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THE QUALITY OF MERCY: RACE AND CLEMENCY IN FLORIDA DEATH PENALTY CASES, 1924-1966

*Margaret Vandiver**

I. INTRODUCTION

The scholarly literature on capital punishment includes few empirical studies of executive clemency.¹ Commutations in capital cases have been rare since 1972 when the current era of capital punishment began with the United States Supreme Court's ruling in *Furman v. Georgia*.² A large proportion of pre-1972 death sentences were commuted; examination of clemency decisions in

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1. The most detailed empirical study of executive clemency analyzed data on 439 persons who were sentenced to death in Pennsylvania between 1914 and 1958. Three statistically significant factors were found to influence whether commutations were granted: type of murder (felony or non-felony), type of counsel (court appointed or private), and race of offender. Marvin E. Wolfgang et al. *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 301 (1962). The rarity of studies of clemency decisions contrasts with the substantial literature on sentencing decisions in capital cases. See DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990); SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989); WILLIAM J. BOWERS ET AL., *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA 1864-1982* (1984). For reviews of sentencing research see Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 89-93 (1989); UNITED STATES GENERAL ACCOUNTING OFFICE, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES* (1990).

2. 408 U.S. 238 (1972). This decision invalidated nearly all death penalty laws then in effect. Legislatures responded quickly by passing new laws designed to meet *Furman's* constitutional requirements. Death sentences began to be imposed under these new laws as early as 1973. The new statutes of Georgia, Florida, and Texas were approved as constitutional in 1976. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

A recent study of executive clemency in death penalty cases found a "precipitous decline in commutations" since *Furman*. Currently commutations are granted to roughly one out of 40 death sentenced prisoners; the proportion of death sentences reduced by clemency used to be approximately one out of each four or five. Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 REV. L. & SOC. CHANGE 255, 266 (1990-91).

those cases promises to reveal much about the history of capital punishment in the United States. The present study attempts to identify factors which influenced decisions to grant commutations of Florida death sentences pre-*Furman*, focusing particularly on whether the race of defendants and victims influenced the decision to commute.

Executive clemency is set apart from the rest of the criminal justice system by its history, intent, and function. Clemency derives from the power of the monarch, allows mitigation of punishment without legal reason, and incorporates grace and mercy with justice.³ Clemency decisions in capital cases present a number of is-

3. The origins of executive clemency are ancient. The power to pardon is included even in the earliest legal codes. KATHLEEN D. MOORE, *PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST* 15 (1989). Pardons were frequently used by the Romans, and were common in pre-Enlightenment Europe. *Id.* at 16-17. In the late Middle Ages, there were "but the two extremes: the fullness of cruel punishment, and mercy. When the condemned criminal is pardoned, the question whether he deserves it for any special reasons is hardly asked; for mercy has to be gratuitous, like the mercy of God." JOHAN HUIZINGA, *THE WANING OF THE MIDDLE AGES* 25 (1954).

In England, the first clear evidence of the monarch's prerogative to pardon comes from the Anglo-Saxon period. Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 *AM. J. LEGAL HIST.* 51, 53-54 (1963). This royal privilege was strengthened by the Norman Conquest, although until as late as the 1500s, other lords and earls sometimes tried to claim the pardoning power for themselves. In 1535, British Parliament explicitly gave the monarch alone power to grant pardons. *Id.* at 55. Throughout the late Middle Ages and early modern times, clemency was only one means of avoiding the full severity of the law. The practices of sanctuary and of claiming benefit of clergy were widely used from the Middle Ages and into the 18th century. These practices disappeared in more recent times, however, and only clemency continues as part of the modern justice system. While the protection of the church has fallen away, the right of the executive to pardon continues with few limitations. Executive clemency has long included the power to commute a death sentence to a less severe punishment. In England, this power was frequently used to mitigate the law which allowed no exceptions; by the 18th century, a large proportion of death sentences was regularly commuted by the monarch. LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW: THE MOVEMENT FOR REFORM 1750-1833*, 120 (1948).

Executive clemency in America derives directly from English law. While America was under British rule, the colonial governors had the power of clemency. Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 *YALE L.J.* 889, 896 (1981). The Constitution of the United States provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." U.S. CONST. art. II, § 2. The modern executive power to pardon in the United States closely resembles the practices developed in England. See *Schick v. Reed*, 419 U.S. 256, 262 (1974). The view the authors of the Constitution took of executive clemency is best expressed by Alexander Hamilton:

Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exception in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.

sues for inquiry and study. Whether governors legitimately may commute all death sentences given in their states is one such issue.⁴ A few governors have done this during their terms in office, effectively nullifying the laws providing for capital punishment. Governor Lee Cruce of Oklahoma, who held office in the early part of this century, expressed his moral opposition to the death penalty by announcing his intention to commute all death sentences which might be imposed during his time in office to sentences of life in prison.⁵ Governor Winthrop Rockefeller commuted the sentences of all fifteen condemned prisoners in Arkansas in 1970. In defense of his action Governor Rockefeller wrote, "[s]ince the law itself creates the executive clemency process, it is nonsense to argue that a governor has taken the law into his own hands when he avails himself of this procedure."⁶ Finally, the Governor of New Mexico, Tony Anaya, commuted the death sentences of the five condemned prisoners in his state before leaving office.⁷

Other governors who opposed capital punishment have not believed that their power to grant clemency gave them the right to commute all death sentences. Governor DiSalle of Ohio, an outspoken foe of the death penalty, granted commutations only when he found factors present which mitigated the offense.⁸ DiSalle wrote

THE FEDERALIST No. 74 (Alexander Hamilton). Many state constitutions also grant their highest executive the power of clemency, which includes the right to commute death sentences. See *Eacret v. Holmes*, 333 P.2d 741, 743 (Or. 1958).

4. During the period under study in Florida, a governor could not commute death sentences without the supporting votes of a majority of the Cabinet. See *infra* note 27 and accompanying text.

5. The Oklahoma Supreme Court strongly castigated Governor Cruce for his position:

If the Governor's position is correct, then we do not have a government of law in Oklahoma, but a government of men only. If it were necessary for the Governor to approve such verdicts before they could be carried into execution, then the Governor should have made his views known before he was elected, and he should have refused to take the oath of office. There is no logical escape from this conclusion. The Governor's position can only be explained upon the hypothesis that he imagines himself to be a dictator, and that his will is supreme and above the law. In this the Governor is mistaken.

Henry v. State, 136 P. 982, 988 (Okla. Crim. App. 1913). However, there was no remedy available to the court; the Governor could not be limited in the use of his prerogative, and the court had to content itself with expressing its opinion of his intended action.

6. Winthrop Rockefeller, *Executive Clemency and the Death Penalty*, 21 CATH. U. L. REV. 94, 95 (1971). For arguments supporting the right of governors to commute all death sentences, see Charles L. Black, *Governors' Dilemma*, 180 NEW REPUBLIC 12 (1979).

7. *Five Lives Spared, Hail Anaya's Move*, N. Y. TIMES, Nov. 28, 1986, at A18. For a discussion of the Rockefeller and Anaya commutations, see Bedau, *supra* note 2, at 259, 267.

8. Michael V. DiSalle, *Comments on Capital Punishment and Clemency*, 25 OHIO ST. L.J. 71 (1964).

of the distress he felt when he could not find grounds to commute, stating, "I could never get used to the idea that a man would die — even a man guilty of the most incredibly inhuman behavior — because I had not exercised the power that was mine as long as I was governor, the power to keep him alive."⁹ Former Florida Governor LeRoy Collins, who held office between 1955 and 1961, believed it to be his constitutional duty to carry out death sentences, and although he opposed the death penalty, he signed twenty-nine death warrants which resulted in executions during his time in office.¹⁰ Edmund Brown, Governor of California between 1959 and 1967, and an opponent of the death penalty, took a similar view of his responsibilities and commuted death sentences only when he could find specific reasons justifying clemency.¹¹

Commutation is an act of executive mercy; as such, it is not bound by the strict requirements of due process.¹² In the Florida case of *Sullivan v. Askew*,¹³ three condemned men argued they were entitled to minimal due process, including "a fair and impartial tribunal, the right to be heard in person and by counsel, and written standards or guidelines setting forth factors to be considered in granting clemency."¹⁴ The Florida Supreme Court held that the power of clemency belonged to the executive without restriction. This power was not subject to limitations by the judicial branch of government, and the constitutional grant of authority to the Governor was not violated by Florida's clemency procedures.

The due process issue was raised again before the Fifth Circuit Court of Appeals in *Spinkellink v. Wainwright*.¹⁵ In that case, the petitioner argued that Florida's clemency procedures violated the

9. MICHAEL V. DISALLE, *THE POWER OF LIFE OR DEATH* 83 (1965).

10. STATE OF FLORIDA, GOVERNOR'S COMM. TO STUDY CAPITAL PUNISHMENT, FINAL REP. 127 (1972).

11. Brown wrote at age 83:

[T]he longer I live, the larger loom those fifty-nine decisions about justice and mercy that I had to make as governor. . . . It was an awesome, ultimate power over the lives of others that no person or government should have, or crave. And looking back over their names and files now, despite the horrible crimes and the catalog of human weaknesses they comprise, I realize that each decision took something out of me that nothing — not family or work or hope for the future — has ever been able to replace.

EDMUND G. (PAT) BROWN WITH DICK ADLER, *PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH* ROW 163 (1989).

12. See Deborah Leavy, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889 (1981).

13. 348 So. 2d 312 (Fla. 1977).

14. *Id.* at 313.

15. 578 F.2d 582 (5th Cir. 1978).

due process requirements of the Fourteenth Amendment. The Fifth Circuit disagreed, and held that clemency is an executive function, "not the business of judges."¹⁶

The unfettered power to grant commutations raises the possibility that governors might base their decisions upon constitutionally impermissible grounds, such as the race, gender or religion of defendants and victims. Evidence that commutations were being granted on the basis of improper factors would raise grave ethical questions, although it is not clear any legal remedy exists to correct such an abuse.¹⁷ The central interest of the present study is whether the race of defendants and victims in capital cases in Florida influenced the likelihood commutations would be granted during the pre-*Furman* era.

II. CAPITAL PUNISHMENT AND CLEMENCY IN FLORIDA PRE-*FURMAN*

The Legislative Council of the Territory of Florida passed laws in 1822 making murder, rape, and arson capital crimes.¹⁸ Death sentences were carried out by hanging in the counties of conviction. Florida passed a law in 1923 changing the method of execution to electrocution, and providing that executions be carried out in one location rather than in the counties of conviction.¹⁹ When this law took effect in 1924, the state began keeping central records of executions and commutations.

Death sentences in Florida before the 1972 *Furman* decision were imposed at the discretion of the jury; a jury vote for mercy

16. *Id.* at 619. A prisoner sentenced to death in Nebraska, Harold LaMont "Wili" Otey, is currently litigating claims challenging the fairness of his clemency proceedings. United States District Judge Warren Urbom rejected Otey's due process claim, holding there exists no constitutionally protected right to clemency. Judge Urbom will hear further arguments on whether Nebraska's clemency proceedings violated Otey's equal protection rights. *Ruling Reshapes Appeal for Otey, Specialists Say*, OMAHA WORLD-HERALD, Sept. 30, 1992, at 1, 11.

17. An executive may grant a pardon for good reasons or bad, or for any reason at all, and the act is final and irrevocable. Even for the grossest abuse of this discretionary power the law affords no remedy; the courts have no concern with the reasons for the pardon. The constitution clothes the executive with the power to grant pardons, and this power is beyond the control, or even the legitimate criticism, of the judiciary. 59 AM. JUR. 2d *Pardon and Parole* § 38 (1987).

18. REPORT OF THE SPECIAL COMMISSION FOR THE STUDY OF ABOLITION OF DEATH PENALTY IN CAPITAL CASES FOR THE STATE OF FLORIDA 7 (1963-65).

19. *Id.*

resulted in imposition of a life sentence.²⁰ The jury determined both guilt and sentence during a single deliberation. Juries might recommend or refuse mercy for any reason. Capital cases did not receive automatic review by any appellate court, and appeals were restricted to challenges to the conviction rather than to the death sentence.²¹ If a death-sentenced prisoner was able to pay an attorney, or to find *pro bono* representation for his appeal, the case was heard by the Florida Supreme Court, which was "without power to alter the judgment except upon the finding of error."²² Appeals for reduction of a sentence were not heard by the Florida Supreme Court; the court was "not a proper forum in which to seek a mercy commutation."²³

Florida's first constitution, written in 1838, gave the Governor alone the power of clemency.²⁴ The Governor retained sole pardoning power in the constitutions of 1861²⁵ and 1865.²⁶ The constitution of 1868 gave the Governor, state supreme court justices, and attorney general the right to grant commutations.²⁷ The constitution of 1885, amended in 1896, created a Board of Pardons:

The Governor, Secretary of State, Comptroller, Attorney General and Commissioner of Agriculture or a major part of them, of whom the Governor shall be one, may upon such conditions and with such limitations and restrictions as they may deem proper, remit fines and forfeitures, commute punishment and grant pardon after conviction, in all cases except treason and impeachment subject to such regulations as may be prescribed by law relative to the manner of applying for pardons.²⁸

The constitution of 1885 was in effect during the period of time covered by this study, and its provision creating a Board of Par-

20. Joseph A. Boyd, Jr. & James J. Logue, *Developments in the Application of Florida's Capital Felony Sentencing Law*, 34 U. MIAMI L. REV. 441 (1980).

21. *Davis v. State*, 123 So. 2d 703, 707 (Fla. 1960). Under Florida law at the time, no sentence within statutory limits could be reviewed on appeal. Darryl M. Bloodworth, *Appellate Review of Sentences in Florida: A Proposal*, 23 U. FLA. L. REV. 736, 737 (1971); Brian D. Cochran & Eileen C. Cochran, *Appellate Review of Sentences: A Survey*, 17 St. Louis U. L.J. 221, 255 (1972).

22. *Sawyer v. State*, 4 So. 2d 713, 713 (Fla. 1941).

23. *Johnson v. State*, 61 So. 2d 179, 179 (Fla. 1952).

24. FLA. CONST. of 1838, art. III, § 11.

25. FLA. CONST. of 1861, art. III, § 11.

26. FLA. CONST. of 1865, art. III, § 12.

27. FLA. CONST. of 1868, art. VI, §§ 11-12.

28. FLA. CONST. of 1885, art. IV, § 12 (amended 1896).

dons defined the procedures applied in the cases studied.²⁹ The Board of Pardons could consider a case for clemency more than once; it also could let a case proceed to execution without a formal hearing if no one presented arguments on behalf of the defendant. No case could proceed to execution without the Board's knowledge, however, since the Governor was required to sign a death warrant to schedule an execution.³⁰

The number of executions carried out in Florida dropped sharply in the early 1960's.³¹ Florida's last executions to take place for fifteen years were carried out May 12, 1964. As executions ceased, so did commutations in capital cases. Three death sentences were commuted in 1966; the next commutations did not occur until 1979.

III. ANALYSIS

Every prisoner executed under state authority³² and every person whose death sentence was commuted³³ in Florida between 1924 and 1966³⁴ is included in this study.³⁵ Data were gathered from

29. The Florida Legislature passed an act in 1935 requiring that whenever the Florida Supreme Court was equally divided whether to affirm or reverse in a death penalty case, the Board of Pardons must immediately convene and commute the death sentence to life imprisonment. However, the Florida Supreme Court found the law to be in conflict with the state constitution, and voided the statute. According to the Florida Supreme Court, the power of the Board of Pardons was discretionary and could not be controlled by the Legislature. *Ex parte White*, 178 So. 876 (Fla. 1938) (en banc).

30. See *Jarvis v. Chapman*, 159 So. 282, 285 (Fla. 1934).

31. This trend occurred throughout the United States; by 1967 executions had come to a halt. See HUGO A. BEDAU, *THE DEATH PENALTY IN AMERICA* 24 (3d ed. 1982).

32. A list of the 196 people executed by the state of Florida between 1924 and 1964 was obtained from the Teeters-Zibulka inventory of executions in America. WILLIAM J. BOWERS, *EXECUTIONS IN AMERICA* (1974). This list gave the name of the person executed, county of conviction, the person's race, sex and age when known, and the date of execution.

33. A list of the 59 people whose death sentences were commuted between 1924 and 1966 was obtained from the Office of Executive Clemency, Koger Executive Center, Knight Building, Suite 308, 2737 Centerview Drive, Tallahassee, Florida 32399. This list provided the name and race of defendant, county of conviction, and date of commutation.

34. The 1924 law which placed executions under state rather than county authority and which led to statewide record-keeping provided a natural beginning point for the study. The ending date of 1966 was chosen since that was the year of the last pre-*Furman* grants of clemency in capital cases.

35. Not every person sentenced to death in Florida between 1924 and 1966 is included. Those persons who received death sentences which were subsequently removed through court action and those who died on death row before final disposition of their cases are not included. David J. Watson, executed in Florida on September 15, 1948, also was not included in the analysis. He was sentenced to death under federal law, and was not eligible for commutation by the state Pardon Board.

three principal sources: the State Pardon Board files,³⁶ opinions of the Florida Supreme Court,³⁷ and newspaper accounts of the crimes and executions.³⁸

Clemency was granted in fifty-nine (23.1%) of the cases, while 196 (76.9%) defendants were executed. Of the 255 cases, eighty-nine (34.9%) defendants were white and 166 (65.1%) were African-American. All but two of the defendants were male.³⁹ Sixteen de-

36. The most important source of data was the collection of the State Pardon Board files, Record Group 690, Series 443-A, Florida State Archives, R. A. Gray Building, Tallahassee, Florida 32399. These files contain information on every Florida case in which a death sentence was carried out or commuted; the amount of information varies widely from case to case. Some files contain only a death warrant and correspondence about the time set for execution; others have hundreds of pages of materials. Several files hold trial transcripts, and the testimony of witnesses provided an excellent source of information both about the details of the crime and about the defendant and victim. In many files there were letters asking for clemency or urging against it. Correspondence requesting commutations provided much information as to the prisoners' social history, suspicions of insanity and mental retardation, employment history, age, and other variables. Letters arguing against commutation sometimes contained descriptions and details regarding the crimes and victims. A few files contained psychiatric evaluations which revealed personal information about the defendant. Indictments and other legal papers contained in many files provided the names of victims.

37. Every case was checked to determine whether the Florida Supreme Court had published an opinion. Death penalty cases did not have mandatory appeals to the Florida Supreme Court. *See supra* note 21 and accompanying text. Nearly one-third of the 255 defendants either were executed or received commutations of their sentences without making any legal challenge to their convictions. As late as 1959, a prisoner in Florida was executed without having an appeal heard in any court. Of white condemned prisoners, 14 (15.7%) had no appeal to the Florida Supreme Court; of black prisoners, 68 (41%) had no appeal. Like the Pardon Board files, the Florida Supreme Court decisions provided a varied selection of information, depending upon the case. Some opinions were very brief; others gave lengthy descriptions of the facts underlying the case. The latter provided much relevant information.

38. Newspapers were consulted only in those cases for which the Pardon Board files and supreme court decisions failed to provide adequate data, and in cases of special interest. From newspaper accounts, it sometimes was possible to gain information such as the victim's race and the circumstances of the crime. Often, however, it was surprisingly difficult to locate news reports of executions or commutations. Unless cases were especially notorious, and sometimes even if they were, newspapers would not mention the case, or would report execution or commutation in only a few lines.

39. Both of the female defendants were white, and both were condemned in Duval County for killing their husbands. Berta Hall was sentenced to death in Florida on June 6, 1926, for the murder of James Hall. She was 28 at the time of the crime, and had three children. Berta Hall had married James Hall when she was 14; she had a second grade education. James Hall drank and beat her and the children. Other members of their families involved themselves in these fights; they sometimes tied Hall to his bed to control him when he was drunk. Before the murder, Hall was constantly drunk and brutal. The night of the murder, June 6, 1926, Hall threatened to kill his wife and she feared for her life. She gave a shotgun to Gordon Denmark, a drunken young man who was present, and told him to kill Hall, which he did. Berta Hall and Gordon Denmark were condemned, but both received commutations. Berta Hall eventually was paroled. *See State Pardon Board, Berta Hall case*

defendants were eighteen years old or younger at the time of their convictions, and fourteen of those young defendants were African-American.⁴⁰ Forty-nine men (19.2%) were condemned for rape, and 206 (80.8%) for murder.

In the great majority of cases (237 or 92.9%), death sentences were imposed for a crime against only one victim. In every case of multiple victims, all victims were the same race. The highest number of victims in any case was five. In 178 (74.5%) of the cases the victims were white; in sixty-one (25.5%) they were black. The race of the victims could not be identified in sixteen cases, and these cases had to be dropped from the analysis.⁴¹ Of the 237 single victim cases, 100 (42.1%) were female and 137 (57.8%) were male. Sixteen victims were children aged fifteen or younger. Thirteen victims were above the age of sixty. In nineteen cases, the victims were law enforcement officers or public officials.

file (1929) (located in the Florida State Archives); *Denmark v. State*, 116 So. 757 (Fla. 1928). Very little information about the other female defendant, Annie Mae Jackson, was found.

40. Florida executed three 15-year-old defendants, all African-American; four 16-year-olds, all African-American; five 17-year-olds, four of them African-American; and four 18-year-olds, three of them African-American. One of the executed juveniles was Robert Hinds, who was 16 years old when he was apprehended in Franklin County for the rape of a white woman. Hinds was saved from an attempted lynching and was granted a change of venue to Leon County. Even there it was necessary to call upon the National Guard to keep order during the trial. Hinds's trial was brief, and his defense attorney declined to appeal the conviction, stating that "the state has already spent a great deal of money on this case and we do not feel justified under the circumstances in asking the state to bear the further expense of appealing." *Judge Denies Hinds Retrial: Negro's Lawyer Says Trial Was Fair*, THE DAILY (TALLAHASSEE) DEMOCRAT, July 16, 1937. Hinds was executed about two weeks after his trial. Several dozen people attended the execution, most of them from Franklin County, where the crime and attempted lynching had taken place. *Robert Hinds Dies in Chair: Apalachicola Negro Pays with Life for Crime*, THE DAILY (TALLAHASSEE) DEMOCRAT, July 23, 1937.

41. Race of defendants was known in all but three cases from the information in the Teeters-Zibulka inventory and the list of commutations compiled by the Office of Executive Clemency. See *supra* notes 32-33. Race of victims was not provided by either of these sources. Because of the central importance of these variables to the analysis, much effort was made to determine the race of the victims and of the three defendants for whom it was unknown. From the State Pardon Board files, Florida Supreme Court opinions, and newspaper articles, race of victim was documented in 207 cases. In another 32 cases, victim's race was inferred from context; this was also done for the three defendants. There were various ways in which inference of race could be made, given the racial caste system present in Southern society during the pertinent years. If defendant and victim were friends and were socially equal, it was assumed they were of the same race. If a white employee killed his employer, it was presumed the victim was white due to the great unlikelihood that a black man had hired a white man. Married couples and lovers were assumed to be of the same race. All victims who were police officers, sheriffs, and public officials were assumed to be white.

Table 1 shows no evidence that a defendant's race influenced commutation decisions.⁴² Although whites were slightly more likely to receive commutations, the difference does not attain statistical significance. Victims' race, however, did have a strong influence upon likelihood of commutation (Table 2); 44.3% of the defendants whose victims were black received clemency, while only 15.2% of defendants whose victims were white received clemency.

TABLE 1
OUTCOME BY DEFENDANTS' RACE

	White	Black	Row Total
Clemency	25 28.1	34 20.5	59 23.1
Execution	64 71.9	132 79.5	196 76.9
Column Total	89 34.9	166 65.1	255 100.0

Chi square = 1.88567 with 1 degree of freedom.

Significance = .1697.

Phi square = .00739.

Corrected contingency coefficient = .12119.

42. The statistical analysis possible with the data was limited to very simple cross-classifications. The small number of cases (N=255) limited the control variables it was possible to introduce. The cases in the study form a population rather than a sample; the chi square statistic was used to provide a "formal, objective, communicable, and reproducible" means for judging whether observed relationships in the cross-classified data were due to chance or not. Robert Winch & Donald Campbell, *Proof? No. Evidence? Yes. The Significance of Tests of Significance*, 4 AM. SOC. REV. 140, 143 (1969). Corrected contingency coefficients are given as a measure of strength of association. For two-by-two tables, phi square, which gives a proportional reduction in error measurement, also is given.

TABLE 2
OUTCOME BY VICTIMS' RACE

	White	Black	Row Total
Clemency	27 15.2	27 44.3	54 22.6
Execution	151 84.8	34 55.7	185 77.4
Column Total	178 74.5	61 25.5	239 100.0

Chi square = 21.98780 with 1 degree of freedom.

Significance = .0000.

Phi square = .09199.

Corrected contingency coefficient = .41055.

Table 3 shows commutations and executions by the race of both defendants and victims.⁴³ Black defendants had a 41.1% chance of receiving clemency if their victims were black, but only a 5.3% chance if their victims were white. Only five African-Americans condemned for crimes against white victims received commutations of their death sentences.

43. There were no cases of white defendants condemned for crimes against black victims. See *infra* note 62 and accompanying text.

TABLE 3
OUTCOME BY DEFENDANTS' AND VICTIMS' RACE

	Black/ white	White/ white	Black/ black	Row Total
Clemency	5 5.3	22 26.5	27 44.3	54 22.6
Execution	90 94.7	61 73.5	34 55.7	185 77.4
Column Total	95 39.7	83 34.7	61 25.5	239 100.0

Chi square = 33.41759 with 2 degrees of freedom.

Significance = .0000.

Corrected contingency coefficient = .51130

Research on the influence of race on case outcomes emphasizes the importance of testing any observed relationship to see if it can be explained by factors other than race. The three variables generally considered to be the most important are the defendant's prior criminal record, the relationship of victim and defendant, and the commission of another felony at the time of the capital offense. It was not possible to find information on prior criminal records for most of the defendants in this study.⁴⁴ Enough information was found on the relationship of the victim and defendant⁴⁵ and the

44. "Probably the most serious shortcoming of death-penalty discrimination studies is that they nearly all fail to control for prior criminal record." Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783, 786 (1981). If black offenders are more likely to have prior criminal records than whites, their previous convictions could explain the greater judicial severity displayed toward them. While it seems reasonable to control for influence of defendants' prior record when testing for the influence of defendants' race, it is difficult to conceive of a logical connection between victims' race and defendants' conviction record. Only if blacks with prior records attacked whites, while blacks with no prior record attacked blacks, could prior convictions explain the relationship shown in Table Three.

45. Homicides in which the victim and offender knew each other are termed primary homicides, and are distinguished from non-primary homicides which occur between strangers, and are frequently accompanied by another felony. M. Dwayne Smith & Robert Parker, *Type of Homicide and Variation in Regional Rates*, 59 SOC. FORCES 136, 139 (1980). Defendants who commit primary homicides often are treated more leniently than those who kill strangers. Information on the relationship of victim and defendant was obtained in 197 cases, only 82.4% of the total; 94 (47.7%) of these cases were non-primary, and 103 (52.3%) were primary. Available data varied by racial categories: primary/non-primary classification

commission of a contemporary felony⁴⁶ to make some tentative analysis possible. These results must be viewed cautiously, however, because of incomplete data and the small number of cases.

Table 4 attempts to test whether the relationship of defendants and victims can account for the racial differences observed in Table 3. Among the category of primary crimes, a significant relationship is observed; this relationship does not hold for the category of non-primary crimes. Interpretation of these results is difficult because of the very small numbers in the cells.

was possible in 70.5% of black/white cases, 92.8% of white/white cases, and 86.9% of black/black cases.

46. Existence of a contemporary felony is a third variable which forms "an important legal and social difference" and might explain observed racial differences. Marvin E. Wolfgang et al., *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 301, 303 (1962). A murder committed in the course of an armed robbery might receive a harsher penalty than a murder arising from an argument. In much the same way, a contemporary robbery could aggravate the punishment imposed for a rape charge. Apparent racial disparities in case outcomes could be explained by this variable, if black defendants with white victims were more likely than other racial combinations to have committed a felony contemporary with the capital crime. The data support the hypothesis that defendants with contemporary felonies were less likely to receive commutations than those defendants whose crimes were not accompanied by additional felonies. Of defendants with no accompanying felony, 36 (30.3%) received commutations; of those with an accompanying felony, only 13 (16.7%) received clemency. Data on contemporary felonies was found in 197 (82.4%) of the cases. The distribution of missing data by racial categories was very similar to that of relationship: felony/nonfelony classification was possible in 71.6% of black/white cases, 91.6% of white/white cases, and 86.9% of black/black cases.

TABLE 4
OUTCOME BY INTERACTION OF DEFENDANTS' AND
VICTIMS' RACE CONTROLLING FOR RELATIONSHIP

A. PRIMARY

	Black/ white	White/ white	Black/ black	Row Total
Clemency	0 0	13 31.0	25 50.0	38 36.9
Execution	11 100.0	29 69.0	25 50.0	65 63.1
Column Total	11 10.7	42 40.8	50 48.5	103 100.0

Chi square = 10.75672 with 2 degrees of freedom.

Significance = .0046.

Corrected contingency coefficient = .4489.

B. NON-PRIMARY

	Black/ white	White/ white	Black/ black	Row Total
Clemency	5 8.9	6 17.1	0 0	11 11.7
Execution	51 91.1	29 82.9	3 100.0	83 88.3
Column Total	56 59.6	35 37.2	3 3.2	94 100.0

Chi square = 1.81720 with 2 degrees of freedom.

Significance = .4031.

Corrected contingency coefficient = .20104.

Table 5 introduces contemporary felony as a control variable. As with Table 4, cell numbers are too low to allow for confident interpretation of the results. For non-felony cases, there remains a significant relationship between race and outcome; for felony cases, the relationship does not attain significance at the .05 percent level, although the relationship is in the predicted direction.

TABLE 5
 OUTCOME BY INTERACTION OF DEFENDANTS' AND
 VICTIMS' RACE, CONTROLLING FOR FELONY
 CIRCUMSTANCE

A. NO FELONY

	Black/ white	White/ white	Black/ black	Row Total
Clemency	1 3.4	14 29.8	21 48.8	36 30.3
Execution	28 96.6	33 70.2	22 51.2	83 69.7
Column Total	29 24.4	47 39.5	43 36.1	119 100.0

Chi square = 16.91810 with 2 degrees of freedom.

Significance = .0002.

Corrected contingency coefficient = .51505.

B. FELONY

	Black/ white	White/ white	Black/ black	Row Total
Clemency	4 10.3	5 17.2	4 40.0	13 16.7
Execution	35 89.7	24 82.8	6 60.0	65 83.3
Column Total	39 50.0	29 37.2	10 12.8	78 100.0

Chi square = 5.08074 with 2 degrees of freedom.

Significance = .0788.

Corrected contingency coefficient = .36101.

The death penalty was imposed in Florida both for rape and for murder during the years under study. Murder is generally considered to be a more serious crime than rape.⁴⁷ Southern states, how-

47. See Charles W. Thomas et al., *Public Opinion on Criminal Law and Legal Sanctions: An Examination of Two Conceptual Models*, 67 J. CRIM. L. & CRIMINOLOGY 110 (1976).

ever, seemed to have a preoccupation with the crime of rape which amounted to a "rape complex."⁴⁸ Table 6 indicates that defendants whose death sentences had been imposed for committing rape had a lower chance of receiving clemency than those condemned for murder. Table 7 further explores this relationship by examining the influence of racial combinations of defendants and victims, controlling for crime of conviction. Race continues to significantly influence outcome, although the number of rape cases is too small to allow reliable analysis.

TABLE 6
DISPOSITION BY TYPE OF CRIME

	Rape	Murder	Row Total
Clemency	6 12.2	53 25.7	59 23.1
Execution	43 87.8	153 74.3	196 76.9
Column Total	49 19.2	206 80.8	255 100.0

Chi square = 4.04655 with 1 degree of freedom.

Significance = .0683.

Phi squared = .01587.

Corrected contingency coefficient = .17677.

48. WILBUR J. CASH, *THE MIND OF THE SOUTH* 115 (1941). See *infra* notes 63, 65 and accompanying text.

TABLE 7
DISPOSITION BY INTERACTION OF DEFENDANTS' AND
VICTIMS' RACE, CONTROLLING FOR TYPE OF CRIME

A. RAPE

	Black/ white	White/ white	Black/ black	Row Total
Clemency	2 5.0	3 75.0	1 100.0	6 13.3
Execution	38 95.0	1 25.0	0 0	39 86.7
Column Total	40 88.9	4 8.9	1 2.2	45 100.0

Chi square = 22.06731 with 2 degrees of freedom.

Significance = .0000.

Corrected contingency coefficient = .83739.

B. MURDER

	Black/ white	White/ white	Black/ black	Row Total
Clemency	3 5.5	19 24.1	26 43.3	48 24.7
Execution	52 94.5	60 75.9	34 56.7	146 75.3
Column Total	55 28.4	79 40.7	60 30.9	194 100.0

Chi square = 22.14571 with 2 degrees of freedom.

Significance = .0000.

Corrected contingency coefficient = .46728.

IV. DISCUSSION

Differences in treatment based upon the victim's race may be traced to southern culture and beliefs. Whites were highly valued, and their attackers were likely to be treated harshly; those who attacked African-Americans were treated more leniently. The fol-

lowing subsections describe a number of cases in order to clarify the ways in which the victim's and defendant's race influenced case outcome.

A. *Crimes with Black Victims*

Leniency toward those who attacked black victims was an important and damaging outcome attributable to the prevalent racial attitudes in the South during much of this century.⁴⁹ Black offenders whose victims also were black often received the benefits of an informal system of paternalism in which white men intervened on their behalf. Paternalism developed during the era of slavery, when the formal legal system often allowed slaveowners to determine and administer punishment to their slaves.

Cases in this study showed paternalism operating in the clemency process. White advocates requested clemency for a number of black men condemned for the murder of black victims. Consistently, the two principal arguments advanced were the victim's race (black), and the characterization of the defendant and his family as "good Negroes."

In 1934, Tom Brooks' employer wrote on his behalf:

Tom has worked for me for the past eight or ten years. He has been down at our barn lot every morning to catch out the mules and has been one of our most faithful men.

He just got a little too much bad licker [sic] in him and in one of these drunken brawls killed one of his contemporaries.⁵⁰

Also writing on behalf of Tom Brooks, the Clerk of the Indian River County Court explained, "This is just another case of one

49. Dollard wrote that when a violent crime was committed by one black person against another, the courts were likely to be lenient. "The result is that the individual Negro is, to a considerable degree, outside the protection of white law, and must shift for himself." JOHN DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* 279 (1949). Black offenders might tacitly be encouraged to express their hostility against other blacks, "since the same court which would crush him if he accused a white man of cheating him will probably let him off if he is accused of killing a black man." HORTENSE POWDERMAKER, *AFTER FREEDOM: A CULTURAL STUDY IN THE DEEP SOUTH* 173-74 (1939).

50. Letter from W.E. Sexton to Nathan Mayo (Oct. 10, 1934) (State Pardon Board, Tom Brooks case file, (1934)) (on file with Florida State Archives).

negro killing another, in which it was hard to determine just which one was to blame about the whole affair."⁵¹

A letter requesting clemency for Roosevelt Bullard, condemned for the murder of another black man, said:

This boy's father, resides at Elba, Alabama, and was down here some few weeks ago and came to see me on behalf of the boy and the old gentleman darkey is a good old southern negro, and this boy is well liked by his boss men while he had been in prison.⁵²

In a similar case, it was asserted that mercy was appropriate because "His daddy is one of those old Georgia farm negroes, old and gray, who thinks the sun rises and sets in accordance with 'White folks' wishes."⁵³ The sentencing judge in Lee Clark's case wrote the following to the Pardon Board requesting clemency:

The practical knowledge of the board, I know, is, that it is seldom that a negro plans a cold-blooded killing; he is of an impulsive nature, and acts without serious thought . . . ; in this case he cut and stabbed his wife . . . I prefer to think of it as one of those cases where a negro cuts on his wife, without really considering the consequences, and doubtless unaware that he had fatally wounded her.⁵⁴

Clemency was granted in all the above cases except the last.

There was widespread pressure for clemency in one case involving black defendants and victims, based largely on the youth and low intelligence of the defendants. Tommie Lee Williams and Dan Wilkens broke into their victims' house to steal money. Williams and Wilkens ransacked the house, killed an eighty-four-year-old man who lived there, and raped his seventy-five-year-old wife. The case received a large amount of public attention due to several newspaper reports about the defendants, and public sentiment favored clemency. Williams and Wilkens were sixteen years old, and

51. Letter from Miles Warren to Board of Pardons of September 10, 1936, (State Pardon Board, Tom Brooks case file, (1934)) (on file with Florida State Archives).

52. State Pardon Board, Roosevelt Bullard case file, (1928) (on file with Florida State Archives). The author of the letter referred to Bullard's father as a "gentleman," but then struck the word out and replaced it with "darkey."

53. State Pardon Board, Henry Johnson case file, (1936) (on file with Florida State Archives).

54. State Pardon Board, Lee Clark case file, (1936). Letter from Judge Fabisinski to Pardon Board September 3, 1935, (State Pardon Board, Lee Clark case file (1936)) (on file with Florida State Archives).

both were retarded, with respective intelligence quotients of fifty-seven and forty-two, and mental ages of eight and six. In addition, they had come from backgrounds of great poverty and deprivation. Ultimately, Williams and Wilkens were given life sentences.⁵⁵

In a few cases, whites supported the executions of black offenders whose victims also were black. A letter encouraging James Larry's execution referred to the victim as a "fine negro" who "appreciated race type." The victim "was well liked by colored and white people and I can say that if all his race was 'his kind' there would be no Little Rock, Clinton, Brooklyn and Sturgis stories."⁵⁶ The Sheriff of Lake County, Willis McCall, wrote to Governor Fuller Warren regarding James Felton, a defendant condemned for murdering a black man. The sheriff began, "You stated after the legislature had met you would notify us if it would be necessary for us to bring a delegation of reliable negroes from this section that would request this sentence be carried out."⁵⁷ It is not known whether McCall ever brought his "delegation of reliable negroes" to Tallahassee, but the defendant in question was executed three weeks after the letter was written.

No case of a white person condemned for the rape or murder of a black victim came before the Pardon Board during the years of this study. Convictions of whites for crimes against blacks were rare, and if there was a conviction, punishment was likely to be light. In 1866, a white man named John Denton shot and killed a black man in Micanopy, Florida, apparently because Denton believed the man had been insolent. Denton eventually was tried for the crime, and was convicted of manslaughter. He was sentenced to pay court costs and to serve a jail term of *one minute*.⁵⁸

In 1927, the *Jacksonville Journal* reported that a twenty-four-year-old white man was convicted for first degree murder of a black man. The rarity of the event was noted by the paper, which commented that it was "one of the few cases in this section of the country where a white man has been brought to trial for murder of

55. State Pardon Board, Tommie Lee Williams and Dan Wilkens case files, (1964) (on file with Florida State Archives).

56. State Pardon Board, James Larry case file (1958). Letter from H.B. Atwood to Governor LeRoy Collins (August 25, 1958) (State Pardon Board, James Larry case file (1958)) (on file with Florida State Archives). James Larry's death sentence was commuted to life.

57. Letter from Willis McCall to Governor Fuller Warren (July 19, 1951) (State Pardon Board, James Felton case file, (1951)) (on file with Florida State Archives).

58. JERRELL H. SHOFNER, *NOR IS IT OVER YET: FLORIDA IN THE ERA OF RECONSTRUCTION, 1863-77, 1888* (1974).

a negro."⁵⁹ It is not known what sentence was imposed. Another unusual case was that of Britt Pringle, a white man who was condemned to death for murdering a black man in Jacksonville in 1926.⁶⁰ Pringle's conviction was upheld by the Florida Supreme Court, but there is no record indicating either that he received clemency, or that he was executed.⁶¹ The final disposition of the case is unknown. No record of any other white person condemned to death in Florida for a crime against a black victim has been found for the pertinent years. Such a case apparently did not occur until 1980.⁶²

B. Crimes with White Victims

The reaction of society and the criminal justice system was much harsher when white victims were involved. A crime against a white victim by a black defendant was perceived as an assault upon all whites, and upon the South's prevailing caste system. Because of these beliefs, whites reacted with great severity to such crimes, especially when the victim was a white woman, and the crime was rape.

Even an unsubstantiated rumor of an assault upon a white woman by a black attacker often created hysteria in the white community. Sometimes the legal process could not contain these sentiments and many African-American men suspected of raping white women were lynched by mobs or posses.⁶³ When mob attack was averted, the subsequent legal proceedings often closely resembled lynchings. Little care was taken to preserve even the external forms of due process; the conviction and condemnation of the defendants were nearly foregone conclusions.⁶⁴

59. *Find White Man Murdered Negro: Anthony Sarage Convicted in First Degree with Mercy at Stuart*, JACKSONVILLE J., July 15, 1927, at 5.

60. Jerrell H. Shofner, *Judge Herbert Rider and the Lynching at LaBelle*, 59 FLA. HIST. Q. 292, 295 (1981).

61. *Pringle v. State*, 115 So. 543 (Fla. 1927).

62. Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 466 (1981).

63. Between 1900 and 1920, Florida's lynching rate was higher than any other state's. DAVID R. COLBURN & RICHARD K. SCHER, *FLORIDA'S GUBERNATORIAL POLITICS IN THE TWENTIETH CENTURY* 13 (1980). Between 1882 and 1968, there were 25 white and 257 black victims of lynching in Florida. ROBERT L. ZANGRANO, *THE NAACP CRUSADE AGAINST LYNCHING, 1905, 1909-50* (1980).

64. For accounts of the workings of the Southern judicial process in the face of threatened lynchings, see GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 553 (1944); JOHN DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* 326 (1949);

Southern whites believed that no white woman would willingly become involved with a black man. Therefore, all such encounters were rape.⁶⁵ In at least one case in this study, a defendant was executed for rape when the situation may have involved consensual sexual relations. William Henry Anderson was condemned for the rape of a white woman in Broward County in 1945. A few days before his execution, his lawyer presented affidavits to the Governor of Florida and to the Pardon Board on his client's behalf because of "well founded belief in the community of Fort Lauderdale that William Henry Anderson and the prosecutrix were intimate since August 1944."⁶⁶ Anderson's sister visited him in the state prison, and then swore in an affidavit:

that he had been going with and was intimatimate [sic] with the woman he was convicted of rapeing [sic] for a long time; that it had been the method for her to come over in the colored section of Ft. Lauderdale, Florida at nights and they would spend time together there. But that on the day he is alleged to have raped her he went out to her house on the outskirts of Ftl [sic] Lauderdale, there he was caught by others, and that his relations with the prosecuting witness were always free and voluntary.⁶⁷

A second affidavit supported these allegations. However, Anderson was executed a few days later.

The case of defendant John Graham also exemplifies how many African-American men charged with raping white women were treated. On March 24, 1931, a fourteen-year-old white girl was raped near the Cummer Lumber company in a small town not far from Ocala. The assailant slashed the girl's throat, apparently in an attempt to kill her. The victim's description of her attacker fit John Graham, a twenty-nine-year-old black man who worked for the Cummer Lumber Company. Graham was arrested and identified by the victim. The county sheriff drove Graham by back roads to a jail in another county, in order to protect him from a lynch mob which had gathered.

William B. Huie, *The South Kills Another Negro*, in *THE DEATH PENALTY: A LITERARY AND HISTORICAL APPROACH* (Edward McGehee & William Hildebrand eds., 1964).

65. JACQUELINE D. HALL, *REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING* 154 (1979).

66. State Pardon Board, William Henry Anderson case file, (1945) (on file with Florida State Archives).

67. *Id.*

Graham was brought back to Marion County the night before his trial. He had no legal representation until the beginning of the trial, June 10, 1931, when two lawyers agreed to serve as defense counsel. The trial proceeded quickly. Three witnesses, including the victim, testified for the state, and Graham testified in his own defense. The case then was submitted to the jury without argument. The entire trial lasted about one hour.

Following three minutes of deliberation, the jury returned a guilty verdict without recommendation of mercy. Judge Bullock immediately sentenced Graham to death, saying, "You need expect no mercy from me, and had it not been for the sheriff who in performance of his duty saved you from the mob on the night of the crime, they would have torn you limb from limb."⁶⁸ A mob had gathered outside the courthouse and it appeared that Graham might yet be lynched. Sheriff Thomas and a dozen officers managed to get the defendant out of the courthouse, while the Judge retained all spectators in his courtroom for fifteen to twenty minutes. The sheriff then drove Graham to the state prison in Raiford.

Three days after the trial, Governor Carlton signed the defendant's death warrant. Graham was electrocuted eight days after his trial. Graham appeared calm and smiled as he walked to the chair. A group of twenty people, including the victim's father, witnessed the execution. Ironically, Sheriff Thomas, who twice had saved Graham from lynch mobs, threw the switch.⁶⁹

The reaction to the murder of a white victim often was swift and fierce. Clayton Bell, a black man, was arrested December 26, 1930, for shooting and killing P.D. Edmunds, grounds supervisor at Stetson University. Bell confessed to the crime that same day. Two days later, Bell was indicted, arraigned, and pled not guilty. At the arraignment an attorney was appointed to represent Bell, and since the lawyer had no objections to immediately proceeding to trial, jury selection began without delay.

68. Ocala Evening Star, June 11, 1931.

69. *Sheriff Saves Life of Negro After Assault: Black Fiend who Attacked School Girl is Spirited Away*, Ocala Evening Star, Mar. 25, 1931, at 1, 5; *Negro Charged with Assault on Young Girl*, Jacksonville J., Mar. 25, 1931, at 2; *John Graham is Sent to Prison for Execution: Death Sentence Quickly Passed on Negro Guilty of Criminal Assault*, Ocala Evening Star, June 11, 1931, at 2; *Graham Goes to Death in Chair at Prison Farm: Black Who Attacked Little Girl Confessed to Prison Chaplain*, Ocala Evening Star, June 19, 1931; Trial Transcript at 2-8, *State v. Graham*, (Fla. Cir. Ct. 1931) (heard in the Fifth Judicial Circuit during the summer term); Death Warrant for John Graham of June 13, 1931, State Pardon Board Files (1931) (on file with Florida State Archives).

Selecting a panel of jurors required only a quarter of an hour, and the trial followed. Both parties presented testimony and opposing counsel gave closing arguments. These took only thirteen minutes and the case then was submitted to the jury. The jurors deliberated for six minutes before finding Bell guilty of first degree murder with no recommendation of mercy. The entire judicial proceeding lasted less than one afternoon. The judge pronounced sentence the following morning, condemning Bell approximately eighty hours after the crime had occurred. The case was not appealed, and Bell was executed on January 27, 1930, one month and one day after the crime.⁷⁰

The only case approaching this speed which involved a white defendant was Guiseppi Zangara's. Zangara was an Italian anarchist who believed it was his mission in life to kill all presidents and kings. He attempted to assassinate Franklin Roosevelt in a park in Miami on February 15, 1933, but missed and killed the mayor of Chicago instead. Mayor Cermak died on March 6th, and a grand jury indicted Zangara for first degree murder on the same day. Zangara pled guilty and was sentenced to death four days later. Zangara declared he was not afraid of the electric chair.⁷¹ Three days after Zangara was sentenced, Governor Sholtz signed his death warrant. Zangara was executed one month and five days after committing his crime. He went to his death shouting "capitalists — all capitalists — lousy bunch — crooks."⁷²

Because clemency was granted to so few African-American defendants convicted of crimes against white victims, it is instructive to examine each such case involving a grant of clemency. Of the forty African-American men sentenced to die for rape in Florida, only two (5%) received clemency. Walter Lee Irvin was one of the two. Governor LeRoy Collins commuted Irvin's death sentence in December of 1955, thus closing the legal history of the "Groveland case," sometimes called Florida's "Little Scottsboro" case.⁷³ On July 16, 1949, a seventeen-year-old Lake County woman reported that she had been raped by four black men. She explained that the men came upon her and her husband on a country road, knocked

70. *Clayton Bell Hears Sentence of Judge Rowe*, DELAND SUN NEWS, Dec. 29, 1930 at 1, 4.

71. *Zangara Electrocuted for Murder of Cermak: Capitalists Denounced in Last Words*, THE BRADENTON HERALD, Mar. 20, 1933, at 1.

72. *Id.*

73. For a detailed account of this case see Steven F. Lawson et al., *Groveland: Florida's Little Scottsboro*, 65 FLA. HIST. Q. 1 (1986).

her husband unconscious, and took her into a field where they assaulted her. Walter Irvin, Samuel Shepherd, and Charlie Greenlee were arrested a few hours later; the fourth suspect, Ernest Thomas, was killed by a posse.

The reaction to reports of the attack was swift and violent. A mob gathered at the Lake County jail and demanded access to the defendants, who then were transferred to the state prison for safe-keeping. Unable to attack the defendants, the mob burned the house belonging to Shepherd's parents and other houses in the area. Shots were fired into houses owned by blacks and various acts of intimidation were committed against neighboring black residents. Mobs roamed the black community and black citizens were forced to flee from their homes. The local authorities were unable to control the crowd, some of whom had come from Alabama and Georgia. Finally, the National Guard and the 116th Field Artillery were called in to restore order.⁷⁴

The defendants were returned to Lake County for trial six weeks after these displays of violence. The presiding trial judge took great precautions to prevent a recurrence of violence, but the atmosphere of the trial remained charged with the threat of riot. Irvin and Shepherd were convicted and condemned to death; Greenlee, who was sixteen years old, was given a life sentence.

An appeal was taken to the Florida Supreme Court, requesting a reversal on the grounds that a fair trial could not be held in Lake County at that time. The appellate court disagreed and wrote:

It is true that strained racial relations existed in about a five-mile square area which embraced Groveland, Mascotte and Starkey's Still. The flare subsided on or before July 24, 1949, the colored people returned to the area, order thereafter prevailed and the troops were recalled. Our study of the record reflects the view that harmony and good will and friendly relations continuously existed between the white and colored races in all other sections of Lake County. The inflamed public sentiment was against the crime with which the appellants were charged rather than defendants' race.⁷⁵

The United States Supreme Court, however, reversed the holding of the appellate court and ordered a new trial.⁷⁶ A change of

74. *Shepherd v. Florida*, 341 U.S. 50, 53 (1951).

75. *Shepherd v. State*, 46 So. 2d 880, 883 (Fla. 1950).

76. *Shepherd*, 341 U.S. at 50.

venue was granted, from Lake County to neighboring Marion County. Before the second trial, Lake County Sheriff Willis McCall killed Samuel Shepherd and seriously wounded Walter Irvin. McCall claimed the men had attacked him.⁷⁷ Irvin recovered from his injuries, and subsequently was retried. He was again convicted and condemned. The Florida Supreme Court affirmed his conviction, and this time the United States Supreme Court refused to review the decision.⁷⁸

Governor Fuller Warren had promised the State Attorney of Lake County, "As soon then as I can legally issue death warrants [I] will do so."⁷⁹ However, the litigation of Irvin's case continued into Governor LeRoy Collins' administration. In 1955, Governor Collins commuted Irvin's death sentence to life imprisonment, saying there were "serious questions about the guilt of Walter Lee Irvin. I cannot take his life."⁸⁰

The commutation was not popular.⁸¹ The Grand Jury in Lake County took the unprecedented step of investigating the Governor's decision to see if it could be reversed.⁸² Governor Collins refused to appear before the grand jury,⁸³ and his decision to grant Irvin clemency was not withdrawn. Irvin was released on parole after approximately eighteen years in prison.⁸⁴

77. Some correspondence about this incident was in Irvin's Pardon Board file. Sheriff Willis McCall wrote Governor Fuller Warren January 3, 1951, asking for a stay of execution for James Leiby, a white convict, because he had been informed "that Mr. Leiby overheard Sheppard [sic] and Irvin planning to escape which resulted in my unfortunate experience." McCall believed that Leiby's personal testimony would have great effect "in case the prejudiced groups in New York bring enough pressure to bear in Washington for the Justice Department to place this case before a Federal Grand Jury." Governor Warren granted the stay to Leiby, and did nothing in the case for a year and a half. On June 13, 1952, the Governor inquired whether McCall still needed Leiby. McCall replied, "It would seem the Federal Grand Jury has had time to act if they are going to. They don't have a case anyway." James Leiby was executed June 30, 1952. State Pardon Board, Walter Lee Irvin case file, (1955) (on file with Florida State Archives).

78. *Irvin v. State*, 66 So. 2d 288 (Fla. 1953), cert. denied, 346 U.S. 922 (1954).

79. Telegram from Gov. Fuller Warren to Hon. J.R. Hunter (July 6, 1950) (State Pardon Board, Walter Lee Irvin case file, (1955)) (on file with Florida State Archives).

80. *Collins Rebuffs Call to Explain Rapist Clemency to Jury: Says Commutation Based on "Serious Questions" of Guilt; Ervin Says Governor Doesn't Have to Appear*, TAMPA MORNING TRIB., Feb. 17, 1956.

81. DAVID COLBURN & RICHARD SCHER, *Florida Politics in the Twentieth Century*, in FLORIDA'S POL. AND GOV. 123 (Manning Dauer ed., 1980).

82. Steven F. Lawson et al, *Groveland: Florida's Little Scottsboro*, 65 FLA. HISTORICAL Q. 23 (1986).

83. *Id.*

84. Jack Greenberg & Jack Himmelstein, *Varieties of Attack on the Death Penalty*, 15 CRIME AND DELINQ. 112, 113 (1969).

If Walter Irvin received clemency partly because of the interest and attention given to his case, Otis Neal Jackson seems to have been spared largely due to his obscurity. In 1951, Jackson was condemned at the age of sixteen for the rape of a white woman in Palm Beach County. He was sent to death row, where he was overlooked for four years.⁸⁵ When his case was noticed again by the authorities, he received a commutation of his death sentence. Jackson subsequently escaped from prison, an offense which automatically resulted in the reimposition of the death sentence. In 1956, he received clemency a second time.⁸⁶

Clemency was granted to three black defendants out of fifty-five (5.3%) condemned for the murder of white victims. The earliest of these cases involved two men, Willie Anderson and Kenzie Surrency. Anderson and Surrency were sentenced to death April 6, 1935, for killing Thomas Walter Higginbotham during a robbery in Jacksonville.⁸⁷ The reason for mercy in this case probably lay in the victim's identity. The Florida Parole Commission report mentioned that the victim was of poor character; he had worked as a convict guard and had killed a young white prisoner.⁸⁸

The prisoner in question was Martin Tabert, and his death had brought tremendous embarrassment to Florida officials. Tabert was a young man from North Dakota, who was arrested in 1923 in Leon County for riding a freight train. As was frequently done with defendants convicted of minor charges, Tabert was leased to a private company to work off his fine.⁸⁹

Tabert was leased to the Putnam Lumber Company, and sent to a convict camp in Dixie County, where he was treated very brutally. About two months after his arrest, Tabert was beaten to death by Thomas Walter Higginbotham. The death was investigated at the insistence of Tabert's family. It was eventually disclosed that the Sheriff of Leon County took payments from the Putnam Lumber Company for each convict the Company received, the sentencing judge held court late at night, while drunk, with no

85. *Youth Snatched From Shadow of Chair Again*, TALLAHASSEE DEMOCRAT, June 14, 1956.

86. *Id.*

87. *Another Jaxon Killed by Negro Bandits*, JACKSONVILLE J., Dec. 29, 1934.

88. State Pardon Board, Willie Anderson and Kenzie Surrency case files, (1941) (on file with Florida State Archives).

89. For a thorough discussion of the convict leasing system and the *Tabert* case, see Noel G. Carper, *The Convict-Lease System in Florida, 1866-1923*, (unpublished Ph.D. dissertation, Florida State University, Tallahassee, Florida, 1964).

attorneys present, and the convict camp physician had lied as to the cause of Tabert's death.

The scandal resulting from Tabert's death led to the abolition of the convict lease system in Florida. State officials thus had little reason to regret Higginbotham's murder. If their victim been any other white man, Anderson and Surrency probably would have been executed.

During the subsequent fourteen years, no other black man received clemency for a crime against a white victim. In 1955, Richard Floyd's death sentence was reduced to life imprisonment in consideration of his testimony against two co-defendants. The three men had killed a police officer who tried to stop them after they had committed a robbery. Floyd pled guilty and testified for the state, but did not receive a reduction of his sentence in exchange for his testimony. The other defendants pled not guilty. Five months after Floyd's sentence was reduced, his co-defendants were executed.⁹⁰

Very little is known about what happened to the fifty-nine persons whose death sentences were commuted in Florida during the years under study. No further references were found to most of the prisoners after commutations were granted. The Department of Corrections supplied data to the Special Commission on Capital Punishment indicating that forty-five persons had been released from prison after receiving commutations of death sentences.⁹¹ The average length of time these prisoners served before release was ten years and nine months.⁹² Raymond Marsh, Chairman of the Florida Parole Commission, reported on the thirty-one condemned prisoners whose sentences were commuted and who later were released under supervision of the Parole Commission. Of the thirty-one, six were apprehended for crimes after their release. One of the six committed a murder, and two committed other violent crimes. Marsh stated, "a little over 80% of those individuals that we have

90. State Pardon Board, Richard Floyd case file, (1955) (on file with Florida State Archives). *3 Negroes, All Convicted Killers, are Electrocuted*, TAMPA MORNING TRIB., Feb. 21, 1956.

91. THE STATE OF FLORIDA, REPORT OF THE SPECIAL COMMISSION FOR THE STUDY OF ABOLITION OF DEATH PENALTY IN CAPITAL CASES (1963-65).

92. *Id.* at 21.

under our supervision have been successful and are making good citizens."⁹³

V. CONCLUSION

The statistical analysis used in this study supports the hypothesis that the race of both defendants and victims influenced decisions to grant clemency. This conclusion must be qualified because of limited available data and the restricted analysis which could be done. Examination of individual cases also supports the conclusion that racial differences affected a convict's request for clemency. The documents preserved in the Florida Archives show a high level of consciousness concerning race,⁹⁴ and a willingness to consider race as an important element dictating the outcome of cases. Based on the evidence presented in this study, the race of defendants and victims influenced the decision to execute or grant clemency to condemned prisoners in Florida during the years under study.

93. *Id.* at 23. In one case, a condemned man who received clemency distinguished himself by saving the lives of a woman and child. Jim Williams was nearly executed on June 1, 1927. He was strapped into the chair, but the deputy sheriff who was present refused to pull the switch.

Because an officer refused to participate in capital punishment, a convict did not die in the electric chair. Two other people may also have escaped death as a result.

Jim Williams, sentenced to death for killing his wife, was strapped into the chair at the state Prison Farm in Raiford, Fla., on June 1, 1927. But the death jolt never came. Chief Deputy Walter Minton — at the switch in place of the official wasn't his job, he said. Besides, it wouldn't be legal, because he was not authorized to be an executioner. The prison superintendent called the governor for advice and was told to return Williams to his cell.

Sometime after that, Williams reportedly saved a woman and child from an enraged bull on the prison grounds. If so, Minton saved three lives by refusing to kill. Williams later was paroled and died a free man.

(Editorial Note: TITLE) TALLAHASSEE DEMOCRAT, *Saved From Death*, PARADE MAGAZINE, July 3, 1933.

94. Correspondence and official documents routinely identified the race of defendants. A handscrawled note in Bozzie Nelson's file, apparently taken during a phone conversation, reads in whole: "5/19 Warden Sinclair — Wilkerson — Death House — Doesn't even know his name — nigger." State Pardon Board, Bozzie Nelson case file, (1958) (on file with Florida State Archives).

