutors in Dallas County, as the US Supreme Court found in 2005 (*Miller-El v. Dretke*); secondly, the bare statistic that the prosecutors dismissed 75 per cent of the blacks in the jury pool; and thirdly, evidence that they had asked different questions of white and non-white prospective jurors, also found to be an issue in the *Miller-El* case.

Not only had the trial lawyer not objected, but neither had the state-appointed appeal lawyer (who reportedly visited his client only once on death row in the 10 years he represented her) raised the failure on appeal, causing it to be procedurally lost to judicial review. The current lawyer is arguing that under a May 2013 Supreme Court ruling, Kimberly McCarthy should be allowed to overcome this procedural bar and her case allowed back into court.

Please write immediately in English or your own language:

- Recognizing the seriousness of the crime for which Kimberly McCarthy is under sentence of death;
- Expressing concern at the evidence of discriminatory jury selection and that no court has examined this as a result of the failures of state-appointed trial and appellate counsel;
- Calling on Governor Perry to stop this execution and support a moratorium on executions.

PLEASE SEND APPEALS BY FAX BEFORE 23.30 GMT ON 26 JUNE 2013 TO:

Governor Rick Perry, Austin, Texas, USA
Fax: + 1 512 463 1849
Salutation: Dear Governor

And copies to:
Governor's Press office, Fax: +1 512-463-1847
Office of the General Counsel, Fax: +1 512-463-1932

Also send copies to diplomatic representatives accredited to your country.

Please check with your section office if sending appeals after the above date.

AMNESTY INTERNATIONAL

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ADDITIONAL INFORMATION

In a capital trial in the USA, the jurors are "death qualified". At jury selection, the defence and prosecution will question the prospective jurors and have the right to exclude individuals, either for a stated reason (for cause) or without giving a reason (a peremptory challenge). Those citizens who would be "irrevocably committed" to vote against the death penalty can be excluded for cause by the prosecution, under a 1968 US Supreme Court ruling. In 1985, the Court expanded the class of potential jurors who could be dismissed for cause. Under the newer standard, a juror can be dismissed for cause if his or her feelings about the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath". Research has shown that "death qualified" jurors are more pro-conviction than their excludable counterparts.

Meanwhile, the US Supreme Court's 1986 *Batson v Kentucky* ruling did not end discriminatory tactics by prosecutors during jury selection, as one of the Justices predicted at the time. The latter Justice said in another opinion in 1989 (on a Texas case) that "Batson's greatest flaw is its implicit assumption that courts are capable of detecting race-based challenges to Afro-American jurors… This flaw has rendered Batson ineffective against all but the most obvious examples of racial prejudice".

In its June 2005 *Miller-El v. Dretke* ruling, in addition to finding that prosecutors at the 1986 Dallas County trial of Thomas Miller-El had resorted to racially motivated peremptory strikes against would-be black jurors, the Supreme Court pointed out that "if anything more is need for an undeniable explanation of what was going on, history supplies it". The Court pointed to "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black [would-be jurors] at the time Miller-El's jury was selected", and to a training manual for prosecutors that gave tips on excluding minorities from juries. In August 2005, a study by the Dallas Morning News reported that the county's prosecutors were still excluding blacks at more than twice the rate that they were excluding eligible white would-be jurors at capital trials.

Along with the recent brief alleging the discriminatory use of peremptory strikes in the Kimberly McCarthy case, her lawyer has filed a motion in the Texas Court of Criminal Appeals requesting that the Presiding Judge and one of the other judges recuse themselves from the case as they both served as prosecutors in Dallas County before being elected to the court.

According to the main brief, the fact that no court has ever considered the merits of the claims therein "is not the result of Ms McCarthy's actions, but of the ineffectiveness of trial and habeas counsel appointed by the State of Texas." The current lawyer only became involved in the case in January 2013 when Kimberly McCarthy was previously facing an execution date. Then, on 28 May 2013, the US Supreme Court issued a 5-4 ruling (*Trevino v. Thaler*) recognizing a possible exception to claims of inadequate legal representation in Texas capital cases being denied judicial review under the procedural default doctrine. It did so on the grounds that the design and operation of the Texas appeals process might prevent death row prisoners from having a meaningful opportunity to raise such claims in state appeal court, thereby preserving them for federal review.

Kimberly McCarthy is scheduled to become the 500th person executed in Texas since judicial killing resumed in the USA in 1977. She would be the 13th woman to be executed in the USA since 1976, and the fourth in Texas.

Some 37 per cent of the 1,336 executions in the USA since the US Supreme Court approved new capital laws in 1976 have been carried out in Texas. During these three-and-a-half decades, dozens of countries have abolished the death penalty and today 140 are abolitionist in law or practice. Amnesty International opposes the death penalty in all cases, unconditionally.

Name: Kimberly McCarthy

Gender m/f: f

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