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Safeguarding Liberty, Justice & the Rule of Law

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identification purposes only*

April 8, 2016

State Board of Pardons and Paroles
2 Martin Luther King, Jr. Drive SE
Suite 458, Balcony Level, East Tower
Atlanta, Georgia 30334-4909

Re: Clemency for Kenneth Fults (execution date: April 12, 2016)

Dear Members of the State Board of Pardons and Paroles:

I am writing on behalf of The Constitution Project (TCP), a nonpartisan organization that promotes and defends constitutional safeguards. TCP undertakes original research; issues reports, statements, and policy briefs; files *amicus* briefs; testifies before Congress; and holds regular briefings with legislative staff and policymakers. Our work—which is driven by bipartisan committees of experts, who craft consensus solutions to the issues we address—includes reforming the nation’s criminal justice system and strengthening access to justice. TCP’s advocacy is driven by its extensive work with a range of criminal justice stakeholders, including those with experience as judges, prosecutors, public defenders, law enforcement officers, policymakers, victim advocates and scholars.

No matter their political perspectives or views about capital punishment, all Americans share a common interest in justice, both for victims of crimes and for those accused of committing crimes. It is based on this principle that TCP urges the Board to grant clemency to Kenneth Fults, who is currently scheduled for execution on April 12, 2016. I write to you today after learning of two profoundly troubling aspects of Mr. Fults’ case, described in detail below.

First, Thomas Buffington, a juror on Mr. Fults’ capital sentencing panel, made the following statement in a post-conviction interview after sentencing Mr. Fults to death:

“I don’t know if he ever killed anybody, but that nigger got just what should have happened. Once he plead guilty, I knew that I would vote for the death penalty because that’s what that nigger deserved.”

During voir dire, Juror Buffington disclaimed any racial bias and assured Mr. Fults’ defense counsel that race would not factor into his decision-making process.

Over a decade ago, TCP convened a bipartisan, blue-ribbon Death Penalty Committee comprising death penalty opponents and proponents who have issued consensus-based recommendations aimed at achieving these common objectives. The Committee is chaired by former Florida Supreme Court Chief Justice Gerald Kogan, former Texas Governor Mark White, and Special Prosecutor in the Oklahoma City Bombing Case, Beth Wilkinson. Many of the Committee’s members have prosecuted, defended and

adjudicated capital cases that resulted in a death penalty verdict. Drawing on their collective expertise, the Committee released a major report in 2014, *Irreversible Error*, in which the Committee made important recommendations on racial fairness and capital punishment. In particular, the Committee emphasized:

If executions are to be a part of our justice system, they must be undertaken in an even-handed fashion. Moreover, the public must be assured that race, or any other improper factor such as ethnicity or gender, is never the deciding factor in determining who will live and who will die.

Allowing Mr. Fults' death sentence to stand, in light of the racially biased statements by Juror Buffington, would undermine public trust in Georgia's capital punishment system. The Sixth Amendment entitles every criminal defendant the right to trial by an impartial jury. Juror Buffington's racial bias infected Mr. Fults' sentencing panel, and violated his Sixth Amendment right to trial by an impartial jury. When that Sixth Amendment right is violated by racial bias, a criminal sentence should not stand.

Second, Mr. Fults was represented at trial by Johnny Mostiler—an overworked public defender with a history of using racial slurs to refer to his clients. For ten years, Mr. Mostiler was Spalding County's only public defender. During this time, Mr. Mostiler handled *seven times* the number of criminal cases that the American Bar Association deems manageable for a defense attorney. Jurors from Mr. Fults' sentencing panel reported seeing Mr. Mostiler fall asleep numerous times during trial. In 1990, while representing Curtis Osborne, another black man facing the death penalty, a local inmate reported hearing Mr. Mostiler say about Osborne, "That little nigger deserves the chair."

The right to effective representation by counsel is a fundamental principle in our criminal justice system. TCP has been working for years to ensure the right to counsel guaranteed by the Sixth Amendment. This work has been guided by the recommendations of our blue-ribbon National Right to Counsel Committee, for which former Vice President Walter Mondale and former Federal Bureau of Investigation (FBI) Director and former Chief Judge for the Western District of Texas William S. Sessions serve as honorary Co-Chairs. Mr. Mostiler's overloaded docket and behavior during Mr. Fults' case quite simply undermines due process and fairness in his trial, and in our criminal justice system in general. The facts are even more troubling given the ultimate punishment that was handed down.

As the most severe sanction that our criminal justice system allows, a death sentence should be unimpeachable. Mr. Fult's death sentence is not only not unimpeachable, it is intolerable. Courts have rejected challenges to Mr. Fults' death sentence, citing procedural bars in refusing to address the merits of his claims. But in cases such as this one, legal technicalities should not stop the Board from reviewing this case with the utmost care and concern. We believe that the deeply disturbing violations of Kenneth Fults' constitutional rights merit executive clemency.

On behalf of The Constitution Project, I respectfully urge you to commute Kenneth Fults' sentence from death to life in prison without the possibility of parole.

Sincerely,

A handwritten signature in black ink that reads "Virginia E. Sloan". The signature is written in a cursive, flowing style.

Virginia E. Sloan