

Barry C. Scheck, Esq.
Peter J. Neufeld, Esq.
Directors

Maddy deLone, Esq.
Executive Director

Innocence Project
40 Worth Street, Suite 701
New York, NY 10013

Tel 212.364.5340
Fax 212.364.5341

www.innocenceproject.org

September 27, 2013

Hon. Rick Perry
Governor of the State of Texas
Office of the Governor
State Insurance Building
1100 San Jacinto
Austin, Texas 78701
Via Hand Delivery

Re: Request for Posthumous Pardon Investigation of Cameron Todd Willingham

Dear Governor Perry:

Eugenia Willingham and Patricia Cox, Todd Willingham's family, have filed a Petition for Posthumous Pardon on behalf of Cameron Todd Willingham.¹ Through this letter, we (Eugenia Willingham, Patricia Cox, Michael Morton, and undersigned counsel) also request that you consider the enclosed Petition and that you order a full investigation of the case by the Board of Pardons and Paroles pursuant to your authority under Section 508.050 of the Government Code.

The Willingham family lost three children just before Christmas in 1992 because of an accidental fire. Todd Willingham was taken by the State twelve years after he was mistakenly accused of arson and found guilty of the murder of his three young daughters. The proof supporting Willingham's innocence was well known to the scientific community for a decade but it was put forward in Willingham's case too late to stop his execution. The legislature just passed, and you signed, a writ bill (Tex. Code Crim. Proc. Art. 11.073, effective September 1, 2013) that could have saved Todd's life because it allows courts to respond to new scientific evidence and set aside convictions based on older, unreliable forensic methods. But we believe there were many more errors in this case: witnesses erred, at least one lied; experts erred; prosecutors erred and in some instances broke the rules; defense lawyers erred; trial and appellate courts erred; and the clemency institutions, the ultimate safety valve in the system, erred. No single one of these errors or acts of misconduct would have been enough without the others – they combined and cascaded to create this tragedy. No single person was responsible for this wrongful conviction; everyone was involved, to one degree or

¹ Mrs. Willingham raised Cameron Todd Willingham from the age of thirteen months when he came to live with her and Todd's father (now deceased). She is joined by Willingham's cousin, Patricia Cox, in making this request.



another, if not by making a mistake or breaking a rule, then by failing to catch and correct it.

But you have the power to uncover and establish the truth about what happened so that everyone in the system can learn from error and minimize the chance this could ever happen again. Although we believe in accountability (if any lawyer deliberately and knowingly violated ethical rules, that should be addressed by other appropriate authorities), our purpose in asking for this posthumous pardon and hearing is not to affix blame on you or any one person or institution. Indeed, we recognize, with humility and empathy, that you were not adequately informed of many critical facts and did not intentionally allow the execution of an innocent man. Yet we believe, as many religious teachers instruct, that there are only two mistakes one can make on the road to truth; not going all the way, and not starting.

Therefore, we respectfully ask that you order the Board to fully investigate Todd Willingham's case so that the truth can finally be brought to light, his innocence established, and justice served. We would also like to meet personally with you to discuss this request and so that we may answer any questions you have about Todd Willingham's character and the need for this investigation.

A. The Evidence of Todd Willingham's Innocence Has Never Been Considered by the Board.

We have enclosed with this letter a copy of the Petition for a Posthumous Pardon filed with the Board that gives a more detailed explanation of the facts of the case and the reasons why Willingham should be pardoned. When the Board originally recommended that you deny a pardon, it was not provided with any evidence that Willingham was innocent. Instead the conviction was supported by two trusted experts who said that Willingham set fire to the house and a jailhouse informant (Johnny Webb) who claimed that Willingham confessed. A report suggesting that the fire was not arson was submitted to your office only days before the scheduled execution, but this last-minute filing did not provide the full picture of innocence, and both you and the courts allowed the execution to proceed.

1. There is no evidence of arson.

Todd Willingham was convicted of murder based primarily on the testimony of experts who concluded that the fire in the Willingham home was intentionally set. The Texas Forensic Science Commission under the leadership of John Bradley has unanimously recognized serious problems with every aspect of the arson investigators' opinions in the case, and leaders in the field of fire investigation have concluded that there was no sign of foul play in the fire.

2. Informant Johnny Webb recanted his testimony.

However, we now know that there was foul play at Todd Willingham's trial. Johnny Webb, a jailhouse informant who had been sentenced to 15 years for aggravated Robbery, testified that Willingham confessed to murdering his children in an effort to cover up child abuse by his wife Stacey. But years before Willingham's execution, Johnny Webb acknowledged in a handwritten motion that he lied about the confession:

I come now to said court and respectfully request that testimony given in the Willingham capital murder case by Mr. Johnny E. Webb, be made null and void. I



Johnny E. Webb wish to withdraw and recant all testimony given in said trial.

I am given no other choice by to make this motion to recant testimony at this time. I was forced [sic] to testify against Willingham by the D.A.s [sic] office and other officials. I was made to lie. Willingham is innocent of all charges.

Submit this Motion to Recant to the Court for the soonest possible consideration.²

Notations on the motion indicate that it was provided in 2000 to then Judge Jackson, who had been the lead prosecutor in Willingham's case.³ But this "Motion to Recant Testimony" does not appear to have been filed in either Willingham or Webb's case files. No one representing Willingham was told about this recantation.

3. The State elicited false testimony about Webb's incentive to testify.

At Willingham's trial, Webb and the prosecutor John Jackson assured the jury that Webb expected nothing in return for his testimony. Jackson confirmed with Webb that "I told you there is nothing I can do for you."⁴ But the actions by Jackson and other State officials contradict these assurances. Jackson appears to have been assisted Webb in dealings with TDCJ for years after the trial. In a 1996 letter to a prison official, Jackson wrote that he was sorry to bring up another Johnny Webb problem.⁵ This indicates that Jackson had intervened on Webb's behalf before.⁶

More alarming are the extensive efforts by Jackson and the Navarro County authorities to reduce Webb's sentence. Roughly five years after the trial, the Navarro County District Attorney, the District Judge, and the Navarro County Sheriff asked the Board of Pardons and Paroles to recommend a commutation of sentence from 15 years to 5 years.⁷ Although the letters told the Board that the request for commutation came from new information from the victim, Jackson admitted in correspondence to a prison warden where Webb had been housed that the commutation was in connection with a capital murder case.⁸

In conjunction with the clemency effort, Jackson obtained an amendment of the judgment sentencing Webb to 15 years that reduced the charge from the first degree felony of aggravated robbery to the second degree crime of simple robbery. This change would carry with it significant benefits in parole eligibility. Although Jackson explained this change in a 1996 letter to the Board of Pardons and Paroles as based on a review of the Navarro County records and those of Webb's criminal

² A copy of Mr. Webb's Motion to Recant is attached as Appendix A.

³ The initials P.C.B. on the document suggest that the Motion to Recant was given to Judge Jackson by the elected Navarro County District Attorney Pat Batchelor.

⁴ Appendix B (Excerpt of Webb Testimony).

⁵ Webb alleged that a prison guard had threatened him and that the guard was enforcing a death threat from Mr. Willingham. Webb actually sued several prison officials based on this complaint and sought \$100,000 in damages. His lawsuit was dismissed by the federal district court in 1997.

⁶ This letter is attached as Appendix C.

⁷ These letters supporting a commutation are attached as Appendix D.

⁸ Letter from Jackson to Warden at Ramsey Unit (Appendix E). This letter also indicates that Jackson had assisted Webb by obtaining a transfer from TDCJ to the Navarro County Jail.



defense lawyer, all of the public documents relating to Webb's case indicated a charge and guilty plea for the first degree felony of aggravated robbery. When asked at Willingham's trial, Webb clearly testified that he had been convicted of an "aggravated" offense.⁹

B. If Willingham's Case Were Considered Today, He Would Have Been Exonerated by the Courts.

Since Willingham's execution in 2004, significant improvements have been made in the consideration of new evidence in capital cases. In 2009, the Court of Criminal Appeals recognized a right to relief where false testimony is provided by experts and informants even where the State did not know that the testimony was false at the time.¹⁰ And you recently signed into law a new habeas remedy for cases in which new scientific evidence contradicts that presented at trial.¹¹ Had these remedies existed in 2004, Willingham's execution would have been stayed by the courts and he would have ultimately been exonerated.

Further, had you known at the time of the execution that (1) the arson evidence was truly false, (2) Webb had recanted his testimony in 2000, and (3) Webb and the State lied about the extraordinary assistance Webb received in exchange for implicating Willingham, we do not think you (or any reasonable person) would have allowed the execution to go forward.

C. You Have the Power to Order a Full Investigation of Willingham's Innocence.

Posthumous pardons are thankfully rare. But the Legislature has given you the power and responsibility to order an investigation where it appears that an innocent person has been executed. Section 508.050 of the Government Code provides a process for you to order an investigation into Willingham's case. The Board must then report to you its findings and make a recommendation on whether Todd should be pardoned. In a formal written opinion, Attorney General Greg Abbott has explained that a request for an investigation under this section is the appropriate procedure for considering a posthumous pardon. *See Op. Tex. Att'y Gen. No. GA-0754 at *4.*¹²

D. You Should Direct the Board to Conduct a Public Hearing so All of the Evidence of Willingham's Innocence Can be Evaluated.

The proper way to evaluate the evidence of Todd Willingham's innocence is through a hearing at the Board of Pardons and Paroles. Although a public hearing is not mandatory under the law, the Board routinely conducts hearings in other matters such as parole revocation or violations of a conditional pardon under section 508.281 of the Government Code. However, the Texas Board of Pardons and Paroles has not employed the procedures needed to ensure that reliable recommendations are made to the Governor's Office.¹³ Investigating the possibility of error where an innocent man has

⁹ Appendix F (excerpt of Webb testimony).

¹⁰ *See Ex Parte Chabot*, 300 S.W.3d 678 (Tex. Crim. App. 2009).

¹¹ Tex. Code Crim. Proc. Art. 11.073 (effective September 1, 2013).

¹² A copy of General Abbott's opinion is attached as Appendix G.

¹³ A recent report by the ABA on the Texas capital punishment system found that none of the ABA's recommended minimum standards for clemency are met in today's clemency process. *See ABA Chart Evaluating Texas Clemency in Capital Cases* (Appendix H).



been executed is important both for the Willingham family and to prevent future wrongful executions.

There have been two prior attempts to obtain a hearing on Todd Willingham's innocence in other forums. In both cases, the hearings were canceled and no determination of innocence was made. When the case was considered by the Texas Forensic Science Commission, the Commission limited its role to evaluating the forensic science in the case and did not comment on Todd's innocence. Then, the Willingham family sought a declaration of innocence in the Travis County District Court through a court of inquiry proceeding, but the case was stayed by the Third Court of Appeals. Although the Court of Appeals did not decide the question, at least one judge advised that the hearing we sought was not authorized. *See In re Thompson*, 330 S.W.3d 411, 422-23 (Tex. App.—Austin 2010, orig. proceeding) (Puryear, J., dissenting). In light of this history and General Abbott's opinion, the Board is the appropriate place for the evidence of Willingham's innocence to be heard.

You should also provide guidance to the Board to ensure that you are provided with all of the information necessary to consider this request for a posthumous pardon. Therefore, your order directing the Board to investigate Willingham's case should contain the following specific procedures:

1. Public hearing with notice to all interested parties.

The Board should consider Todd's case at a public meeting of the whole Board with adequate notice so that all interested parties may participate. Notice should be given to the Petitioners, the State, and the victim. As with other hearings before the Board, the parties should be given subpoena power to compel the attendance of witnesses and the production of documents. *See* Tex. Gov't Code § 508.048.

2. Guidelines for determining innocence.

The Board should be given guidance on determining innocence. The definition of actual innocence has been articulated the courts and the Legislature using the standard of "probably innocent" or "more likely than not" innocent. *See In re Allen*, 366 S.W.3d 696, 706 (Tex. 2012) (unanimous opinion of Texas Supreme Court defining "actual innocence" under Tim Cole Act). Therefore, you should instruct the Board to recommend a pardon if the Board finds it "more likely than not that no reasonable jury would have convicted [Todd] in light of the new evidence." *See id.*

3. Written findings.

In the traditional clemency process in capital cases, the Board has only provided a "yes" or "no" recommendation. The Statute authorizing you to order an investigation, however, requires that the Board both (1) report on its investigation and (2) make a recommendation regarding a pardon. You should make clear in your order that the Board should issue detailed findings discussing the evidence and how the Board applied the facts to the innocence standard. Such findings are commonplace and required by law in virtually every other administrative determination. *See* Tex. Gov't Code § 2001.141.

The informal and closed-door clemency process failed in its role as a safety net against wrongful



execution in 2004. By providing the Board clear direction in considering this posthumous pardon, you can make sure that your office receives all of the relevant information necessary to thoroughly review this posthumous pardon request and make the correct decision.

E. Conclusion.

Few can imagine the pain of losing three young children in a fire. But that tragedy was increased tenfold for the Willingham family when Todd Willingham was mistakenly blamed for the fire and then executed as a murderer. There has been much said on this case over the years, but it is time for all of the evidence of Willingham's innocence to be heard. We ask that you step away from invective of the past and consider all of the facts as we know them now.

There is substantial and persuasive evidence that Todd Willingham did not murder his children and that his execution was a terrible miscarriage of justice. Because most of this evidence of innocence was not presented to you in 2004, we ask for your leadership in calling for an investigation of the case by the Board of Pardons and Paroles with the procedures detailed above. And on the Board's recommendation, we ask that you grant a posthumous pardon so that the Willingham family, including his stepmother Eugenia, can receive some closure; confirming that Mrs. Willingham did not raise a murderer.

Please also let us know a convenient time for us to meet with you to discuss Todd Willingham and the need to finally have a full and open examination of the case.

Respectfully submitted,

Eugenia Willingham

Patricia Cox

Michael Morton

Innocence Project, Inc.

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Barry Scheck

Bryce Benjet

INNOCENCE PROJECT

Gerry Goldstein

Cynthia Orr

GOLDSTEIN, GOLDSTEIN & HILLEY