BEFORE THE TEXAS BOARD OF PARDONS AND PAROLES

In re

THOMAS JOE MILLER-EL,

Petitioner.

PETITION FOR A RECOMMENDATION OF A REPRIEVE OF EXECUTION AND COMMUTATION OF DEATH SENTENCE

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PREFACE

Mr. Gary L. Bledsoe, Esq., is the President of the Texas National Association for the Advancement of Colored People (NAACP), and appears on behalf of the Texas NAACP. The Texas NAACP's mission is as follows:

> The NAACP insures the political, educational, social and economic equality of minority groups and citizens; achieves equality of rights and eliminates race prejudice among the citizens of the United States; removes all barriers of

> racial discrimination, through the democratic processes, seeks to enact and enforce federal, state and local laws securing civil rights; informs the public of the adverse effects of racial discrimination and seeks its elimination; educates persons as to their constitutional rights and to take all lawful action in furtherance of these principles.

Mr. Luis R. Vera, Jr., Esq., appears in his capacity as the Legal Counsel for the Texas League of United Latin American Citizens (LULAC). Texas LULAC's aims and purposes are, in part, as follows:

> To exert our united efforts to uphold the rights guaranteed to every individual by our state and national laws and to assure justice and equal treatment under these laws;
>
> To combat with every means at our command all un-American tendencies and actions that deprive American citizens of their rights in educational institutions, in economic pursuits and in social, civic and political activities.

In 2001, Texas LULAC and Texas NAACP ratified an agreement of cooperation and understanding between the two civil rights organizations, and pledged to "consult and cooperate with each other openly in reference to matters of common interest including but not limited to . . . fairness in the criminal justice system."

Mr. Miller-El's death sentence was secured in a judicial proceeding corrupted by the exclusion of African-American citizens, based on a stereotype that black citizens cannot be fair jurors because they automatically empathize with the accused. The invocation and approbation of this offensive stereotype denigrates the integrity and fairness of Mr. Miller-El's death sentence and stigmatizes an entire race of people.

Mr. Bledsoe and Mr. Vera, in their official capacities, join Mr. Miller-El's counsel in urging that the Board of Pardons and Paroles and the Governor of Texas commute Mr. Miller-El's death sentence in order to remove the taint of discrimination that permeates this case. Although the offense for which Mr. Miller-El was sentenced to death was a tragic and reprehensible act of violence, proceeding with his execution under these circumstances will condone the use of race stereotypes in the process of determining who deserves to die in the State of Texas. As described herein, Dallas County has a dishonorable yet well-documented legacy when it comes to the exclusion of its citizens from participation in the criminal justice system based on their race, religion and gender. There is simply no question that Dallas County's shameful policies of the past reached as far as 1986, and corrupted the proceedings against Mr. Miller-El.

A commutation is necessary to affirm that the Texas criminal justice system has evolved beyond its ignoble past, in which "Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated," were denied their fundamental right to participate in the system based on the deplorable racial and ethnic prejudices held by those who controlled access to the administration of justice. As the United States Supreme Court has recognized, acceptance of the racial stereotypes invoked in Mr. Miller-El's case will both impede our progress as a society and cause continued injury to the citizens of Dallas County:

> [I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution. Other means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a test. If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630-31 (1991).

The "hurt and injury" caused by "automatic invocation of race stereotypes" is concrete in Mr. Miller-El's case. Carrol Boggess, an African-American woman who was stricken peremptorily from Mr. Miller-El's jury by the prosecution, states on camera, "It really upsets me that they think like that, that they think that they can't trust me, not even knowing who I am." She is angry, she says, that the prosecutors "would discriminate against me . . . and not look at me as a person, as an individual, but as a color." Exhibit 1 (Videotape).

REQUEST FOR COMMUTATION OR REPRIEVE

We request that the Board recommend that the Governor commute Mr. Miller-El's sentence to life imprisonment, and that he effect the Board's recommendation. 1) In the alternative, we urge the granting of a reprieve to permit a more reasoned and thorough consideration of this case. We also request a hearing before the Board where witnesses may be called to attest to the facts asserted herein.

Unlike a pardon, commutation does not "cancel" the defendant's guilt, nor does it imply forgiveness. Thus, if the Board and the Governor choose to commute Mr. Miller-El's sentence, he will still stand convicted of the most serious offense known under Texas law. Commutation may be granted for a variety of reasons, including a determination that the original sentence was excessive, for reasons relating to the the rehabilitation of the prisoner, "for any reason that the commuting authority deems adequate," or as an act of mercy. National Governor's Association, *A Guide to Executive Clemency Among the American States*, 5 (1988).

The executive clemency power in capital cases derives from the recognition by the

framers of the Texas Constitution that in imposing the ultimate punishment – the taking of a human life – no legal process, however complex, lengthy, or ingenious, is sufficient in all cases to ensure that a just and reliable result is reached.

I. The Offense for Which Mr. Miller-El Has Been Sentenced to Death.

Mr. Miller-El was convicted of the November 16, 1985, shooting death of Douglas Walker during an armed robbery at the Holiday Inn in Irving, Texas. Mr. Walker and Donald Ray Hall, Jr., both of whom were employees of the hotel, were taken to the bellman's closet where they were robbed, bound and gagged, and shot. Mr. Walker was killed; Mr. Hall was rendered a quadriplegic.

II. Victim Impact Statement.

On the night that he was shot and killed, Douglas Walker was working at the Holiday Inn with Donald Ray Hall, Jr. Mr. Hall had recently been promoted to the position of Chief Night Auditor, and was supervising the hotel's night staff and training Mr. Walker to work with the hotel's ledger. When he heard someone at the hotel desk, he went out to attend to the person. At that point, the man at the counter pulled a gun on him and instructed him to get Mr. Walker. After Mr. Hall complied, he and Mr. Walker were bound, gagged and shot.

At trial, a pathologist testified that Mr. Walker's death was caused by two shots to his back. He stated that it appeared that his hands were tied behind him when he was shot, and that he had been lying face-down on a tile floor. Mr. Hall's doctor testified that Mr. Hall had a spinal cord lesion causing permanent paralysis, as well as problems controlling bladder and stool. He further stated that Mr. Hall would never be able to father children, and that his life expectancy had been shortened by his injuries. Mr. Hall also testified at the trial, in a wheelchair. He stated that, while he had hope that he some day would walk again, his doctors had not offered him any such hope.

III. The Appellate History of Mr. Miller-El's Case and the Legal Issues Raised in

Judicial Proceedings.

Mr. Miller-El developed and presented, to both the state and federal courts, copious and multifaceted evidence demonstrating that the Dallas County District Attorney's Office had a policy of systematically discriminating against African-Americans through the use of State's peremptory challenges, 2) and that this practice was deployed at his trial when the prosecutors used their peremptory challenges to strike 10 of 11, or 91%, of the qualified African-American jurors.

All of the following facts – which are discussed in detail throughout this Petition – remain **uncontested** by the State of Texas, except for the last two:

- In 1963, a treatise on jury selection, prepared by a top aide to Dallas County District Attorney Henry Wade, advised prosecutors in no uncertain terms to prevent "Jews, Negroes, Dagos, Mexicans, or [] member[s] of any minority race [from sitting] on a jury."

- In 1969, another treatise, written by Assistant District Attorney Jon Sparling, explicitly advised Dallas County prosecutors to remove all minorities from juries with peremptory challenges, because they "empathize with the accused." This jury-selection memorandum was incorporated into a training manual given to all new Dallas County prosecutors, and its teachings were often the basis of live presentations by its author. The jury-selection memo remained, with its discriminatory advice intact, in a manual for new prosecutors at least until the early 1980s.

- The prosecutor in charge of the jury selection in Mr. Miller-El's case, Paul Macaluso – a self-proclaimed "jury selection specialist"– joined the Dallas County District Attorney's Office in 1973 and was trained at a time when the office actively taught the racially discriminatory jury-selection advice in the manual.

- Statistical studies of Dallas County jury selection practices performed shortly before Mr. Miller-El's trial indicated that the Dallas County District Attorney's Office persistently struck the overwhelming majority – 86% – of the qualified African-American jurors.

- Judges and lawyers from Dallas testified that it was common knowledge in the Dallas County legal community that the Dallas County assistant district attorneys routinely excluded African-Americans from jury service in the mid-1980s.

• The pattern of exclusion in capital murder cases was even starker: the prosecution removed 90% of the eligible black jurors in 15 death penalty cases tried between 1980 and 1986. The prosecutor in charge of jury selection in Mr. Miller-El's case was responsible for picking the jury in at least five of these cases.

• This same prosecutor was found to have engaged in intentional racial discrimination in a 1985 death penalty case involving, as this one does, an African-American defendant charged with killing white victims. During the hearings in that case, the courts found the prosecutor's testimony concerning his reasons for striking the African-American jurors not credible.

• The other prosecutor in Mr. Miller-El's case was lead counsel in the trial of Mr. Miller-El's wife, which was held in the same court at nearly the same time as Mr. Miller-El's trial. Her conviction was overturned because of intentional racial discrimination in the jury selection process.

• During Mr. Miller-El's trial, the prosecution attempted to manipulate the jury-shuffle process, which "shuffles" a panel of fifty potential jurors and thus changes the order in which they are interviewed by the lawyers, to ensure that fewer black persons would be considered for service on the jury.

• The jury cards filled out by prospective jurors in Mr. Miller-El's trial did not provide a blank for the jurors' races. Nevertheless, the prosecutors explicitly noted the race of every juror on the cards. They also kept racially coded lists of all selected jurors, and all jurors struck by either side with peremptories.

• The prosecution struck 10 of 11 – or 91% – of the qualified African-American jurors. Only one African-American was allowed to serve on Mr. Miller-El's jury.

• During Mr. Miller-El's trial, the prosecution singled out black jurors and subjected them to blatantly disparate questioning regarding their ability to assess the minimum punishment for non-capital murder, using manipulative questioning techniques which were almost never used against white jurors. The disparate questioning clearly was an attempt to manufacture a basis to exercise a "challenge for cause" against the black jurors.

• During Mr. Miller-El's trial, the court required the prosecution to provide reasons for its multiple peremptory challenges against black jurors. The reasons offered by the prosecution were clearly a pretext to mask the presence of racial discrimination, because the reasons applied with equal or greater force to white jurors who were not challenged by the State.

Mr. Miller-El was convicted of capital murder and sentenced to death on

March 24, 1986. During jury selection for his trial, Mr. Miller-El's counsel filed a motion challenging the prosecution's racially discriminatory jury selection practices, but the court denied the motion. On appeal, in response to arguments from Mr. Miller-El's counsel, the Texas Court of Criminal Appeals ("CCA") sent Mr. Miller-El's case back to the trial court. The CCA ordered the trial court to conduct a "*Batson* hearing," under the law announced by the United States Supreme Court in *Batson v. Kentucky*, 486 U.S. 79 (1986), regarding the allegation that the prosecutors had used their peremptory strikes to discriminate against African-Americans. *Miller-El v. State*, 748 S.W.2d 459 (Tex. Crim. App. 1988). Following the *Batson* hearing, the CCA affirmed Mr. Miller-El's conviction and death sentence in a unpublished opinion. 3) The CCA denied rehearing on January 20, 1993, and the United States Supreme Court denied Mr. Miller-El's petition for a writ of certiorari on October 4, 1993. *Miller-El v. Texas*, 510 U.S. 1004 (1993).

In state post-conviction proceedings, Mr. Miller-El sought relief based on his incompetence to stand trial and the trial court's failure to conduct a hearing regarding Mr. Miller-El's competency to stand trial.4) Mr. Miller-El had been arrested for capital murder in Houston, Texas, after S.W.A.T. officers shot him with an exploding round of ammunition that caused extensive internal injuries. After spending two months in a Houston hospital, Mr. Miller-El was transferred to Dallas County, where he was tried for capital murder. During his trial, Mr. Miller-El experienced serious Medical complications and was transported to the hospital on three occasions. The trial court requested medical evaluations of Mr. Miller-El on three occasions. The third request – which followed the onset of medical complications that interrupted the punishment phase proceedings and

resulted in Mr. Miller-El's third hospitalization – was for the express purpose of ascertaining Mr. Miller-El's fitness to attend court. Yet, despite its repeated questions about Mr. Miller-El's condition, the court never convened a hearing to determine whether Mr. Miller-El was competent to stand trial, in violation of the law.

The state courts denied Mr. Miller-El's repeated requests for an evidentiary hearing during post-conviction proceedings. Instead, the convicting court simply adopted a proposed order drafted by the district attorney, which had been submitted to the court without any notice to Mr. Miller-El, without providing him with the opportunity to object to – or even to review – the proposed order. Mr. Miller-El requested relief from the CCA but, on June 17, 1996, the CCA denied his application for a writ of habeas corpus. The CCA adopted the findings of the convicting court which had been drafted by the district attorney.

Mr. Miller-El presented his *Batson* and competency-to-stand-trial claims in his federal habeas corpus petition.5) The Magistrate Judge recommended that Mr. Miller-El's petition be denied, and the district court adopted the magistrate's recommendation on June 5, 2000. On appeal, the Fifth Circuit affirmed the district court, and subsequently denied his timely requests for rehearing. Mr. Miller-El's petition for a writ of *certiorari*, in which he seeks a remedy for the racial discrimination and relief from the lower federal courts' erroneous interpretation of the Anti-Terrorism Act, is currently pending before the United States Supreme Court.

IV. The Proceeding that Resulted in Mr. Miller-El's Conviction and Death Sentence was Corrupted by Overt Racial Discrimination that Undermines the Integrity of Texas' Criminal Justice System.

A. Dallas County's history of systemic racial discrimination in the

selection of juries is well-documented and undisputed.

1. The Dallas County District Attorney's Office promulgated explicit, written policies instructing prosecutors to use peremptory challenges to prevent minorities from sitting on juries.

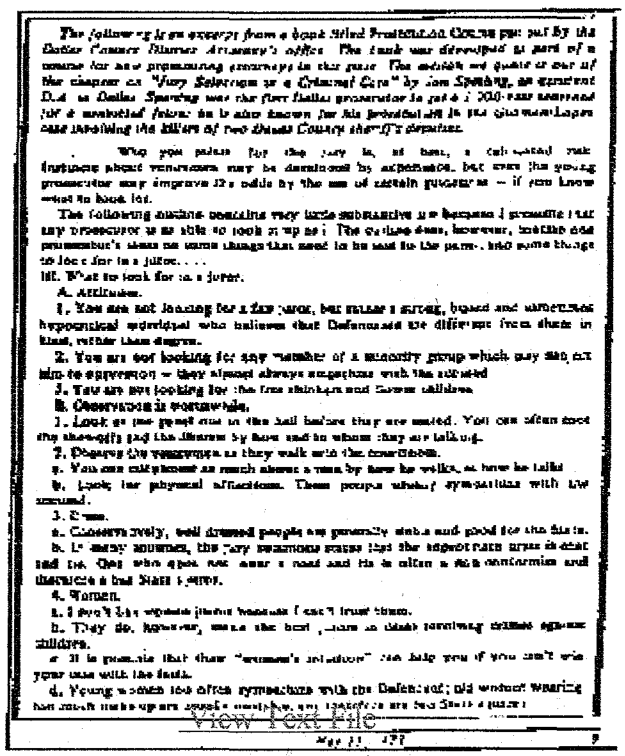
Between 1942 and 1950, the United States Supreme Court was called upon to redress intentional racial discrimination in the selection of Dallas County grand juries on three occasions.6) The highest Court in the nation unambiguously condemned the racial discrimination in Dallas County's trial process and specifically instructed that "Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race." 7) Yet, prosecutors in Dallas County defiantly turned a deaf ear to the Court.

In 1963, not long after the Court admonished Dallas County for excluding its citizens on the basis of race from participation in the criminal justice system, a treatise on jury selection in criminal cases was written by one of Henry Wade's top aides, Bill Alexander, advising: "**Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.**" Exhibit 3 & 4.

(Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, Mar. 9, 1986, at A1). After the Alexander memo was written, then-Assistant District Attorney Jon Sparling wrote the now-infamous Sparling Memorandum. Sparling advises prosecutors that "[w]ho you select, and what you will qualify the panel on will depend on the type of crime, the age, **color** and sex of the defendant, the personality of the defense attorney, and your own individual style and judgement." Exhibit 5 (Jon Sparling, *Jury Selection in a Criminal Case*). The manual specifically advises, "**You are not looking for any member of a minority group which may subject him to oppression – they almost always empathize with the accused.**" It further states, "Look for physical afflictions.

These people usually sympathize with the accused," and, "I don't like women jurors because I can't trust them." "It is impossible to keep women off your jury," Sparling notes, "but try to keep the ratio at least seven to five in favor of men." After directing prosecutors to ask venirepersons, or potential jurors, about their religious preference, Sparling declares: "Jewish veniremen generally make poor State's jurors. Jews have a history of oppression and generally empathize with the accused." In 1973, Sparling's memorandum was incorporated into a larger manual to be handed out to all Dallas County District Attorney's Office personnel.

In 1973, the *Texas Observer* published an article about the Dallas County District Attorney's Office. Exhibit 6 (J.D. Arnold, *Wretched Excess in Dallas*, TEXAS OBSERVER, May 11, 1973, at 9). The Observer had obtained a copy of the Sparling Memo, and featured excerpts in a sidebar to the piece. *See* Fig. 1. The *Observer* introduced the excerpts thus: "The following is an excerpt from a book titled *Prosecution Course* put out by the Dallas County District Attorney's Office. The book was developed as a part of a course for new prosecuting



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attorneys in this state." The Observer article apparently caught the eye of *Time* magazine, for it also excerpted Sparling's memo in its June 4, 1973 issue. Exhibit 7 (*Women, Gimps, Blacks, Hippies Need Not Apply*, TIME, June 4, 1973, at 67); see Fig. 2 (next page). In *Time*, the Sparling memo excerpts appeared underneath a cartoon depicting a jury of hooded Klansmen in the background. In the foreground, a

Observer Article May, 11, 1973

The following is an except from a book titled Prosecution Course put out by the Dallas County District Attorney's office. The book was developed as part of a course for new prosecuting attorneys in this state. The section we quote is out of D.A. in Dallas. Sparling was the first Dallas prosecutor to get a 1,000-year sentence for a convicted felon; he is also known for his prosecution in the Guzman-Lopez case involving the killers of two Dallas County sheriff's deputies.

....Who you select for the jury is, at best, a calculated risk.
Instincts about veniremen may be developed by experience, but even the young prosecutor may improve the odds by the use of certain guidelines - if you know what to look for.

The following outline contains very little substantive law because I presume that any prosecutor is as able to look it up as I. The outline does, however, contain one prosecutor's ideas on some things that need to be said to the panel, and some things to look for in a juror....

A. Attitudes.

1. You are not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them kind, rather than degree.

2. You are not looking for any member of a minority group which may subject him to oppression - they almost alwayws empatihize with the accused.

3. You are not looking for the free thinkers and flower children.

B. Observation is worthwhile.

1. Look at the panel out in the hall before they are seated. You can often spot the showoffs and the liberals by how and to whom they are talking.

2. Observe the veniremen as they walk into the courtroom.

a. You can tell almost as much about a man by how he walks, as how he talks.

b. Look for physical afflications. These people usually sympathize with the accused.

3. Dress.

a. Conservatively, well dressed people are generally stable and good for the State.

b. In many counties, the jury summons states that the appropriate dress is coat and tie. One who does not wear a coat and tie is often a non-conformist and therefore a bad State juror.

4. Women.

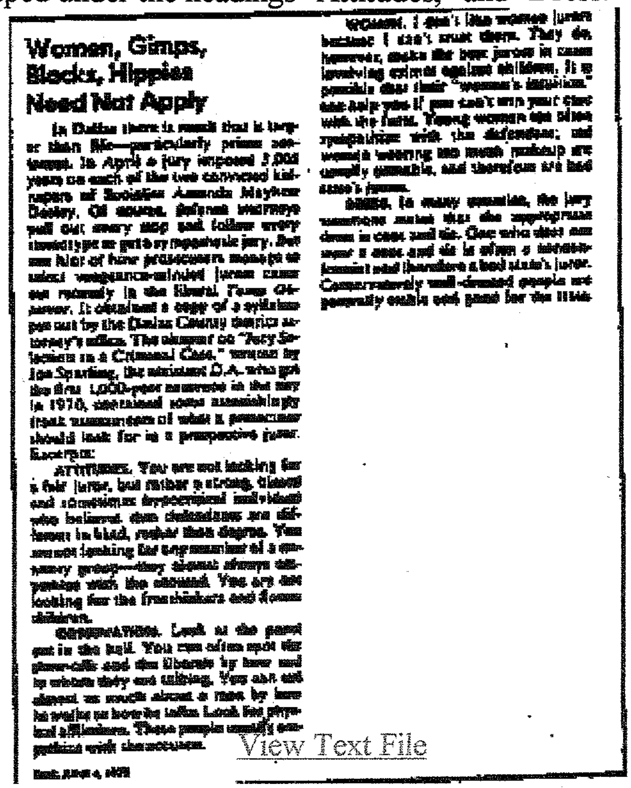
a. I don't like women jurors because I can't trust them.

b. They do, however, make the best jurors in cases involving crimes against children.

c. It is possible that their "women's intuition" can help you if you can't win your case with the facts.

d. Young women too often sympathize with the Defendant; old women wearing too much make-up are usually unstable, and therefore are bad State jurors.

defense attorney whispered to his client: "I don't like the look of this at all." *Time* described the memo as containing "astonishingly frank assessments of what a prosecutor should look for" in order to obtain "vengeance-minded jurors." *Time* then provided accurate excerpts from the memo, grouped under the headings "Attitudes," and "Dress."



Women, Gimps, Blacks, Hippies Need Not Apply

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The excerpts include Sparling's remarks about women and minorities, including his instruction that "You are ***not looking for a fair juror***, but rather a strong, ***biased***, and sometimes hypocritical individual who believes that defendants are different kind, rather than degree." Exhibit 7. They also include remarks indicating a troubling attitude toward justice: "It is possible that their 'woman intuition' can help you ***if you can't win your case with the facts***." *Id.*

The national scrutiny devoted to the jury-selection practices of the Dallas County DA's office, however, apparently made little impact. At some time during the 1970s, the Sparling memo was revised. The memo that Mr. Miller-El's lawyers entered into evidence during his 1986 trial evidently differs from that circulating in 1973, when the *Texas Observer* and *Time* articles were written. It is particularly illuminating to compare the two versions of the memorandum and determine which parts were "cleaned up" and which parts were not. In 1973, subsection III.A.1. of the memo, entitled "What to look for in a juror: Attitude," read as follows: "You are not looking for a fair juror, but rather a strong, biased, and sometimes hypocritical individual who believes that Defendants are different from them [sic] in kind, rather than degree." The same section

Women, Gimps,
Blacks, Hippies
Need Not Apply

In Dallas there is much that is larger than life -- particularly prison sentences. In April a jury imposed 5,005 years on each of the two convicted kidnappers of Socialite Amanda Mayhew Dealey. Of course, defense attorneys pull out every stop and follow every stereotype to get a sympathetic jury. But one hint of how prosecutors manage to select vengeance-minded jurors came out recently in the liberal *Texas Observer*. It obtained a copy of a syllabus put out by the Dallas County district attorney's Office. The chapter on "Jury Selection in a Criminal Case," was written by Jon Sparling, the assistant D.A. who got the first 1,000-year sentence in the city in 1970, contained some astonishingly frank assessments of what a prosecutor should look for in a prospective juror.

ATTITUDES. You are not looking for a fair juror, but rather a strong, biased and sometimes hypocricital individual who believes that defendants are different in kind, rather than degree. You are not looking for any member of a minority group - they almost always empathize with the accused. You are not looking for the freethinkers and flower children.

OBSERVATION. Look at the panel out in the hall. You can often spot the show-offs and the liberals by how and to whom they are talking. You can tell almost as much about a man by how he walks as how he talks. Look for physical afflications. These people usually empathize with the accused.

TIME, JUNE 4, 1973

WOMEN. I don't like women jurors because I can't trust them. They do, however, make the best jurors in cases involving crimes against children. It is possible that their "women intuition" can help you if you can't win your case with the facts. Young women too often sympathize with the defendant; old women wearing too much makeup are usually unstable and threfore are bad state's jurors.

DRESS. In many counties, the jury summons states that the appropriate dress is coat and tie. One who does not wear a coat and tie is often a nonconformist and therefore a bad state's juror. Conservatively well-dressed people are generally stable and good for the state.

in the version of the memo introduced in 1986 reads: "You are looking for a strong, stable, [sic] individual who believes that Defendants are different from them [sic] in kind, rather than degree." However, the very next section of the memo – the controversial racial-exclusion section exposed to nationwide publicity in the 1973 *Time* article – remained unchanged. Other controversial sections dealing with race and gender selection remained the same as well.

The Dallas County District Attorney's Office, despite receiving national attention for its race- and gender-based discriminatory policy, distributed the manual until at least the early 1980s.

2. Statistical studies demonstrate that at the time of Mr. Miller-El's trial, the Dallas County District Attorney's Office struck 90.3% of qualified black jurors in capital murder cases.

In 1986, the year Mr. Miller-El was prosecuted, the Dallas Morning News studied one hundred trials selected at random from the 1,036 felony jury trials held in Dallas County in 1983. The reporters analyzed court records relating to 4,434 prospective jurors in order to determine the race of the jurors, whether they were excluded from jury service, how, and by whom. The study concluded that although blacks comprised 18% of Dallas County's population, less than 4% of jurors were black. The chance of a qualified black serving on a jury was one-in-ten, compared to a one-in-two chance for a qualified white. **Eighty-six percent (405 out of 467) of otherwise-qualified African-American jurors were struck with peremptory challenges by the State.** Exhibits 3 & 4.

The pattern of exclusion in capital murder cases was even starker. In December 1986, the Dallas Morning News published another article examining the fifteen capital murder cases tried in Dallas County between 1980 and December 1986. Exhibit 8 & 9 (Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986, at A1). In these fifteen

capital cases, **the prosecution used peremptory challenges to remove 90.3% (56 out of 62) of the qualified African-American jurors.** Out of 180 jurors in the fifteen trials, only five, or 2.8%, were black.

3. Dallas judges and lawyers testified that the Dallas County prosecutors routinely excluded African-Americans from criminal juries in the 1980s.

At Mr. Miller-El's pre-trial hearing, judges and lawyers from Dallas testified that it was common knowledge in the Dallas County legal community that Dallas County assistant district attorneys routinely excluded all African-Americans from jury service in the mid-1980s. Dallas County criminal district court judges provided specific examples of the prosecutors' racially discriminatory selection procedures. One judge testified that a prosecutor had admitted that a jury shuffle had been requested in order to reduce the number of blacks on the jury, and another testified that he had excluded a prosecutor from his court in 1985 because of discriminatory selection procedures. At a hearing held in connection with *Ex Parte Haliburton*, 755 S.W.2d 131 (Tex. Crim. App. 1988), numerous defense attorneys testified that Dallas County prosecutors so consistently used their peremptory challenges against black jurors that the defense attorneys did not "waste" strikes on pro-State black jurors.

This evidence in the court record is confirmed by the videotape prepared for this Petition, which features interviews with four men who formerly were Assistant District Attorneys in Dallas County. *See* Exhibit 1. "The policy in a nutshell," states former Judge Larry W. Baraka, "was try to get an all-white jury of all white men." Others echo Judge Baraka's belief. Balon B. Bradley recalls, "When I was in the District Attorney's Office, I felt like there was an unofficial policy to exclude black jurors from jury service." Julius E. Whittier confirms that "blacks were routinely excluded . . . from capital murder jury selection." A fourth former district attorney, E.X. Martin, remembers being trained

by Jon Sparling and reading his memorandum, which is attached as Exhibit 5. Black people were struck from juries, he says, because it was assumed that "they would empathize with the defendant." Looking back on the training sessions for prosecutors, he states:

> I heard Jon Sparling give . . . his infamous talk or speech pertaining to jury selection for prosecutors. . . . I remember Jon giving his talk. I also had a copy of the manual. **I can remember him talking about, just simply put, striking blacks off the juries.** There was no . . . outrage, and certainly nobody got up and walked out after Jon made these comments. And I suspect that was because it was just so much common knowledge. **It was just the way business was conducted at the time. Strike the blacks off the jury and roll on.**

Id. According to Judge Baraka, "that policy was so strong that, even to this day, it has not thoroughly left the mentality of the D.A.'s Office." *Id.*

4. Mr. Miller-El's prosecutors were trained to employ racially discriminatory tactics and were found to have engaged in intentional racial discrimination in cases tried immediately before and after Mr. Miller-El's.

Paul Macaluso was the prosecutor in charge of the jury selection in Mr. Miller-El's case, and was a self-proclaimed "jury selection specialist." He joined the Dallas County District Attorney's Office in 1973 and was trained at a time when the office actively taught the racially-discriminatory methods in the jury selection manual. Mr. Macaluso selected the jurors in several of the fifteen capital cases identified in the Dallas Morning News study discussed above, in which 90.3% of qualified African-American jurors were removed by State peremptory strikes.

In a case tried just before Mr. Miller-El's trial, Mr. Macaluso picked the jury and was later found by the Texas courts to have engaged in racially discriminatory selection procedures. In the case, the defendant argued that Mr. Macaluso had used his peremptory strikes to remove potential African-American jurors on the basis of their race, and Mr. Macaluso then was required to provide the court with an explanation for

his actions. Although he put forth purportedly race-neutral explanations for his strikes, the state appellate court "specifically" considered the reasons proffered by Mr. Macaluso and concluded that his testimony regarding his reasons for striking African-American jurors was **not credible**. *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989). The court's opinion provides a revealing and critical look at Mr. Macaluso's strategy of manipulating the minimum punishment issue to disqualify African-American jurors:

> In addition to the black potential jurors stricken by the State peremptorily, the State successfully challenged two black potential jurors (Thomas Johnson & Sharon E. Curtis) and unsuccessfully attempted to challenge a third potential black juror (Loretta Rooks) on the basis that they would not consider the **minimum** punishment in the event Appellant was convicted of the lesser included offense of murder. The State made no corresponding effort to challenge potential white jurors on the basis of their willingness to consider the minimum punishment for a lesser included offense.

Chambers, 784 S.W.2d at 31. This pattern of disparate questioning on the minimum punishment issue was also followed in Mr. Miller-El's case, as discussed later in this Petition. The trial court in *Chambers* recognized that the State's peculiar and persistent attempts to disqualify **only African-American jurors** on the ground that they may be too favorable **to the State's position** was compelling inferential evidence of discrimination. Mr. Chambers' conviction was reversed.

Another prosecutor in Mr. Miller-El's case, James Nelson, was lead counsel in the trial of Mr. Miller-El's wife. Dorothy Miller-El was tried for murder and attempted capital murder only months after her husband was convicted, in the same court and before the same judge. Of the seven African-American potential jurors called for her trial, two were removed for cause by the defense. The prosecutor working under Mr. Nelson then used five of its strikes to remove all of the remaining African-American persons from the jury panel. The defense demanded a *Batson* hearing, alleging racial discrimination. The Texas courts held that the prosecutor's purported race-neutral reasons were a pretext for intentional racial discrimination, and Ms. Miller-El's

conviction was overturned.

B. The prosecutors who tried Mr. Miller-El adhered to the racially discriminatory jury selection practices of the Dallas County District Attorney's Office.

1. The prosecutors in this case used strikes to eliminate 91% of the qualified African-American jurors on the panel.

The prosecution struck ten of eleven – or **91%** – of the qualified African-American jurors. Three of the stricken jurors were interviewed on camera for purposes of this Petition. *See* Exhibit 1 (Videotape). Only one African-American, Troy Woods, was allowed to serve on Mr. Miller-El's jury. Mr. Woods was also the only juror of any race to volunteer an opinion that people who commit murder should be slowly tortured to death, stating "[execution is] too quick. They don't feel the pain. That's the way I feel about it . . . . Well, what I call punishment is back to the old Indian days. Pour some honey on them and stake them out over an ant bed. That's the way I feel about it. That's what I call punishment."

2. The prosecutors race-coded their jury selection materials.

The juror information cards filled out by prospective jurors in Mr. Miller-El's trial did not provide a blank for a juror's race. Nevertheless, the race and gender of every juror is coded on each card, in the prosecutors' handwriting. The prosecutors also kept racially-coded lists of all selected jurors, and all jurors struck by either side with peremptories.

3. The prosecutors attempted to manipulate the "jury shuffle" process in order to effectively eliminate African-American jurors.

At the time of Mr. Miller-El's trial, both the defendant and the State had the absolute right to one jury shuffle, which "shuffles" a panel of fifty potential jurors and thus changes the order in which they are interviewed by the lawyers. In capital cases in Dallas County, jury shuffles were particularly important, since only the first few members of any of the fifty-member venire panels called each week were likely to be interviewed, and

the jurors not reached in a specific week would be discharged from service. The likelihood that the jurors at the back of the panel would be needed was so small that the judge routinely dismissed the last fifteen jurors in the panel before even asking them to fill out questionnaires, as it did in this case.

At the beginning of the second week of jury selection in Mr. Miller-El's case, a panel of jurors was brought down and the State requested a shuffle. The defense asked "Could we ask the reason for the shuffle?" "No," the State responded. The defense then made its concerns clear:

> For purposes of the record, I would like the record to indicate that within the first ten jurors, prospective jurors, four are black. Within the second set of ten prospective jurors, three are black and within the third set of prospective jurors, two are black and the fourth set of prospective jurors, one is black.

When the third panel of jurors was originally seated in the courtroom, jurors number 1, 2, 3, 4, 8, and 15 were African-Americans. The State again requested, and performed, a shuffle. After the State's shuffle, the six African-American jurors' positions had changed: they were now at positions 19, 26, 36, 37, 38, and 39. The defense then exercised its prerogative to shuffle the jurors. After this, the African-American jurors were located at positions 1, 2, 3, 4, 7 and 14.

The twice-shuffled panel was then seated, and the last sixteen jurors excused. The prosecutor then asserted, for the first time in the jury selection process, that the jurors "were not shuffled as thoroughly as they should have been." Moreover, despite the fact that both sides had exercised their shuffles in the central jury room on the previous two occasions without objection from either side, the State announced that it wanted a re-shuffle of the jurors because the defense's shuffle had not been performed inside the courtroom, as the law required.

Mr. Miller-El objected, pointing out the State was merely manipulating the position of black jurors. The court rejected the State's request, ordered that all further shuffles take place in the courtroom, and observed that this was the first time in his twenty-five years

practicing law and sitting on the bench in Dallas County that someone had raised an objection in his presence to the routine practice of shuffling in the central jury room. The prosecutors' efforts to shuffle and reshuffle the potential jurors took place **before** they knew anything about the jurors other than how they looked, because the jurors had yet to fill out the jury questionnaires or be placed on a panel for interviews.

4. African-American jurors were subjected to blatantly disparate questioning.

The prosecutors at Mr. Miller-El's trial engaged in glaringly disparate questioning of prospective jurors based on race. For example, the prosecutors singled out black jurors and questioned them about their ability to assess the minimum punishment for non-capital murder, in a manner almost never employed with white jurors. The form and substance of the questions to potential jurors were clearly designed to eliminate African-Americans by setting them up to be challenged for cause. When the prosecutors questioned white jurors, they generally informed the juror of the range of punishment first, and then asked whether he or she could impose the minimum sentence of five years, if appropriate to the facts of the case. In sharp contrast, African-American jurors consistently were asked whether he or she could impose the minimum sentence of five years, if appropriate to the facts of the case. 8) In sharp contrast, African-American jurors consistently were asked open-ended questions that forced them to speculate as to what the minimum punishment for non-capital murder **should** be, without any information about the actual range of punishment. The prosecutors subsequently used the number named by the juror -- often much higher than five years -- to argue that the juror would be unwilling to consider the actual minimum sentence. 9) As noted above, the *Chambers* Court specifically cited this practice as evidence of Mr. Macaluso's discriminatory intent when reversing Mr. Chambers' conviction.

Similarly, the State was quite solicitous of the scheduling conflicts of African-American jurors, while insisting that white jurors who had vacation plans or employment

commitments be compelled to serve. When questioning African-American jurors Fields and Bozeman, the State initiated inquiries into whether the juror had upcoming vacation time, or work or family obligations. In one instance, the prosecutor asked the juror, "[a]ny problems at work or anything like that, family schedule?"; in another, he stated, "We have an indication, Judge, that this juror has what they denominate as an annual leave coming up in the next couple of weeks and we thought that was a situation that the Court ought to check into before a decision is made as to the qualification of this juror." By contrast, a white juror requested that she be released from service because of a mandatory work-related training program and a previously scheduled vacation, toward which she already had paid a non-refundable $650.00 down payment. She informed the court that she would be very angry and distracted if she had to serve despite these conflicts and that this state of mind could affect her jury service. Although the defense agreed to excuse the juror, the State emphasized that vacations or work training were not adequate excuses and argued, albeit unsuccessfully, that the juror be compelled to serve or that, in the alternative, the court contact her employer to determine whether alternate plans could be made for the training.

5. The prosecutors' proffered reasons for their peremptory challenges of black jurors were a pretext for race discrimination, in that they applied with equal or greater force to white jurors who were not challenged.

> In the courtroom, [Dallas County] prosecutors commonly exercise peremptory challenges against blacks who voice views and appear to possess qualifications similar to those of the whites selected for the jury. 7)

During Mr. Miller-El's trial, when asked about its numerous peremptory strikes against African-American jurors, the prosecution offered reasons which were clearly pretextual because they applied with equal or greater force to white jurors who were not

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7) Exhibits 3 & 4 | RETURN |

challenged by the State. One of the most common reasons proffered by the prosecutors was the black jurors' alleged "hesitancy" to apply the death penalty. Hesitancy about the death penalty is a facially race-neutral reason for a peremptory challenge. However, in Mr. Miller-El's case it was selectively applied only against African-American jurors. Numerous African-American jurors were struck from the jury panel, purportedly because of their reservations about the death penalty, despite their clear statements that they could serve on a capital jury and vote for a death sentence if appropriate. Three of these jurors -- Carrol Boggess, Billy Jean Fields, and Wayman Kennedy -- are interviewed on the videotape. See Exhibit 1. Each juror states, and each stated during jury selection for Mr. Miller-El's trial, that he or she supports the death penalty and would have been willing to impose it if warranted by the evidence. Ms. Boggess states that she is "concerned about crime in [her] community," and that "[i]f someone commits a crime, then they should pay the consequences." Id. She further states that, "If I had felt . . . that he was guilty and indeed deserved the death penalty, then I could have given him that sentence." Id. Mr. Kennedy states, just as he did during jury selection, "I could vote for the death penalty." *Id.* 8) Mr. Fields states, "I would be able to render the death penalty." Like other African-American potential jurors, Mr. Fields had testified during jury selection that he strongly believed in the death penalty, 9) so enthusiastically that he expected that the **defense** would strike him. On camera, he states, "I was expecting to be possibly rejected by the defense, because of some of the questions that had been asked." Exhibit 1. Apparently the trial judge, after listening to his testimony, had the same expectation. Mr. Fields remarks that, "after everything was over, the judge called me up and commented that he was surprised that the prosecution had stricken me." *Id.* Nevertheless, all three of these jurors were struck peremptorily by the prosecution, and for each the State cited the juror's alleged hesitancy to vote for a death sentence.

Comparisons between black and white jurors further illustrate the State's discriminatory

treatment. For example, African-American juror Joe Warren was struck peremptorily by the State, despite testimony that was remarkably similar to that of white persons who were seated on the jury. When asked why he had struck Mr. Warren, the prosecutor stated that he had done so because of Mr. Warren's "misgivings" and "mixed feelings" about the death penalty, and because he had indicated he did not agree with the death penalty in all cases. In fact, the trial record makes clear that Joe Warren was an excellent State's juror. He was a married, middle-aged veteran; he had three children; he volunteered for the PTA; he was a member of Crime Stoppers and other crimefighting programs; and he had managed the meat section at a Kroger supermarket for 19 and a half years. He repeatedly affirmed that he believed in the death penalty and that he could serve on a capital jury and impose death in an appropriate case. Mr. Warren stated that he had "mixed feelings" because "sometimes you feel that it might help to deter crime and then you feel that **the person is not really suffering**. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment." The prosecutor then asked further questions:

> Q. In other words, you feel under certain circumstances the death penalty would be bad, but being locked up in a cage would be a whole lot worse and be more punishment; is that what you're saying?
>
> A. Yes. In some cases you feel like maybe if the person were to suffer in some other way maybe. Nevertheless, the Texas court and the federal magistrate judge both upheld the State's peremptory strike against Mr. Warren based on his "misgivings" and "mixed feelings" about the death penalty.

Clearly, to the extent that Mr. Warren had any "misgivings" about the death penalty, his sole concern was that the death penalty might be **too humane** for murderers. Nevertheless, the State struck him from the jury.

By contrast, when white juror Kevin Duke expressed "misgivings" similar to those of Mr. Warren, he was not challenged by the State -- and, in fact, was seated as Juror Number

7. During jury selection, Mr. Duke had stated:

> I think you have to have the death penalty. I think sometimes it should be up to the person who is convicted because, if he's sentenced to life imprisonment, sometimes death would be better to me than – being in prison would be like dying every day and, if you were in prison for life with no hope of parole, I just [sic] as soon have it over with than be in prison for the rest of your life. If he's committed a crime like this that maybe he should be convicted of and put away, if he's not put away for life, that's – if he has no chance for parole, then I don't see the difference between death and life imprisonment. If there's a chance for parole, that's a different story, but I think you might as well go ahead and give the death sentence instead of life in prison because it's the same thing to me.

White juror Sandra Jenkins voiced similar sentiments, stating during the State's questioning, "I think that a harsher treatment [than the death penalty] is life imprisonment with no parole." The prosecutor failed to follow up on this remark, and voiced no objection to Ms. Jenkins serving on the jury. Clearly, the prosecution's stated concern about jurors' hesitations regarding capital punishment was reserved for African-American jurors only. 10)

The use of the African-American jurors' alleged hesitancy to impose a death sentence was only one of the pretextual explanations offered by the State. As another example, the State stated that it struck some black jurors, such as Mr. Fields, for the purported reason that they had relatives with legal troubles. While this is a facially race-neutral reason, it is patently pretextual, since several comparable pro-death penalty white jurors were not challenged by the State. Mr. Fields testified that his brother had been arrested and convicted for possession of a controlled substance, and had served time. A white juror, Noad Vickery, testified that his sister had been arrested and had served time in the penitentiary. Both men affirmed that they did not know many details. Both men affirmed that the experience with their family members would not affect their judgment in Mr. Miller-El's case. However, the State, after hearing Mr. Vickery's account, accepted Mr. Vickery as a juror. After hearing Mr. Fields' virtually identical account, the State seized upon it as one reason to strike him. 11)

In short, Mr. Miller-El presented compelling evidence that the prosecutors manipulated the jury selection process in an effort to exclude African-Americans from his jury. These efforts commenced with the jury shuffles before the lawyers had any information about the prospective jurors other than their physical appearance. These efforts persisted, in the form of disparate questioning and peremptory challenges, even after the prosecutors learned that many of the African-American venirepersons were very State-oriented jurors.

V. Action by this Board Is Necessary to Ensure the Integrity of, and Confidence In, Texas' Criminal Justice System, and to Prevent the Unseemly Spectacle of a Prisoner Being Executed After a Trial So Obviously Contaminated by Intentional Racial Discrimination.

> True peace is not merely the absence of tension and conflict;
> it is the presence of justice.
>
> Dr. Martin Luther King

This Board plays a critical role in the administration of capital punishment in Texas, and it must decide whether it will place Texas' seal of approval on the racial discrimination described above, or whether it will send a clear message that a shameful, well-documented, widely-publicized chapter in the history of Texas' criminal justice system will be closed. "[R]acial discrimination in the selection of jurors casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt. 12) If Thomas Miller-El is executed despite the racially discriminatory proceedings that resulted in his death sentence, his execution will send a clear signal to Texans, and the rest of the nation, that Texas' criminal justice system openly condones the derogatory stereotype that African-Americans are not fit to serve on criminal juries because they automatically empathize with the accused. "The willingness of the courts to tolerate racial discrimination in order to carry out the death penalty has a corrupting effect not just on capital cases, but throughout the criminal justice system. 13)

This Board must act to prevent the erosion of confidence of Texas' criminal justice

system. In a recent speech, United States Supreme Court Justice O'Connor observed:

> The jury system is not only central to our trial process, but it is also the primary link between the courts and the community. The impressions that jurors receive during their jury service have a significant impact on public perceptions of the justice system. . . . The time jurors spend in jury service is perhaps our best opportunity to instill in them a sense of trust in the fairness and competence of the justice system. 14)

In her remarks, Justice O'Connor described a 1999 survey conducted by the National Center for State Courts, which examined public attitudes toward the judicial system and found African-Americans and Hispanics were more likely than white people to agree that "[m]ost juries are not representative of the community. 15) Justice O'Connor firmly concluded: "The *perception* that African-Americans are not accorded equality before the law is pervasive and it requires us to take action at every level of our legal system."

In Mr. Miller-El's case, there is not merely a perception of unequal treatment, but an extensive and undisputed record. "It's not right for the justice system to be biased like this, but it's no surprise," observes stricken juror Billy Jean Fields. Exhibit 1. Discrimination against potential jurors such as Mr. Fields, as the Supreme Court has ruled, "retards" our "progress [as a society] and causes continued hurt and injury," and impugns the integrity of the criminal justice system. It further "has a very negative impact on the criminal justice system," states Judge Baraka, because it "isolates a significant portion of the community, be they women, men, black, white . . . ." Exhibit 1. It is clear that Dallas County's "racial discrimination in the selection of jurors [has] cast[] doubt on the integrity of the judicial process and place[d] the fairness of [Mr. Miller-El's] criminal proceeding in doubt. 16) In the videotape, Pastor Zan W. Holmes, Jr., states:

> If you're not participating in the system . . . that in itself . . . makes you less trustful of a system. And you also question whether or not you can really get a fair trial. It troubles me that there are people who have been sentenced, convicted by juries that were selected on the basis of [the criteria in the Dallas County prosecutors' manual].

Id. Dallas County's discriminatory policy, in the words of potential juror Carrol Boggess, "certainly . . . brings things home, and it makes you not trust, not be as trusting." *Id.*

The concrete harm caused by Dallas County's racial discrimination is reflected in the words of potential jurors Carrol Boggess, Wayman Kennedy, and Billy Jean Fields. *See* Exhibit 1. As Pastor Holmes succinctly put it:

> To assume that one group of people . . . are more capable of judging a person as to whether or not they are guilty or not . . . is racist at the very core. And to assume that black people will excuse people and will not be faithful in exercising their responsibilities is an insult.

Exhibit 1. Jury service is both a fundamental right and, for many, the only opportunity to participate in the administration of criminal justice. As Mr. Fields states, "It is a very important right that African-Americans be selected to serve on juries and participate in the justice system, because we are affected by crime as much as anyone else." Exhibit 1. Former district attorney Julius Whittier states the obvious: "Black people have just as much stake in the success of their community as white folks have in theirs." *Id.*

As the U.S. Supreme Court explained in the case of *Ex Parte Grossman*, 267 U.S. 87, 120-121 (1925):

> Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts the power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.

This is such a "special case." This petition documents Dallas County's shameful racial discrimination, and the State has never contested most of this overwhelming evidence. Mr. Miller-El's execution in the face of such evidence would signal this Board's acquiescence to the idea that African-American people, "no matter how rich or how well educated," simply cannot be trusted to ascertain guilt and assess an appropriate

punishment in a serious criminal case. Because such a result is intolerable, Mr. Miller-El respectfully requests that the Board of Pardons and Paroles recommend a commutation of his sentence of death. In the alternative, Mr. Miller-El asks this Board to grant a 60 day reprieve so that evidence regarding the above issues can be presented in a public hearing.

Respectfully submitted,

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Footnotes:

8) During jury selection, Ms. Boggess expressed the same views. She testified that she believed in the death penalty and could serve on a capital jury, even knowing her vote "would result in the execution of this defendant." She repeatedly affirmed that there was "no doubt in [her] mind at all" about her ability to serve on a capital jury and sentence the defendant to death.
| RETURN |

9) During jury selection, Mr. Fields testified, "[T]he way I personally believe, . . . God's word, you know, provides for the State to serve in his [sic] behalf. According to the Old Testament, people were killed if they violated His law. In its extended service, the State represents Him if the crime has been committed and death is warranted." | RETURN |

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1) The documents required by Tex. Admin. Code tit. 37 §§143.42-3 are submitted as Exhibit 2. | RETURN |

2) A "peremptory challenge," or "peremptory strike," is a tool used in jury selection by both the State and the defense. Each party is allotted a specific number of peremptory strikes, and may use them to remove from the jury panel persons that it does not want to serve on the jury. The party does not have to provide any reason for the strike, and indeed, peremptory strikes may be exercised for any reason – except that no potential juror may be struck because of race or gender. By contrast, each side may use an unlimited number of challenges for cause, which allow a potential juror to be struck because the person somehow is unfit to serve on the jury. If, for example, a potential juror was a friend of the victim of the crime, they would be subject to a challenge for cause. | RETURN |

3) In addition to Dallas County's racially discriminatory jury selection practices, Mr. Miller-El's appeal to the CCA had raised the following issues: The trial court erred in refusing to grant Mr. Miller-El's request to excuse ten potential jurors for cause, even though each was unwilling to consider the full range of punishment and/or was demonstrably biased against Mr. Miller-El, forcing Mr. Miller-El to use nine of his peremptory challenges to ensure that these persons would not serve on the jury and, after his peremptory challenges were exhausted, allowing a person objectionable to Mr. Miller-El to be seated on the jury; the trial court erred in refusing to grant Mr. Miller-El additional peremptory challenges after his challenges had been exhausted on the potential jurors discussed above; the trial court erroneously denied "transactional immunity" to two witnesses who were crucial to defense, but on the stand invoked their Fifth Amendment right against self-incrimination and refused to answer questions from Mr. Miller-El's counsel; the trial court erred when it refused to allow Mr. Miller-El have testimony by his wife Dorothy Jean Miller-El, given in an hearing out of the presence of the jury, read to the jury by a court reporter; the trial court erred in admitting into evidence 23 color photographs of the victim and the crime scene, since the photographs were highly inflammatory and prejudicial; the trial court erred in admitting any evidence recovered as a result of Mr. Miller-El's arrest and the subsequent search of his automobile, since both the arrest and the search were unlawful; the trial court erred because its instructions to Mr. Miller-El's jury failed to properly restrict the jury's consideration of extraneous offenses; and, the trial court erred in granting the State's request to excuse four potential jurors on the basis of their expressed conscientious or religious scruples against the death penalty, since these potential jurors' scruples did not prevent them from considering the death penalty when warranted by the evidence. | RETURN |

4) Mr. Miller-El also sought relief based on the following: The trial court violated Mr. Miller-El's right to due process of law when it prevented him from presenting an alibi defense by refusing his request for a continuance; the trial court permitted the State, over defense objection, to inflame and prejudice the jurors against Mr. Miller-El on religious and racial grounds by injecting unnecessary references to Mr. Miller-El's affiliation with the Moorish Science Temple, an Eastern religion associated with African-American activism; and, both Mr. Miller-El's trial counsel and his counsel on direct appeal rendered ineffective assistance of counsel. | RETURN |

5) Mr. Miller-El also raised the following issues: the trial court violated Mr. Miller-El's constitutional rights when it granted the State's request to excuse a prospective juror who expressed some reluctance to impose the death penalty, since the juror repeatedly declared that she could vote for the death penalty when the State had proven its case against the defendant; the State raised Mr. Miller-El's membership in the Moorish Science Temple at

sentencing, without any evidentiary basis to do so, and, further, insulted his beliefs by referring to them as a "so-called" religion, in violation of Mr. Miller-El's First and Fourteenth Amendment rights to freedom of association.
| RETURN |

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

7) *Cassell v. Texas*, 339 U.S. 282, 286 (1950). | RETURN |

8) The questioning of Mary I. Sumrow is a typical example. Before asking her about her attitude toward the minimum punishment in a murder case, the prosecutor twice explained the full range of punishment for murder. He then explained that the range was wide because "there are several of [sic] a multitude of circumstances under which one person could knowingly or intentionally cause the death of another individual." He continued in this vein:

> Now, in order for you to be able to be qualified to serve as a juror, you have to tell us that you would be able to consider the entire range of punishment for murder . . . . At the other end, you have to be able to tell us that, if you feel that the facts and circumstances, as you find them to be, justify a sentence of five years, you can give that or twenty years or forty-five years, anything in between. As you're sitting there right now, Ms. Sumrow, you don't even have to be able to verbalize to us the facts and circumstances that would justify five years or that would justify life or something in between. You do have to tell us that, if the facts and circumstances justified that in your mind, whatever that may take, you would assess a five year sentence if you felt it was justified or a ninety-nine or life sentence if you felt that was justified.

Ms. Sumrow answered that she could consider the minimum sentence and was accepted for jury service, but was later excused due to medical hardship because of her pregnancy. Other strong pro-State jurors were handled in a similar manner.
| RETURN |

9) For example, when questioning Roderick Bozeman, Mr. Macaluso talked to him extensively about a hypothetical non-capital murder. Mr. Macaluso emphasized that the killing was "without any legal excuse or any legal justification whatsoever," that it was not in self-defense, that it was not an accident, that the defendant was not insane, and that the defendant had not acted in the heat of passion. Then, without having informed Mr. Bozeman of the actual range of punishment, Mr. Macaluso stated, "Let's divorce our thinking from those sorts of things and let's talk about a situation where one person knowingly or intentionally causes the death of another. . . . Let me ask you: What do you personally feel ought to be the minimum punishment for somebody committing a murder, sir?" When the juror eventually answered, "I would say twenty years, I guess," the prosecutor asked him to confirm that twenty years would be his minimum sentence, then asked if he was stating that a sentence of five years could never be proper. Despite the prosecutor's manipulative questioning, Mr. Bozeman eventually stated that he could consider a five-year sentence for murder if appropriate to the facts and circumstances of the case. This pattern of manipulative questioning on the minimum punishment issue repeated with African-American jurors Joe Warren, Edwin Rand, and Wayman Kennedy.

10) Other white jurors who expressed reluctance to impose a death sentence also were not challenged by the prosecution. For example, Sandra Hearn repeatedly affirmed that she could not give the death penalty for a first offender in an ordinary capital murder case, "[r]egardless of what the facts are, regardless of what the circumstances are[.]" The prosecutor attempted to rehabilitate Ms. Hearn. She initially stated, "I do not think anyone should be sentenced to a death penalty on [a] first offense." The prosecutor replied that he "gather[ed]" from what Ms. Hearn was saying that she would require "a continuing course of criminal conduct" before voting for death. She agreed. The prosecutor then asked if the prior offenses could be something less than murder. When the juror responded that it would "be according to the situation," he suggested that she would "look at each individual case and each individual defendant" in order to render a decision. Ms. Hearn agreed, "Right." However, upon further questioning, Ms. Hearn repeated her view that she could not give the death penalty for a first offense. Nevertheless, she was seated as Juror Number 12. The prosecution also accepted white jurors Noad Vickery and Gwendolyn Smale, although each had expressed reluctance to impose the death penalty. | RETURN |

11) This pattern repeats. Chatta J. Nix, a white woman, indicated that her brother was **currently** on trial as part of the I-30 construction scandal. Moreover, Ms. Nix revealed that she **herself** had been "charged in a conspiracy case" relating to the I-30 scandal. However, without even questioning her about this information, the State accepted her as a juror. Similarly, Cheryl A. Davis's husband was convicted of theft in 1976, and received seven years' probation, which had ended in 1983. | RETURN |

12) Powers v. Ohio, 499 U.S. 400, 411 (1991). | RETURN |

13) Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433, 475 (1995). | RETURN |

14) The Hon. Sandra Day O'Connor, Luncheon Address at the National Conference on Public Trust and Confidence in the Justice System (May 15, 1999), *at* http://www.ncsc.dni.us/ptc/trans/oconnor.htm. Justice O'Connor also discussed a survey conducted by the American Bar Association (ABA), which "showed almost 70% of those surveyed consider the jury the most important component of the justice system." *Id.* | RETURN |

15) National Center for State Courts, How the Public Views the State Courts 7, 29 (1999) at http://www.ncsc.dni.us/ptc/results/results.pdf. | RETURN |

16) *Powers v. Ohio*, 499 U.S. 400, 411 (1991) | RETURN |

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