FROM AN INSUFFICIENT CRIMINAL INVESTIGATION THROUGH IGNORED POSTHUMOUS EFFORTS TO EXONERATE: HOW THE SYSTEM FAILED CAMERON TODD WILLINGHAM AT EVERY STEP AND ALLOWED THE STATE OF TEXAS TO EXECUTE A LIKELY INNOCENT MAN

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It should be noted at the outset that the dissent does not discuss a single case—not one—in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it; the innocent's name would be shouted from the rooftops by the abolition lobby. [1]

Justice Antonin Scalia

I. INTRODUCTION

Shouts from rooftops. That is how we will know if and when an innocent man is executed in the United States, according to Justice Antonin Scalia.[2] The timing of his assertion, made in a 2006 dissenting opinion in *Kansas v. Marsh*,[3] probably seemed rather odd to those familiar with the case of Cameron Todd Willingham. Those doubting Willingham's guilt hadn't taken to rooftops, but they had been fighting for more than a decade to prove his innocence. Just two

1 Kansas v. Marsh, 548 U.S. 163, 188 (2006) (Scalia, J., dissenting).
2 *Id.*
3 *Id.*

years prior to *Marsh*, the *Chicago Tribune* published a groundbreaking story detailing how the arson evidence used to convict Willingham of murdering his three little girls was based on little more than old wives' tales.[4] Most investigators who have reviewed the evidence against Willingham now believe that the fire was not arson but rather a tragic accident.[5] Even if it is not "clear," as Justice Scalia may argue, that Willingham is actually innocent, it is clear that the evidence used to convict Willingham was so deeply flawed that it is highly unlikely he would be convicted if tried today using scientifically and legally sound evidence. And it is also clear that Willingham's case raises serious concerns about whether a United States government executed an innocent man.

Doubts about Willingham's guilt existed long before the *Tribune* article made a national story out of him. Indeed, doubts arose well before Willingham's 2004 execution.[6] In the final months before Willingham's execution, his attorneys and a well-known arson expert had

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[4] Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics, Fire that Killed His 3 Children Could Have Been Accidental*, CHICAGO TRIBUNE, at C1 (Dec. 9, 2004) *available at* http://www.chicagotribune.com/news/nationworld/chi-0412090169dec09,0,1173806.story.

[5] *Id.*; Brandi Grissom, *Citing New Evidence, Urging a Posthumous Pardon in 1992 Case*, N.Y. Times (Sept. 26, 2013) *available at* www.nytimes.com/2013/09/27/us/citing-new-evidence-urging-posthumous-pardon-in-1992-case.html?_r=1& ("Several fire scientists . . . have concluded that the science underpinning [Willingham's conviction] was faulty. In April 2011, the Texas Forensic Science Commission agreed."); David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, New Yorker at 8 (Sept. 7, 2009) *available at* www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann. Page numbers to the Grann article refer to the page on which the cited material appears in the online version of this article. These page numbers do not match the print version.

[6] Grann, *supra* note 5 at 8 (describing the troubling facts unearthed in 2000 by an informal investigation into Willingham's case that was conducted by a pen pal Willingham befriended).

frantically produced and presented to courts a report detailing the flaws in the State's evidence.[7] In the end, none of their efforts would matter. Willingham was executed on February 17, 2004.[8]

In the years that have passed since Willingham's execution, the evidence pointing toward his innocence has only mounted. Given this abundance of evidence, Willingham's case also raises concerns over whether the appeals process, and specifically Texas's, provides those convicted of capital murder an adequate opportunity to prove their innocence. Part II of this paper will provide an overview of Willingham's case; from the fire that started this tragic tale, to the trial that resulted in his death sentence. Part III details the exculpatory evidence that arose after Willingham's trial. Part IV, meanwhile, will provide an overview of the process Willingham and his attorneys pursued in attempting to appeal his conviction, and argues that this process failed to provide Willingham an adequate opportunity to prove his actual innocence. Finally, Part V discusses the most recent steps Willingham's supporters have taken to clear his name.

II. A FIRE, A TRIAL, AND A DEATH SENTENCE

A. *The Fire and Investigation*

Willingham, 23, his wife Stacy, 22, and their three young daughters lived in a modest home in a working-class neighborhood of Corsicana, Texas.[9] On the morning of December 23, 1991,[10] Willingham and his daughters were asleep while Stacy was out running errands in

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[7] Petition to Convene a Court of Inquiry and for a Declaration to Remedy Injury to Mr. Willingham's Reputation Under the Texas Constitution, In Re: Cameron Todd Willingham (Sept. 24, 2010) Ex. 6 [hereinafter Petition, Exhibit 6 of the Petition is hereinafter the Hurst Report] *available at* www.innocenceproject.org/docs/willingham/Willingham_COI_Petition.pdf.

[8] Grann, *supra* note 5 at 8.

[9] *Id.* at 1, 2.

[10] Petition, Ex. 3 at 1 (Exhibit 3 of Petition hereinafter Fogg Report].

anticipation of Christmas.[11] Willingham told police he woke up when he smelled smoke and heard his three-year-old Amber yelling "Daddy, Daddy!"[12] After unsuccessfully attempting to gain entrance to the girls' room, Willingham said he ran outside to get help.[13] Amber, and one-year-old twins Kameron and Karmon, were trapped inside.[14] Amber was rushed to the hospital, where she died of smoke inhalation.[15] Kameron and Karmon were pronounced dead at the scene.[16]

Witnesses initially told police that Willingham was frantic, inconsolable, and had to be physically restrained when he attempted to rush back into the burning home to save his daughters.[17] Later, however, many of these witnesses would tell investigators that Willingham acted strange during fire. First, one witness said, Willingham did not try to enter the home until after authorities had arrived at the scene.[18] Second, when the house exploded in flames, Willingham calmly moved his car out of the driveway.[19] Meanwhile, fire investigators, led by Assistant Fire Chief Douglas Fogg and Fire Marshal Manuel Vasquez, were finding more and more evidence leading them to believe not only that the fire was intentional, but that Willingham was the sole person who could have set the home aflame.[20] Moreover, the investigators had

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[11] Grann, *supra* note 5, at 1; Michael McLaughlin, *Cameron Todd Willingham Exoneration Was Written But Never Filed by Texas Judge*, HuffPost (May 19, 2012) *available at* http://www.huffingtonpost.com/2012/05/19/cameron-todd-willingham-exoneration_n_1524868.html.

[12] Grann, *supra* note 5, at 1.

[13] *Id.*

[14] *Id.*

[15] Petition, *supra* note 7, at 7.

[16] *Id.*

[17] Grann, *supra* note, at 1.

[18] *Id.* at 2.

[19] *Id.* Willingham later explained this seemingly strange act by saying that he moved the car because it was parked near burning the house and was concerned his children, who were still trapped inside, could be further harmed if the car caught fire and exploded. *Id.* at 6.

[20] *Id.* at 2-3.

determined that the fire started in the bedroom all three girls shared. Pour patterns indicated to them that the girls' bed had been doused with accelerant.[21] To the investigators, this could only mean one thing; Willingham started the fire specifically to kill his daughters.[22] On January 8, 1992, police arrested Willingham.[23]

B. *The Trial*

Because the fire resulted in multiple deaths and because the deaths occurred during the commission of an alleged arson, Willingham was eligible for the death penalty.[24] He was appointed two public defenders; David Martin and Robert Dunn.[25] Both men were convinced Willingham was guilty and so, when prosecutors approached them with a plea bargain, they urged their client to take the deal.[26] Willingham was an admittedly flawed human being; a "sorry-ass husband" as he described himself.[27] He was an adulterer, an alcoholic, and a domestic abuser.[28] But he was not, he insisted, a murderer.[29] Willingham turned down the offer to plead guilty in exchange for life in prison, telling his attorneys that he refused to plead guilty to a crime he did not commit.[30] "I ain't gonna plead to something I didn't do, especially killing my own kids," Willingham told them.[31]

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21 *Id.* at 2.

22 *Id.* at 3.

23 Petition, *supra* note 7, at 9.

24 TEX. PENAL CODE ANN. § 19.03(a)(2), (7) (providing that a murder is death eligible if it is intentionally committed during the commission of arson or when multiple murders are committed).

25 Grann, *supra* note 5, at 4

26 *Id.* at 4-5.

27 *Id.* at 6.

28 *Id.* at 3.

29 *Id.*

30 Petition, *supra* note 7, at 11.

31 Grann, *supra* note 5, at 5.

Shortly after Willingham's arrest, Johnny Webb, Willingham's fellow inmate, contacted authorities and alleged that Willingham had confessed to him.[32] Webb was a longtime petty criminal and drug addict who was seeking leniency for his latest crimes.[33] Despite his undesirability as witness, Webb offered prosecutors the one key element they were missing in their case against Willingham: a motive. Webb claimed that Willingham had told him that he started the fire in order to cover up the fact that Stacy had injured one of the girls.[34]

Willingham's trial started in August 1992.[35] Much of the prosecution's case relied on testimony from the two lead fire investigators, Vasquez and Fogg, who painted a grisly picture of the fire and, therefore, the man they believed started it. Fogg testified that he and Vazquez identified "pour patterns" in the girls' bedroom, hallway, and porch door.[36] Pour patterns, Fogg told the jury, are irregularly shaped patterns that are darker than other burned areas.[37] These pour patterns, Fogg explained, are a sure sign that an accelerant was used and, therefore, that the fire was intentional.[38] The floor around the girls' beds was one of the most charred areas in the house.[39] This, according Vazquez, meant that the area under and around the girls' beds had burned hotter than at the ceiling level, which is "not normal" given that heat generally rises.[40] Based on these findings, the investigators concluded that one of the fire's points of origin was in the girls' bedroom. Fogg said his investigation revealed no signs of faulty wiring in the bedroom

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32 *Id.* at 4.
33 *Id.* at 8.
34 *Id.*
35 *Id.* at 5.
36 Petition, *supra* note 7, at 9; Fogg Report, *supra* note 10.
37 Grann, *supra* note 5, at 2.
38 Petition, *supra* note 7, at 9; Fogg Report, *supra* note 10.
39 Grann, *supra* note 5, at 2.
40 *Id.*; Petition, *supra* note 7; Petition, *supra* note 7 at Ex. 4 [hereinafter Vasquez Report].

and said he did not believe that a space heater that was in the bedroom could have caused the fire because it was in the "off" position.[41]

The investigators located two other points of origin in the home; the threshold of the front door, where Willingham exited the home the night of the fire, and the hallway between the door and the girls' bedroom.[42] In the hallway, Vazquez and Fogg found soot marks along the wall that resembled a *V*.[43] According to the investigators, this distinct *V* shape forms when an object quickly catches fire; it is an indication that the area is a point of origin for a fire.[44] Vazquez and Fogg also found melted aluminum at the porch doorway, another sure sign that an accelerant was used because wood only burns 800 degrees Fahrenheit while aluminum does not melt until 1,200 degrees.[45] Finally, Vasquez noted the presence of highly fractured "crazed glass" in the windows, which is evidence that a fire has burned "fast and hot," another indicator that accelerant was used to intentionally start to the fire.[46] At the end of Fogg's and Vazquez's testimony, the jury had a clear picture of how the investigators believed the fire occurred. Willingham had started by dousing the area around the girls' bed with accelerant. He continued pouring it as he walked out of their room, down the hallway, and out the front door.[47] Willingham's actions, the prosecutor argued, were designed to block all exits out of the home, creating a deathtrap for his girls inside.[48]

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41 Petition, *supra* note 7, at 12, Fogg Report, *supra* note 10. .
42 Grann, *supra* note 5, at 2.
43 *Id.*
44 *Id.*
45 Petition, *supra* note 7; Vasquez Report, *supra* note 38.
46 Petition, *supra* note 7; Vasquez Report, *supra* note 38.
47 Grann, *supra* note 5, at 2.
48 *Id.*

Willingham's defense attorneys tried to find a fire expert to rebut the testimony of Fogg and Vasquez. However, the only one they contacted agreed with Fogg and Vasquez.[49] In the end, Willingham's defense team presented only one witness; the Willinghams' babysitter who said she did not believe Willingham was capable of killing his own daughters.[50]

Before the trial was over, prosecutors again offered Willingham a chance to save his life if he pleaded guilty. In an attempt to convince Willingham to plead, one of his attorneys showed Willingham's parents pictures of the little girls' charred bodies. "Look what your son did," the attorney told the parents. "You've got to talk him into pleading, or he's going to be executed." Willingham's parents pleaded with him to take the deal but, again, he again refused. The jury deliberated for an hour before returning guilty verdicts on all three counts of murder.[51]

With a guilty verdict in hand, the State set about proving that Willingham would commit future violent acts that would constitute a continuing threat to society; a vital element to the State's case during the penalty phase in order to make Willingham eligible for the death penalty.[52] To accomplish this, the State introduced evidence indicating Willingham was preoccupied with death and violence. They noted that Willingham had a large tattoo of a serpent wrapped around a skull.[53] Prosecutors showed the jury photographs of posters Willingham had in his house: an Iron Maiden poster showed a fist being punched through a skull; a Led Zeppelin poster depicted a falling angel; still another poster portrayed a hooded skull with wings and a hatchet.[54] The State's psychologist testified that these images indicated Willingham was

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49 *Id.* at 8.
50 *Id.* at 5.
51 McLaughlin, *supra* note 11.
52 Willingham v. State, 897 S.W.2d 351 (Ct. Crim. App. 1995).
53 Grann, *supra* note 5, at 8.
54 *Id.* at 7.

obsessed with death and dying, and that people who have this kind of art engage in cult-like and satanic activities.[55]

Finally, the State delivered its deathblow and called forensic psychiatrist James P. Grigson the stand. At the time of Willingham's trial, Grigson was one of the most "praised, reviled, criticized, reprimanded and relied [upon] forensic psychiatrists in Texas's history."[56] He had testified in more than 150 capital cases, and almost always appeared as a witness for the State.[57] He was notorious for telling juries that he could predict with 100 percent accuracy whether a defendant would kill again if given the chance.[58] On occasion, he would tell a jury that there was "a one thousand percent chance" that the defendant would be a future danger.[59] Bold statements such as these, along with the easy-going, down-to-earth manner with which he approached juries had earned him the nickname "Dr. Death."[60] As journalist David Grann noted, "A Texas appellate judge once wrote that when Grigson appeared on the stand the defendant might as well 'commence writing out his last will and testament.'" Grigson had not personally examined or interviewed Willingham, yet he testified that Willingham was "an extremely severe sociopath" who could not be cured.[61] "[T]here is no pill, no medication, and there is no treatment

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55 *Id.*

56 Mike Tolson, *Effect of Dr. Death and His Testimony Lingers*, HOUSTON CHRONICLE (June 17, 2004) *available at* http://www.chron.com/news/houston-texas/article/Effect-of-Dr-Death-and-his-testimony-lingers-1960299.php.

57 ROGER J. R. LEVESQUE, THE PYSCHOLOGY AND LAW OF CRIMINAL JUSTICE PROCESSES 505 (2006).

58 *Id.*

59 *Id.*

60 Tolson, *supra* note 56.

61 Grann, *supra* note 5, at 8; Petition, *supra* note 7, at 12.

process. There's no rehabilitation anywhere in the world that modifies [a sociopath's] behavior," Grigson told the jury.[62]

After Grigson, the jury heard testimony from Willingham's friends, family, and acquaintances. Evidence of Willingham's troubled past was explored, along with his often tumultuous relationship with his wife. The defense sought to introduce enough mitigating evidence to convince the jury that a life sentence, not death, was appropriate. But the last thing the jury heard before going into deliberations, were the final words of the prosecutions closing:

> As I was preparing for this case, I ran across a bit of -- a bit of ancient verse that describes the anomaly, the aberration of Cameron Todd Willingham. It talks about demons. It talks about monsters. That ancient hand wrote, "The Almighty hand drove those demons out and they're exiled; they're shut away from men; they're split into a thousand forms of evil. Spirits and themes, monsters, a brood forever opposing the Lord's will and again and again defeated." I am asking you to defeat the evil of Cameron Todd Willingham now and forever . . . .[63]

At 10:15 a.m., the jury began deliberations. During that time they sent two notes to the court. The first asked "What is the definition of the word 'mitigating,' according to the dictionary."[64] The second asked "What does life sentence mean in term of years? Also can parole be denied."[65] The jury was informed that they were not entitled to answers to these kinds of questions. At 12:05 p.m., the jury returned. They had unanimously agreed that Willingham would pose a future threat to society and that the mitigating circumstances did not warrant a life sentence. A few minutes later, the judge formally sentenced to Willingham to death.[66]

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[62] Trial Transcript, State v. Willingham, No. 00-00-24467-CR (Nov. 1992) at 95-96 *available at* http://www.innocenceproject.org/docs/Willingham_Transcript/Willinghamv14.pdf.

[63] Trial Transcript, State v. Willingham, No. 00-00-24467-CR (Nov. 1992) at 23-24 *available at* http://www.innocenceproject.org/docs/Willingham_Transcript/Willinghamv15.pdf.

[64] *Id.* at 24.

[65] *Id.* at 25.

[66] *Id.* at 25-28.

III. THE CASE UNRAVELS

A. *Arson Evidence*

In 1992, the National Fire Protection Association released NFPA 921, *A Guide to Fire and Explosion Investigation* (NFPA 921), which debunked much of the "science" fire investigators had previously relied on to determine whether a fire was arson or an accident.[67] Although NFPA 921 was released after Willingham's home burned, it was available by the time he was on trial for the fire.[68] Furthermore, the guidelines within NFPA 921 were already well-established scientific principles known by properly educated fire investigators.[69] But most fire investigators at the time of Willingham's trial were not properly trained.[70] Instead, most investigators learned the "art" of interpreting fires by learning from the "wisdom" passed down by their superiors.[71] Thus, most investigators received very little, if any, formal scientific training.[72] With the release of NFPA 921, investigators were put on notice that much of what they believed to be solid fire science was actually junk science.[73] Unfortunately, Willingham's defense attorneys were not aware of NFPA 921's release during the trial, and never rebutted the fire investigators' testimony, which left jurors believing they were hearing reliable, scientific evidence that unequivocally proved the fire was the result of arson. And, as will be discussed

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[67] Petition, *supra* note 7, at 20.

[68] Hurst Report, *supra* note 7, at 12 (noting that NFPA 921 was released three weeks after Fogg and Marshall completed their investigation into Willingham's house fire).

[69] Grann, *supra* note 5, at 10.

[70] Hurst Report, *supra* note 7, at 12 (noting the "many critical errors" made in Fogg's and Vasquez's reports, and that these errors were common at the time of the investigation because old and untested theories were just "accepted on faith").

[71] Grann, *supra* note 5, at 12.

[72] *Id.* (noting that most states do not even require a high school diploma in order to become a certified fire investigator, instead requiring only completion of a 44-hour course and a written exam).

[73] Mills & Possley, *supra* note 4.

below, his appellate attorneys did not learn of how flawed the arson evidence was until the very final stages of Willingham's appeal.

In 2004, shortly before Willingham was executed, renowned fire expert Dr. Gerald Hurst agreed to review the evidence used against Willingham. His report, also released prior to the execution, showed that every piece of "science" Vasquez and Fogg relied on was based on false information and "would be considered invalid in light of current knowledge."[74] First, Hurst noted that "pour patterns" are not accurate indications that an accelerant has been used.[75] Although accelerants often do leave these patterns, the patterns also regularly appear when a room experiences a flashover during a fire, which Hurst concluded undoubtedly occurred in the areas where Vazquez and Fogg found pour patterns.[76] In fact, if a room experience a flashover, it becomes impossible to determine whether an accelerant was used based on these kinds of burn patterns.[77] Vasquez and Fogg also testified that there were multiple points of origin for the fire, meaning Willingham started multiple locations of the home on fire.[78] Multiple points of origin are powerful proof of arson.[79] However, Hurst showed conclusively that there was a single point of origin in the girls' bedroom.[80] Even more importantly, Hurst noted that investigators should have recognized this this even prior to the release of NFPA 921.[81]

Hurst also debunked Fogg's and Vasquez's testimony that *V* patterns indicate a point of origin and the use of accelerants. In fact, *V* patterns are rarely indicators of an accelerant or

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74 Hurst Report, *supra* note 7, at 12.
75 *Id.* at 14.
76 *Id.*
77 *Id.*
78 Grann, *supra* note 5, at 5
79 Hurst Report, *supra* note 7, at 14.
80 *Id.*
81 *Id.* ("The findings of multiple origins was inappropriate even in the context of the state of the art in 1991.").

points of origin.[82] In reality, *V* patterns form whenever an object suddenly catches fire, and so in a fire of long duration, such as Willingham's house fire, any *V* patterns indicating the original point of origin would have been burned over and replaced by new *V* patterns having nothing to do with a point of origin or the use of accelerant.[83] Next, Hurst explained that Fogg and Vazquez's theory that accelerant caused the melted aluminum was "clearly impossible."[84] Instead, Hurst explained, aluminum at doorway threshold melts when the door to a burning room is opened, and not when an accelerant is used.[85] The sudden inflow of oxygen causes the temperature to rise to the level required to melt aluminum.[86] Today, this principle "is textbook knowledge" to trained fire investigators.[87]

Finally, Hurst blasted the investigators' testimony about the significance of "crazed glass." As previously mentioned, the investigators stated that extreme and rapid heating caused the windows to crack, and that a fire only gets hot enough to cause this when an accelerant is used. However, the exact opposite is true. Crazed glass does not occur from rapid and extreme heating but from rapid cooling, most often from water sprayed by fire hoses trying put out the blaze.[88] "The idea that crazed glass is an indicator of the use of a liquid accelerant is now classified . . . as an "Old Wives Tale," Hurst stated in his report.[89] All told, Hurst concluded that there was not a single piece of scientifically sound evidence that indicated the fire was caused by arson.

Since Hurst released his report, dozens of investigators have reviewed Willingham's case and come to the same conclusion; the evidence used to convict him was largely based on theories

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82 *Id.*
83 *Id.*
84 *Id.* at 15.
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*

that have since been disproved and were known to be incorrect well before Willingham was executed.[90] Indeed, the fire investigator who was later hired by the Texas commission charged with investigating Willingham's possible wrongful execution, reviewed Fogg's and Vazquez's investigation and testimony, and concluded that none of their analysis comported with NFPA 921 standards, and much of it did not even comport with the standard of care expected of fire investigators in 1991.[91] Both men's hypotheses were "directly contradicted by eyewitness testimony."[92]

B. *Improper Expert Testimony*

Beyond Fogg's and Vasquez's reliance on bogus science, they also offered opinion testimony that was clearly prohibited by rules of evidence. The most egregious of this testimony came from Vasquez who made blatant and damning statements about Willingham's credibility. "I've talked to the [Willingham], and I let him talk and he told me a story of pure fabrication," Vasquez told the jury.[93] "I listened to him. I never questioned him. I never asked him any questions. He just talked and talked and all he did was lie."[94] Vasquez's testimony continued:

> Q. Do you have an opinion as to who started the fire?
> A. Yes, sir.
> Q. What is that opinion.
> A. The occupant, Mr. Willingham.
> . . . .
> Q. Based upon your investigation and your examination of the scene and your conclusions, can you tell what the arsonist intended to do by setting the fire?
> A. The intent was to kill the little girls.

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[90] *See e.g.* Petition, *supra* note 7, at Ex. 1, Ex. 8, Ex. 9 (providing a brief sample of the opinions from various fire investigation experts). Exhibit 1 is hereinafter referred to as the Beyler Report.

[91] Beyler Report, *supra* note 90, at 47, 50-51.

[92] *Id.*

[93] Petition, *supra* note 7, at 15.

[94] *Id.*

Dr. Craig Beyler, the state-hired investigator, has issued one of the harshest critiques of Vazquez's testimony. In his report, Beyler states:

> "In the end Vasquez concludes that the fire was arson based solely on the physical evidence at the fire scene. Remarkably, he gleans human intent from the physical evidence. Apparently, the fire communicates with Vazquez about people as well. Vasquez's opinions are nothing more than a collection of personal beliefs that have nothing to do with science-based fire investigation
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> Vasquez's investigation did not comport . . . with the modern standard of care. Further, his investigation did not satisfy the contemporaneous standard of care. His hypothesis was directly contracted by eyewitness testimony and he admitted that he had not eliminated other possible causes. Vasquez is unique among [fire investigators] in his attitudes toward arson and fire scene investigation. His approach toward fire scene investigation is not found in any text of the day.[95]

Additionally, Dr. Grigson, who had testified that Willingham was incurable sociopath, was expelled from the American Psychiatric Association in 1995, just three years after providing his damning testimony against Willingham.[96] The association noted Grigson had a disturbing history of testifying against capital defendants without ever personally examining them and of telling juries that he could predict, with 100 percent accuracy, whether a defendant would commit a future violent act.[97] As noted by Paul Appelbaum, the psychiatry professor whose complaints ultimately led to Grigson's expulsion, "future behavior went well beyond what science can purport to know."[98] By the time he was finally expelled, the "psychiatric establishment considered his opinions little more than quackery."[99] The testimony Grigson provided in Willingham's trial was nearly identical to the testimony he gave in the case against Randall Dale Adams, who was convicted in 1977 of murdering a police officer. Adams had no prior criminal history, yet Grigson claimed, again without personally examining him, that Adams

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95 Beyler Report, *supra* note 90, at 50-51.
96 Grann, *supra* note 5, at 8.
97 Tolson, *supra* note 56.
98 *Id.*
99 *Id.*

was a severe sociopath who would commit future violent crimes.[100] After 12 years on death row, and coming within 72 hours of being executed, new evidence emerged showing that Adams was not involved in the officer's murder.[101] Adams was exonerated and has not had run-ins with the law since.[102]

C. *Jailhouse Snitch*

Jailhouse snitches are notoriously unreliable witnesses and are one of the leading causes of wrongful convictions.[103] Nonetheless, prosecutors regularly rely upon snitch testimony to make their cases.[104] Willingham's case was no different. As previously mentioned, Johnny Webb's testimony provided the State with a much-needed motive to tell the jury. However, when Elizabeth Gilbert began informally investigating Willingham's case in 2000, she immediately noticed the weakness of Webb's testimony and credibility.[105] Gilbert had become acquainted with Willingham through a prison pen pal program. After speaking with Willingham, she started questioning the State's theory of Willingham's motive for starting the fire and decided to talk to people associated with the case.[106] Gilbert discovered that another inmate had overheard Webb say that he was hoping to get time cut from his sentence in exchange for his testimony.[107] The jury was never allowed to hear this testimony because the judge determined it was inadmissible hearsay. When Gilbert met with Webb, he admitted to be suffering from PTSD at the time of

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100 *Id.*

101 *Id.*; Grann, *supra* note 5, at 7.

102 Tolson, *supra* note 56.

103 Center on Wrongful Convictions, Northwestern University School of Law, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* (2005) *available at* http://www.law.northwestern.edu/wrongfulconvictions/documents/SnitchSystemBooklet.pdf.

104 *Id.*

105 Grann, *supra* note 5, at 8.

106 *Id.* at 7-8.

107 *Id.* at 8.

Willingham's trial and had difficulty remembering events.[108] Webb had also claimed Willingham told him that he killed the girls to cover up the fact that Stacy had hurt one of the girls. However, the autopsy reports showed no signs of injury or trauma to any of the girls' body beyond what was attributable to the fire.[109] In 2000 Webb sent prosecutors a letter recanting his testimony, only to recant his recantation a few days later.[110] When Grann interviewed Webb, he admitted he had been diagnosed as bipolar since the trial, was heavily medicated at the time of the trial, and that he could only remember things in "bits and pieces."[111]

Despite his shakiness as a witness, Webb and prosecutors had always maintained that Webb was not given any leniency in exchange for his testimony.[112] "We didn't cut him any slack," prosecutor John Jackson told Grann in 2009. However, the Innocence Project recently obtained documents that Innocence Project co-founder Barry Scheck says show prosecutors actually granted Webb significant leniency and sought to hide Webb's recantation from Willingham's defense counsel.[113] First, in 1992, the same year Webb testified against Willingham, Webb admitted to committing a robbery at knifepoint, and agreed to and was convicted of aggravated robbery, for which he had just begun serving a 15-year sentence at the time of Willingham's trial.[114] Yet in 1996 and 1997, Jackson and others began writing letters stating that they believed Webb's 15-year-sentence was excessive, and that he should be granted

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108 Grann, *supra* note 5, at 8.

109 *Id.* at 16.

110 *Id.* at 8; Petition for Posthumous Pardon Exhibits, Appendix A (showing the Webb's original letter recanting his testimony) *available at* www.innocenceproject.org/Content/Cameron_Todd_Willingham_Posthumous_Pardon_Filing_Documents.php, click on "Letter to Rick Perry - Appendices" [hereinafter Perry Letter Exhibits].

111 Grann, *supra* note 5, at 8.

112 Grissom, *supra* note 5; Grann, *supra* note 5, at 8.

113 Grissom, *supra* note 5.

114 *Id.*; Perry Letter Exhibits, *supra* note 110, at App. F.

clemency.[115] Even more telling, in 1997, just prior to Webb's early release, Jackson sent a letter to Webb's warden inquiring about the whereabouts of some of Webb's belongings.[116] The letter established a direct link between Webb's testimony against Willingham and his release. In the letter, Jackson noted that Webb was "about to be released, based upon executive clemency *in connection with* a capital murder case."[117] Finally, although Webb attempted to formally recant his testimony in 2000, Willingham's defense counsel were not made aware of the letter until after Willingham's execution.[118]

All told, every piece of evidence used to convict Willingham of murdering his daughters turned out to be either entirely false or extremely unreliable. Unfortunately, much of this information was not known to Willingham, his supporters, or his advocates, until well after his conviction and well into his appeals process.

IV. WILLINGHAM'S APPEALS

A. *Direct Appeals*

After his conviction, Willingham spent the next few years going through a death row inmate's typical appeals process. His journey began with an automatic direct appeal to the Texas Court of Criminal Appeals, which is the state's highest court for criminal cases and only reviews the record for trial errors.[119] In his appeal, he argued the trial court erred (1) in refusing to grant a motion for a change of venue because the prosecutor made inflammatory pretrial statements, (2) in refusing to admit defense evidence to impeach a State witness, (3) in failing to instruct the jury during the punishment phase that, if convicted of life instead of a death sentence, he would have

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115 Grissom, *supra* note 5; Perry Letter Exhibits, at App. D and E.

116 Perry Letter Exhibits, *supra* note 110, at App. E.

117 *Id.*

118 Grissom, *supra* note 5.

119 In Texas, state appeals go directly to the Court of Criminal Appeals, bypassing the state court of appeals and the Texas Supreme Court.

to serve a minimum of 35 years in prison before becoming eligible for parole.[120] His final argument was that there was insufficient evidence to prove he was a continuing threat to society and that the mitigating circumstances did not warrant a life sentence.[121]

The court began by recounting the "heinous" nature of the crime, and in denying Willingham's fourth argument, the court relied exclusively on Grigson's[122] and Webb's testimony as proof that there was sufficient evidence to support the jury's findings.[123] In denying Willingham's first two arguments, the court noted significant mistakes made by Willingham's trial attorneys. First, the court noted, after the initial motion for a change of venue was denied, the attorneys never again raised the issue during or after voir dire, even though the trial court said it would revisit the issue if it arose again.[124] In regard to Willingham's second argument, the court noted that the defense witness who could have impeached Webb's testimony may have been allowed to testify if trial counsel had laid a proper foundation for the testimony; however, they never did.[125] Willingham's third argument was denied because the court held that eligibility for parole is not a "mitigating circumstance" proper for a jury to consider during the punishment phase.[126] As previously noted, the jury asked how long Willingham would serve without a death sentence and, thus, undoubtedly would have considered the 35-year minimum to be an important consideration.[127] Unsurprisingly, the appeal was denied.[128] Six months later, the U.S. Supreme Court denied his petition for writ of certiorari.[129]

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120 Willingham v. State, 897 S.W.2d 351, 354, 359 (Tex. Ct. Crim. App. 1995).

121 *Id.* at 354.

122 Grigson would be expelled from the American Psychiatric Association just four months after the court's decision.

123 *Willingham*, 897 S.W.2d at 354-55.

124 *Id.* at 357.

125 *Id. at* 358.

126 *Id.* at 359.

127 Trial Transcripts, *supra* note 63, at 25.

B. *State Habeas Relief*

In 1996, Willingham received a new court-appointed defense attorney, Walter Reaves.[130] After reviewing Willingham's case, Reaves told Grann that he was appalled by the quality of work Willingham's previous attorneys had provided during the trial and initial appeals process.[131] Reaves set about preparing Willingham's state writ of habeas corpus to the Texas Court of Criminal Appeals. The writ is one of the most important stages in the appeals process because it is one of the only stages at which a convict can introduce new evidence.[132] This was Willingham's best chance to get a court to consider the critical defects in the State's evidence: Webb's lack of credibility, the faulty fire forensics, and Grigson's expulsion from the American Psychiatric Association.[133] But Reaves had few resources available to him and never discovered this new evidence. Instead, his writ raised mostly procedural issues in the case, including a claim

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128 *Willingham*, 897 S.W.2d at 354.

129 Willingham v. Texas, 516 U.S. 946 (1995).

130 Grann, *supra* note 5, at 11.

131 *Id.* In *Incendiary: The Willingham Case*, which was released in 2011, Willingham's defense attorney David Martin vehemently *defended* the original fire evidence used *against* Willingham and the jury's reasonableness in finding Willingham guilty. *See* 16:20 of *Incendiary*. Completely unperturbed by the new fire evidence and apparently unaware of his continuing ethical obligations toward his client, Martin responded to Hurst and other qualified fire experts by stating:

> All of that is a red herring, rabbit trail, irrelevant. Look at the body of evidence and the crime scene and the conduct of the defendant. The jury reached their verdict based on all the evidence, not just based on one or two fine points. There seems to be perception that the criminal lawyer can't be effective unless he believes the client is not guilty. I can assure you that's just silly. . . When you went in to the house and you looked at the house . . . , the evidence, and you talked to the people, a reasonable person would conclude it was arson. . . There was accelerant under the threshold . . . there were pour patterns . . . irrespective of what anybody else says.

Amid requests for Governor Rick Perry to pardon Willingham, Perry claimed Martin sent Perry a letter stating that Willingham was a "monster" who had killed his children. *See* Perry's interview in *Incendiary* at 1:19:30.

132 Grann, *supra* note 5, at 11.

133 *Id.*

that the trial judge issued improper jury instructions and improperly admitted Vasquez's and Fogg's opinion testimony.[134] The writ was a long shot to begin with; the Court of Criminal Appeals is notorious for upholding convictions even in the face of "overwhelming exculpatory evidence."[135] To no one's surprise, the court denied the writ on October 31, 1997.[136] This was followed by another expected denial of certiorari by the U.S. Supreme Court.[137]

C. *Federal Habeas Relief*

In April 1998, Willingham and Reaves moved to the next step of the appeals process and filed a petition for federal habeas relief.[138] Willingham again raised the issues he presented during his state appeals, and also argued that he received ineffective assistance of counsel during his appeals, that the Texas death penalty scheme is unconstitutional because it fails to provide an adequate review process, and that certain potential jurors were erroneously excluded for cause based on their views about the death penalty.[139] After his petition was denied by the district magistrate judge[140] and the district court[141], it finally found its way to the Fifth Circuit in 2003.[142] The Fifth Circuit quickly dismissed all of Willingham's claims that were raised in the state courts because he could not meet the high burden of establishing the state court decisions were "contrary to, or involved an unreasonable application of, clearly established federal law.[143] The court also found that Willingham had received adequate counsel, and that even if he did not, he

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134 *Id.*
135 *Id.*
136 *Id.*
137 Willingham v. Texas, 524 U.S. 917 (1998).
138 Willingham v. Cockrell, 61 Fed. Appx. 918, 2003 WL 1107011 at *1 (5th Cir. 2003).
139 *Id.*
140 Willingham v. Johnson, 2001 WL 1677023 (2001).
141 Willingham v. Cockrell, 2002 WL 32303234 (N.D. Tex. 2002).
142 *Willingham*, 2003 WL 1107011 at *1.
143 *Id.* at *2.

was not prejudiced by the counsel's failure to raise arguments about the improper exclusion of jurors, improper hearsay testimony, and improper jury instructions.[144] Willingham's arguments about the unconstitutionality of Texas's death penalty scheme and the trial court's failure to instruct the jury that a life sentence would result in a minimum of 35 years in prison were barred by Fifth Circuit precedent; thus, Willingham raised them solely to present them to the Supreme Court later.[145] As in his state appeals, Willingham never raised any arguments attempting to prove his actual innocence because his attorneys were still unaware of the unreliability of the fire evidence used against him. On November 3, 2003, the U.S. Supreme Court denied his petition for writ of certiorari.[146]

D. *Executive Relief*

After the Supreme Court's denial, Willingham had exhausted all appeals and his execution date was set for February 17, 2004.[147] His last hope was to apply to the Texas Board of Pardons and Paroles for executive clemency.[148] On January 26, 2004, Willingham's defense team, now including powerhouse attorneys from the Innocence Project, filed the petition.[149] This time, they were armed with Dr. Hurst's report. Hurst was one of the expert's responsible for securing release Ernest Willis, a man who was convicted of a strikingly similar arson using the same faulty evidence that was used against Willingham.[150] Hurst's report on behalf of

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144 *Id.* at *4-8.
145 *Id.* at *9.
146 Willinghame v. Dretke, 540 U.S. 986 (2003).
147 Petition, *supra* note 7, at 44.
148 Petition, *supra* note 7, at 45.
149 *Id.* at Ex. 17.
150 Petition, *supra* note 7, at 44; *See also* discussion in Part IV.D *infra*.

Willingham detailed the same flaws that ultimately set Willis free.[151] Still, Willingham's defense knew their request was not likely to be granted.

The Board is made up of 15 members. They deliberate in secret and often do not even meet to discuss applications. Instead, they review the petitions and then fax in their votes.[152] The Board is notorious for essentially rubbing stamping 'no' on applications for clemency. "Between 1976 and 2004, when Willingham filed his petition, the [Board] had approved only one application for clemency from a prisoner on death row."[153] The Board is so unlikely to approve an application that one judge called Texas's clemency system "a legal fiction."[154]

On February 14, the Board unanimously voted to deny Willingham's petition.[155] The Board gave no explanation for its decision, and never asked anyone from Willingham's defense team to attend a hearing or provide further information.[156] Willingham's last hope was now a 30-day stay from Governor Rick Perry.[157] On February 17, at 4 p.m., a Perry representative informed Reaves that the stay request had been denied.[158] Willingham was served his last meal and then taken to the lethal injection chamber, where he was strapped down and a medical team inserted intravenous tubes into his arms.[159] When asked if he had any final words, he used the

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151 Petition, *supra* note 7, at 44; *See also* discussion in Part IV.D *infra*.

152 Grann, *supra* note 5, at 15.

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 In Texas capital cases, a death row inmate may apply to the Board for a commutation and stay of execution as long as the application is received at least 21 days prior to the scheduled execution date. If the board recommends clemency, the Governor may commute the sentence or grant a reprieve. If the board does not recommend clemency, the Governor may grant a one-time 30-day reprieve. Texas Board of Pardons and Paroles, *What Types of Clemency Are Available for Offenders Sentenced to Death? available at* http://www.tdcj.state.tx.us/bpp/exec_clem/Capital_Cases.html (last visited Dec. 11, 2013).

158 Grann, *supra* note 5, at 16.

159 *Id.*

opportunity to declare his innocence one last time: "I am an innocent man convicted of a crime I did not commit. I have been persecuted for twelve years for something I did not do. From God's dust I came and to dust I will return, so the Earth shall become my throne."[160] Moments later, at 6:20 p.m. on Februrary 17, 2004, Cameron Todd Willingham was executed.[161]

D. *Sufficiency of the Appeals Process*

Despite the overwhelming evidence of Willingham's legal innocence, much of the appeals process cannot be blamed for its failure to prevent Willingham's execution. None of the state or federal courts ever received any evidence that the fire "science" relied on by the State was faulty. On this point, the real flaw in the system was that Willingham was never appointed attorneys, either for his trial or during his appeals, with adequate experience or resources to mount an a proper investigation into the State's evidence. Thus, Willingham's case mostly shows the flaws in Texas's Executive Clemency process. Both the Texas Board of Pardons and Paroles and Governor Rick Perry received Hurst's report prior to Willingham's execution. Both were also aware that Hurst and his evidence had recently secured the release of Ernest Willis.[162] Yet neither the Board nor Perry were willing to grant even a temporary stay of execution in order to provide Willingham's counsel time to petition the courts for exoneration based on Willingham's

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[160] Grann, *supra* note 5, at 17. In addition to proclaiming his innocence, Willingham took an opportunity to say goodbye to two friends and to disparage his ex-wife Stacy who, after years of supporting him in his quest to prove his innocence, had recently denied his request to be buried next to his children. Stacy had also recently publicly stated that she now believed Willingham was guilty. She was among the observers who sat eight feet away to watch Willingham die. David Bry, *Cameron Todd Willingham's Real Last Words,* The Awl (Dec. 8, 2009) *available at* http://wwwtheawl.com/2009/12/cameron-todd-willinghams-real-last-words. Letter to the Editor, *Re: Trial By Fire*, New Yorker (Oct. 12, 2009) *available at* www.newyorker.com/magazine/letters/2009/10/12/091012mama/mail2.

[161] Petition, *supra* note 7, at 24.

[162] *Incendiary: The Willingham Case* (2002).

actual innocence.[163] And because Texas's clemency system is beyond the public's view, it is impossible to know how much consideration the Board or Perry gave to Hurst's report, if any.[164]

Thus, while Willingham's case does not necessarily present an adequate opportunity to fully evaluate the appeals process, the case of his fellow inmate, Ernst Willis does. In the 1990s, while Willis and Willingham were on death row in the same prison for nearly identical crimes, Willis received a stroke of luck that would turn out to save his life.[165] Willis had been convicted of a strikingly similar arson that resulted in the death of two women.[166] In the 1990s, patent attorney James Blank took on Willis's case as part of his firm's pro bono program.[167] Blank became convinced that Willis was innocent and, like Willingham, was the victim of faulty fire forensics.[168] Blank and his team's work paid off; after hiring a team of fire experts to rebut the evidence used against Willis, a federal judge ordered the state to either release Willis or retry him.[169] The state hired its own fire experts, all of whom agreed with Willis's experts.[170] The state dismissed all charges and Willis was released from death row in 2004.[171] The evidence used to convict Willis was nearly identical to that used against Willingham. And Willis's experts noted the same flaws that existed in Willingham's case. But it took Willis' high-powered and deep-pocketed defense team more than 10 years, 8,400 hours of work from attorneys, clerks, and

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163 *Id.* In the documentary, Willingham's attorney Walter Reaves explains that, even though he and the other attorneys knew the Board and Perry were unlikely grant a full pardon, they ultimately just wanted a temporary stay in order to distribute Hurst's report and establish that Hurst was a more credible expert than Fogg and Vasquez.

164 *Id.*

165 Grann, *supra* note 5, at 10.

166 *Id.*

167 Douglas McCollam, *The Accidental Defenders*, AMERICAN LAWYER 6 (January 2005).

168 *Id.*

169 Petition, *supra* note 7, at 39.

170 *Id.*

171 *Id.*

paralegals, and $3 million to secure Willis' release.[172] Willingham, like nearly every death row inmate, did not have money or friends in high places. Willis's case demonstrates the hurdles Willingham would have faced even if his attorneys were aware of the faulty evidence sooner. And it demonstrates that the vast majority of death row inmates with plausible claims of actual innocence may fall through the system's cracks unless, through pure dumb luck, they land representation like James Blank and his firm.

V. POST-EXECUTION EFFORTS TO PARDON

Shortly after Willingham's execution, knowledge of the questionable arson evidence used against Willingham spread beyond Texas's borders. The 2004 *Chicago Tribune* article that shredded the State's evidence brought Willingham's case to the public's attention and forced Texas officials to respond.[173] In 2005, the state created a commission to investigate allegations that fire investigators were using discredited theories to send people to prison. The commission hired noted fire scientist Craig Beyler to lead the investigation.[174] In August 2009, he released a report that lambasted the investigators in Willingham's case. "[Beyler] concluded that [the investigators] had no scientific basis for claiming that the fire was arson, ignored evidence that contradicted their theory, had no comprehension of flashover and fire dynamics, relied on discredited folklore, and failed to eliminate potential accidental or alternative causes of the fire."[175] He singled out Vasquez, saying that his fire investigation techinique denied "rational reasoning" and was more "characteristic of mystics or psychics" than proper forensics.[176] Beyler's report was supposed to be issued to the state's commission, but two days before Beyler

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172 McCollam, *supra* note 167.
173 Mills & Possley, *supra* note 4.
174 Beyler Report, *supra* note 90, at 1.
175 Grann, *supra* note 5, at 16.
176 Beyler Report, *supra* note 90, at 49.

was scheduled to present his findings, Governor Perry suddenly removed and replaced three members of the commission, including the Chair.[177] The new Chair immediately cancelled the scheduled meeting and set about delaying a hearing on the report and Willingham's case nearly a year.[178] Finally, in July 2010, the commission sent leters to noted fire experts, the Innocence Project, and Beyler asking for comments and materials regarding "the standard of practice as it existed in Texas at the time of the Willingham investigation and testimony."[179] Every respondant reported that Vasquez and Fogg's testimony fell below the standards expected of a fire investigator even prior to the publication of NFPA 921.[180] Nonethless, the commission's Chairman drafted a preliminary report that concluded that the investigation did meet the standard expected of the time.[181] The report was so contradradictory to the information the commission received that a majority of the commission's members voted against adopting it.[182]

On September 24, 2010, lawyers for Willingham's family took the unusual step of filing a petition to commence a court of inquiry to investigate Willingham's case, to determine whether the state committed official oppression in their handling of Willingham's case, and to officially declare that Willingham was wrongfully convicted.[183] The fire occurred in Corsicana, Navarro County, but lawyers filed the petition with then-state district judge Charlie Baird, who sits in Austin, Travis County, which is 150 miles from Navarro.[184] Neither Travis County nor Baird

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177 Petition, *supra* note 7, 53.

178 *Id.* at 54.

179 *Id.* at 54-55.

180 *Id.* at 54-55.

181 *Id.* at 56-57.

182 *Id.* at 57.

183 *Id.* at 61.

184 Steven Kreytak, *Appeals Court Rebukes Baird in Willingham Case*, AUSTIN AMERICAN-STATESMAN (Dec. 21, 2010) *available at* www.statesman.com/news/news/local/appeals-court-rebukes-baird-in-willingham-case/nRT8H/.

had any connection with Willingham's case.[185] Baird had also previously sat on the Texas Court of Criminal Appeals and twice voted to deny Willingham's appeals while he was still alive.[186] But Willingham's lawyers chose Baird for strategic reasons. The petition relied on a little known and rarely used provision of the Texas Constitution that granted jurisdiction to all Texas courts when people claim harm to their reputation.[187] Just the year before the 2010 petition, Baird had relied on the same provision to issue Texas's first posthumous exoneration to Timothy Cole,[188] a man who had spent 14 years and died in prison before DNA testing proved he did not commit the rape for which he was convicted.[189] Thus, even though Baird had ruled against Willingham before, the lawyers sensed they have found a sympathetic listener given Baird's ruling in Cole's case.[190]

As it turns out, the lawyers were right. In late 2010, Baird prepared an order to posthumously exonerate Willingham, but no one learned of the order until May 2012.[191] Shortly after the petition was filed, Baird ordered a hearing on the matter, which immediately prompted Navarro County District Attorney R. Lowell Thompson to file a motion asking Baird to recuse himself.[192] Thompson claimed Baird was biased "for a variety of reasons, including that he had recently received an award from a death penalty abolition group."[193] Baird declined to consider Thompson's motion, ruling that he was not a party to the lawsuit and therefore lacked

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185 Kreytak, *supra* note 184.
186 McLaughlin, *supra* note 11.
187 *Id.*
188 *Id.*
189 Elliott Blackburn, *It's Official: Cole is Exonerated*, LUBBOCK AVALANCHE-JOURNAL (April 8, 2009) *available at* http://lubbockonline.com/stories/040809/loc_427036872.shtml.
190 McLaughlin, *supra* note 11.
191 *Id.*
192 Kreytak, *supra* note 184.
193 *Id.*

standing.[194] Thompson, in turn, took his complaint three blocks down the street, to the Third Court of Appeals of Texas, and asked the court to stop the proceedings until Baird either recused himself or referred the recusal motion to another judge.[195] While the court was considering Thompson's request, Baird went on with his proceeding and heard testimony from numerous fire experts challenging the evidence used to convict Willingham.[196] Shortly after the hearing, Baird wrote an order to exonerate Willingham, stating that the "overwhelming, credible and reliable evidence" presented during the hearing convinced him that "Texas wrongfully convicted" Willingham.[197] Baird never got to issue his order, though, because the Third Court of Appeals ruled against him. In December 2010, the court held that Baird had abused his discretion in not recusing himself or referring the motion to another judge.[198] The court stayed the proceedings until Baird recused or referred the motion.[199] He referred the motion, but the issue became moot because a ruling was not made before Baird's planned departure from the bench. [200] His order was never issued and the proceedings in Willingham's case never went forward.[201] Baird, now a private practitioner, did not make his proposed ruling public until nearly a year and a half later, at which point he said he felt compelled to share it upon reading about another Texas man, Carlos DeLuna, who many believe was also wrongly convicted and executed.[202]

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194 In re Thompson, 330 S.W.3d 411, 414 (Tex. App. 2010).

195 *Id.* at 419.

196 Kreytak, *supra* note 184.

197 McLaughlin, *supra* note 11.

198 *Id.*; Kreytak, *supra* note 184.

199 In re Thompson, 330 S.W.3d 411, 419 (Tex. App. 2010).

200 Kreytak, supra note 184.

201 *Id.*

202 McLaughlin, *supra* note 11; Michael McLaughlin, *Carlos DeLuna Execution: Texas Put to Death an Innocent Man, Columbia University Team Says*, HUFFPOST (May 16, 2012) *available at* www.huffingtonpost.com/2012/05/15/carlos-de-luna-execution-_n_1507003.html.

Still undeterred, the lawyers recently filed a Petition for a Posthumous Pardon with the Texas Board of Pardons and Paroles on October 12, 2012.[203] In September 2013, they filed an amended petition in light of new evidence surrounding the testimony of Johnny Webb and possible prosecutorial misconduct.[204] To date, there is no indication of when the Board may consider the petition. However, Willingham's advocates may be hoping that the process drags on for at least another year, as some observers believe the advocates won't succeed in clearing Willingham's name until a new Governor replaces Rick Perry in 2015.[205]

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[203] Petition for Posthumous Pardon, Oct. 24, 2012 *available at http://www.innocenceproject.org/Content/Cameron_Todd_Willingham_Posthumous_Pardon_Filing_Documents.php*, and select "Petition for Posthumous Pardon" under "Original October 24 Filing Documents.

[204] Petition for Posthumous Pardon, Sept. 27, 2013 *available at http://www.innocenceproject.org/Content/Cameron_Todd_Willingham_Posthumous_Pardon_Filing_Documents.php*, and select "Petition for Posthumous Pardon" under "Amended September 27, 2013 Filing Documents.

[205] Grissom, *supra* note 5.