

TCADP Execution Alert: Support Clemency for Stephen Barbee

The State of Texas is scheduled to execute Stephen Barbee on November 16, 2022 despite the violation of his constitutional right to a fair trial that occurred when his lawyers unexpectedly and impermissibly conceded his guilt to the jury despite Barbee's insistence on his innocence.

His attorneys also failed to take any reasonable steps to establish his innocence or to present compelling mitigating evidence to the jury, particularly regarding the crucial special issue of "future dangerousness," which a Texas jury is required to determine to impose a death sentence. Barbee did not have a criminal record prior to his arrest in 2005 and he has not committed a single act of violence since his incarceration on death row.

Since his trial, Barbee's physical health has deteriorated to the point that he is mainly confined to a wheelchair and is unable to attend to his basic hygiene needs. He has persistent, well-documented arm immobility and range-of-motion disabilities that the Texas Department of Criminal Justice has failed to treat and may cause excruciating pain if Barbee is placed in the usual position on the gurney with his arms straight to the side. Contrary to the jury's determination of "future dangerousness," he is not a physical threat to his fellow inmates or the prison staff.

Based on these considerations, Barbee has filed an application for clemency with the Texas Board of Pardons and Paroles asking for a recommendation of the commutation of his sentence to a lesser penalty or at least a 120-day reprieve so that the Board may fully investigate and consider the facts of his case, including the questions surrounding the reliability of his conviction and fairness of his trial, at a live hearing.

Take action today!

Email the members of the Texas Board of Pardons and Paroles at bpp_clemency@tdcj.texas.gov to urge them to recommend clemency or at least a 120-day reprieve for Stephen Barbee (you must include his TDCJ #999507 and DOB 03/30/1967 in your appeals). Share your concerns with Governor Greg Abbott. Adapt our sample message or use the talking points below to craft your own email. Contact information for the Board and Governor is also below. *Contact the Board by Friday, November 11, 2022.*

Case background

Barbee was convicted and sentenced to death in Tarrant County for killing Lisa and Jayden Underwood in 2005. This is the third execution date he has faced since 2019.

Last year, a federal judge granted a stay to Barbee based on his complaint that the Texas Department of Criminal Justice was planning to carry out his execution in a way that would violate his right to the free exercise of his religious beliefs. Although the U.S. Supreme Court upheld the religious rights of individuals facing execution in Texas in its opinion in *Ramirez v. Collier*, Barbee's lawsuit in the federal district court regarding his specific requests related to his spiritual advisor is still pending and the stay remains in effect. This means the state trial court did not have jurisdiction to set the date; litigation protesting the date setting and the false information contained in the death warrant has been filed with the Texas Court of Criminal Appeals and is pending.

In 2019, Barbee was granted a stay by the Texas Court of Criminal Appeals in response to the U.S. Supreme Court's decision in *McCoy v. Louisiana* (2018). In that opinion, the Justices ruled that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." Even though Barbee's lawyers unexpectedly and impermissibly conceded his guilt to the jury despite Barbee's insistence on his innocence, both state and federal courts have refused to grant him relief based on McCoy.

After being threatened with the death penalty, Barbee initially told police he caused the deaths of Lisa and Jayden Underwood, but that they were accidental and not premeditated. He immediately recanted this coerced "confession", however, and has maintained his innocence ever since, asserting that his business partner, Ron Dodd, committed the murders and framed Barbee to take over his businesses. Barbee admits he helped Dodd to conceal the bodies of the Underwoods, but he denies participating in the murders. Evidence not presented at Barbee's trial contained significant support for his innocence.

Talking points for your appeals to the Texas Board of Pardons and Paroles and Governor Abbott

- Stephen Barbee is scheduled to be executed on November 16, 2022 despite the violation of his constitutional right to a fair trial.
- Barbee's attorneys violated his Sixth Amendment right to insist upon his innocence when they conceded his responsibility for the killings against his express wishes and despite the fact he pled "not guilty."
- Barbee's death sentence was wrongly imposed because he was never allowed to present his case for innocence. Not only did his trial attorneys concede his guilt without authorization during their closing arguments to the jury but they also failed to take any reasonable steps to establish his innocence or investigate the possibility that his co-worker and co-defendant Ron Dodd committed the murders, as Barbee has long maintained.
- Barbee's attorneys presented virtually no compelling mitigating evidence to the jury, particularly regarding the crucial special issue of "future dangerousness," which a Texas jury is required to determine to impose a death sentence. Barbee did not have a criminal record prior to his arrest in 2005 and he has not committed a single act of violence since his incarceration on death row.
- Barbee's health has deteriorated considerably during his years on death row. He uses a wheelchair, has serious arm immobility issues, and has had two hip replacements and many other serious

ailments. He is not a danger to his fellow inmates or prison staff.

- Despite repeated requests, the Texas Department of Criminal Justice has refused to disclose any information on whether the execution protocol will be modified to prevent what would amount to torture if Barbee is placed in the usual position on the gurney with his arms straight to the side.
- Clemency presents the Board with an opportunity to address the issues that state and federal courts have refused to rectify and to extend mercy to a man whose severe physical health issues leave him largely disabled.

Sample email message

Dear Chairman Gutiérrez and Members of the Texas Board of Pardons and Paroles,

I am writing to urge you to recommend clemency – or at least a 120-day reprieve – to Stephen Barbee (TDCJ #999507 and DOB 03/30/1967), who is scheduled to be executed on November 16, 2022. There are serious unresolved questions regarding Barbee’s claim of innocence and the violation of his right to due process and the Sixth Amendment right to counsel. The U.S. Supreme Court has held it is unconstitutional for attorneys to concede the guilt of their clients without permission, yet that is exactly what occurred during Barbee’s 2006 trial. His attorneys violated his desire to maintain his innocence, disregarded his plea of “not guilty,” and, against his wishes, told the jury he was guilty of the murders of Lisa and Jayden Underwood.

Defendants who plead “not guilty” should be afforded their right to have evidence of their innocence presented to the jury. Barbee’s trial attorneys failed to even investigate evidence of his innocence, however. They also neglected to present compelling mitigating evidence to the jury that would have undermined the State’s argument that Barbee, who had no criminal record prior to his arrest, constituted a “continuing threat to society.”

Barbee, who is in extremely poor health, has not committed a single act of violence since his incarceration on death row. His current medical conditions and disabilities show that he is not a danger to fellow inmates or prison staff. Executing him at this time, after he has been denied the opportunity to make the case for his innocence, would be undeniably cruel and unnecessary.

In the interest of fairness and justice, I implore you to recommend that Governor Abbott either commute Barbee’s death sentence to a lesser penalty or issue a 120-day reprieve so the Board may fully investigate and consider the facts of his case, including the troubling issues surrounding the reliability of his conviction and fairness of his trial.

Thank you for your time and consideration.

Sincerely,

Contact information for the Texas Board of Pardons and Paroles and Governor Abbott

Texas Board of Pardons and Paroles
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8610 Shoal Creek Boulevard

Austin, Texas 78757
Fax (512) 467-0945
bpp_clemency@tdcj.texas.gov

Chairman: David Gutiérrez

Texas Governor Greg Abbott

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Information and Referral Hotline: (800) 843-5789 [for Texas callers]

Information and Referral and Opinion Hotline: (512) 463-1782 [for Austin, Texas and out-of-state callers]

Office of the Governor Main Switchboard: 512-463-2000

Online Contact: <https://gov.texas.gov/contact/>