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# EXECUTIVE CLEMENCY: STUDY OF A DECISIONAL PROBLEM ARISING IN THE TERMINAL STAGES OF THE CRIMINAL PROCESS

MICHAEL B. LAVINSKY\*

## PREFACE

**T**HIS PAPER UNDERTAKES an examination of the executive power of clemency as a decisional problem in the terminal stages of the criminal process. Because the dimensions of the subject are so broad, it is necessary to confine this paper to a limited scope. Therefore, the focus will be upon the exercise of the executive power of commutation of capital sentences in Illinois during the incumbency of Governor Otto Kerner. It is felt that such a limited approach will most readily lend itself to analysis, evaluation, and perhaps some tentative conclusions.

After setting forth the nature, purposes, and administration of clemency, this paper will then study in detail recent Illinois cases relating to commutation of the death sentence. The ultimate purpose is to observe and derive some insight into the various considerations—the influences and impulses, the pressures and responses—which seem to bear upon an executive decision in exercise of the clemency power.

Throughout much of the literature dealing with the subject of executive clemency, the term “pardon” is used synonymously with the term “clemency.” This paper will attempt to avoid such undesirable confusion of fundamental terminology by employing the more properly accurate term “clemency” as a generic concept of executive discretion which inherently includes the powers of pardon, commutation, and reprieve.

This paper has attempted to avoid “amateur forays into the behavioral sciences.” Nevertheless, the concern is with dynamics rather than mechanics. Such approach involves an amalgam of source material drawn not only from legal literature, but also from “field investigation.”

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With respect to the latter, this writer should like to proffer due credits to Judge George N. Leighton, Circuit Court of Cook County, Criminal Division; to John D. Callaway, Director of Public Affairs, WBBM, CBS Radio, Chicago; to Jason Bellows, Chicago attorney; and to Elmer Gertz, also a Chicago attorney. These individuals—along with the Chicago office of the Governor and the State Parole and Pardon Board—have been generous in their cooperation. Their important contributions to this study are therefore appreciatively acknowledged.

## PART I

The power of pardoning Offenses is inseparably incident to the Crown; and this High Prerogative the King is entrusted with upon a special confidence, that he will spare those only whose Case, could it be foreseen, the Law itself may be presumed willing to have excepted out of its general Rules which the Wisdom of Man cannot possibly make so perfect as to suit every particular Case.

. . . Francis Bacon, *A New Abridgement of the Law*.

### INTRODUCTION: THE CLEMENCY CONCEPT

Most societies have felt the need to inject flexibility into the administration of criminal justice by providing a broad discretionary power of executive clemency.<sup>1</sup> Perhaps in an ideal society, where all laws are just and perfect in their operation, the institution of clemency should be unnecessary. But this is an imperfect world.

The criminal law can only deal with general patterns of anti-social behavior. It can never take into account every conceivable situation which may occur in the diverse circumstances of life. Nor is the application of the criminal law by the courts necessarily wise or correct in any given case. Therefore, our institutional machinery permits executive reconsideration of a penal sentence pronounced in the judicial process.

The power of executive clemency exists then as a device to afford relief from undue severity or apparent error in the application of the criminal law, as a device for tempering justice with mercy by allowing for a consideration of the totality of circum-

<sup>1</sup> See generally, U.S. Dept. of Justice, 3 Attorney General's Survey of Release Procedures—Pardon (1939). This pilot study represents an exhaustive treatment of the law relating to executive clemency.

stances which may properly mitigate guilt. Entrusted to the executive for exercise in special cases, the concept of clemency "represents the sense of human weakness, the recognition of human fallibility, the cry of human compassion. It is a confession of imperfect wisdom. . . ."<sup>2</sup>

#### ENGLISH BACKGROUND AND AMERICAN EXPERIENCE

The concept of executive clemency in the United States derives from our English heritage. In England the power of clemency developed as a royal prerogative of the Crown. The King was considered the fountain of justice, and as a corollary of his power to punish he could exercise the prerogative of extending mercy to those who breached the peace.

The English conception of clemency was transplanted to the American colonies, where its use by the authorities was regarded as a delegation of the royal prerogative. This view, however, was superseded after American independence by the notion that the power of clemency was inherent in the people, as sovereign. Thus, while the power of clemency is historically presented as an attribute of the Crown, or the executive, in the United States the right to dispense mercy is recognized as vested in the people, to be delegated as they in their sovereign wisdom please.

"The clemency power is neither inherently nor necessarily an executive power, but is a power of government inherent in the people, who may by constitutional provision place its exercise in any official, board, or department of government they choose."<sup>3</sup> In practice, it has been found most convenient to confer the power upon the executive branch of government. Thus, under the United States Constitution the clemency power in federal cases is delegated to the President;<sup>4</sup> and practically all the state constitutions have delegated this power in state criminal cases to the governor, either alone or in conjunction with advisors.<sup>5</sup>

While most of the states originally conferred the clemency

<sup>2</sup> *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 178 & n.146 (1964), citing *Smithers*, *Executive Clemency in Pennsylvania* 61 (1909).

<sup>3</sup> *Jamison v. Flanner*, 116 Kan. 624, 634, 228 Pac. 82, 87 (1924).

<sup>4</sup> U.S. Const. art. II, § 2. See generally, Humbert, *The Pardoning Power of the President* (1941).

<sup>5</sup> See generally, Jensen, *The Pardoning Power in the American States* (1922).

power upon the governor alone, the more recent trend has been to establish advisory boards to make recommendations to the governor as to the exercise of clemency in individual cases.

. . . At one period in our history, the (clemency) power was vested almost exclusively in the governor. But new administrative duties placed upon him, and also an increase of requests for clemency . . . made it impossible for him to give the detailed attention to clemency problems which was demanded. Added to these reasons was the feeling . . . that some executives had administered their power with such laxness that the system needed further regulation and safeguarding.<sup>6</sup>

### ILLINOIS PRACTICE

In Illinois, as in all states, there are prescribed rules which govern the practice and procedure of the clemency authority. These are embodied in the State Constitution,<sup>7</sup> statutes,<sup>8</sup> and in regulations formulated by the clemency authority.<sup>9</sup> In Illinois, the State Parole and Pardon Board acts as the governor's agent in hearing applications for the various forms of executive clemency. For the purpose of receiving and considering evidence relative to the granting of clemency, it is the practice of this seven-member board to hold public hearings on clemency applications four times a year, as required by law.

The Parole and Pardon Board acts merely in an advisory capacity to the governor. It has no power to grant clemency; it can only, after thorough deliberation, submit a recommendation to the governor. The governor is free to accept or reject the recommendation of the board. Under his constitutional authority, he takes final discretionary action and assumes full responsibility therefor.<sup>10</sup>

One of the most intense responsibilities of the governor of the State of Illinois is the problem of clemency. . . . The Parole and Pardon Board can and does make recommendations. . . . However, in the final analysis, the decision is, and properly should be the governor's. . . .<sup>11</sup>

<sup>6</sup> *Id.* at 23.

<sup>7</sup> See Appendix I.

<sup>8</sup> See Appendix II.

<sup>9</sup> See Appendix III.

<sup>10</sup> For a recent discussion of the Illinois governor's constitutional power of clemency, see *People v. Kinney*, 30 Ill. 2d 201, 195 N.E.2d 651 (1964).

<sup>11</sup> Gov. Stratton, Report on Leopold Decision (July 30, 1957).

## FUNDAMENTAL TERMINOLOGY

Before proceeding to a detailed analysis of the various decisional considerations relating to the exercise of the clemency power, it would seem appropriate to undertake a brief definitional survey. This paper is employing the term "executive clemency" as a generic concept of discretion which inherently includes the powers of pardon, commutation, and reprieve.

Pardon is an executive act of grace, relieving the individual upon whom it is bestowed from the punishment the law prescribes for the crime of which he has been convicted.<sup>12</sup>

A pardon may be full or partial. A full pardon freely absolves the party from all legal consequences, direct and collateral, of his conviction. It releases the offender from the entire punishment prescribed for the offense, and from all the disabilities consequent upon his conviction. It fully avoids or terminates punishment for a crime. A partial pardon, however, remits only a portion of the punishment or absolves from only portions of the legal consequences attendant upon the crime and conviction.

A pardon may be unconditional or conditional. An unconditional pardon frees the convicted party from criminal liabilities without any conditions whatsoever. A conditional pardon, on the other hand, is operative only upon the performance of certain stipulated conditions which have been annexed. Any condition precedent or subsequent may be imposed that is not illegal, immoral, or impossible of performance.<sup>13</sup>

Whereas pardon (and amnesty<sup>14</sup>) possess certain exculpatory effects, commutation and reprieve do not. Most state constitutions specifically include in the clemency power the authority to grant commutations and reprieves. And in those states whose constitutions do not specifically so provide, it is held that such exercises

<sup>12</sup> See *United States v. Wilson*, 32 U.S. 150 (1833), and *Ex parte Wells*, 59 U.S. 307 (1856). For a discussion of the legal effects of a pardon, see 3 Attorney General's Survey of Release Procedures—Pardon ch. IX (1939).

<sup>13</sup> 3 Attorney General's Survey of Release Procedures—Pardon 198-199 (1939).

<sup>14</sup> Sometimes inaccurately referred to as a "general" pardon, amnesty is a sovereign act of oblivion, usually applied in forgiveness of political offenses, such as treason, sedition or rebellion. Amnesty is usually general, addressed to classes, or even communities. Pardon, on the other hand, is employed in cases of infractions of the ordinary criminal laws of the state and applies only to the individual, relieving him from the punishment inflicted by the law for his specific offense. See *id.*, ch. VIII.

of mercy are included in the pardon provision, for the reason that the greater power necessarily includes the lesser power.<sup>15</sup>

While pardon avoids or terminates punishment, a commutation merely substitutes a milder punishment in place of that imposed by the court. It refers to a mitigation of punishment.<sup>16</sup>

The power of commutation is exercised in many cases to reduce the length of imprisonment and thereby make eligible for parole prisoners not otherwise eligible.<sup>17</sup>

The question has been raised whether the power to mitigate punishment includes the power to change the nature and character of the punishment, as by the usual practice of substituting life imprisonment for the death sentence. The United States Supreme Court held in *Biddle v. Perovich*<sup>18</sup> that inasmuch as life imprisonment is generally understood to be a less severe penalty than death, such a substitution is therefore a proper commutation.

Reprieve is a respite, a suspension of the execution of the sentence of the court.<sup>19</sup> It neither reduces the punishment nor changes its substance. It does no more than postpone the execution of the sentence, and after termination of the period of reprieve the full sentence may be carried out.

Reprieves are granted to afford a convicted party the opportunity to obtain some amelioration of the sentence imposed upon him. The most important use of a reprieve arises in capital cases, where it is used to stay the execution of the death penalty, pending action on application for pardon or commutation.<sup>20</sup>

<sup>15</sup> *Id.* at 195.

<sup>16</sup> *Id.* at 209 *et seq.*

<sup>17</sup> It is doubtful whether this is a legitimate exercise of the power of commutation in Illinois. See *People v. Jenkins*, 322 Ill. 33, 152 N.E. 549 (1926).

<sup>18</sup> 274 U.S. 480 (1927).

<sup>19</sup> See 3 Attorney General's Survey of Release Procedures—Pardon 221 *et seq.* (1939).

<sup>20</sup> The power of the courts to temporarily suspend sentence by a "stay of execution" pending appeal or other procedural remedies should not be confused with reprieves, which are an exercise of the power of executive clemency.

Note that while probation and parole are somewhat related to conditional pardon, they are concepts not properly within the purview of executive clemency. Probation is a judicial suspension of the prescribed punishment. Parole is a conditional release granted a convict before the expiration of his prison term.

## PART II

In any capital case there can be no easy decision. Every possible factor must be evaluated before a final decision is made.

. . . Governor Otto Kerner, *Crumph Clemency Statement*.

## THE DECISIONAL PROBLEM

Having set forth the theoretical and structural framework necessary for an understanding of the dynamics of clemency administration, this paper now turns toward an examination of the exercise of clemency as a decisional problem. What considerations are relevant to a clemency determination? What discernible reasons or standards appear to influence the governor? What motives? What attitudinal impulses? What factor-patterns emerge as determinant? Montesquieu thought this "a point more easily felt than prescribed."<sup>21</sup>

It seems reasonable to suggest that the reasons for awarding clemency may vary with changes in social conditions, with advancement in thought on penal questions, and with periodic changes in government personnel. Circumstances which one governor may consider unconvincing, another governor may consider persuasive, and indeed determinant, relative to an exercise of clemency in a particular instance.

However, the exploratory concern here is with four capital cases in Illinois, each involving an application for commutation during the administration of Governor Otto Kerner. Of the four applications, one was granted, two were denied, and one is currently pending as of this writing. For reference purposes, brief case histories of these four convicted Chicago murderers next follows. Then, an attempt will be made to delineate and analyze those discernible decisional factors which would seem to relate to the exercise of the clemency power in the four referent cases.

## VINCENT CIUCCI

Ciucci was a Chicago grocer who was convicted and ultimately executed for the 1953 murder of his wife and three children. The

<sup>21</sup> Montesquieu, *Spirit of the Law*, Book 6, ch. 21, cited in DiSalle, *Comments on Capital Punishment and Clemency*, 25 Ohio St. L.J. 71, 74 (1964).



victims were found dead in a burning building with bullet wounds in their heads.

Three consecutive trials were held in the Criminal Court of Cook County. The first was for the murder of Ciucci's wife; he was found guilty and sentenced to twenty years imprisonment. The second trial was for the murder of one of his daughters; the defendant was again found guilty and this time given forty-five years. The third trial was for the murder of his son; again, Ciucci was found guilty, but this time he was sentenced to death.<sup>22</sup> The conviction and death sentence was affirmed by the Illinois Supreme Court,<sup>23</sup> and then by the United States Supreme Court.<sup>24</sup>

The Supreme Court had granted *certiorari* to consider Ciucci's claim that by bringing three separate trials under separate indictments, and by obtaining repeated convictions upon the same evidence, the state sought merely to harass him until it achieved the desired capital verdict. The precise question thus presented was whether due process was offended by separate and successive trials for each offense occasioned by a single occurrence, when each offense rests precisely upon the same evidence and when each trial is free from error.

The conviction was affirmed *per curiam*. The Court saw no violation of due process since the "State was constitutionally entitled to prosecute these individual offenses singly at separate trials, and to utilize therein all relevant evidence. . . ."<sup>25</sup> The Court refused to consider a number of articles appearing in Chicago newspapers after the first and second trials attributing to the prosecuting attorney expressions of extreme dissatisfaction with the sentences fixed by the juries and of a determination to prosecute until the death sentence was obtained. The reason ascribed was that neither the articles nor their content were included in the record.<sup>26</sup>

After dismissal of a petition under the Illinois Post-Convic-

<sup>22</sup> Under Illinois law at the time, each murder constituted a separate crime, and evidence of the entire occurrence was relevant in each of the three prosecutions.

<sup>23</sup> *People v. Ciucci*, 8 Ill. 2d 619, 137 N.E.2d 40 (1956).

<sup>24</sup> *Ciucci v. Illinois*, 356 U.S. 571 (1958).

<sup>25</sup> *Id.* at 573.

<sup>26</sup> Commentary on the *Ciucci* case may be found in: 44 A.B.A.J. 771 (1958); 8 De Paul L. Rev. 102 (1958); 19 Md. L. Rev. 127 (1959); 35 N.D.L. Rev. 72 (1959); 26 U. Chi. L. Rev. 326 (1959); 1958 U. Ill. L.F. 472 (1958); 107 U. Pa. L. Rev. 109 (1958).

tion Hearing Act,<sup>27</sup> Ciucci's attorney, George Leighton, petitioned the Governor for commutation of the death sentence, primarily upon the ground of oppressive unfairness resulting from the successive prosecutions. The prayer for clemency was denied, and Ciucci was executed March 23, 1962.

#### PAUL CRUMP

Paul Crump was convicted and sentenced to death for the 1953 slaying of a plant guard during an armed robbery at a packing plant in the Chicago Stockyards. Crump's first trial in the Criminal Court of Cook County was reversed and remanded because of prejudicial error.<sup>28</sup> At the second trial, Crump was again found guilty and sentenced to death. This time the Illinois Supreme Court affirmed.<sup>29</sup> Crump then initiated *habeas corpus* proceedings to determine whether his constitutional rights had been violated through the use of an allegedly coerced confession. He was denied a writ.<sup>30</sup>

The Crump commutation case attracted widespread comment and controversy, for the grounds urged by attorneys Donald Page Moore and Louis Nizer were unique and unprecedented: complete rehabilitation during the years spent in Cook County Jail awaiting execution. On August 1, 1962, two days prior to the scheduled execution date, Governor Kerner commuted the sentence imposed upon Paul Crump from death to imprisonment for a term of 199 years, without parole.<sup>31</sup>

#### JAMES DUKES (ALIAS JESSE WELCH)

Dukes was convicted and ultimately executed for the 1956 murder of a Chicago police officer in the course of a running gun battle. There were two trials in the Criminal Court of Cook County. At the first, Dukes was convicted of murder, with punishment fixed at death. The conviction was reversed and remanded by the Illinois Supreme Court because of the admission of prejudicial

<sup>27</sup> Ill. Rev. Stat. ch. 38, §§ 122-1 *et seq.* (1963).

<sup>28</sup> *People v. Crump*, 5 Ill. 2d 251, 125 N.E.2d 615 (1955). See also 5 De Paul L. Rev. 141 (1955).

<sup>29</sup> *People v. Crump*, 12 Ill. 2d 402, 147 N.E.2d 76 (1957).

<sup>30</sup> *United States ex rel. Crump v. Sain*, 264 F.2d 424 (7th Cir. 1959); 295 F.2d 699 (7th Cir. 1961).

<sup>31</sup> See Appendix IV.

evidence and because of highly prejudicial and inflammatory conduct on the part of the prosecutor.<sup>32</sup> At the new trial, Dukes was again convicted and sentenced to death. This time the Illinois Supreme Court affirmed.<sup>33</sup>

*Habeas corpus* proceedings,<sup>34</sup> and an appeal for commutation, primarily on the ground of mitigating circumstance, were of no avail. Dukes was executed August 24, 1962.

#### WILLIAM WITHERSPOON

Witherspoon was convicted and sentenced to death following trial in the Criminal Court of Cook County for the 1959 murder in Chicago of an arresting police officer. The Illinois Supreme Court affirmed.<sup>35</sup> Witherspoon subsequently petitioned for a writ of *habeas corpus*, but he was unsuccessful in that proceeding.<sup>36</sup>

A petition for commutation, based primarily upon rehabilitation and mitigating circumstances, has been prepared by Attorney Elmer Gertz,<sup>37</sup> with request that the hearing be held in abeyance pending the exhaustion of further judicial remedies.<sup>38</sup>

#### EXAMINATION OF DECISIONAL FACTORS

What decisional factors are relevant to an exercise of the clemency power, particularly with reference to commutation in capital cases?

The clemency power is generally regarded as one in which there should be free exercise of discretion by the clemency authority.<sup>39</sup> It is thought that each case should be individually determined solely upon its merits, that it is impossible to develop uniform rules and standards of general application. So much depends upon the

<sup>32</sup> *People v. Dukes*, 12 Ill. 2d 334, 146 N.E.2d 48 (1957). See 60 W. Va. L. Rev. 375 (1958).

<sup>33</sup> *People v. Dukes*, 19 Ill. 2d 532, 169 N.E.2d 84 (1960).

<sup>34</sup> *United States ex rel. Dukes v. Sain*, 297 F.2d 799 (7th Cir. 1962).

<sup>35</sup> *People v. Witherspoon*, 27 Ill. 2d 483, 190 N.E.2d 281 (1963).

<sup>36</sup> *United States ex rel. Witherspoon v. Ogilvie*, 337 F.2d 427 (7th Cir. 1964).

<sup>37</sup> See Appendix V.

<sup>38</sup> There is a general understanding that inasmuch as a clemency hearing is a court of last resort and the clemency process is extra-judicial in nature, the clemency hearing should await the completion of judicial proceedings. *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 152 (1964).

<sup>39</sup> The criminal law has been described as "an island of technicality in a sea of discretion." See Scott, *The Pardoning Power*, 284 Annals 95 (1952), reprinted in Newman, *Sourcebook on Probation, Parole and Pardon* 41 (1958).

individual characteristics of each petitioner and the particular circumstances surrounding the commission of the crime in each case.<sup>40</sup>

Indeed, it must be recognized that one must be somewhat chary of making definitive assertions when discussing decisional criteria relative to the exercise of the discretionary power of executive clemency. Reasons for a decision in any given case are often difficult to ascertain. The decision of the governor is a function of multifarious and variegated stimuli.

It may be further conceded that there are motivating forces which influence the governor to extend clemency, but which are not by him assigned as reasons for so acting. Various subjective attitudinal impulses may bear upon the governor's ultimate decision—various unarticulated and undefinable personal views, sympathies, biases, and a host of homogenized visceral reactions and individual estimates.

What differences emerge as between the cases of those who suffer the full extent of the law through death, and those who have enjoyed the privilege of executive reconsideration and retraction of the originally imposed capital sentence? Admitting due regard for the aforementioned caveat, this paper will now essay an examination of those fundamental decisional factors which would seem to relate to the discretionary exercise of executive clemency in the four referent Illinois capital cases.

#### DOUBTS AS TO GUILT—IMPRESSIONS OF COURT TREATMENT

Most clemency authorities are alert to the possibilities of an erroneous conviction, and they may make inquiry into the existence of new, ignored, suppressed, or underdeveloped evidence. And they apparently regard the fairness of the police treatment and of the judicial proceedings as somewhat of a consideration in their decision. However, these would seem to be relatively infrequent grounds for commutation, for there is an extreme hesitancy to "retry" the case.<sup>41</sup>

In the Paul Crump clemency hearing,<sup>42</sup> attorney Louis Nizer

<sup>40</sup> Jensen, *The Pardoning Power in the American States* 101 (1922).

<sup>41</sup> See *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 160-161 (1964).

<sup>42</sup> Much of the information concerning the Crump clemency hearing has been derived

took extreme pain to emphasize in his opening statement that there would be no questioning of the police practices and no challenge to the judicial determination. Indeed, it was admitted in the petition for executive clemency that Paul Crump was fairly tried and convicted, having received the full process of law accorded by our judicial system. The issue was to be confined solely to the question of rehabilitation as a basis for commutation of the death sentence.<sup>43</sup>

However, in the clemency petition for Witherspoon, there appears to be serious challenge to the circumstances surrounding his confession and to the composition and verdict of the jury.<sup>44</sup> Thus, the two cases present somewhat of a contrast as to the relative propriety and advisability of challenging the administration of criminal justice in any given case.

In the Dukes petition the possibility was suggested that it was not Dukes, but in fact another pursuing officer, who shot the policeman.

And in the Ciucci case, the clemency appeal was based primarily upon the unjustness of the successive prosecutions. George Leighton, Ciucci's state-appointed attorney, has indicated that while it is best to avoid "rehashing" the issue of guilt or innocence, it is proper to urge that some factor has impeded the ultimate justice which the case merits.

Because of the disinclination to "retry" the case and challenge the judicial process, "the reluctance to override the decision of the judge and jury" emerges as "the single most important reason for denying commutation."<sup>45</sup>

#### MITIGATING CIRCUMSTANCES

In some cases there may exist certain extenuating circumstances surrounding the commission of the crime. Examples are self-defense, provocation, duress, and necessity. These factors may

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from a full tape-recorded account of the proceedings, generously provided by John Callaway of WBBM, CBS Radio, Chicago.

<sup>43</sup> In point of fact there was some doubt as to the "voluntariness" of Crump's confession, but for various reasons it was not considered politic to urge this factor in the clemency appeal.

<sup>44</sup> See Appendix V.

<sup>45</sup> *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 187 (1964). See also Appendix II, § 10; Appendix III, § 9.

properly be considered in examining the totality of circumstances attendant upon any given case.<sup>46</sup>

Voluntary confession of the crime, guilty plea, and cooperation with the state may also be factors of some influence in arriving at a clemency decision.

On the other hand, the nature of the crime might operate as somewhat of a countervailing consideration. How vicious was the crime, how offensive to the community? Certainly the more heinous the crime, the less chance for clemency. Cases involving child molestation resulting in homicide, rape-murder, "cop-killing," mutilation, torture, and planned assassination are representative of those types of crimes which would seem to represent a relatively unfavorable case for executive clemency.<sup>47</sup> In this respect it might be noted that Ciucci was convicted for the nighttime murder of his wife and three children, Dukes and Witherspoon for the murder of apprehending police officers, and Crump for the murder of a plant guard.

Mitigating circumstances surrounding the criminal act were urged in the Dukes case, and are now being urged in the Witherspoon petition for clemency.

That the homicide was unplanned and spontaneous, not perpetrated in the course of a felony, was urged as a fundamental basis for commutation in the Dukes case. According to the account of Dukes' attorney, Jason Bellows, Dukes became intoxicated one night and began abusing his girlfriend in front of a small church in Southside Chicago. Some of the church members came out, and Dukes began shooting wildly. Two police officers came upon the scene and attempted to apprehend Dukes; during the ensuing pursuit one of the policemen was shot. Mr. Bellows characterizes the homicide as a "drunken Saturday night brawl—spur of the moment type shooting," one which lacked planning and premeditation.

<sup>46</sup> "Clemency is also occasioned if the crime was induced by others, if the victim unduly exposed the defendant to temptation, if the homicide was a 'mercy-killing,' . . . and if the act was a crime of necessity . . ." Rubin, *The Law of Criminal Correction* 573 (1963). And in some cases the relative culpability, or directness of participation in the homicide, may become critical to the clemency outcome. *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 163 (1964).

<sup>47</sup> *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 159 (1964).

Attorney Bellows believes that Dukes' crime was less heinous than Crump's, which was a felony-murder, a deliberate murder in the course of a planned robbery. He further believes that but for the fact that it was a police officer that was shot, Dukes would not have been given the death sentence. Therefore, he reasons, since Crump had only recently been granted commutation, so then should the same mercy have been extended to Dukes. George Leighton is apparently in accord with this view, having expressed the opinion that with respect to mitigating circumstances Duke certainly presented a better case than Crump, for the murder was not committed during an act of felony.

In Witherspoon's petition for commutation, it is urged that the shooting was not premeditated and not with malice aforethought; that Witherspoon was unfamiliar with the foreign-made, mechanically imperfect weapon; and that in the process of surrendering the gun to the arresting officer it went off accidentally or as the result of panic.<sup>48</sup> And, as in Dukes, this was not a felony-murder.

The factor of mitigating circumstances may also arise from certain social characteristics discernible in the individual petitioner.<sup>49</sup> Here psychological data and social history become relevant. Variables such as age, sex, race, nativity, occupation, marital status, physical and mental condition, prior character, prison record, etc. may enter the scene. Such data may assume special importance if it was not available for the trier of fact or the sentencing authority.<sup>50</sup>

Consider the following hypothesis: The governor tends to consider with special care the prayers for commutation of relatively unenlightened and apparently friendless individuals, particularly those whose crimes may have been the result of sudden and violent passion, ignorance, poverty, or unhappy surroundings; however, the governor tends to deal less favorably with clemency applications filed by offenders who enjoyed at the time of the crime

<sup>48</sup> See Appendix V.

<sup>49</sup> See Wolfgang, Kelly & Nolde, *Comparison of the Executed and Commuted Among Admissions to Death Row*, reprinted in John, Savitz & Wolfgang, *The Sociology of Punishment and Correction* 63 (1962). The purpose of this study was to analyze statistically the social characteristics of those persons who have been sentenced to death for the crime of murder since the introduction of the electric chair in Pennsylvania.

<sup>50</sup> *Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 166 (1964).

a good social background, material comforts, the benefits of education, and a happy domestic life.

#### PROLONGED DELAY BETWEEN SENTENCING AND EXECUTION

Our system of criminal justice harbors an ingrained resistance to the execution of the irretrievable penalty. Appeals, new trials, and judicial and executive orders granting stays of execution account for the wide range in elapsed periods of time between sentence and execution.

There has been a great deal of concern about protracted delays in carrying out the imposition of the death penalty, for there is reason to believe that the longer the delay the greater the possibility that the death penalty will never be implemented.<sup>51</sup> An extended delay in execution of the capital sentence seems to arouse public sentiment, often based upon the notion that the condemned party has already "died a thousand deaths" as he awaits his fate.<sup>52</sup>

In the Ciucci, Crump, and Dukes cases, a considerable number of years elapsed between sentence and final execution date. And now, in the Witherspoon petition, it is urged that the condemned man has already been subjected to the emotional equivalent of the death penalty by virtue of having undergone the agony of years in jail while awaiting execution and the further agony of the ups and downs of legal proceedings and numerous last minute stays of execution.

But why should the fact that through legal maneuvers several years have elapsed result in any special bonus to the applicant for commutation? This objection was stressed by the State's Attorney at the Paul Crump hearings. How about those individuals who are not able to delay their execution by various legal proceedings—what of them? George Leighton has observed that extended delay in execution is nothing but a windfall for the condemned individual. It is often a result of the zeal of the lawyer, and at the same time it provides a greater opportunity for the lawyer to attract publicity and perhaps generate various pressures upon the gov-

<sup>51</sup> Vedder & Kay, *Penology* 287 (1964).

<sup>52</sup> See Lunden, *Time Lapse Between Sentence and Execution: The United States and Canada Compared*, 48 A.B.A.J. 1043 (1962). See also McIntyre, *Delays in the Execution of Death Sentences*, American Bar Foundation Research Memorandum Series (1960).



error—or perhaps to develop an argument for rehabilitation as a basis for commutation. Judge Leighton believes that the “thousand deaths” theory should be of no real importance in the clemency determination.

#### DOUBTS AS TO APPROPRIATENESS OF DEATH PENALTY

The existence of capital punishment casts upon the executive a difficult task in deciding upon the exercise of clemency. How is he to weigh the claims of particular murderers?<sup>53</sup>

The executive may, in his discretion, consider that some decisional factor renders the imposition of the extreme penalty unduly harsh and therefore inappropriate in any given case.

Grounds for clemency may exist where popular indignation and excitement over a widely publicized crime make calm and even-handed consideration of the case almost impossible. . . . The result, if not an actually erroneous conviction, may be an excessive and vindictive sentence. . . . Time is a great healer; its passage lessens the impact of a crime, and so a sentence whose severity seemed to be justified at the time of the trial appears later to be unnecessarily harsh.<sup>54</sup>

Furthermore, there can be little doubt but that the views of the governor on the issue of capital punishment<sup>55</sup> will have some influence on his attitude toward the granting or denying of commutation in a death penalty case.<sup>56</sup> If the governor favors the abolition of capital punishment it would seem that he should be more prone to commute.

An extreme example of such a tendency occurred about a half-century ago in Oklahoma. Governor Lee Cruce (1911-1915) took the position that capital punishment was legalized murder and that he would therefore commute all death sentences to life im-

<sup>53</sup> Address by Norval Morris, *Chicago Maroon Forum on Capital Punishment*, University of Chicago Law School (Feb. 18, 1965).

<sup>54</sup> Rubin, *op. cit. supra* note 46, at 572.

<sup>55</sup> The exercise of clemency in death penalty cases is difficult to discuss without adverting to the broader issue of the morality and legality of capital punishment. Interest in capital punishment has reached its peak in this century preceding the execution of highly controversial persons. Definite strong feelings for the retention or repeal of the death sentence have resulted in a tremendous growth of literature on the subject. Generally the arguments speak to the following areas: deterrence, protection, retribution, religion, morality, social solidarity, eugenics, economics. Vedder & Kay, *op. cit. supra* note 51, at 276. See also *The Bitter Battle Over Capital Punishment*, Look, May 7, 1963 p. 23, in which reference is made to Ciucci, Crump and Witherspoon.

<sup>56</sup> *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 175 (1964).

prisonment. He expressed a fixed determination strictly to adhere to this policy. The Oklahoma Supreme Court took occasion severely to denounce the Governor's position.<sup>57</sup> The court correctly maintained that the Governor's conscientious scruples against capital punishment are not a valid basis upon which to override the legally established penal policy of the state. *Private* views should not control a state officer in the performance of *official* acts; public, not private motives, should prevail in any clemency determination. The court said:

No Governor has the right to say, directly or substantially, either by words or by actions, which speak louder than words: "I think that capital punishment is wrong. I know that it is taught in the Bible, and is provided for in the laws of Oklahoma; but I occupy a higher plane than this. I am not such a barbarian as to believe this is right. I am a better judge of what punishment should be inflicted than is taught in the Bible, or than the ignorant, savage, and bloodthirsty people of Oklahoma have provided for in their laws. Therefore, notwithstanding my official oath, I will place my judgement above the law, both human and divine, and will make my will supreme in this state, and will not permit capital punishment to be inflicted in Oklahoma, no matter what the law is, or how atrocious the offense committed may have been. . . ."58

However, the court felt constrained to allow that the exercise of discretion by the governor in clemency matters is not to be reviewed or interfered with by the courts. This is consistent with the theory to which the judiciary uniformly adheres:

There seems to be no right existing in the judiciary, unless granted by competent authority or unless fraud has entered into the case, to review or question in any way the motives or reasons upon which the granting of any particular (clemency) has been based. . . . It goes without serious question, however, that an executive has no right, morally at least, to allow personal motives or opinions or policy to influence his actions with respect to the granting of (clemency), and that he should act only when justice requires it, and when to do so would be in keeping with the dignity of his office and with respect for the law and the decisions of the judiciary, a co-ordinate branch of the government.<sup>59</sup>

In complete contrast to the position of the Oklahoma governor, Governor Kerner, professing the more orthodox and correct attitude, observed in commuting Paul Crump's death sentence:

I am personally opposed to capital punishment. My personal con-

<sup>57</sup> Henry v. State, 10 Okla. Crim. 369, 136 Pac. 982 (1913).

<sup>58</sup> *Id.* at 389, 136 Pac. at 990.

<sup>59</sup> Annot., 52 L.R.A. (n.s.) 113, 114 (1914).

victions, however, will not predetermine my actions in a request for commutation in a capital case.<sup>60</sup>

### REHABILITATION

While rehabilitation assumed no significant role in the Ciucci and Dukes cases, it was determinant for Paul Crump, and is currently being urged as a primary basis for commutation in the Witherspoon case. Rehabilitation appears to be a standard for commutation only where the condemned party has managed through court action for a number of years to remain alive and delay the execution.<sup>61</sup>

At the clemency hearings for Paul Crump,<sup>62</sup> Louis Nizer, in his brilliant opening statement, defined the issue as follows: "Is there rehabilitation here that merits commutation of the death sentence"? The thrust of the argument, testimony and affidavits produced by attorneys Nizer and Moore was that rehabilitation was a legitimate basis for commutation, and, indeed, that Crump was in fact rehabilitated. There would be no questioning of the police practices, no challenge to the judicial determination, no setting forth of the origins and past of Crump. The issue joined was whether the transformation of Crump's character was such as to merit commutation of the death sentence.

Nizer characterized the change in Crump as a case of sincere rehabilitation—"unique and miraculous"—a transformation only emphasized by the fact that Crump was a "beastly, animalistic, illiterate criminal" when convicted.

After Nizer's opening statement, Moore proceeded to call three clergymen to testify. A Chicago Rabbi observed that the traditional Jewish theological position favors society extending mercy to the repentant who seeks to rehabilitate himself. And Judaism in its modern thought favors forgiveness for the sinner who is penitent. Then a Methodist clergyman advanced the theory that there are two orders—the order of law and the order of grace—and that since Crump had undergone a moral and spiritual transformation, it would be an advancement of justice for the

<sup>60</sup> See Appendix IV.

<sup>61</sup> *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 168 (1964).

<sup>62</sup> Tape-recorded account, *supra* note 42.

state to act in terms of grace and thereby allow Crump to continue his self-discovery. The last of the theological testimony was offered by a Catholic priest, who cited Pope Pius XII to advance the idea that rehabilitation is a sufficient ground for commuting the death sentence.

Moore next called forth Warden Clinton Duffy ("Duffy of San Quentin"). He testified that he went to Cook County Jail, interviewed Crump, and observed him in the course of his duties. He concluded that Crump was not a phony, that he went about his duties earnestly and did everything possible to help others. He felt that Crump had eliminated his past hostility, had lost his old resentments, and that he was no longer the resentful, vicious, uncooperative person he once had been. Duffy suggested that Crump could be valuable in helping to rehabilitate others in prison, that he might assist in educational and morale-building programs.

Finally, Moore called Father James G. Jones, of the Episcopal Diocese of Chicago, and a leading figure in the movement to abolish capital punishment in Illinois. Father Jones had been a chaplain at Cook County Jail, and he knew Crump since the day Crump had entered, in March, 1953. He was then "one of the most frantic, hostile, dangerous men I knew." However, Father Jones then proceeded to characterize Crump's religious and educational development, his subsequent character transformation, as the "growth of a soul."

Father Jones cited examples of Crump's genuine progress. As tier captain ("barn boss" in prison argot), Crump undertook to protect the youthful and helpless from "tier creditors"; he was known as a "stand-up" person and would not tolerate sexual or property exploitation of those in his tier.

Crump often assisted Father Jones in his efforts to relate to other inmates. And when Father Jones observed men with apparently severe psychotic problems—possibly to the extent of committing suicide—he would have then transferred to Crump's tier in order that they be under Crump's surveillance.

Father Jones urged that Crump's life be spared in the interest of criminological science, so that he could be a referent, a subject

of study, to ascertain what happened in the institution to make him rehabilitate himself, what he himself did and how it might be copied.

To support the contention that Crump had developed into a social and useful force within the prison community and that therefore his life should be preserved, Nizer then offered excerpts from 222 pages of affidavits sworn to by fifty-seven persons who came into close contact with Crump during his years in prison:

Hans Mattick, Assistant Warden, Cook County Jail, 1955-1958: Crump was thirsting for knowledge and for self-betterment. He devoured literature and even wrote a creditable book.<sup>63</sup>

Chief Nurse, Cook County Jail: Crump was in charge of the tier for the chronically ill—diabetics, epileptics, alcoholics, etc. He was always a gentleman. He helped the sick and positively saved at least one life. "When I went onto the tier, Paul always made sure that there was no cursing and that every one was decently dressed and behaved. . . ."

Prison Guards: Paul settles disputes among the men; he acts as a judge; he prevents fights. "He has some sort of special magic—he is able to mold the men . . . and get respect from them." He is a benefit and a good influence. He is like a scoutmaster. He has stayed up all night helping sick prisoners and has sometimes sacrificed his food for them; and he makes sure they keep clean. He has read medical and sociological books so that he could help other inmates. He is a priest and a social worker and a nursemaid combined. He is definitely reformed; he counsels prisoners to go straight when they get out, to learn from his example. He would save men from going wrong again if he were to serve life in prison, and therefore he would be a benefit to society.

Criminologist: Crump has transformed into a sensitive and responsive human being. We would not be executing the same man who was convicted years ago.

The State's Attorney argued against the granting of clemency, his position essentially being that there was no *genuine* rehabilitation, and that in any event rehabilitation is not a valid basis upon which to commute the death sentence. To support his contentions, he called forth United States Federal District Court Judge Richard B. Austin, who was First Assistant State's Attorney at the time Crump was prosecuted. Judge Austin argued that there were two Crumps: one who, when armed, held up citizens, injured people, and killed an unarmed guard; another who, when unarmed and in custody, was a meek, mild, clever, cunning, intelligent man,

<sup>63</sup> Crump, *Burn, Killer, Burn!* (1962).

doing whatever necessary at all times to avoid the consequences of his conduct. That, said Austin, was what he had been doing during his time at prison. Where, asked Austin, was the remorse, the repentance, the contrition? What was being done was an effort to circumvent the death penalty.<sup>64</sup>

The State's Attorney next called a psychiatrist, who testified that while Crump presented an appearance of normality and rehabilitation, it was nevertheless extremely difficult to make an accurate assessment in the circumstances of prison incarceration.

Discussing the nature and function of executive clemency, the State's Attorney reasoned that commutation should be granted only in cases where guilt is questionable, the trial unfair, or the sentence too severe. Rehabilitation, he contended, is only a proper basis for clemency in those cases where the sentence imposed is designed to encourage rehabilitation. Therefore, by definition, in death cases rehabilitation is not a factor for consideration, inasmuch as the incarceration is not for that purpose.

In rejoinder, Attorney Moore characterized this as an "unconscionable" doctrine, and Nizer asserted that, from 259 cited references researched, there was no indication that the exercise of clemency is limited to the grounds suggested by the State's Attorney. Indeed, contended Nizer, rehabilitation ought to be the foremost ground for clemency!

Apparently Governor Kerner was somewhat disturbed about this novel argument for rehabilitation as a basis for commuting the death sentence. He confessed his uneasiness in the following terms:

What has troubled me is how the concept of rehabilitation can be judged and evaluated in a case where the process of law, after the extensive review permitted every defendant by our concern for justice, has determined that a man committed a crime so repugnant as to merit a sentence of death.<sup>65</sup>

Nevertheless, Governor Kerner, recognizing that "the embittered, distorted man who committed a vicious murder no longer

<sup>64</sup> "The rejection of rehabilitation arguments has often been expressed in terms of disbelief, perhaps summed up in the words of one prison official, 'Everyone gets a little religion on Death Row.'" *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 168 (1964).

<sup>65</sup> See Appendix IV.

exists," concluded that "under these circumstances, it would serve no useful purpose to society to take this man's life."<sup>66</sup>

The element of rehabilitation has likewise assumed a significant role in the Witherspoon petition for commutation. It is urged that Witherspoon is so completely rehabilitated that his execution would serve no social purpose, would outrage the public conscience, and would discourage the principle of rehabilitation. Witherspoon has apparently proved very effective in aiding sick and disturbed prisoners.<sup>67</sup> The petition for clemency asserts that there is substantial evidence that Witherspoon is a person of great potentiality for social usefulness:

His intimate knowledge of crime, his powers of observation, his articulateness, and his desire to be of public service should be utilized in the study of ways and means of preventing crime and rehabilitating prisoners.<sup>68</sup>

Attorney Gertz, who prepared Witherspoon's clemency petition, believes that "this is a case where there *ought* to be clemency, for the rehabilitation factor here is at least as strong as in Crump."

#### PUBLICITY AND PUBLIC PRESSURE

Clemency authorities maintain that publicity and community sentiment brought to bear in various forms do not influence their decision.

Clemency is neither to be given nor denied because some will approve or disapprove of the action in a particular case. I am not unmindful of the strong divergence of public opinion and of the deluge of protests that will ensue regardless of the action taken.<sup>69</sup>

However, notwithstanding protestations to the contrary, it would seem that pressures exerted by various groups and individuals in the body politic may be a meaningful factor, especially where the governor assumes full responsibility for the ultimate clemency determination, as in Illinois, without benefit of insulation by the Parole and Pardon Board. As an elected official, the governor cannot remain totally impervious to energetic displays

<sup>66</sup> *Ibid.*

<sup>67</sup> See Appendix V for Witherspoon's description, in his own words, of his experiences in Cook County Jail.

<sup>68</sup> *Ibid.*

<sup>69</sup> Gov. Stratton, Report on Leopold Decision (July 30, 1957).

of public opinion in any given case.<sup>70</sup> Fundamental questions emerge, then, as to the proper role of publicity and public pressure as factors affecting a clemency determination.

Where there is a great deal of publicity attaching to a clemency petition, the balance of public comment is often heavily in favor of extending mercy, thereby increasing to some extent the possibility that clemency will in fact be forthcoming.<sup>71</sup> Indeed, in the Crump case, where an overwhelming amount of community controversy was engendered,<sup>72</sup> it seems reasonable to suggest that he was benefited considerably by the favorable publicity and public pressure brought to bear upon the governor.<sup>73</sup>

Attorney Moore generated a huge public relations campaign for Crump. He approached the case as a public policy question, taking the issue of rehabilitation directly to the people through newspaper interviews, radio and television programs, and columnist Irv Kupcinet:

Without Kup, Moore's cause would have been far weaker. No reader of the Chicago Sun Times . . . could have failed to know what the next move in the Crump case would be. Kup was one jump ahead of everyone else. . . . His live *At Random* program with Crump at County Jail . . . evoked hundreds of letters favoring mercy for Crump. All of these letters were forwarded to Governor Kerner.<sup>74</sup>

The Crump case attracted much attention from the news media, and sympathetic feature stories were published in several nationwide magazines. Referring to Crump as "minister to the sick, protector of the weak, and keeper of the conscience of men who have no conscience," one major magazine rhetorically asked:

Is not that Paul Crump, who was convicted and sentenced, already dead? And has not a new soul risen in this same flesh, a soul devoid of the capacity of killing, a mature man ready to make positive contributions to that society which the other man offended, a human

<sup>70</sup> Scott, *The Pardoning Power*, 284 *Annals* 95 (1952), reprinted in Newman, *Sourcebook on Probation, Parole and Pardon* 41, 46 (1958).

<sup>71</sup> *Executive Clemency in Capital Cases*, 39 *N.Y.U.L. Rev.* 136, 174 (1964).

<sup>72</sup> "Parole and Pardon Board Chairman Kinney says the public pressure on the Board during the Crump case was tremendous. He says the Board has two file cabinets full of thousands of letters urging the Board to spare Crump's life. The Board has another file full of letters condemning the Board for its recommendation of mercy." Callaway, *Donald Page Moore: The New Clarence Darrow?*, *Chicago Scene Magazine*, June 1963 & July 1963.

<sup>73</sup> *Executive Clemency in Capital Cases*, 39 *N.Y.U.L. Rev.* 136, 172 (1964).

<sup>74</sup> Callaway, *supra* note 72, at 32.



being whose predestined execution by the State of Illinois would be nothing short of murder with malice aforethought?<sup>75</sup>

Concerned individuals and groups were active along with the news media in the mounting save-Crump crusade. One weekly news magazine reported:

Illinois Governor Otto Kerner has been besieged by requests for clemency from the likes of Billy Graham, Father Charles Dismas Clark (the "hoodlum priest"), state representatives, the former warden of San Quentin prison, the former county sheriff, a host of lawyers, sociologists, and teachers. Two Chicago dailies, the *American* and the *News*, and the St. Louis *Post-Dispatch*, have weighed in with strong editorial support for mercy. . . . By unanimous agreement, 300 Chicago ministers sermoned their flocks on salvation for the convicted killer.<sup>76</sup>

The apparent importance of media attention and community pressure in a clemency case is underlined by an analysis of the treatment given Dukes. While the media seemingly had an unfavorable effect on Ciucci and a favorable effect upon Crump, they were uninterestedly neutral in the Dukes case. Dukes' clemency appeal came close behind that of Crump—mere weeks later. In the Crump case there had been so much pressure, so much publicity, that, according to Attorney Jason Bellows, Dukes was completely overshadowed. There was more than reporting in the Crump case—there were feature stories and editorials. Bellows reasons that after the exhaustive treatment given to Crump, the subject of commutation of the death sentence merely ceased to be newsworthy to any appreciable extent. Thus, while neutral in posture, the media really did little for Dukes. And the community had likewise spent its interest and emotion on Crump, and consequently had little reserve upon which to draw for Dukes.

Nevertheless, Mr. Bellows believes that the news media can serve a valuable function. The fact that they may at times misuse their power does not necessarily mean that they should keep out of these cases altogether. Contrast this view to that of George Leighton, who seems to me rather critical of the press. He believes that the press injects itself into these cases and improperly influences the results, that the media draw upon false and irrational

<sup>75</sup> *Ebony Magazine*, July 27, 1962, p. 31.

<sup>76</sup> *Time*, July 20, 1962, p. 22.

standards with no understanding of the law. "Why," he asks, "should they clamor for commutation for X and death for Y?"

Executive clemency campaigns in death penalty cases apparently tend to become somewhat merged with the movement to abolish capital punishment. The abolition groups initiate direct public action campaigns for commutation. They seek to inform the public and gain its support with respect to individual commutation cases. The working philosophy may be somewhat akin to that of a political lobbying organization. They may conduct campaigns by distributing handbills, writing press releases, advising people of pending commutation hearings and requesting those interested to send letters, telegrams, and petitions to the governor.<sup>77</sup>

The active membership of the current save-Witherspoon crusade seems to be an admixture of capital punishment abolitionists and believers in Witherspoon the man. The Citizens for Witherspoon Committee has plunged directly into the arena of community action in an effort to arouse community opinion and consequently bring pressure to bear upon Governor Kerner. They have distributed petitions; they have urged concerned persons to write the Governor; they have appealed to various civic and church groups. But the Committee has indicated its particular disappointment with the lack of positive response on the part of the organized churches and the civil rights groups as well, especially since their potential influence is so great.

The Committee has been concerned with gaining access to the news media. The feeling seems to be that while the press has devoted less attention to Witherspoon than was given to Crump, nevertheless they have been quite fair in presenting Witherspoon's side of the story. Some college newspapers in the Chicago area have taken up the cause, and a limited amount of coverage has been obtained on Chicago radio and television.

The fundamental problem that emerges for the Committee is how to reach more of the public, how to attract more interest and thereby broaden the base of support for the commutation movement?

<sup>77</sup> *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 174-175 (1964).

## INSULATING FACTORS

In solitude he must resolve each case and alone he must face the judgment of the people. . . .<sup>78</sup>

Where the governor assumes ultimate responsibility for the clemency decision, he must take on an awesome power and a difficult task. "He must become the conscience of the people of his state."<sup>79</sup> But need he necessarily sustain such a heavy burden?

Theoretically, there is no strict adherence to precedent as a standard for determining whether commutation should be granted. The employment of standards of general applicability is thought to be incompatible with the singular nature of the clemency decision.<sup>80</sup> However, one writer has pointed out that:

Despite these assertions, one wonders whether clemency authorities do not feel compelled to rely to some degree on precedent, for to decide every case on an *ad hoc* basis, particularly for the governor who must decide alone, is to bear a heavier burden than need be borne: Precedent shields those who must decide. . . .<sup>81</sup>

One also wonders to what extent the statutorily required recommendations of the prosecutor and trial judge affords the governor an opportunity partially to relieve himself of the lonesome duty of arriving at a life-or-death clemency decision.

Consider, too, whether the governor, subconsciously or otherwise, permits himself to share his awesome responsibility by unduly relying upon the recommendations and conclusions of the State Parole and Pardon Board. The significance of this decisional factor must remain the object of some speculation in Illinois, however, for the Board's advisory reports to the governor are not a matter of public record. Therefore, no positive assertions properly may be offered with regard to the governor's reliance upon the Board's advisory report in his constitutional action upon any given case.

## CONCLUSION

Executive clemency subserves as a vehicle for the expression of society's compassion, as an outlet from the rigorous inflexibility of a judicial system. This mobile institution has assumed telling

<sup>78</sup> Gov. Stratton, Report on Leopold Decision (July 30, 1957).

<sup>79</sup> Harriman, *Mercy is a Lonely Business*, Saturday Evening Post, vol. 230, no. 38, p. 24, 84 (1958).

<sup>80</sup> *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 176-177 (1964).

<sup>81</sup> *Id.* at 177.

significance in the historic development of the criminal law.<sup>82</sup> And today, operating within its proper sphere, executive clemency continues to fulfill a meaningful role in the operation of the criminal process.

It would seem vital to the proper functioning of the clemency device that the reasons and influencing factors, both assigned and unassigned, which relate to a decision, be sound and rational. The spotlight of publicity is constantly focused upon the governor, and by injudicious use of the power of clemency he could not only expose himself to severe criticism, but might also bring the institution of discretionary executive clemency into disrepute and reduce it to an instrument of little meaning, or even of harm. Thus, the all-importance of sound, well-founded decisional considerations in the clemency process, especially in capital cases where community emotions are often at their highest.

Interviews reveal a certain dissatisfaction with the decisional soundness of executive clemency. It would seem that much of the clemency process revolves about somewhat unpredictable patterns of interdependent variables. Human factors seem to become mixed with political factors. There is much publicity, public pressure, and emotionalism—all of which tend to divert the governor's attention from the merits of the particular case. Indeed, clemency decisions in capital cases have been characterized as "often fortuitous and discriminatory."<sup>83</sup>

Certain troublesome patterns seem to suggest themselves from an analysis of the referent Illinois commutation cases. It seems that much depends upon mere luck! What kind of attorney happens to be appointed by the state? How zealous is he in delaying execution through legal maneuvers and in generating publicity and public pressure? Of what logical relevance to life and death is a public relations campaign?

What about rehabilitation? How about the condemned man who is not able to delay his execution and thereby receive a bonus of time in which to "rehabilitate" himself and attract community

<sup>82</sup> The law of insanity, self-defense, compulsion, and improved treatment for juvenile offenders developed from the practice of exercising clemency in those cases where rigid application of the then existing criminal law seemed undesirable. <sup>3</sup> Attorney General's Survey of Release Procedures—Pardon 52 (1939).

<sup>83</sup> Address by Norval Morris, *Chicago Maroon Forum on Capital Punishment* (Feb. 18, 1965).

sympathy? And how about the individual who is not so intelligent and capable as to react positively to prison society? Should he be placed at a disadvantage? How about the man who is not able to compose or write, one who does not achieve or communicate to the extent of attracting the attention of influential persons with access to the news media? Is there a tendency to confuse artistic creativity and the ability to articulate with rehabilitation? Is it true that "everyone gets a little religion on Death Row"?

And what of timing? Why should a man be put at a disadvantage merely because his case is overshadowed by a recent *cause celebre*, where news value and community interest were exhausted? Of what relevance to the question of life or death is the factor of temporal fortuity?

Notwithstanding dissatisfaction with these troublesome decisional patterns, however, it would be somewhat remiss to suggest any diminishing of the importance of executive clemency, especially in capital cases. For as long as capital punishment exists, the discretionary power of the executive to grant clemency is bound to remain an important element in the terminal stages of the criminal process.

## APPENDIX I

### ILL. CONST.

#### ARTICLE V. EXECUTIVE DEPARTMENT

§ 13. The Governor shall have power to grant reprieves, commutations, and pardons, after conviction, for all offenses, subject to such regulations as may be provided in law relative to the manner of applying therefor.

## APPENDIX II

### PARDON ACT (ILL. REV. STAT. CH. 1041½)

#### APPLICATIONS

AN ACT to regulate the manner of applying for pardons, reprieves and commutations. Approved May 31, 1879. (Chapter 1041½, Illinois Revised Statutes, 1961.)

APPLICATION FOR PARDON—HOW MADE. Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That hereafter all applications for reprieves, commutations and pardons shall be made by petition in writing to the Governor, signed by the party under conviction, or other persons in his behalf, which petition shall contain a brief history of the case and the reasons why such pardon should be granted; and shall also be accompanied by a statement in writing made by the judge

and prosecuting attorney of the court in which the conviction was had; stating the opinion of said judge and prosecuting attorney in regard to the same, or satisfactory reasons shall be given to the Governor, why such statements of the judge and prosecuting attorney, or either of them, do not accompany such petition; and it shall be the duty of such judge and prosecuting attorney to give such opinion, whenever such petition shall be presented to them.

**NOTICE.** Section 2. Notice of the proposed application shall be given by publication for three weeks prior thereto, in a newspaper published in the county where the conviction was had, a duly certified copy of which notice shall accompany said petition; Provided, the Governor may dispense with publication of notice, when in his judgment justice or humanity requires it.

#### BOARD OF PARDONS

**AN ACT** in relation to pardons and the commutation of sentences. Approved June 5, 1897. Title as amended by Act approved June 29, 1943.

**RULES AND REGULATIONS—RECORD OF PROCEEDINGS.** Section 4. The Department of Public Safety shall make all such rules and regulations for the orderly conduct of its business, as may be deemed necessary. The Department shall cause proper records to be kept in its office of its acts and proceedings, and shall hear all applications for pardons and for the commutations of sentences in the order in which they are filed; but the Department may take up any application out of its regular order, where the exigencies of the case require it.

**PETITIONS FOR PARDONS—HEARING—NOTICE.** Section 5. All petitions and requests for pardons and commutations shall be addressed to the Governor, and, as to form, accompanying statements, publications of notices, etc., shall be governed by the Act of May 31, 1879, entitled, "An Act to regulate the manner of applying for pardons, reprieves and commutations," except that the three weeks' notice provided in that Act to be given shall have reference to the hearing before the Department of Public Safety, and not the Governor; and every such petition or request shall, before its actual presentation to the Governor, be filed and kept in the office of the Department of Public Safety for the preliminary action of the Department.

**MEETINGS OF DEPARTMENT OF PUBLIC SAFETY OR OFFICER DESIGNATED.** Section 6. The regular meeting of the Department of Public Safety, or of the officer or agency of the Department designated by the Director thereof, shall be held on the second Tuesday of the months of January, April, July and October in each year, and special meetings may be called at any time by the Governor, or the Director of the Department.

**HEARING OF APPLICATIONS—REPORT TO GOVERNOR.** Section 7. The Department of Public Safety shall, upon due public notice, give a full hearing to each application for pardon or commutation filed with it, allowing representation by counsel, if desired, after which it shall, without publicity, make report upon each case to the Governor, accompanying such report with the original petition and all accompanying papers and documents, and in such report shall be embodied the conclusions and recommendations of the Department, with its reasons therefor, briefly stated. The report to the Governor shall be advisory to him in his constitutional action upon the case.

**RECORD TO BE KEPT—DEPARTMENT OF PUBLIC SAFETY NOT TO ACT AS COURT OF REVIEW.** Section 8. A full record of the report and recommendation made

in each case shall be kept in the office of the Department of Public Safety. The Department shall in no case act as a court of review to pass upon the correctness, regularity or legality of the proceedings in the trial court which resulted in conviction, but shall confine itself to a hearing and consideration of those matters only which properly bear upon the propriety of extending clemency by the Governor.

GOVERNOR MAY HEAR APPLICATION FOR REPRIEVE IN CASE OF DEATH SENTENCES. Section 9. This Act shall not deprive the Governor of the right to hear any application made directly to him for a reprieve of a death sentence where the exigencies of the case require such reprieve in order to give the Department of Public Safety the time and opportunity to properly investigate the case.

### APPENDIX III

#### DEPARTMENT OF PUBLIC SAFETY RULES GOVERNING APPLICATIONS FOR PARDON AND COMMUTATION OF SENTENCE

The Department of Public Safety of the State of Illinois, by Joseph E. Ragen, Director, having heretofore designated the Parole and Pardon Board as the agency to hear petitions for pardons, reprieves and commutations of sentence and make reports to the Governor, does hereby adopt and promulgate the following rules and regulations governing petitions for pardon and commutations of sentence.

1. All applications for pardons, reprieves and commutations of sentence shall be made by petition, in quintuplicate, addressed to the Governor and filed in the office of the Parole and Pardon Board at Springfield at least twenty days prior to the succeeding regular meeting of the Pardon Board, and conform to the following requirements:

(A) The petition shall be signed by the applicant or other person in his behalf.

(B) If signed by another person, the full address of such person shall be given, and his interest in the applicant stated.

(C) Each petition shall contain a brief history of the case, a brief biography of the petitioner, setting forth his full and correct name, any aliases he has been convicted under, his age, place of birth, the different places where he has resided, the years of residence in each place, the occupations pursued in each locality, and the reasons why a pardon or commutation of sentence should be granted.

2. Each original petition shall be accompanied by a statement in writing made by the Judge and Prosecuting Attorney of the court in which the conviction was had, stating the opinion of the Judge and Prosecuting State's Attorney in regard to the same, or satisfactory reasons shall be given why such statement of either of them does not accompany the petition. Copies of the petition shall be furnished to the said Trial Judge, Prosecuting State's Attorney and present State's Attorney in each case if they are available; and proof thereof may be made by a receipt of such official, or affidavit that it was delivered, or a registered receipt of the United States Post Office if sent by registered mail. Such proof of service shall accompany the petition.

3. Notice of the hearings on all petitions shall be given by publication, as required by Statute, for three successive weeks prior thereto in a newspaper published in the county where the petitioner was convicted; and a

certificate of such publication must accompany the petition, unless the Governor dispenses with such publication.

4. The published notice shall contain the name of the person convicted, the fact that he is applying for a pardon or commutation of sentence, the date of sentence, the crime of which he was convicted, the nature of the sentence, the court in which he was sentenced, and the term of the Pardon Board to which the petition is being filed.

5. A copy of the published notice of the application for pardon or commutation of sentence shall be given to the present State's Attorney of the county in which the applicant was convicted; and if he is not the State's Attorney who prosecuted the applicant, a copy of the petition shall be served on the duly elected prosecuting State's Attorney. Proof of the service of notice and copy of the petition shall accompany the original petition.

6. A copy of the published notice of application for pardon or commutation of sentence shall also be served on the complaining witness at least twenty days before the date of hearing, and proof of such service shall be attached to the original petition.

If the complaining witness cannot be found upon diligent inquiry, an affidavit setting forth the efforts made to locate the witness shall be attached to the original petition.

7. At the quarterly meetings of the Pardon Board counsel for applicants, as well as others who appear in their behalf and those who appear in opposition, will be heard.

8. At each quarterly meeting as aforesaid, a docket shall be prepared listing all petitions which comply with the Statutes and these Rules, and shall have been filed in apt time. Counsel and those who wish to be heard in favor of or in opposition to the respective petitions on the call of the docket, must register in Room 223, State Office Bldg., 400 So. Spring St., in Springfield. The cases will be called in the order of registration. Public hearings will be held in Room 219.

9. The Pardon Board shall in no case act as a court of review to pass upon the correctness, regularity or legality of the proceedings in the trial court which resulted in conviction, but shall confine itself to a hearing and consideration of those matters only which properly bear upon the propriety of extending clemency by the Governor.

#### APPENDIX IV

Springfield, Ill., Aug. 1—Gov. Otto Kerner today issued the following statement:

"I have today commuted the sentence imposed upon Paul Crump from death to imprisonment for a term of 199 years, without parole.

"In doing so, I am fully aware of the responsibility of my action. It is admitted in the petition for executive clemency that Paul Crump was fairly tried and convicted, having received the full process of law accorded by our judicial system. Yet the Constitution of Illinois grants to the Governor the power of executive clemency to be exercised in exceptional cases. This is such a case.



"In any capital case, there can be no easy decision. Every possible factor must be evaluated before a final decision is made.

"I am personally opposed to capital punishment. My personal convictions, however, will not predetermine my actions in a request for commutation in a capital case.

"It does not follow, however, that every request for clemency must be denied. To take that position would be to abrogate the power which was consciously and deliberately invested in the Governor.

"The most significant goal of a system of penology in a civilized society is the rehabilitation of one of its members who, for a variety of complex reasons, has violated the laws of the society. If that premise were to be denied, solely because it is a capital case, a great disservice would be done to what we hopefully embrace as the ultimate goal of this system.

"What has troubled me is how the concept of rehabilitation can be judged and evaluated in a case where the process of law, after the extensive review permitted every defendant by our concern for justice, has determined that a man committed a crime so repugnant as to merit a sentence of death.

"I do not suggest that by my decision in this case I have totally resolved this dilemma, nor that I can set forth standards so universal as to lead to an inevitable conclusion in the next case.

"We must, however, be able to hold forth to others the hope that they can look forward to a useful life—to life itself—if they will make the necessary effort to face squarely their past actions and the alternatives.

"Before me is a voluminous record of testimony and affidavits from almost all of the people who have had any association with Paul Crump since his imprisonment nine years ago. This record is virtually unanimous that the embittered, distorted man who committed a vicious murder no longer exists. Rather, the record speaks eloquently of the degree of introspection, the maturity of judgment and of values he has achieved, and of the genuine contribution he has made, and can continue to make, as a human being even in his restricted environment. Within this framework, Paul Crump must be accepted as rehabilitated.

"Under these circumstances, it would serve no useful purpose to society to take this man's life. The power of clemency entrusted to the Governor permits giving effect to this judgment.

"This consideration, however, can never be entirely free of doubt, for the real test for Paul Crump lies ahead. The years he must face in prison will serve as a true test of his willingness and ability to be of service to his fellow man."

## APPENDIX V

BEFORE THE PAROLE AND PARDON BOARD OF THE STATE OF ILLINOIS

In the matter of

WILLIAM WITHERSPOON

PETITION FOR COMMUTATION OF DEATH SENTENCE

TO THE HONORABLE OTTO KERNER, GOVERNOR OF THE STATE OF ILLINOIS:

Your petitioner, William Witherspoon, respectfully seeks the grant of your Excellency's clemency in order that his sentence of death may be com-

muted to any term of years the facts and circumstances warrant, and in support thereof submits the following:

#### A PREFATORY NOTE OF URGENT IMPORTANCE

After what appeared to be the termination of the federal and state proceedings in this matter, counsel for Witherspoon petitioned the Illinois Supreme Court for an indefinite stay of execution on the grounds that it was necessary for new counsel, Mr. Elmer Gertz, to acquaint himself with the record in order to prepare, file and present argument on a petition for executive clemency. The court thereupon re-set the execution date to March 19, 1965. Pursuant to the representation made by counsel to the Supreme Court, this petition is accordingly filed.

It is necessary, however, to point out that since application was made to the Illinois Supreme Court other United States District Court appointed counsel are pursuing a new habeas corpus proceeding in the United States District Court. Because of the seriousness and scope of that effort, we cannot state at this time as to how prolonged it will be, and we must assume that it may succeed, making this petition for executive clemency then unnecessary. This petition is filed now without prejudice to the said habeas corpus proceeding, and it is our suggestion and prayer that the hearing hereon be postponed and that, meanwhile, the Governor exercise his statutory right to grant a stay or reprieve, pending the disposition of the said habeas corpus proceeding and this petition for executive clemency.

At a subsequent time it may be incumbent upon counsel to file an amended petition for executive clemency or a supplement thereto and a memorandum of law and fact in support thereof. Leave to file the same is hereby prayed.

#### REASONS WHY THE GOVERNOR SHOULD DISPENSE WITH PUBLICATION OF NOTICE

By Statute, applications for commutation of death sentence should be published in a newspaper for three weeks prior to the filing of the application (Chapter 104-1/2, Ill. Rev. Stat., 1963). The same statute, section 2 thereof, provides that ". . . the governor may dispense with publication of notice, when in his judgment, justice or humanity requires it." By order of the Supreme Court of Illinois entered on January 15, 1965, the execution of the death sentence has been stayed, pending an application to your Excellency for a commutation of the death sentence, to March 19, 1965. To require three weeks' notice of publication would unfairly delay any hearings which your Excellency might order to be held. The State's Attorney of Cook County, Illinois, is served a copy of this petition and the next of kin of the deceased is also served through the office of the State's Attorney in accordance with the suggestion of assistant State's Attorney Elmer Kissane, the chief of the criminal appeals section, and the assistant State's Attorney who has handled this case through all of the court proceedings.

This application is further made in accordance with Section 9 of Chapter 104-1/2, which states:

This Act shall not deprive the Governor of the right to hear any application made directly to him for a reprieve of a death sentence where the exigencies of the case require such reprieve in order to give the Department of Public Safety the time and opportunity to properly investigate the case.

Attached hereto is an affidavit of service of this petition upon the State's Attorney of Cook County, and upon the next of kin. No service can be had upon the trial judge, he now being deceased.

#### HISTORY OF THE CASE

It is charged that on April 29, 1959, petitioner, William Witherspoon, shot and killed Chicago police officer, Mitchell Stone, who was in the act of arresting Witherspoon at about 4:30 in the morning (Abst. 11, 25, 55). Shortly thereafter, Witherspoon was arrested. He was taken to police headquarters at 11th and State Street, Chicago, where he was interrogated.

In the trial in his cause in the Criminal Court of Cook County, Witherspoon contended that his purported confession was extorted from him by brutal beatings and by threats of death against him by the interrogating police officers. This is one of the subjects of the pending habeas corpus proceeding.

It was petitioner's trial testimony that the shooting had been accidental, that he had tried to hand the gun to Officer Stone who fired a shot at him, and that petitioner's gun had discharged accidentally as he jumped back (A. 127). It is contended that the gun was a defective foreign make.

The petitioner, being indigent, had court-appointed counsel in the trial of the cause and has been represented by court-appointed counsel throughout all of the proceedings, including this one.

The petitioner had requested that the jury pass only upon the question of guilt or innocence and that the court determine the punishment, but the court denied this request.

The jury returned a verdict of guilty and fixed the punishment at death. (This proceeding was permissible at that time. Since then, effective January 1, 1963, the jury has no right to fix the punishment and a hearing in mitigation before the judge is required in all cases. See Section 1-7(g), Chapter 38, Ill. Rev. Stat. 1963). There has never been a hearing in mitigation.

After Witherspoon's conviction, the Supreme Court of Illinois appointed counsel and an appeal was taken to that court. In March, 1963, the Supreme Court affirmed the conviction and a petition for rehearing was denied on May 22, 1963 (*People v. Witherspoon*, 27 Ill. 2d 483). No petition for certiorari with respect to this case was ever filed with the United States Supreme Court.

Thereafter, on September 11, 1963, the Supreme Court of Illinois appointed new counsel, who filed a petition for a writ of habeas corpus, No. 63 C 1812 in the District Court in Chicago. Because Witherspoon had not exhausted his state remedies, he filed in the trial court his post-conviction petition which was denied in November, 1963, and an original writ of habeas corpus in the Supreme Court which was likewise denied in November, 1963. He filed an appeal from the denial of his post-conviction petition to the Supreme Court of Illinois (No. 1308), and in an unpublished opinion the Supreme Court of Illinois denied the writ of error on the post-conviction petition on January 17, 1964.

Thereafter, hearings were held in the District Court for the Northern

District of Illinois, Judge James B. Parsons presiding, and on March 24, 1964, Judge Parsons, ruling on the then pending petition for a writ of habeas corpus, ruled that the sentence of death as set by the jury was unconstitutional in that it did not permit the petitioner to present evidence in mitigation to the sentencing authority.

The State then appealed to the Court of Appeals for the Seventh Circuit from that part of Judge Parsons' order (No. 14595) and Witherspoon cross-appealed from certain orders (No. 14597). The Court of Appeals, in an opinion on September 28, 1964, reversed the judgment of Judge Parsons and affirmed in all other respects the conviction and sentence (*United States ex rel. Witherspoon v. Illinois*, — F.2d —).

Petition for a writ of certiorari on this (but not the original conviction) was filed in the Supreme Court of the United States to the October, 1964 Term, No. 602 Misc., and the petition was denied without opinion on December 14, 1964.

The Supreme Court of Illinois has stayed the execution of the death sentence to March 19, 1965, permitting your Excellency to consider and to rule upon his petition for a commutation of the death sentence.

Since then a new proceeding for habeas corpus has been filed and is now pending.

#### PERSONAL BIOGRAPHY OF PETITIONER

Petitioner was born in Detroit, Michigan on January 31, 1924. His mother died when he was two years of age and he was raised by his grandmother until he joined the United States Navy at the age of seventeen, in January, 1941. When war broke out, he was a member of the Asiatic fleet stationed in the Far East. He participated in active combat with the Navy in various war zones in the Pacific. Petitioner was aboard ship for about eighteen months when the ship returned to the United States at San Francisco. Together with many others from the ship, he was absent without leave. Given a general court marshal, petitioner was returned to duty on eighteen months' probation. While stationed in Hawaii, he was twenty-four hours over leave and was subsequently given a bad conduct discharge.

Petitioner returned home to Detroit, Michigan, where he became a truck driver. For stealing a car, he received a sentence of one to five years at the penitentiary in Jackson, Michigan, received a parole and satisfactorily was discharged on the parole. He again worked as a truck driver and as a part time re-write man for the *Detroit Times*.

Subsequently, he pleaded guilty to a charge of grand larceny and received a sentence of from two to five years in prison. While on parole, he committed an act called gross indecency with a woman and received a sentence of three to five years and was returned to the penitentiary at Jackson, Michigan.

After his discharge, petitioner was in no trouble for a period of five years. He then committed offenses in Detroit and left that city for Chicago. While in Chicago four days he had met a woman in a tavern with whom he had a dispute. It was as a result of this dispute that Officer Stone sought to arrest the petitioner, with the consequences as hereinbefore described. At this time, petitioner had not committed, nor was he in the process of committing, any crime.

Petitioner was married in the Philippine Islands during the war. His wife was killed there in bombing raids. He subsequently married again and was divorced. His former wife's three daughters by a prior marriage still correspond with him.

With respect to the conduct of Witherspoon since his incarceration in the County Jail and the remarkable change in his character, Witherspoon himself has written to counsel, and his own words have a special significance:

Since coming to the jail I have begun writing, mostly for magazines. I am also at work on a novel. My writing has gathered many friends; among them staunch supporters who see something in my work—that there is a realism that captures them. I answer most of the letters that come in as a result of my writing and have found only a few of these to be in any way against me—those are usually unsigned.

My job here is on the ABO, a hospital outpatient tier, where I have charge in the capacity of inmate "barn boss." Here we care for the aged, the diabetic, heart, ulcer and psycho patients. Here we house the stool pigeons, the red tags, the guys who could get along nowhere else in the jail. I do not run this tier with "force," but rather with kindness and understanding. I am sure that Ulette Goodloe, the head nurse, will tell you that this unit now runs smoother than it ever has in the past.

Many of my nights are spent with sick inmates; getting them medication and doctors when necessary. Often I have to set aside my own work to sit down with some kid who is scared, or some old timer who decided he no longer has anything he wants to live for . . . I guess I am the only man who walks into the cell of one of these psycho inmates and calms him down with words and understanding. I talk them out of knives they have fashioned from spoon handles and bits of tin from their cups . . . For some reason I can get thru to these men and they form a trust toward me they do not possess for anyone else. Perhaps if a jail officer walked in on one of them he would get cut, I don't know, but I think this is a strong—a very strong possibility . . . This tier is an exacting job and you have to exert a great deal of energy. You must be father to those who need it; friend to those who never had one; in short you have to know how—and when—to apply psychology. I would say there is less racial tension here than anywhere else in the jail because it is a rule that anyone who works with me in the running of the tier must treat everyone equal—not only his race and religion, but his crime status is obscured by the way he treats those around him while here. In other words, an ex-cop is as safe here against all prejudice as any one of us.

There is no compensation for this job, other than the knowledge that you are doing something to benefit others. I have had some inmates go out of here and write back saying they were using their friendship for me as a strength that kept them away from crime; away from narcotics . . . Parents have written me saying their boy spoke of me when he got home and they wanted to thank me for all I have done for their sons . . .

Often, you see, young inmates, attacked by homosexuals upstairs, are put down here for safe keeping. They are scared kids until they learn that I do not tolerate the things down here that take place in other areas of this jungle. Then they are at ease, and can regain their balance and self-respect. I argue for their rights, and argue them down when they are wrong . . . .

My name and my word commands respect among the inmates and among the officials. I have never broken my word to any man.

My mailing list includes about 350 names; to some of whom I merely send Xmas cards once a year; others about 150, I write sporadically, and about 50 are my regular correspondents. There just is not time to reply to too many letters and to write for the magazines also. The articles, I have been told, give people an insight into this sort of place and into the people who inhabit it. Among my friends, acquired since coming here, are sons, daughters and brothers of policemen.

I have tried to set an image of the condemned prisoner while here that would off-set the stereo-type. So I have co-operated with members of the press and other news media, for I felt people had a right to know how and what I feel at this penalty . . . .

These and other aspects of his rehabilitation will be covered more fully in the hearing before the Board, through the testimony of witnesses and documentation.

#### REASONS WHY COMMUTATION SHOULD BE GRANTED IN THE CASE OF WILLIAM WITHERSPOON

- I. In an executive clemency proceeding, the Board and the Governor are not restricted by technical rules as may be a trial court or a reviewing tribunal. The courts, confronted by a jury verdict, are limited in what they may consider in order to set aside the verdict; the Board and Governor may act in accordance with the dictates of conscience, public welfare and justice, regardless of any legal technicalities.
- II. In a capital case, the defendant ought not to suffer the final penalty because he cannot legally avail himself of the advantages afforded by changes in the law since his conviction. In an executive clemency hearing, such changes should be applied to defendant.
- III. Petitioner was deprived of rights that defendants in his position now receive as a matter of course, including:
  - (a) A determination by a jury confined to the sole issue of guilt;
  - (b) A hearing in mitigation prior to adjudication of punishment;
  - (c) The opportunity to petition the United States Supreme Court for certiorari in connection with the *original* case.
- IV. Despite the jury verdict against him, the reasonable conclusion should have been drawn that the shooting was accidental, and not premeditated and not with malice aforethought, for the following reasons, among others:

- (a) Petitioner was not in the act of committing a crime;
  - (b) Technically, he was not a fugitive;
  - (c) There was no reason, good or bad, for the shooting;
  - (d) The gun was not his and he was not familiar with it;
  - (e) The gun was mechanically imperfect and capable of going off accidentally;
  - (f) Petitioner claims he was in the process of surrendering the gun to the police officer when it went off accidentally;
  - (g) Petitioner did not intend to shoot the police officer.
- V. At worst (assuming the killing was not accidental), the crime was an act of panic, not of premeditation.
- VI. This community, like the rest of the nation, is divided on the subject of capital punishment; more persons being opposed to it than in favor. Yet all those opposed to capital punishment were excluded from the jury. Thus, there was not a representative jury, but one slanted in favor of the death penalty.
- VII. There is serious question as to the admissibility, voluntariness and propriety of the claimed confession. Circumstances surrounding the confession make the death sentence inappropriate in any event.
- VIII. The jury might have imposed a lesser penalty on defendant but for evidence collateral to the chief issue prejudicial to defendant and the rejection of significant evidence tendered by defendant.
- IX. A study of homicide cases contemporaneous to that of the defendant indicates that almost all defendants received a life sentence (or equivalent).
- X. The orderly processes of the administration of criminal justice are hampered by capital punishment.
- XI. The supreme, irrevocable penalty of death, if invoked at all, should be reserved for the vicious and depraved. Petitioner is neither vicious nor depraved; there is abundant and irrefutable evidence that he is a person of great potentiality for social usefulness. His intimate knowledge of crime, his powers of observation, his articulateness and his desire to be of public service should be utilized in the study of ways and means of preventing crime and rehabilitating prisoners.
- XII. Since only three murderers out of the thousands convicted of murder have been executed in the last twelve years in Illinois, it is clear that only as a matter of fortuitousness, or chance, is any one executed in Illinois. It is, therefore, morally and, perhaps, legally wrong to execute any one in Illinois. Such execution constitutes, in a real sense at this time in history, cruel and unusual punishment and deprivation of due process.
- XIII. The capital punishment law (like witchcraft laws) having become virtually a dead-letter law, the Governor and the Board should courageously recognize that fact, and not be intimidated by the opinion of the unenlightened and vindictive.
- XIV. Having gone through the agony of years in jail while awaiting

execution and the further agony of the ups and downs of legal proceedings and numerous last minute stays of execution, petitioner has already been subjected to the emotional equivalent of the death penalty, and it would be barbaric to execute him at this time.

- XV. The Illinois General Assembly, in common with legislatures throughout this and other countries, is presently considering the abolition of the death penalty, and it is believed that such legislation may be enacted. It is morally wrong to execute any one while the enactment of such legislation is probable or even possible.
- XVI. Informed men and women in all walks of life have urged executive clemency. These include many leaders of the community.
- XVII. Petitioner is so completely rehabilitated that his execution at this time would outrage the public conscience and discourage the principle of rehabilitation generally.
- XVIII. In the opinions of those best acquainted with the petitioner—the Sheriff and the County Jail personnel and those who have been in close contact with him since his conviction—petitioner has demonstrated qualities that justify the extending of mercy to him.
- XIX. There is pending in the United States District Court a new habeas corpus proceeding. In any event, petitioner's life should be spared pending the final determination of that proceeding.

Petitioner will supplement this application with a memorandum as to the applicable law and facts.

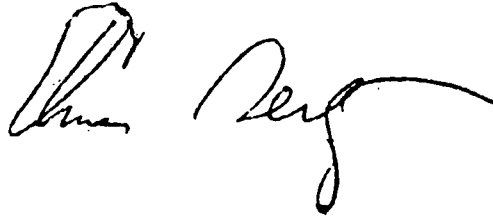
In the circumstances set forth in this petition, the full ends of justice are served by the incarceration of petitioner, not by his execution.

#### CONCLUSION

For these reasons, commutation of this death sentence should be granted in the interest of justice.

JULIUS LUCIUS ECHELES  
30 N. LaSalle St.  
Chicago, Illinois 60602  
DEarborn 2-1594

Respectfully submitted,



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Attorneys for Petitioner, William Witherspoon





# CHICAGO-KENT LAW REVIEW

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