

**AMENDED¹ MEMORANDUM IN SUPPORT OF PETITION FOR A POSTHUMOUS
PARDON OF CAMERON TODD WILLINGHAM**

Cameron Todd Willingham did not murder his children, and the evidence that proves his innocence was not presented to the Board when it denied his pre-execution request for a commutation of sentence filed in 2004. Therefore, Eugenia Willingham and Patricia Willingham Cox (the "Petitioners"), surviving relatives of Cameron Todd Willingham, hereby petition the Texas Board of Pardons and Paroles (the "Board") for a posthumous pardon so that Mr. Willingham's name can finally be cleared of this infamous crime.

Introduction

Cameron Todd Willingham was wrongfully convicted of capital murder, by way of arson, of his own children in 1992 and was executed in 2004. Since his trial, scientific advances have shattered every assumption underlying the testimony of the two fire investigators who claimed that Willingham set the fire that killed his children. Today, no credible arson expert would make such a finding. Moreover, the prisoner who testified that Willingham confessed to setting the fire has recanted his trial testimony and there is evidence that he lied about his motive to implicate Mr. Willingham. Had the facts presented herein been known at the time of the tragic fire, Willingham would never have been charged, let alone convicted and sentenced to death. And had the information now known been presented to this Board in Mr. Willingham's pre-execution pardon application, he would have not been executed.

Todd and Stacey Willingham lived together with their two-year-old daughter Amber and one-year-old twins Carman and Cameron. There was no history of child abuse in the household,

¹ This memorandum replaces the one filed with the original Petition. However, the exhibits (designated A-JJ) remain the same. Additional exhibits will be cited consecutively beginning with KK.

and his children were a source of great joy and pride for Willingham. The loss of these three children in a fire only two days before Christmas was an unimaginable tragedy for the Willingham's and the local community. Having lost his children, Willingham was then visited by a second tragedy—he was falsely accused, convicted and ultimately executed for murdering the children he loved. Petitioners must also live with the fact that their loved one has been falsely labeled a murderer, a psychopath, and a monster. A Posthumous pardon can remedy the damage done to the Willingham name. And by acknowledging the miscarriage of justice in this case, the Board will take an important step in repairing the loss of public confidence in the Texas justice system that has resulted from this case.²

I. Summary of Argument

There is compelling evidence that Texas executed an innocent man, Cameron Todd Willingham, in 2004. Prosecutors relied on two pieces of evidence to convict Willingham: expert testimony from two fire officials and a jailhouse informant's testimony that Willingham confessed. Both have since been proven to be false.

Nine of the nation's leading arson experts have reviewed the scientific evidence and each has concluded that the expert testimony used to convict—and ultimately execute—Willingham was based on unreliable proof that was discredited scientifically long before Willingham's execution, as described in a report by Dr. Gerald Hurst that was submitted to the courts and the Governor. The Texas Forensic Science Commission, after extensive review of all expert submissions, issued a report that strongly condemned the arson science presented in the

² See, e.g., Michael Hall, *Life After Death: Why We Need A Moratorium on the Death Penalty in Texas*, Texas Monthly (January 2011); *Death by Arson? Junk Science and the Death Penalty, A Toxic Combination*, Houston Chronicle (Oct. 21, 2010); Paul Burka, *The Willingham Case*, Texas Monthly: BurkaBlog, (July 27, 2010, 9:43AM), <http://www.texasmonthly.com/blogs/burkablog/?p=7563>.

Willingham case as “flawed” and voluntarily undertook a statewide audit of arson cases to see if there were other convictions based on similar, unreliable arson evidence. The only other evidence of guilt in the case was that of a jailhouse informant who has recanted his testimony.

After reviewing the new evidence, a retired judge who served both on the Texas Court of Criminal Appeals and on the District Court recently concluded that Willingham should be exonerated. In short, there is no longer any credible evidence that a crime had been committed—much less that Willingham was guilty of it.

Mr. Willingham was not a “monster” that murdered his children. At the time of the fire, he was a twenty-three year old father of three young girls. Mr. Willingham was their primary caregiver while his wife, Stacey, worked. Seventeen witnesses testified at the trial that Mr. Willingham had a great relationship with the children and described him as attentive and loving towards his daughters. While the Texas Board of Pardons and Paroles cannot bring back the life of Mr. Willingham or his daughters, Petitioners ask the Board for a posthumous pardon in order to clear the Willingham name and as a first step toward ensuring that future sons and daughters of Texas are not subject to the same fate.

II. Those Who Knew Willingham Believe in His Innocence and Describe His Good Character

Those who knew Todd Willingham both before and after his capital murder conviction described him as a thoughtful and caring father. Although Mr. Willingham certainly had problems in his marriage and with drug addiction, he always maintained his innocence and there was no credible evidence that he ever abused his children.

At Mr. Willingham’s trial, the defense presented neighbors and family members who uniformly described him as an attentive and loving father to his three girls. None testified that

they believed Mr. Willingham would be capable of murdering his children. These character witnesses included:

Gene Willingham (Father)

Eugenia Willingham (Stepmother)

Colisa Porter (Mother)

Yvette Crozier (Sister)

Christina Brown (Friend)

Ted Brown (Friend)

Sherrie Cooley (Friend)

Mike Cooley (Friend)

Monte Willingham (Brother)

Carla Petty (Cousin)

Christopher Brown (Uncle)

Linda Brown (Aunt)

Cindy Preston (Aunt)

Gerald Preston (Uncle)

Betty Mason (Aunt)

Doug Mason (Cousin)³

Most importantly, Stacey Willingham testified at trial in support of her husband. She knew his relationship with their three children better than any other person on earth. Although she conceded that she fought loudly with her husband—even coming to blows—she knew that Todd

³ These witnesses all testified during the sentencing phase of Willingham's trial. *See* TR. Vol. 14: 99-199.

was a good father and did not believe that her children were murdered.⁴ If Mr. Willingham were truly the “monster” he was labeled, seventeen people who knew him well (including the mother of the children) would not have testified under oath that he was a loving and responsible father.

Mr. Willingham’s juvenile probation officer in Oklahoma, Polly Gooden, and an Oklahoma Judge, Bebe Bridges, who presided over some of his criminal cases have also confirmed that Mr. Willingham was not the violent psychopath claimed by the State.⁵ Gooden has described Willingham as “one of my favorite kids” and recalled the pride he demonstrated when he returned home to Oklahoma only months before the fire and showed Gooden photos of the girls. Judge Bridges said that she:

could not imagine [Willingham] killing his children. . . He was polite, and he seemed to care . . . His convictions had been for dumb-kid stuff. Even the things stolen weren’t significant.⁶

Those who knew Mr. Willingham after his incarceration have also described his good character and love for his children. One of Mr. Willingham’s closest friends in the years before his execution was Elizabeth Gilbert, a Houston-based author who first corresponded with him through a prison outreach program. The two became close, and Ms. Gilbert wrote essays and a play about Mr. Willingham and his ordeal. In support of this Petition, Ms. Gilbert describes Mr. Willingham’s good character as follows:

⁴ See *id.* at 187-190. It was alleged in a last-minute, pre-execution filing by the State that Mr. Willingham confessed to Stacey on the eve of his execution. But the State provided only an affidavit from Stacey’s brother who was not party to the conversation. Although Stacey has personally claimed that Willingham did confess in 2009, she told reporters that her brother’s affidavit was “untrue” when interviewed several months after the execution and did not mention the alleged confession when she described the meeting in an interview with a local newspaper. See David Grahn, *Stacey Speaks*, *New Yorker* (October 26, 2009). Even the man who prosecuted Willingham, John Jackson, has not endorsed the notion that Willingham confessed, stating “She’s given very different stories about what happened on this particular day right up to the date of the execution . . . Its hard for me to make heads or tails of anything she said or didn’t say.” *Id.*

⁵ See David Grahn, *Trial by Fire*, *New Yorker* (Sept. 7, 2009).

⁶ *Id.*

The man I befriended was a compassionate, sensitive and caring individual who expressed concern not only for his own situation, but for others on Death Row. In spite of more than nine years of imprisonment, he was remarkably centered, patient and resolute. At first, I had assumed he was guilty of his crime and I was well aware prisoners often attempt to manipulate visitors. After several months of visits, however, I decided to travel to Austin and read the transcripts of his trial. It was then I attempted to bring attention to his case by writing several essays and a play which was produced in December 2000, at Diverse Works Houston.

From our first meeting, Mr. Willingham declared his innocence. There was never a visit, or letter, where he did not express love for his girls, regret for not saving their lives and shame for how he treated his wife. While he willingly admitted his failure as a spouse, he insisted he had always been a good father. I am enclosing a copy of a letter he wrote to his ex-wife which he sent to me. In this, he apologizes for his behavior toward her and asks for permission to be buried next to his children. Sadly, Stacy Kuykendall never forgave him, nor allowed him his final wish.⁷

I believe Mr. Willingham guilty only of self-preservation. He stated as much to me when he admitted fleeing his burning home without saving his children. I interviewed numerous individuals in Corsicana who declared this action tantamount to murder. However, a firefighter in Corsicana, disagreed. He reminded me that no one knows how they will behave in a fire until faced with that situation.

The following excerpt from one of Mr. Willingham's letters illustrates the effects of his imprisonment ... *"I now have to look at my photos of my daughters to even prove to myself I really did have a life at one time, a purpose, a desire to be loved and give love in return..."*⁸

Another friend of Mr. Willingham's was Ernest Willis, a man who was also wrongly convicted and sentenced to death based on false arson testimony. Mr. Willis narrowly escaped execution largely because he had pro bono counsel that fully investigated and presented the

⁷ Perhaps this explains the words of anger expressed by Mr. Willingham in his dying moments as a lethal dose of barbiturates overcame him.

⁸ A copy of this letter was submitted separately to the Board in response to its request for documents dated December 3, 2012.

evidence of false arson testimony in a more timely manner. In a letter to this Board, he asks that Mr. Willingham's innocence be recognized:

I met Todd at the Polunsky Unit in Livingston, Texas. We went out on the recreation yard with a fence between us and we got to talking. He told me a little bit about his case, and I found it so similar to mine. We met this way several times and always supported each other in our efforts to clear our names. He was sincere in his innocence, and I believed him. I tried to get my attorneys to take his case, but they said that they couldn't take any more pro bono cases.

Todd never had the legal counsel that I had. If it hadn't been for Latham & Watkins, I would've been dead. I came within two days of being executed myself. It's hard to explain what it feels like being in there and knowing that you're innocent. Todd was one of the very few who could understand.

In October, I went to speak in support of Todd's pardon petition in Austin. It was the first time that I met his family, and I felt badly for them, knowing that Todd should have been out just like me. Eight months after he was executed, I was exonerated based on the same evidence. I know that the same forensic expert who helped to clear me also tried to help clear Todd. After learning this, I feel even more sure of Todd's innocence.

I ask you to step up to the plate and do the right thing for Cameron Todd Willingham and his family.⁹

Mr. Willingham also became friends with Anthony Graves, another death row inmate who was later exonerated. Mr. Graves also described the great burden carried by Mr. Willingham from being falsely accused of murdering his children:

I met Mr. Willingham, who I knew as Todd, back in 1995 on death row. We lived on the same wing in the Ellis Unit. We were in the same group for recreation. We played basketball with each other, and we walked the rec yard together. And during that time, we would talk.

Todd was a lively person and usually in good spirits. One thing I remember him always saying was that he was innocent. To the day he died, he said he was innocent. He never wavered, nor did he contradict himself. And in the way he

⁹ A copy of this letter was submitted separately in response to the Board's request for documents dated December 2, 2012.

acted towards others, it was clear he was not the killer the State portrayed him to be. He was a decent human being and he loved his children. That the world believed he had killed his children was a burden that he carried until the end of his life.

I believe in my heart that Cameron Todd Willingham was actually innocent. I believe that Texas executed an innocent man.¹⁰

Fabrizio De Rosso corresponded with Willingham from 1993 until 2004, and was so compelled by Willingham's story that he travelled across the Atlantic to visit Willingham the week before Willingham's execution. De Rossa, like Willingham, is a father of three, and that alone was enough for the men to bond – the two men shared accounts of their fatherly experiences. Eventually, the correspondence grew to a friendship and Willingham began to take a further interest in De Rossa's children, sending them drawings of Mickey Mouse and other characters. This caring, this interest in the happiness of children near to him, is consistent with Willingham's affection and love for his own daughters. Willingham was a grateful man; he was a strong man; and he was protective man. And, as De Rossa acknowledged to Willingham days before Willingham's execution, Willingham helped De Rossa become a better father.¹¹

III. Mr. Willingham's Was Convicted and Executed Based on False Expert Testimony and the Word of a Mentally Ill Felon Who Has Since Recanted His Testimony.

The fire science in this case has been the subject of considerable scrutiny, and has been uniformly discredited by leading experts in the field as well as the Texas Forensic Science Commission. There is simply no evidence to suggest that the fire that killed the Willingham children was intentionally set. The only other evidence of Mr. Willingham's guilt was an

¹⁰ A copy of this letter was submitted separately to the Board in response to its December 3, 2012 request for documents.

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alleged jailhouse confession made to Johnny Webb. Mr. Webb has since recanted his testimony and there is evidence that the State provided extraordinary assistance in exchange for his testimony, a fact that both Webb and the District Attorney denied at trial.

A. The Trial

The prosecution's case hinged on the testimony of Assistant Fire Chief Fogg and Fire Marshal Vasquez who both unequivocally testified that the fire was intentionally set. We now know that despite their good intentions, these men were wrong. All of the reasons cited by these trial experts have since been rejected as invalid. *See infra* Part IV.

1. Testimony of Assistant Fire Chief Fogg¹²

Fogg based his arson conclusion primarily on the floor damage in the Willingham home that he believed was consistent with liquid pour patterns.¹³ He claimed to have examined plastic toy remains and concluded that the toys had not melted and run during the fire to cause the patterns observed.¹⁴ He testified that the floors were made of carpet tiles or linoleum tiles, with a plywood underlayer and tar paper above the original oak floor.¹⁵ He asserted that the glue from the tiles had no role in the formation of the puddle configurations he observed.¹⁶ He opined that the fire was intentionally set.¹⁷

¹² A copy of Assistant Fire Chief Fogg's investigative report, created in 1991, is attached as Exhibit A.

¹³ Tr., part 1, at 160:19-161:6.

¹⁴ *Id.* at 163:16-24.

¹⁵ *Id.* at 162:20-163:5; 169:6-170:5.

¹⁶ *Id.* at 179:22-180:14.

¹⁷ *Id.* at 180:15-19; 184:23-25.

Fogg further testified that the investigators found no evidence that the space heaters had started the fire, and found no shorting in the bedroom wiring.¹⁸ No mention was made of examining any electrical appliances, a ceiling fan in the children's bedroom, or wiring elsewhere in the home. Fogg told the jury that the damage at the front door threshold was caused by a liquid flowing under the threshold and burning there, which he opined also showed the use of an accelerant.¹⁹ He added that the staining of the concrete porch was also due to a liquid accelerant, and that the fire started on the porch before burning across the threshold and into the hallway.²⁰ He did not consider or explain how this could be true in light of the testimony of initial eyewitnesses who saw no fire on the porch or at the front door.²¹

Even though Fogg conceded that some of the evidence could possibly have innocent explanations, he told the jury that he had eliminated all accidental causes of the fire and that it was his opinion as the Assistant Fire Chief of Corsicana that the fire was intentionally set.²²

2. *Testimony of Deputy State Fire Marshal Vasquez*²³

Deputy State Fire Marshal Vasquez provided powerful corroboration of the local fire chief's arson conclusion. Vasquez testified that he had been a certified arson investigator for 15 years and provided a lengthy description of his credentials and experience. He testified that

¹⁸ *Id.* at 159:3-19; 160:8-18.

¹⁹ *Id.* at 165:15-25.

²⁰ *Id.* at 161:10-22; 166:7-22.

²¹ *See, e.g., id.* at 55:6-10; 57:22-25; 74:14-75:4; 104:11-13.

²² *Id.* at 177:25-178:10; 180:15-19, 184:23-25.

²³ A copy of Fire Marshal Vasquez's investigative report, created in 1991, is attached as Exhibit B.

he had investigated between 1,200 and 1,500 fires and that, "with the exception of a few, most all of them" were arsons.²⁴ He claimed that about half of those fires resulted in deaths.²⁵

Based on his viewing of the floors after they were cleaned, Mr. Vasquez opined that a liquid accelerant had covered much of the floor in the children's bedroom.²⁶ He told the jury that "the whole room here on the northeast [children's] bedroom is a point of fire origin."²⁷ He claimed that there were additional points of fire origin in the hallway and on the porch.²⁸ He identified a V pattern on the hallway wall as an indicator of a point of origin.²⁹ He testified that the multiple points of origin were unconnected and thus indicated an intentional fire.³⁰

Vasquez testified that there were pour patterns in the hallway, and that the pouring was done with the intent to block the exit.³¹ He claimed that accelerant had been poured on the front door, and that there was liquid pooling on both sides of the door.³² He stated that the front door was closed during the fire. He told the jury that the charred baseboard along the porch meant a flammable or combustible liquid was poured in front of it.³³ Vasquez told the jury that the damage to the children's bedroom was not "normal," but did not explain why.³⁴ He later argued that he believed the temperatures were higher at floor level than at ceiling level, and that

²⁴ *Id.* at 227:24-228:4.

²⁵ *Id.* at 228:5-9.

²⁶ *Id.* at 245:3-16.

²⁷ *Id.* at 254:14-255:7.

²⁸ *Id.*

²⁹ *Id.* at 236:15-237:5.

³⁰ *Id.* at 255:9-11.

³¹ *Id.* at 250:20-251:2.

³² *See id.* at 251:21-252:1.

³³ *Id.* at 251:21-252:7.

³⁴ *Id.* at 247:18-248:9.

the difference was due to an accelerant.³⁵ He said that bedsprings in the children's bedroom were burned from underneath.³⁶ Mr. Vasquez also told the jury that the fact that the fire was auto-ventilated (by breaking window glass) was an indicator of arson.³⁷ He testified that this behavior was "inconsistent with fire behavior," suggesting it could not otherwise be explained.³⁸

Based on his examination of the porch—and notwithstanding contrary testimony of eyewitnesses—Mr. Vasquez told the jury that the fire spread into the house and not from the house out to the porch.³⁹ In examining the threshold, he noted a low burn at the doorway and a melted aluminum threshold plate.⁴⁰ He told the jury this was evidence of incendiarism; wood burns at 800 degrees Fahrenheit, so an accelerant was necessary to reach the 1,200 degrees Fahrenheit required to melt aluminum.⁴¹ He also claimed that crazed glass on the porch indicated a fast and hot fire due to an accelerant.⁴²

Fire Marshal Vasquez told the jury that he eliminated the space heaters as a potential cause because they were turned off, but did not explain how he knew that they were off given that he had arrived at the scene four days after the fire and after significant activities at the scene were completed.⁴³ He further opined that a child could not have caused the fire based on

³⁵ *Id.* at 256:8-22.

³⁶ *Id.* at 240:19-241:5.

³⁷ *Id.* at 255:12-19.

³⁸ *Id.* at 255:18.

³⁹ *Id.* at 248:14-20.

⁴⁰ *Id.* at 248:20-249:16.

⁴¹ *Id.* at 249:9-16.

⁴² Vasquez Report at 4-5.

⁴³ Tr., part 1, at 246:20-247:9.

the extent of the pour patterns and that Willingham could not have escaped the home if a child had set the fire because the front hallway exit path would have been engulfed in flames.⁴⁴

3. *Testimony of Johnny Webb*⁴⁵

The testimony of Webb—who had never met Willingham before encountering him in jail—was incredible. According to Webb, Willingham denied for 30 days having caused the fire.⁴⁶ Then one day, Willingham allegedly confessed out of the blue.⁴⁷ According to Webb, Willingham killed his children because his wife had injured or killed one of the children which caused Willingham to panic and burn the house down to cover the abuse.⁴⁸ Even on its face, there were problems with Webb's story in that the medical examiner found no injuries on the children that would indicate abuse.

Webb, who was not Willingham's cellmate, alleged that this conversation took place a few feet away from a deputy and near other inmates, over an intercom between the cell Willingham shared with other inmates and the room outside.⁴⁹ The deputy was free to listen in on the intercom, and anyone nearby could have heard Webb's alleged conversation with Willingham.⁵⁰ Yet other than Webb's testimony, no testimony as to the alleged confession was introduced.

Webb's testimony was often confused and inconsistent. Webb testified that he could not remember whether he had in fact committed the crimes underlying his most recent

⁴⁴ *Id.* at 261:17-262:6; 267:11-15.

⁴⁵ Webb's testimony can be found at Tr., part 1, at 13:11-49:10.

⁴⁶ *Id.* at 35:2-6; 36:19-24; 37:20-23.

⁴⁷ *Id.* at 36:19-24; 37:20-23.

⁴⁸ *Id.* at 18:5-16.

⁴⁹ *Id.* at 29:2-20; 30:6-8; 31:22-32:8; 32:15-17; 33:5-34:2.

⁵⁰ *Id.* at 30:3-31:24; 32:15-17.

convictions.⁵¹ Moreover, after initially stating that Willingham had not mentioned moving one of the children into a different room before setting the fire, Webb changed his story after being shown a piece of paper by Assistant District Attorney Jackson.⁵²

Webb testified very clearly on leading questions by the District Attorney that he was not offered any incentive for his testimony:

Q. Johnny, have I promised you anything in return for your testimony in this case?

A. No sir you haven't.

Q. As a matter of fact, I told you there is nothing I can do for you. . . .⁵³

When Webb testified he was only a few months into a fifteen-year sentence for aggravated robbery—an extended sentence due to use of a deadly weapon.⁵⁴ In addition, he admitted that was suffering from mental problems and was currently on psychiatric medication.⁵⁵

B. Willingham is Convicted and Sentenced to Death

Before the trial was over, Willingham was again offered the chance to plead guilty to avoid the death penalty. Family members begged him to take the deal. Willingham would not. "I am not guilty," he said. And, if accepting a plea meant admitting to killing his children, "they may as well get the needle ready." Thereafter, Willingham was convicted and sentenced to death.

⁵¹ *Id.* at 23:11-13; 23:18-19; 27:19-28:12.

⁵² *Id.* at 46:12-14; 46:25-47:2; 47:9-12.

⁵³ *Id.* at 11:21.

⁵⁴ *Id.* at 13:24-14:22; 22:18-22.

⁵⁵ *Id.* at 15:3-5; 24:8-25:25; 41:9-11; 42:21-43:3.

C. Willingham's Final Days

By December 2003, Willingham had exhausted all traditional avenues of appeal available to him. His last petition to the United States Supreme Court was denied in November,⁵⁶ and his execution was set for February 17, 2004.

On January 26, 2004, Willingham, through his attorney Walter M. Reaves, Jr., applied to this Board for executive clemency, seeking commutation of his death sentence to life imprisonment and a 90-day reprieve from execution.⁵⁷ At the time of the filing, Mr. Reaves had not yet learned that the arson testimony in the case was invalid, but he advised the Board that an additional 90 days was needed to investigate Johnny Webb in support of Willingham's claim of innocence:

One of the most significant pieces of evidence against petitioner came from a jailhouse informant, Johnny Webb. Petitioner has reason to believe that Webb's testimony was false, and was the product of prosecutorial misconduct. Petitioner has located a witness who can testify as to how Webb was coached in his testimony. Petitioner also has reason to believe that upon being released from prison, Webb was provided with a car. Petitioner has been unable to develop information earlier because of a limitation on funds. Additionally, Webb has only recently been open to talking about [what] really happened.⁵⁸

At 1:20 pm, on Friday, February 13, 2004, the Board advised Mr. Reaves by fax that it had decided not to recommend commutation of the death sentence or a reprieve.⁵⁹

Approximately two weeks before Willingham's scheduled execution—Dr. Hurst, an Austin-based arson expert, reviewed the Fire Marshal's report on a pro bono basis at the

⁵⁶ See *Willingham v. Texas*, 516 U.S. 946 (1995).

⁵⁷ Cameron Todd Willingham Application for a Ninety-Day Reprieve and for Commutation of Sentence, dated Jan. 26, 2004 (the "Initial Board Application"). A copy of the Initial Board Application is attached as Exhibit C.

⁵⁸ Id.

⁵⁹ See Letter from Board to Mr. Reaves, dated Feb. 13, 2004 (the "Reaves Letter"). A copy of the Reaves Letter is attached as Exhibit D.

request of the Petitioners. Dr. Hurst knew that at least his preliminary analysis would have to be completed for there to be any hope in saving Willingham. When completed, the Hurst report contained a serious critique of the validity of the arson evidence on which Todd Willingham was convicted.⁶⁰ Dr. Hurst's analysis strongly suggested that there was no valid evidence that the fire had been intentionally set. Unfortunately, Dr. Hurst's report was not completed until late in the day on February 13, 2004—after this Board had announced its vote to deny clemency. Upon receipt of the Hurst Report, Mr. Reaves immediately filed a new habeas corpus application with the Texas Court of Criminal Appeals asserting a claim of actual innocence based on Dr. Hurst's conclusion that the fire was not arson.⁶¹ He also presented the report to Governor Perry in a letter requesting a 30-day reprieve.⁶²

The State responded to the habeas application on the day before Willingham's execution. Each of the factual assertions presented by the State to support Willingham's execution was untrue:

- **The State questioned Dr. Hurst's credentials.**

It is uncontested that Dr. Hurst is one of the leading experts in fire science and his conclusions confirmed in each of the the various examinations of the arson testimony in this case.

⁶⁰ A copy of the Hurst Report dated Feb. 13, 2004 is attached as Exhibit E.

⁶¹ Subsequent Application for Writ of Habeas Corpus (February 13, 2004).

⁶² Letter from Mr. Reaves to Gov. Perry, dated Feb. 13, 2004 (the "Reprieve Letter"). A copy of the Reprieve Letter is attached as Exhibit F.

- **The State pointed to Willingham’s alleged confession to Johnny Webb.**

Johnny Webb had submitted a written recantation of his testimony in 2000, claiming that Willingham never confessed and that Webb was forced by the Navarro County District Attorney.⁶³ This recantation was known to the DA and Judge Jackson, but never disclosed to Willingham’s lawyers. Although the jury was told in 1992 that the State could not help Webb in prison, John Jackson had consistently advocated on Webb’s behalf both as a prosecutor and later as a judge.⁶⁴ Jackson obtained a nunc pro tunc judgment reducing the conviction from first to second degree robbery.⁶⁵ Based on the request of the prosecutor, judge and sheriff, this Board also recommended that Webb’s sentence be commuted in from fifteen years to five years.⁶⁶

- **The State claimed that Willingham confessed to Stacey in a January 2004 meeting.**

The State supported this allegation with the affidavit of Stacey’s brother, and not Stacey herself. Although Stacey has more recently said that Willingham confessed, she denied this confession in several interviews around the time of the execution.⁶⁷ The fact that the District Attorney relied on the double hearsay of Stacey’s brother makes this claim even more suspect.

⁶³ Exhibit KK (Motion to Recant Testimony). Contrary to the testimony that he was not promised anything in exchange for his testimony, Webb also filed a motion seeking to enforce a “contract” relating to his testimony in the Willingham case. Exhibit LL (Motion by Webb).

⁶⁴ Exhibit MM (Letter from Jackson to TDCJ); Exhibit NN (correspondence from Jackson as Judge regarding sentencing/parole issues). **

⁶⁵ Exhibit OO (Nunc Pro Tunc Judgment).

⁶⁶ Exhibit PP (Webb commutation letter).

⁶⁷ See *supra* note 4 (discussing Stacey’s inconsistent accounts of her 2004 meeting with Willingham).

- **The State alleged that Willingham “made little or no effort” to save his children from the fire and did not have burns on his hands and feet.**

Mr. Willingham sustained second degree burns in the fire, including on his hand, and the heat of the fire was so intense as to have made his arms black with soot and burned the hair in his nose. Willingham was dressed in only pants with no shoes or shirt, and a neighbor testified that the house exploded with fire only moments after Willingham escaped.⁶⁸ A newspaper article published the day after the fire (before arson was suspected) described Willingham as follows:

[Willingham] was sitting on the back of a firetruck sobbing, “I want to see my babies” he screamed. He was later taken to Navarro Regional Hospital fighting wildly against the four Corsicana Police Officers who carried him to a stretcher.⁶⁹

- **The State claimed a refrigerator had been moved to block the back door of the house, preventing the children’s escape.**

Corsicana Police Detective Jimmie Hensley and Assistant Fire Chief Fogg, who both believed Willingham to be guilty, told a journalist in 2009 that there were two refrigerators in a cramped kitchen and that they never believed that the fridge was part of an arson plot.⁷⁰

⁶⁸ Tr. Vol. 11 at 59, 61.

⁶⁹ *Fire Claims Lives of 3 Children*, Corsicana Daily Sun (December 23, 1991).

⁷⁰ David Gahn, *Trial by Fire*, New Yorker (September 7, 2007).

- **The State claimed Willingham callously moved his truck away from the fire, thus saving his truck while his children perished.**

According to a neighbor's testimony at trial, Willingham moved his truck away from the house only after the house had "exploded" into flames and entrance into the house was impossible.

Having considered the false arguments presented by the State, the Court of Criminal Appeals dismissed the habeas application on procedural grounds in a summary order on the day of the execution.

Mr. Reaves wrote to Governor Perry shortly after receiving this Board's decision not to recommend clemency requesting a 30-day reprieve of Willingham's execution in light of Dr. Hurst's findings.⁷¹ He stressed how close they were to obtaining evidence of Willingham's actual innocence and the need for additional time to conduct a complete investigation. Specifically, Mr. Reaves discussed the problems with Webb's testimony in addition to the Hurst report:

Everyone I have talked to agrees that [Webb] is not someone that was credible or worthy of belief. Nevertheless, he got on the witness stand and testified to admissions made by Mr. Willingham. We have been able to do little with that. I think that is an issue that raises serious questions about the criminal justice system in death penalty cases, I do not believe it is enough to merely present evidence to a jury and leave the decision to them. Instead, I believe prosecutors have an obligation, if not ethically, at least morally, to ensure that there are no doubts about the evidence they present. I do not think you can say the evidence from Mr. Webb was of that type.⁷²

But Governor Perry denied the reprieve as well. Despite the Hurst Report's powerful evidence that Willingham was convicted on the basis of faulty forensics—it had come too late. Willingham was executed and pronounced dead on February 17, 2004 at 6:20 pm.

⁷¹ Letter from Mr. Reaves to Gov. Perry, dated Feb. 13, 2004 (the "Reprieve Letter"). A copy of the Reprieve Letter is attached as Exhibit F.

⁷² *Id.*

IV. We Now Know that Mr. Willingham is Innocent

The story presented to the jury that convicted and sentenced Mr. Willingham to death went virtually uncontradicted until the eve of execution. But we now know that all of the evidence of guilt was faulty. There is simply no evidence suggesting anything but that the Willingham girls died in a tragic accidental fire.

A. Forensic Science Used In Willingham's Case Was Outdated and Wrong

Fire investigation reached a turning point in 1992 when the National Fire Protection Association published its first edition of *NFPA 921, Guide for Fire and Explosion Investigations* ("NFPA 921"). At its core, NFPA 921 is a set of processes for applying the scientific method to fire investigation.⁷³ The significance of NFPA 921 must not be overlooked. Prior to NFPA 921, fire investigations conducted were based only on an amalgamation of the anecdotal experiences of firefighters and investigators, and not the valid empirical study central to reliable science.⁷⁴

The procedures outlined in NFPA 921 and the scientific methodologies contained therein were not utilized in Willingham's case. It should come as no surprise, then, that the scientific community has universally rejected the forensic evidence used against Willingham. For example, as has been discussed, Dr. Hurst⁷⁵ prepared a report in which he concluded that the

⁷³ NFPA 921 (2011) at 11.

⁷⁴ See Report of the Texas Forensic Science Commission ("The Texas Forensic Science Commission Report") dated April 15, 2011 at 14. A copy of the Texas Forensic Science Commission Report is attached as Exhibit I.

⁷⁵ Dr. Gerald Hurst holds a Ph.D. in Chemistry from Cambridge University and has spent nearly three decades as a fire and explosives expert. He has served repeatedly as an expert witness in numerous arson cases. Dr. Hurst's work helped exonerate North Carolina resident Shelia Bryan, who was wrongfully convicted of arson and sentenced to life in prison, and Texas resident Ernest Ray Willis. Mr. Willis was exonerated and released after spending 17 years on death row based on flawed arson evidence.

Fire Marshal's report contained numerous "critical errors" in interpreting the evidence.⁷⁶ In addition, a panel of fire scientists (the "Arson Review Committee")⁷⁷ prepared a report that systematically examined each of Fogg and Vasquez's "indicators" of arson and unanimously concluded that "*each and every one of the indicators relied upon have since been scientifically proven to be invalid.*"⁷⁸ Likewise, Dr. Craig L. Beyler,⁷⁹ an expert for the Texas Forensic Science Commission, concluded that the methodologies applied in the Willingham case "did not comport with the scientific method or the process of elimination."⁸⁰ Finally, Mr. Mark Goodson⁸¹ and Dr. John DeHaan,⁸² both well-regarded experts in their own right, have concluded that the science used against Willingham was entirely bogus.⁸³

⁷⁶ Hurst Report at 1. Moreover, "most of the conclusions reached by the Fire Marshal would be considered invalid" in light of the arson science known in 2004."

⁷⁷ John J. Lentini, a certified fire investigator and chemist with more than 30 years of experience in forensic and fire investigation, chaired the Arson Review Committee. Mr. Lentini has investigated more than 2,000 fire scenes and has been accepted as an expert witness more than 200 times. He has published numerous articles on fire science and investigation in peer-reviewed publications, including *The Fire and Arson Investigator* and *The Journal of Forensic Sciences*. Mr. Lentini is also the author of a leading fire investigation textbook, *Scientific Protocols of Fire Investigation* (CRC Press 2006). The other members of the Arson Review Committee were Douglas J. Carpenter, Daniel L. Churchward, Michael McKenzie, and David M. Smith. A copy of the Arson Review Committee Report is attached as Exhibit J.

⁷⁸ Arson Review Committee Report at 3 (emphasis added).

⁷⁹ Dr. Beyler has a B.S. in Civil Engineering and an M.S. in Mechanical Engineering from Cornell University, a B.S. in Fire Protection Engineering from the University of Maryland, a M.Sc. in Fire Safety Engineering from the University of Edinburgh, and a Ph.D. in Engineering Science from Harvard University. He is also the current Chairman of the Internal Association for Fire Safety Science, a member of the NFPA and Society of Fire Protection Engineers, and a prolific scholar in fire science. A copy of Dr. Beyler's Report ("Beyler Report") is attached as Exhibit K.

⁸⁰ See Beyler Report at 2.

⁸¹ Mr. Goodson is an engineer and fire investigation expert in Denton, Texas. He holds a B.S. in Electrical Engineering from Texas A&M, and has served as a court-appointed special master. He is also a Fellow of the American Academy of Forensic Sciences and a member of the IAAI and the NFPA.

⁸² Dr. DeHaan has more than 35 years of forensic experience with fires and explosives, and has testified as an expert witness in more than 50 cases. He holds a B.S. in physics from the University of Illinois and a Ph.D. from the University of Strathclyde in Glasgow, Scotland. Dr. DeHaan is the author of the widely-read textbook Kirk's Fire Investigation, now in its sixth edition. He is also a Fellow of the American Board of Criminalistics with a Fire Debris specialty, an IAAI certified fire investigator, and a NAFI certified fire and explosion investigator.

⁸³ See Letter from Mark Goodson to Commission dated Aug. 20, 2010 (the "Goodson Letter"); see also Letter from John D. DeHaan to Commission dated Aug. 19, 2010 (the "DeHaan Letter"). Copies of the Goodson Letter and the DeHaan Letter are attached as Exhibits L and M, respectively.

In the end, no less than nine experts have examined the forensic evidence and concluded that such evidence was wrong and outdated. For this Board's reference, we have compiled their findings in chart at Exhibit P. The outright rejection of the forensic evidence means that there remains only one leg of evidence on which Willingham's conviction could stand—the testimony of jailhouse informant, Johnny Webb. But that leg too has fallen.

B. Webb Has Recanted His Testimony and He Received a Substantial Benefit

On March 30, 2000, Johnny Webb submitted an official "Motion to Recant Testimony." In a handwritten pleading to the Navarro County District Attorney's Office, Webb state as follows:

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.

A notation on the document indicates that the Motion to Recant was not filed, but instead “Gave to Dist. Judge Jackson 4-3-00.” The initials on this notation, P.C.B., match those of the elected district attorney Patrick C. Batchelor. Judge Jackson was the First Assistant District Attorney of Navarro County and the lead prosecutor at Willingham's trial. Neither the District Attorney's Office nor Judge Jackson disclosed the recantation Willingham's writ attorney.⁸⁴

Moreover, despite Webb's testimony that trial prosecutors did not offer him a deal, Webb later filed a motion in Navarro County seeking to enforce an undisclosed “contract” with then-

⁸⁴ See Affidavit of Walter Reaves (Appendix QQ).

lead prosecutor Jackson.⁸⁵ There is also evidence that Jackson repeatedly acted as an advocate for Mr. Webb with prison authorities after he claimed at trial that there was nothing he could do for Webb.⁸⁶ A 1996 letter from then Assistant District Attorney Jackson to a TDCJ official begins with the statement, “I hate to keep bothering you with Johnny Webb problems,” clearly indicating that Jackson had repeatedly sought help for Webb at the prison.⁸⁷

Then in a remarkable turn of events, the Navarro County District Attorney’s Office, the Navarro County Sheriff, and District Judge wrote to this Board asking that Mr. Webb’ 15-year sentence be commuted to 5 years.⁸⁸ Although the letters to this Board claimed that the commutation request was based on information from the victim, Jackson admitted in a letter to the Warden at the TDCJ Unit where Webb was to be released “based on executive clemency in connection with a capital murder case . . .”⁸⁹ On May 22, 1997, this Board recommended that the commutation be granted.

Around the same time, Mr. Jackson requested and obtained a nunc pro tunc judgment changing Mr. Webb’s conviction from “aggravated robbery” to second degree robbery.⁹⁰ In a letter from Mr. Jackson advocating for Webb’s parole, he claims that there was a mistake in the paperwork and that Webb’s plea bargain was intended to be for a simple robbery conviction.⁹¹ However, all of the public documents indicate that Mr. Webb was charged and convicted of

⁸⁵ See Motion for Protection (Appendix LL).

⁸⁶ See David Grann, *Trial by Fire*, The New Yorker, Sept. 7 2009 (“*Trial by Fire*”) at 52 (quoting Jackson). A copy of *Trial by Fire* is attached as Exhibit N.

⁸⁷ Exhibit MM (Letter from Jackson to TDCJ Chief McElyea)

⁸⁸ Exhibit RR (Letters from Navarro County Officials recommending commutation).

⁸⁹ Exhibit SS (Letter from Jackson to Ramsey I Warden).

⁹⁰ Compare Exhibit OO (Nunc pro Tunc judgment) with Exhibit TT (original judgment).

⁹¹ Exhibit UU (Letter from Jackson to TDCJ).

“aggravated robbery” including a waiver of indictment signed by Webb and his counsel indicating a charge of aggravated robbery and a stipulation of facts signed by Webb constituting aggravated robbery through the use of a deadly weapon.⁹² Webb made it unmistakably clear at Willingham’s trial that he had been convicted of aggravated robbery:

Q. Now presently you are under a sentence of 15 years to do in the penitentiary?

A. True.

Q. Is that aggravated or non-aggravated?

A. Aggravated.⁹³

A notation in the clerk’s file in Webb’s aggravated robbery case suggest that Jackson wanted the judgment to be ambiguous, and incorrectly instructed the clerk to inform the Texas Department of Corrections that the judgment was for non-aggravated robbery.⁹⁴

Webb has demonstrated a propensity to say whatever suits him in order to gain an advantage.⁹⁵ And it appears that, contrary to sworn testimony at trial, the district attorney has gone to great efforts to assist Webb. Yet the fact remains that “[s]ince making his statement at trial, Webb has spent much time and effort attempting to recant his testimony.”⁹⁶

⁹² Exhibit VV (Waiver of indictment and stipulation of facts).

⁹³ Tr. Vol. 11 at 41.

⁹⁴ Exhibit WW (note in clerk’s file).

⁹⁵ In a 2009 interview with New Yorker Magazine, Webb admitted that “It’s very possible I misunderstood what [Willingham] said.” Since the trial, Webb has also been diagnosed with bipolar disorder. “Being locked up in that little cell makes you kind of crazy,” he said. “My memory is in bits and pieces. I was on a lot of medication at the time. Everyone knew that.” See *Trial by Fire* at 52 (quoting Webb).

⁹⁶ Baird Draft Opinion (discussed *infra*) at 13.

C. Texas Forensic Science Commission Report Finds the Arson Testimony Invalid

In 2005, the Texas Legislature formed the Texas Forensic Science Commission (the "Commission"). The legislature tasked the Commission with investigating misconduct or professional negligence that would affect the integrity of forensic results,⁹⁷ and the Commission analyzed the scientific evidence used in this case.⁹⁸

After soliciting comments from multiple organizations—including the Corsicana Fire Department ("CFD") and the State Fire Marshal Office ("SFMO"), the Commission convened an expert panel to address the Commissioners' questions. In addition, the Commission retained Dr. Beyler to provide his expert opinion on the quality and accuracy of the original fire investigation. During the Commission's consideration of the Willingham case, Governor Perry selected new members of the Commission and replaced its chair, criminal defense attorney Sam Bassett, with then Williamson County District Attorney John Bradley.⁹⁹ This reconstituted Commission significantly narrowed the scope of the inquiry and did not ultimately comment on Mr. Willingham's guilt or innocence.

But even with this narrowed inquiry, the Commission's unanimously found that all of the evidence of arson presented in Todd Willingham's case was scientifically invalid.¹⁰⁰ Consistent with the opinions of numerous fire experts discussed above, the Commission specifically stressed that the SFMO should follow the analytical procedures in NFPA 921.¹⁰¹ For instance, the Commission noted the importance of maintaining records with respect to debris

⁹⁷ Tex. Code Crim. Proc. Ann. art. 38.01 § 4(a)(3).

⁹⁸ The Commission interviewed arson experts and retained a renowned arson expert, Dr. Craig L. Beyler, to investigate and provide a report to the Commission.

⁹⁹ See Texas Forensic Science Commission Report.

¹⁰⁰ Texas Forensic Science Commission Report at 17-31.

¹⁰¹ *Id.* at 18.

analysis and removal—procedures not followed in the Willingham case. Without records as to the removal and analysis of the debris, according to the Commission, "investigators leave themselves open to tremendous scrutiny."¹⁰² The Commission also called into question Fogg and Vazquez's so-called arson indicators.¹⁰³ Finally, the Commission was critical of misleading and unscientific testimony offered at Willingham's trial including statements like "The fire tells a story. I am just the interpreter," and "the fire does not lie. It tells me the truth."¹⁰⁴

In response to the position of the Texas State Fire Marshall's Office that it stood by its original report and arson conclusion in the Willingham case, the Commission's rejection of the arson evidence could not be more clear: "This appears to be an untenable position in light of the advances in fire science."¹⁰⁵ Noting that the problems in the Willingham case were systemic, the Commission also recommended a retroactive review of all cases in which the invalid fire investigation procedures were used to convict.¹⁰⁶

D. A Retired Judge Has Recently Concluded That Willingham Was "Wrongfully Executed"

In 2010, the Petitioners filed a petition with the Honorable Charles F. Baird, then a District Court Judge, seeking relief from the Texas courts. Relying on the scientific expertise and efforts of Dr. Hurst, the Arson Review Committee, Dr. Beyler, Mr. Goodson, and Dr. DeHaan, the Petitioners demonstrated that no credible scientific evidence exists that Willingham committed a crime. In addition, the Petitioners explained how Webb's testimony is wholly unbelievable.

¹⁰² *Id.* at 21.

¹⁰³ *Id.* at 21-29.

¹⁰⁴ Texas Forensic Science Commission Report at 35.

¹⁰⁵ *Id.* at 16.

¹⁰⁶ *Id.* at 41.

Judge Baird invited the following parties to attend an October 14, 2010 hearing on this case: (1) Navarro County District Attorney R. Lowell Thompson; (2) Governor Rick Perry; (3) State Prosecuting Attorney; (4) State Fire Marshall; and (5) Willingham's ex-wife and mother of the three descendants.¹⁰⁷ He also gave them the opportunity "to offer evidence . . . on any issue(s) presented"¹⁰⁸ None of these parties chose to participate or offer evidence. Nevertheless, Judge Baird proceeded with the hearing and, on December 22, 2010, signed, but never filed, an opinion (the "Baird Draft Opinion").¹⁰⁹

Judge Baird never filed his opinion because the Navarro County District Attorney filed a motion to recuse Judge Baird citing (1) the fact that he had previously denied Willingham's appeals while on the Texas Court of Criminal Appeals and (2) anonymous internet comments to a newspaper article questioning Judge Baird's impartiality.¹¹⁰ After Judge Baird dismissed the motion on jurisdictional grounds, the Navarro County District Attorney sought and received a stay of the hearing from the Third Court of Appeals. The State's appeal and subsequent proceedings ordered by the Third Court of Appeals in a December 21, 2010 opinion restricted Judge Baird's ability to act in the case until his judicial term expired on December 31,

¹⁰⁷ Baird Draft Opinion (defined *infra*) at 1, n.1.

¹⁰⁸ *Id.* (emphasis added).

¹⁰⁹ *In re Cameron Todd Willingham*, No. D-1-DC 10-100069, at 17 (299th Dist. Ct. (Travis County) Dec. 22, 2010) (Baird, J.) (Draft Opinion). A copy of the Baird Draft Opinion is attached hereto as Exhibit O.

¹¹⁰ See Mandamus Record on file with the Third Court of Appeals, *In re Thompson*, No. 3-10-000689 (Tex. App.—Austin).

2010.¹¹¹ Judge Baird publicly released his draft opinion after his retirement from the bench while serving as a private attorney.¹¹²

Judge Baird's draft opinion provides yet another comprehensive review of the evidence. Judge Baird agrees that the "central evidence" used to convict Willingham was the forensic evidence—i.e., Fogg and Vazquez's testimony—and Webb's testimony about an alleged confession.¹¹³ Regarding the forensic evidence, Judge Baird noticed that "some of these indicators had already been discredited by 1991" when Vazquez and Fogg performed their investigations.¹¹⁴ Moreover, by 2010—when Judge Baird wrote the Baird Draft Opinion, "each indicator ha[d] been subsequently refuted. No less than nine experts have condemned Vasquez and Fogg's conclusion that the Willingham fire was arson."¹¹⁵ Indeed, Judge Baird concluded that the "[t]he testimony given by Vasquez and Fogg has been thoroughly refuted." Judge Baird highlighted 12 indicators of arson, to which Vazquez and Fogg testified at Willingham's trial, and detailed how the indicators have been discredited.¹¹⁶ Judge Baird also found that "Webb has spent much time and effort attempting to recant his testimony."¹¹⁷

In the end, Judge Baird concluded that "[g]iven the compelling and overwhelming evidence presented . . . it is clear that the State of Texas wrongfully executed Cameron Todd

¹¹¹ *In re Thompson*, 2010 Tex. App. LEXIS 8510 (Tex. Ct. App. Oct. 14, 2010); *In re Thompson*, 330 S.W.3d 411 (Tex. Ct. App. 2010).

¹¹² Michael McLaughlin, *Cameron Todd Willingham Exoneration Was Written But Never Filed By Texas Judge*, Huffington Post (May 19, 2012).

¹¹³ Baird Draft Opinion at 5-6.

¹¹⁴ *Id.* at 6.

¹¹⁵ *Id.*

¹¹⁶ Attached as Exhibit P is a chart summarizing Judge Baird's conclusions on each of these so-called "arson indicators." We offer this chart here merely to highlight Judge Baird's conclusions. For a more in-depth discussion of the forensic evidence, see Appendix A.

¹¹⁷ Baird Draft Opinion at 13.

Willingham . . . The legislature is encouraged to pass comprehensive legislation to ensure that an innocent human life is never again taken in the name of the Citizens of Texas."¹¹⁸ While it is true that the legislature should pass legislation to protect the citizens of Texas from being wrongfully executed, it is also true that this Board has the opportunity to act now to right the wrong that has been committed.¹¹⁹

To be sure, the Baird Draft Opinion is not binding judicial precedent. Despite receiving notice of the hearing and an invitation to attend and testify, the prosecutors, fire marshal's or other members of law enforcement who defend the verdict and sentence declined to come to court and defend their positions. Notwithstanding the procedural issues that limited his review, the Board should consider the Baird Draft Opinion for what it is: a sincere attempt by a Judge who personally affirmed a guilty verdict and death sentence to determine the truth.

The Texas Court of Criminal Appeals considered Willingham's case twice: on direct appeal in 1995¹²⁰ and on the initial habeas application in 2004.¹²¹ As Judge Baird readily admits, "I was a member of the Court of Criminal Appeals on both occasions, and, therefore, I am partially responsible for this miscarriage of justice."¹²² For this reason alone, Judge Baird's ultimate conclusion in this matter deserves respect and serious consideration.

Finally, this Board is in a position to conduct its own analysis of the evidence presented to Judge Baird, more evidence of misconduct with respect to the Webb testimony than

¹¹⁸ *Id.* at 13, 18.

¹¹⁹ Indeed, Judge Baird's efforts were cut short, in the end, by the Court of Appeals' strict adherence to a procedural issue. *See supra*.

¹²⁰ *Willingham v. Texas*, 897 S.W.2d 351 (Tex. Crim. App. 1995).

¹²¹ Order, *Ex Parte Cameron Todd Willingham*, No. 35162-02 (Tex. Crim. App. Feb. 17, 2004).

¹²² Baird Draft Opinion at 15 n.7.

was known when Judge Baird heard the case, and yet more evidence the Board can gather itself. The same exhibits presented to Judge Baird are attached as noted in the Exhibit Index. This Board has the power to hold its own hearing and subpoena any documents that it deems to be relevant under Texas Gov't Code §508.048. The fact that Judge Baird took an honest look at this evidence and concluded that "Willingham suffered the ultimate indignity of being put to death for a crime that he did not commit" gives reason to pause.¹²³ All Petitioners ask of this Board is to evaluate the evidence that exists today and to make an honest determination of what that evidence indicates.

V. This Board Should Remedy the Damage Done to Willingham's Reputation and to His Family

Willingham's name should be cleared and his reputation repaired. In a final letter to the mother of his children, days before his execution, Willingham expressed his hope that "some day, somehow the truth will be known and my name cleared."¹²⁴

A. The Trial Evidence of Mr. Willingham's Bad Character Was Weak and Based on Junk Science

In contrast to the seventeen witnesses who testified that Willingham was an attentive and loving father who would not have murdered his children, the State presented rank and disputed hearsay and junk science to suggest that Willingham was instead a violent psychopath. Willingham's criminal record was non-violent and consistent with a young man struggling with addiction. Most of Willingham's criminal history was in Oklahoma, and petty

¹²³ *Id.* at 2.

¹²⁴ *Trial by Fire* at 62.

theft and sniffing paint. The closest to a violent crime on his record was that at the age of eighteen, he was once convicted of pointing a BB gun at two other eighteen year olds.¹²⁵

The State attempted to present some evidence of violent tendencies or animus between Willingham and his children. Karen and Kim King, a former neighbor of Stacey Willingham and the neighbor's teen-aged daughter, testified that Stacey complained to them that Willingham had physically abused Stacey when she was pregnant and that Stacey had sustained visible injuries.¹²⁶ At the time of the alleged abuse, however, the Kings lived over 100 miles away from the Willingham's in Gainesville, TX. Another neighbor in Corsicana witnessed a loud argument between the couple.¹²⁷ Stacey herself vehemently denied the abuse and the making the statement to the Kings. Furthermore, no one who actually saw the Willingham's on a daily basis in Corsicana confirmed what were described as obvious injuries to a pregnant woman. Another witness, also from Gainesville, testified that Willingham once claimed to have once killed a dog. Aside from these two incidents, the State presented general testimony from law enforcement officers who claimed Willingham had a bad reputation and attempted to demonize Mr. Willingham for having tattoos and for hanging rock music posters from the groups Iron Maiden and Led Zeppelin in his home.¹²⁸

¹²⁵ Tr. Vol. 14 at 53.

¹²⁶ Tr. Vol. 14 at 22-33.

¹²⁷ Tr. Vol. 14 at 68.

¹²⁸ Far from a sign of deviance, a 2010 survey found that 32% of people between the ages of 30-45 have at least one tattoo. See http://www.nytimes.com/2013/04/18/fashion/tattoos-peek-out-at-offices-but-only-at-some.html?_r=0. The bands mentioned at trial are mainstream and have received critical recognition. Iron Maiden is a Grammy Award winning rock band that has sold over 85 million records worldwide. See <http://www.grammy.com/blogs/the-53rd-grammys-rocked>; http://www.nytimes.com/2010/09/06/business/media/06maiden.html?_r=3&ref=music&. The founders of the legendary band Led Zeppelin have been given awards by both Barack Obama (Kennedy Center Honor) and the Queen of England (Robert Plant named Commander and Jimmy Paige named Officer of the Order of the British Empire). See <http://www.forbes.com/sites/davidwisner/2012/12/27/hearts-ann-wilson-kills-led-zeppelins-stairway-to-heaven-at-kennedy-center-awards-see-it-here/>; <http://catherinesherman.wordpress.com/2009/07/13/robert-plant-receives-commander-of-the-british-empire-honor/>.

With such thin evidence that Willingham was dangerous, the State resorted to another sort of discredited expert testimony. A license professional counselor specializing in marriage and family therapy and the notorious Dr. James Grigson were retained by the State and testified based only on a short hypothetical question that Willingham was a dangerous psychopath with no hope of rehabilitation.¹²⁹ There is no evidence that either expert met Willingham, conducted a psychological evaluation, or spoke to anyone with first-hand knowledge of the case, including the seventeen witnesses who attested to his good character. This sort of prediction of future dangerous was controversial at the time, earning Dr. Grigson the nickname “Dr. Death.” More recently the Texas Court of Criminal Appeals has barred such testimony from the courtroom because it is unreliable, citing Dr. Grigson’s testimony in capital cases as an example of this junk science.¹³⁰

B. Mr. Willingham and his Family Have Been Harmed by the Conviction

Although Willingham is deceased, his family continues to suffer because of the damage done by the State of Texas to Willingham's reputation. Willingham certainly had his faults¹³¹ but he was not a psychopath and the contention that he purposefully killed his own children was personally devastating.¹³² Even after Willingham’s execution and evidence of innocence came to light, Willingham was publicly described as "an absolute monster who killed

¹²⁹ TR Vol. 72-85; 90-98.

¹³⁰ *Coble v. State*, 330 S.W.3d 253, 283 (Tex. Crim. App. 2010).

¹³¹ For example, at the sentencing hearing, Prosecutor Jackson alleged that Willingham beat his wife. Willingham’s wife responded by stating, “Me and Todd argued, just like everybody else. Sometimes we did have fights but Todd got more bruises and stuff than I did . . .” Aug. 20, 1992 Tr. at 12:11-20.

¹³² *See Baird Draft Opinion* at 2 (“Cameron Todd Willingham suffered the ultimate indignity . . . that indignity is magnified by the fact that the crime for which he was wrongfully executed was the justly reviled crime of filicide [, killing one’s own children].”).

his own kids" By the Governor.¹³³ However, Governor Perry is not the only official that has not looked closely at the evidence we now know about the case and Willingham. John Jackson, the prosecutor at Willingham's trial told PBS's *Frontline*, "[Willingham] was an individual with essentially no redeeming values. This was his crowning achievement as a psychopath, the murder of his three children."¹³⁴ These statements have been made despite detailed assessments by leading arson experts refuting the conclusions drawn by the original investigators and Johnny Webb's recantation. This Board's recognition, even posthumously, of his innocence would enable his family to start to move on from this tragic accident.

VI. The Board Should Conduct a Hearing on This Application

The U.S. Supreme Court has told us that it is "an unalterable fact that our judicial system, like the human beings who administer it, is fallible."¹³⁵ The clemency power, deeply rooted in Anglo-American legal tradition, has served as the "historic remedy for preventing miscarriages of justice where judicial process has been exhausted."¹³⁶ Yet when this Board does not receive the evidence it needs to evaluate a person's innocence, it cannot serve as a constitutionally-required "fail safe." And there can be little doubt that Texas' criminal justice system (including the clemency system) failed Willingham in 2004. It is worth noting that judicial review of new evidence like that in Willingham's case has improved. The Court of Criminal Appeals expanded review of false testimony in a 2009 decision and the Legislature recently enacted article 11.073 of the Code of Criminal Procedure that allows for review of cases involving new scientific

¹³³ Jeff Carlton, *Texas Panel Ready To End Disputed Arson Inquiry*, The Associated Press, Sept. 14, 2010, available at <http://www.statesman.com/news/texas/texas-panel-ready-to-end-disputed-arson-inquiry-915514.html>.

¹³⁴ *Frontline: Death by Fire* (PBS Television) (transcript available at: <http://www.pbs.org/wgbh/pages/frontlinedeath-by-fire/etc/transcript.html>).

¹³⁵ *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

¹³⁶ *Id.* at 412

evidence.¹³⁷ Had the Hurst report been presented to the courts in a capital case today, Willingham would have been entitled to a hearing and ultimately would have been exonerated.

Unfortunately, this Board has not made similar improvements in the way it reviews claims of innocence in penalty cases. A committee of the American Bar Association recently found that the clemency process in Texas capital cases did not meet any of the Bar's recommended minimum procedures.¹³⁸ While it is true that this Board's directives are limited and hearings are not mandatory, this Board has the express authority and the moral obligation to conduct a thorough and transparent review when an innocent man has been executed. The Board should hold a public hearing on this application so that all interested parties may be heard and the public can have confidence in the process.

Conclusion

Petitioners respectfully request that this Board examine the evidence used against Willingham—in light of modern investigation techniques and in light of Webb's recantation—and make an honest assessment. Speaking on the death penalty exoneration process, Governor Perry has already acknowledged that the system allows us "to find errors that were made and clear them up."¹³⁹ A tragic error was made in Mr. Willingham's case that cost Todd Willingham his life, and has cast a shadow of shame and grief on his family. It is time to clear it up.

¹³⁷ See *Ex Parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009); Tex. Code Crim. Proc. Art. 11.073 (effective September 1, 2013).

¹³⁸ Exhibit XX (Clemency Chart from ABA Report).

¹³⁹ See Elliott Blackburn, *Release of innocent man who spent 18 years in prison proves system works, Perry says*, Lubbock Avalanche-Journal, Oct. 29, 2010, available at <http://lubbockonline.com/filed-online/2010-10-29/release-innocent-man-who-spent-18-years-prison-proves-system-works-perry>.