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Texas Board of Pardons and Paroles
ATTN: Clemency Section
8610 Shoal Creek Boulevard
Austin, Texas 78757

Re: Rodney Reed—Application for Executive Clemency

Dear Members of the Texas Board of Pardons and Paroles:

The American Bar Association is deeply troubled by Texas' plans to execute Rodney Reed on **November 20, 2019**, despite significant evidence of innocence that has not been evaluated by the courts. As President of the ABA, I write today not only to express concern over Mr. Reed's imminent execution, but also to underscore the critical role that the Texas Board of Pardons and Paroles plays in ensuring accuracy in capital cases. The courts have indicated that they are unable to weigh much of the new evidence undermining Mr. Reed's guilt due to procedural restrictions on considering new claims.[1] In a case such as this, where significant evidence of innocence has not been considered because of procedural limitations, a Board recommendation for a grant of executive clemency may be necessary to prevent an irreversible act.

The ABA does not take a position on the appropriateness or constitutionality of the death penalty as a general matter. Nevertheless, for more than forty years, the Association has been committed to ensuring that jurisdictions not carry out executions unless safeguards are in place to protect the constitutional rights of the accused and minimize the risk that an innocent person will be executed.[2] Among these essential safeguards is a robust and meaningful clemency review that accounts for the possibility that a prisoner has been wrongfully convicted.[3] Since 1976, 166 death row prisoners have been exonerated in the United States,[4] including 13 prisoners from Texas[5]. These exonerations demonstrate not only the real danger that an innocent person may be sentenced to death, but also the importance of checks along the way to identify and correct these errors. The clemency power—enshrined in both the U.S. and Texas constitutions—is often the final chance to catch such mistakes and prevent an injustice that cannot be undone.

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[1] *See Ex parte Reed*, 2019 Tex. Crim. App. Unpub. LEXIS 371, at *5-6.
[2] AM. BAR ASS'N, Resolution 1997 MY 107, https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/1997_my_107.pdf.
[3] AM. BAR ASS'N, *Protocols on the Administration of Capital Punishment* at 12 (2010), *available at* https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/protocols2010.pdf.
[4] Innocence Database, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/policy-issues/innocence-database.
[5] *Id.* (with search filter "Texas").

While it is not the ABA's role to resolve the fact-intensive questions of guilt in this case, the evidence amassed in the years since trial casts grave doubts on the reliability of Mr. Reed's conviction.[6] Even as Mr. Reed's execution date approaches, evidence continues to come to light supporting his innocence. Regrettably, procedural limitations on post-conviction review have prevented the courts from conducting a comprehensive evaluation of this evidence and whether it undermines confidence in his guilt.[7] Each building block of the State's theory of Mr. Reed's guilt—including the time of Ms. Stites' death based on DNA found in her body; the truthfulness of Ms. Stites' fiancé's testimony; and the lack of credible proof of a consensual affair between Ms. Stites and Mr. Reed—has now been called into question.

The new evidence of innocence includes retractions and affidavits from a barrage of expert and lay witnesses. Both the medical experts employed by Mr. Reed's defense as well as experts that originally testified for the State at trial now agree that the central scientific testimony presented to the jury in support of Mr. Reed's guilt—the amount of time DNA can remain in a body—was false. Accepted scientific opinion now *supports* Mr. Reed's defense that he and Ms. Stites were having a consensual affair and had been intimate the day before her death.[8] In addition, the forensic expert who testified at trial about time of death has since recanted his testimony, and new experts who have examined the case have concluded that Ms. Stites was killed during the time period when she was with her fiancé.[9] Other evidence has been developed pointing to her fiancé as an alternate suspect, including threats he made to Ms. Stites on various occasions and possible knowledge of her affair with Mr. Reed. Mr. Reed's contention that he and Ms. Stites were having a consensual affair has also been bolstered with never-before-heard evidence from several witnesses, including Ms. Stites' cousin and coworkers.

While there is no doubt that Mr. Reed's attorneys have sought to present evidence of his innocence to the courts on multiple occasions, or that the courts have repeatedly denied his claims, the diligence of Mr. Reed's defense counsel does not mean that the courts have actually considered all of the evidence of innocence that now exists.[10] For example, no court has heard testimony from the aforementioned witnesses who knew Ms. Stites, but did not know Mr. Reed, and who have come forward affirming the existence of a relationship between Ms. Stites and Mr. Reed.[11]

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[6] *See Reed v. Texas*, Petition for a Writ of Certiorari, No. 19-41, Sept. 24, 2019 at 9-23, https://www.supremecourt.gov/DocketPDF/19/19-411/116802/20190924133210835_USSC%20Petition%20for%20Writ%20of%20Certiorari.pdf.

[7] The possibility that procedural rules will prevent courts from reaching the merits of important claims is precisely why the ABA recommends that clemency decisionmakers "should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case…" and that "[clemency] decisions should be based upon an independent consideration of facts and circumstances." AM. BAR ASS'N, *supra* note 3.

[8] *Reed v. Texas*, *supra* note 6 at 20.

[9] *Id.* at 16.

[10] Mr. Reed's attorneys submitted this new evidence across three post-conviction petitions, all of which were disposed of in a one-page CCA order in June 2019. The order did not address the vast majority of the questions raised by Mr. Reed's evidence.

[11] *Reed v. Texas,* Petition for a Writ of Certiorari, *supra* note 6 at 22-23.

This is particularly troubling because the absence of such testimony in previous proceedings was a determinative factor cited by the courts in denying relief.[12] The courts have also refused to order access to DNA testing that may point to Ms. Stites' fiancé, rather than Mr. Reed, as the perpetrator of this crime.

In short, the courts have not considered or analyzed much of the evidence of innocence that this Board now has before it. The courtroom doors are effectively closed to Mr. Reed due to the procedural bars that prize finality of a conviction over the consideration of late-emerging evidence. These technical obstacles do not exist in clemency, however; unlike the courts, this Board has the power to review all of the evidence on its merits, making your work essential to ensuring fairness and accuracy in our justice system, especially in capital cases.

Because the Texas Governor is unable to grant any form of clemency other than a 30-day reprieve from execution without a Board recommendation, your careful consideration of this case is indispensable. While not binding on Governor Abbott, your recommendation provides the *possibility* for the Governor to act—a crucial opportunity in a case like Mr. Reed's, where so much evidence has not been evaluated by the courts. This Board can also provide a forum for judging the credibility of new witnesses and evidence. It can hear directly from the individuals who have come forward stating that they knew Mr. Reed and Ms. Stites were having an affair and question the forensic scientists who say that Mr. Reed's guilt is medically and scientifically impossible. In recognition of the important safeguard function served by the Board, Texas law provides a flexible clemency power that allows you to seek the truth in a case in the way that courts often cannot, particularly in the late stages of a capital case.

Like Texas, the U.S. Supreme Court has also recognized the critical role of clemency, particularly in cases involving prisoners who may be innocent. In *Herrera v. Collins*, the Supreme Court rejected the idea that actual innocence alone could be grounds for relief, finding that "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."[13] Where errors of fact have been made, the Court has placed the burden for addressing those mistakes on clemency decision makers such as yourselves. The Court has singled out clemency as the "fail-safe" in our justice system, promising that "…petitioner is [not] left without a forum to raise his actual innocence claim. *For under Texas law, petitioner may file a request for executive clemency. […]. Clemency is deeply rooted in our Anglo-American tradition of law and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted*."[14]

While the evidence supporting Mr. Reed's innocence may have emerged over many years and in a piecemeal manner that has precluded its reviewability in the courts, the clemency process is specifically empowered—and uniquely positioned—to correct injustice where the courts cannot.

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[12] *See Reed v. Stephens*, 739 F.3d 753, 772 ("As we have noted, the CCA concluded that the evidence as to all the "witnesses who affirmed a relationship between Reed and [Stites]" was 'unreliable.'").
[13] *Herrera v. Collins*, 506 U.S. 390, 400 (emphasis added).
[14] *Id*. at 411-412 (emphasis added).

In recognition of the singular and weighty responsibility that has been placed on you in a case such this, we urge you to recommend that Mr. Reed be spared from execution to allow for further factfinding in this deeply troubling case.

Sincerely,

Judy Perry Martinez