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February 1, 2006

M. E. Grenander Department of Special Collections & Archives
University Libraries
University at Albany
State University of New York
1400 Washington Avenue
Albany, NY 12222

Dear Sirs or Madams:

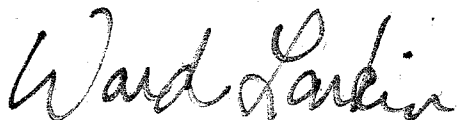
I write regarding the M.E. Grenander Department of Special Collections and Archives, Archives of Public Affairs and Policy, Finding Aid For The Capital Punishment Clemency Petitions Collection, Circa Apap-214.

Years ago I provided a copy of the Application for Executive Clemency I filed with the Texas Board of Pardons and Paroles on October 31, 2002 in behalf of Texas Death Row inmate James Lee Clark. I just learned that one of the statements contained therein is factually incorrect. Please redact footnote 18. It is contained on page 15 of this Clemency Application.

Thank you.

As far as I'm concerned you are otherwise free to have and use this Application for Executive Clemency as you see fit.

Sincerely yours,



Ward Larkin

BEFORE THE GOVERNOR OF THE STATE OF TEXAS

AND

THE TEXAS BOARD OF PARDONS AND PAROLES

JAMES LEE CLARK

APPLICATION FOR 60-DAY REPRIEVE FROM EXECUTION
AND
FOR COMMUTATION OF DEATH SENTENCE TO LIFE IN PRISON

PUBLIC HEARING REQUESTED

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AUTHORIZED REPRESENTATIVE FOR
JAMES LEE CLARK [SEE APPENDIX A.]

This Application for Commutation of Death Sentence to Life in Prison is presented in behalf of James Lee Clark in compliance with § 143.57 of Title 37 of the Texas Administrative Code

This Application for Reprieve from Execution for 60-days is presented in behalf of James Lee Clark in compliance with § 143.43 of Title 37 of the Texas Administrative Code.

Table of Contents

Table of Appendices	i
Application for Commutation of Death Sentence to Life in Prison	1
Inadequate Legal Representation	7
Judicial Indiscretion	16
Prosecutorial Duplicity	17
The Meaning of Clemency	24
Conclusion	30
Application for 60-day Reprieve from Execution	34
Appendices	

Table of Appendices

Appendix A	Authorization and Fee Affidavits
Appendix B	True Bill of Indictment
Appendix C	Judgment on Plea of Not Guilty Before Jury
Appendix D	Charge of The Court (For Guilt-Innocence/Includes Verdict Form)
Appendix E	Charge on Punishment (Includes Verdict of The Jury)
Appendix F	Order Setting Execution
Appendix G	Death Warrant
Appendix H	Henry Paine's Summation at Guilt Innocence
Appendix I	Richard Podgorski's Summation at Punishment
Appendix J	Dr. Marc Krouse's Testimony at Clark's trial
Appendix K	Dr. Marc Krouse's Testimony at Brown's trial
Appendix L	April 12, 1994 Investigator's Fee
Appendix M	June 1, 1994 Investigator's Fee
Appendix N	James Clark's Subpoena List
Appendix O	Dr. E. Clay Griffith M.D. Psychiatric Evaluation Invoice
Appendix P	Prosecution's Subpoena List
Appendix Q	Motion to Grant James Clark Immunity
Appendix R	New York Times Editorial & Story
Appendix S	Clemency Request Letters

October 31, 2002

To the Governor And the Honorable Members of the Board Of Pardons & Paroles:

Application for Commutation of Death Sentence to Life in Prison

James Lee Clark is scheduled to be executed on November 21, 2002 for the June 7, 1993 capital murder of Shari Catherine "Cari" Keeler Crews¹ in Denton County, Texas. Jesus Gilberto Garza was also killed as part of the same criminal action. Mr. Clark's co-defendant James Richard Brown was tried for the capital murder of Jesus Garza. Mr. Brown was found not guilty of capital murder and guilty of the lesser charge robbery.

Cari Crews had just completed her junior year at Billy Ryan High School in Denton. She was in the top 2% of her class, had just been named a National Merit Scholarship Semifinalist for a science project dealing with deaf children, competed in classical piano competitions, and was to be president of her high school's chapter of Amnesty International in the upcoming school year. Jesus Garza had just completed his sophomore year at Billy Ryan High School. He was an A and B student, and he played football and baseball.

This is Mr. Clark's first execution date, and these are his first two Applications for Executive Clemency. Presented here are applications for a 60-day Reprieve from Execution and for Commutation of Death Sentence to Life in Prison. Per 37 TAC § 143.57(e), Mr. Clark requests an interview with a member of the Board.

My name is Ward Larkin. Mr. Clark has authorized me to present these applications to the Governor of the State of Texas and to the Texas Board of Pardons and Paroles in his behalf. [See Appendix A, Pg. 1.] I have sworn that I have not and will not take any compensation whatsoever for any services associated with Mr. Clark's

¹ Miss Crews' formal name is Shari Catherine Keeler Crews. The Denton County District Attorney's Office refers to her as Shari Catherine Crews, or Cari Crews.

Applications for Executive Clemency. [See Appendix A, Pg. 2-3.] Also included are letters from private individuals requesting the Governor, in conjunction with the Board of Pardons and Paroles, to grant a commutation of sentence for Mr. Clark. [See Appendix S.]

I am particularly fond of a line that Albert Einstein used to begin his book on the General Theory of Relativity: "a fair amount of patience and force will be put upon the part of the reader." That phrase beats in my head now. I pray that I'm not too presumptuous to say the same to you, the Honorable Members of the Texas Board of Pardons and Paroles.

I bought and read a copy of Robert Coles' book *The Call of Service: A Witness to Idealism* (Houghton Mifflin Company, 1993) soon after it was published. Then I read it again about 1-1/2 years ago. It examines why people take idealist action; what inspires and sustains them; how they express their idealism; why that idealism is so necessary for each individual person; and, why that idealism is also so necessary for society.

The first chapter deals with the 1960 school desegregation in New Orleans, Louisiana. Despite the angry and determined protestations of the New Orleans School Board, the City of New Orleans, the Louisiana State Legislature and Louisiana Governor Jimmie H. Davis, U.S. District Judge J. Skelly Wright ordered the New Orleans schools desegregated.

The plan was to integrate just the first grade that first year. Then each subsequent year another grade would be integrated incrementally. However, before any black student was allowed to attend a white school, the New Orleans School Board had black kindergarteners who wanted to attend white schools tested. The School Board's idea was to make the test artificially difficult. Their hope was that all of the black students who took that test would fail, thereby allowing the School Board to still keep the

schools segregated. Out of the approximately 100 black kindergarteners who took the test, only four passed.

When school was scheduled to start in September of 1960, the Louisiana State Legislature succeeded in slowing integration down. Governor Davis even threatened to close all of the public schools rather than see them integrated. Finally, the delay tactics failed, and on November 14, 1960 four black six-year-old girls initiated the integration of the New Orleans public school system: Ruby Bridges, Gail Etienne, Tessie Prevost and Leona Tate. Ruby Bridges attended William Franz Public School; the other three attended McDonogh No. 19 Public School.

With few exceptions the white parents immediately removed their children from these two schools. One such exception was the Reverend Lloyd Foreman. He knew that integration was morally and spiritually correct. He personally walked his daughter Pam to and from Franz school every day in spite of the merciless abuse and epithets hurled at him and his daughter. Other students who stayed at Franz or McDonogh were allowed to enter and leave through back entrances, well out of sight of the protestors.

U.S. Marshals escorted Ruby Bridges, Gail Etienne, Tessie Prevost and Leona Tate to and from their respective schools. The girls needed the protection because the protestors at the two schools were viciously angry and occasionally violent. It was not uncommon for stones and rotten eggs to be thrown. One especially shameful part of these protests was a group of white women who called themselves "The Cheerleaders". Their behavior even shocked John Steinbeck, who wrote about them in his book *Travels With Charlie*:

Now I've heard the words bestial and filth and degenerate, but there was something far worse than dirt, a kind of frightening "witches' Sabbath." These are not mothers, not even women. They were crazy actors playing to a crazy audience.

Ruby Bridges' walk to school also inspired the 1964 Norman Rockwell painting "The Problem We All Live With".



The parents of these four little girls demonstrated remarkable courage. They refused to back down in spite of the great difficulty, distress and hardship. Ruby Bridges herself "withstood this ordeal with remarkable resilience and even managed to find time occasionally to pray for her tormentors."²

Please, God, try to forgive those people.
Because even if they say those bad things,
they don't know what they're doing.
So you can forgive them,
just like you did those folks a long time ago
when they said terrible things about you.

I find this story is an inspiration and a heartbreak. A heartbreak because so many people so savagely refused to do what was right. They refused to embody the ideals of

² Robert Coles, *The Call of Service: A Witness to Idealism*, pg. 1 (Houghton Mifflin Company, 1993).

democracy and refused to honor the fundamental principle of our constitutional form of republican government: the rights to equality, to liberty and to freedom.

But vastly more important, it is an inspiration. First, it is a poignant example of how a small group of courageous and committed people can take society one step closer to our nation's creed – "We hold these truths to be self-evident: that all men are created equal." Ultimately, it is an inspiration because Ruby Bridges saw her daily walk to school as her Call to Service, her personal chance to contribute in a positive way. Even more important than being a vital part of the integration process itself, Ruby Bridges saw her daily walk to school as an opportunity, if not a duty, to do what she could to ease the pain, the suffering and the anger of those who were protesting against her: "Please, God, try to forgive those people. Because even if they say those bad things, they don't know what they're doing."

This is the personification and embodiment of "love thy neighbor as thyself"³ and "love your enemies"⁴. I cry, I am crying, at the thought of how gentle, how kind, how considerate Ruby Bridges was in the face of such adversity. Even though I do not consider myself a particularly religious person, these are the principles with which I too want to live my life. And this is the spirit in which I approach you, the members of the Texas Board of Pardons and Paroles, in presenting James Lee Clark's application for Commutation of Death Sentence to Life in Prison.

Having said that, and now having taken a deep breath and having dried my tears, I need to step back and explain. I do not consider any member of the Board of Pardons and Paroles my enemy. Over the years I've met many of you – not all, but

³ Leviticus 19:18 "Thou shalt not avenge, nor bear any grudge against the children of thy people, but thou shalt love thy neighbour as thyself: I am the LORD."

⁴ Matthew 5:43-44 "But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you;"

many. I've always been treated with courtesy and respect. My personal experience is that the members of the Board of Pardons and Paroles are committed and hard working public servants. You are good and decent people. You are not, as Ruby Bridge's had to deal with, "crazy actors playing to a crazy audience".⁵ However, the Texas Board of Pardons and Paroles has lost sight of the fundamental and essential role that Executive Clemency plays in our constitutional form of representative government. [See section labeled The Meaning of Clemency.]

Ruby Bridges stood and prayed to God to forgive those who so savagely and maliciously protested against integration. I stand and pray for the strength and the skill to convince you, the members of the Texas Board of Pardons and Paroles that simply asking yourselves "Is the person guilty" and "Did the person have a fair opportunity to raise his claims with the courts" is not enough. I stand and pray for the strength and the skill to convince you that mercy, grace and forgiveness are indispensable aspects of Executive Clemency. "The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."⁶

I will also present information showing that James Clark's trial attorneys provided wholly inadequate representation. [See section labeled Inadequate Legal Representation,] the judge showed poor discretion, [See section labeled Judicial Indiscretion,] and the prosecutors in his case were deceitful and duplicitous. [See section labeled Prosecutorial Duplicity.]

⁵ This was John Steinbeck's description of some of the protestors against integration in 1960 New Orleans.

⁶ Alexander Hamilton, The Federalist Papers, No. 74.

Inadequate Legal Representation

In non-capital cases, the major concern is guilt or innocence. Did the defendant commit the crime, or not? Did the police violate the defendant's rights? However, in a capital case, the attorney's first and foremost concern is to save the defendant's life. Guilt or innocence and prosecutorial civil rights violations are secondary. Everything that jury members see or hear during the trial – because it's the same jury that decides guilt and punishment – may determine whether the defendant is going to be sentenced to life, or is going to be sentenced to death. Therefore, the background investigation must also be about person on trial, not just the crime that he or she has been accused of committing.

In a non-capital case, where the issue is did the person do it or not, when you are faced with a confession, the issue is: Is the confession admissible and if so what does it say? In a capital case, once you get all past that, the difference between life and death can be how the defendant said what he said; what his tone of voice was; what his manner was; exactly word for word what he said; when it may not have been electronically recorded. And even if it was, what were all the circumstances surrounding that? Because the jury is going to grapple with issues like: is this a remorseless killer or is this a mentally impaired person who never lived his life on an even playing field to begin with? What is his moral culpability? These questions being asked are things like, at bottom, not just what did this person do, but who is this person? Who is he? And that means that nothing is off-limits; nothing is irrelevant. Every aspect of a person's life, of the crime, of the investigation, becomes possibly the tipping point between life and death. And that is why, rather than a two-dimensional usual inquiry, yes or no, guilty or not guilty, did it or did not do it, the inquiry in a capital case, not only at the sentencing phase, but throughout, since the same jury hears everything, is tremendously complex. There is almost nothing that can be left uninvestigated or unpursued because anything that is left uninvestigated or unpursued could turn out to be the difference between life or death.

David I. Bruck
Death Penalty and Indigent Representation
Symposium on Indigent Criminal Defense in Texas
December 7-8, 2002, Austin, Texas.

David I. Bruck is an attorney with the Federal Death Penalty Resource Center and has been successful defending capital cases. For example, he defended Susan Smith in her capital trial, getting her a life sentence. Smith's crime was particularly heinous. On October 25, 1994, at John D. Long Lake near Union, South Carolina, Smith murdered her own two children: three-year-old Michael and 14-month old Alex. Smith put both boys in her car and let the car roll into the lake. The car sunk, and the boys drowned. At first Smith told the police that she had been carjacked by a black man, and he kidnapped the boys. The "kidnapping" received widespread media coverage, and Smith was regularly interviewed on television nationwide. However, the police were soon suspicious of Smith's story; she confessed to the murders on November 3, 1994.

James Clark's court appointed defense attorneys – Denton, Texas law partners Richard Podgorski and Henry Paine – clearly didn't understand how to properly defend a capital case, particularly a heinous capital case. They plainly lost sight of the fact that their primary duty was to save their client's life. Their defense was all but non-existent. They made no opening statement to the jury during the guilt-innocence phase of the trial. They called no witnesses. Moreover, they didn't even cross examine the most damaging prosecution witness, or call an expert of their own to refute that damaging prosecution testimony.

Medical Examiner Dr. Marc Krouse gave testimony that eliminated co-defendant James Brown as the possible shooter. In short, Dr. Krouse testified that the muzzle to wound distance of the shot that killed Jesus Gilberto Garza was "within a couple of feet".⁷ Because James Brown was shot and wounded before Jesus Garza was killed, Dr. Krouse's "couple of feet" testimony was the prosecution's lynchpin evidence necessary

⁷ See Appendix J, pg. 490, line 24 to pg. 491, line 6. Testimony of Dr. Marc Krouse at James Lee Clark's capital murder trial.

to prove that a severely wounded man could not have shot and killed young Mr. Garza. Specifically, since Brown was severely wounded and because Jesus Garza was shot upward from under the chin, any shot fired by Brown to Mr. Garza must have been fired within just a few inches, not a "a couple of feet".⁸ Thus, via the process of elimination, James Clark became the only possible suspect. Yet one simple cross-examination question would have destroyed this theory of the crime.

For example, "Dr. Krouse, by 'within a couple of feet' do you mean that the shot could have been fired from just a few inches, or do you mean that the shot was fired from no closer than two feet?" In fact, Dr. Krouse changed this very testimony at co-defendant James Brown's trial. In Brown's trial, the second trial, Dr. Krouse swore that the muzzle to wound distance of the shot that killed Jesus Garza was "just a few inches".⁹ But we'll never know what Dr. Krouse would have said. Podgorski and Paine didn't ask the question. Thus, the prosecution was free to exploit Dr. Krouse's "couple of feet" testimony to their advantage. With Dr. Krouse's "couple of feet" testimony, the prosecution was able to prove, unchallenged and undisputed, that James Clark alone shot Jesus Garza.

Henry Paine did give a summation argument in the guilt-innocence phase of the trial. However, summation arguments are not evidence. They are simply opportunities for the prosecution and defense to interpret and explain the evidence to the jury. Thus, James Clark's attorneys presented no evidence whatsoever to the jury in a death penalty case. All of the information the jury learned about the crime and about Mr. Clark came from the prosecution.

⁸ The full impact of Dr. Krouse's testimony is examined in detail under the heading Prosecutorial Duplicity. For now please realize that Dr. Krouse's testimony was crucial, and Podgorski and Paine did nothing to defend James Clark against it, not even ask one single cross-examination question.

⁹ See Appendix K, Pg. 911, lines 18-19. Testimony of Dr. Marc Krouse at James Richard Brown's capital murder trial.

Paine's summation consisted of just 8 pages in the court's trial transcript. [See Appendix H] It probably took about 5 minutes to say. In much of it Paine merely repeated that he didn't know what happened the night of the crime. Apparently Paine's tactic to create reasonable doubt with the jury was by subliminal suggestion. If he repeated "I don't know" enough, the various members of the jury would subconsciously pick up on it and then not convict. It didn't work, for the jury deliberated for just an hour and twelve minutes before returning with a guilty verdict on capital murder. The jury retired at 3:26pm on Friday, April 29, 1994 and returned with a verdict at 4:38pm.

The punishment phase of James Clark's trial started on Monday, May 2, 1994. Podgorsky and Paine again made no opening statement to the jury, and again they called no witnesses. Podgorski's closing argument consisted of 10 pages in the trial transcript. [See Appendix I] Amazingly, it was worse than Paine's closing argument for guilt-innocence. In the 2ND paragraph Podgorski goes into what appears to be a bad comedy routine:

Now, you know, we might think we're at the end of this trial now; we're at the end. But we're not at the end. We're not even at the beginning of the end, but we're at the end of the beginning.¹⁰

Next Podgorski uses insulting terms relating to his Polish heritage. "Now you [the jury] are saying, all right, Polack attorney, why should he get life?"¹¹ Most importantly, Podgorski admitted to the jury that he preferred to be impulsive, to think or act without forethought. "[I] don't want to say [my prepared speech], I'm just going to shoot from the hip, and that's what I'm doing."¹²

¹⁰ See Appendix I, page 187, lines 21-24.

¹¹ See Appendix I, pg. 196, lines 7-8.

¹² See Appendix I, pg. 196, lines 13-15. Also, just as reprehensible as admitting that he was unprepared was his very use of the figure of speech "Shoot from the hip". It's very utterance likely made some on the jury cringe. Miss Crews and Mr. Garza had each been killed by shotgun blasts to the head. Podgorski was supposed to be trying to save Mr. Clark's life, not helping the prosecution get him sentenced to death.

James Clark's very life is at risk, and Podgorski admits to the jury that he hasn't given careful thought to what he wants to tell them. Podgorski is sending a signal to each and every member of the jury that, 1) James Clark doesn't deserve my best effort, 2) you, the jury, don't deserve my best effort, and 3) since I'm being rash and impulsive, it's perfectly alright for you, the jury, to be rash and impulsive with regard to deciding James Clark's life, too.

Podgorski was required by Texas State Bar Rules on Professional Conduct to try to save James Clark's life with competence, with diligence and with zealousness. The U.S. Supreme Court held in *United States v. Cronin*, 466 U.S. 648 (1984) that Podgorski was required to oppose the prosecution's case with "meaningful adversarial testing". Yet during the punishment phase of Mr. Clark's trial Podgorski gave no opening statement to the jury, he called no witnesses to testify on James Clark's behalf, and he admitted that he hadn't given careful thought to his only statement to the jury. "I'm just going to shoot from the hip, and that's what I'm doing."

David I. Bruck, in contrast, called enough witnesses in Susan Smith's trial to show the jury her family history and life experiences. During his closing arguments Bruck explained how and why the choices Susan Smith made were tragic. He explained how the jury was left with a choice of its own, but a choice that was far more rational and sound than Susan Smith's. Bruck explained that the choice the jury should make, the judgment the jury should make, was to sentence Susan to life in prison. Near the end of his summation, Bruck took a bible and read from the Gospel of John about the woman who committed adultery and was to be stoned. "He that is without sin among you, let him cast the first stone." Bruck finally told the jury that Susan's choice will "haunt her for the rest of her life."

The strategy worked. The jury in Susan Smith's trial deliberated for about two hours before unanimously deciding on a life sentence. David I. Bruck allowed the jury the opportunity to get to know Susan Smith, to learn about her troubled life, to understand the reasons for her actions. But Podgorski and Paine did nothing for James Clark. They presented no evidence to the jury. They gave the jury no opportunity to get to know James Clark. They gave the jury no chance to learn about the tragedy of Mr. Clark's childhood. Podgorski and Paine simply let the jury learn everything about Mr. Clark and the crime from the prosecution. "I'm just going to shoot from the hip, and that's what I'm doing."

Futhermore, and worst of all, Podgorski and Paine essentially did no investigation. This was a capital case, and to repeat what David I. Bruck said

There is almost nothing that can be left uninvestigated or unpursued because anything that is left uninvestigated or unpursued could turn out to be the difference between life or death.

Texas District Judge Ira Sam Houston was the presiding trial judge at Mr. Clark's trial, and he limited Podgorski and Paine's investigation expenses to \$5,000.

Unbelievably Podgorski and Paine accepted this unreasonably low amount without a fight. How could they leave almost nothing uninvestigated, almost nothing unpursued on \$5,000?¹³ They couldn't, and they didn't.

Podgorski and Paine hired Richard Payeur to investigate. They filed two Motions For Payment of Investigator's Fees: one on April 12, 1994 for \$3,704.90¹⁴ and another on June 1, 1994 for 1,263.40.¹⁵ The details of Payeur's investigations prior to April 12, 1994 were sealed by the court. Payeur's second invoice provides that he spoke to a witness

¹³ Judge Houston wasn't as stingy when it came to paying the attorneys. Podgorski received \$56,500 and Paine received \$51,000.

¹⁴ See Appendix L.

¹⁵ See Appendix M.

on April 12, 1994, a witness on April 20, 1994, two witnesses on April 22, 1994 and served subpoenas on May 2, 1994 and May 3, 1994. Most telling of Podgorski and Paine's woeful lack of investigation and their unskilled trial strategy is the fact that the prospective witness list they submitted to the court did not even include such people as James Clark's mother, his brothers, his step-father, his aunt, or former elementary school, or middle school teachers.¹⁶ Podgorski and Paine let the jury know nothing about James Clark. They presented no mitigation.

The U.S. Supreme Court held in *Woodson v. North Carolina*, 428 U.S. 280 (1976) that all defendants in death penalty cases must be allowed to present evidence that may persuade the jury against imposing a death sentence. Specifically, the U.S. Supreme Court said that "consideration of the character and record of the individual offender and the circumstances of the particular offense ... [are] a constitutionally indispensable part of the process of inflicting the penalty of death."

In short, death penalty defendants must be allowed to plead for their lives. However, they don't have to if they don't want to, and there probably are times in which the most prudent legal strategy during the penalty phase of a capital murder trial is to remain silent. However, those times are precious few. Moreover, Mr. Clark's case wasn't one of them. He had just been convicted of the brutal rape and savage murder of Cari Crews, a 17-year old high school honors student. Podgorski and Paine, should have done something, anything, to temper that grisly image with the jury.

But Podgorski and Paine called no witnesses at all during the punishment phase of Mr. Clark's trial. They made no attempt to present mitigating evidence to the jury. They should have, at the very least, mentioned James Clark's troubled childhood. His

¹⁶ See Appendix N, James Clark's Subpoena List.

father abandoned his mother when she got pregnant with him. His mother then abandoned James when he was 15 years old.

James Clark had two brothers, one older and one younger. All three boys had a different father. Both his father and his older brother's father deserted their mother. James' father disappeared soon after he learned that James' mother was pregnant. James' mother married the father of James' younger brother. Sadly, however, this man was alcoholic and regularly beat the children.

Not surprisingly, with this kind of upbringing, James was a poor student with many behavioral problems. However, he was not in trouble with the law until he was 15-years old. At that time he was arrested for allegedly stealing a bicycle. Not only was this a first offense, it was petty theft.¹⁷ Nonetheless, James Clark was sentenced to attend the Texas Youth Services' State School in Gainesville, Texas until he was 18 years old.

In actuality, James had borrowed the bicycle and it was stolen from James while in his care. He had driven to his aunt's house, chained the bicycle to the porch, then when he went to leave the bicycle was gone. In compensation, James did work around the bicycle owner's house. Hurricane Alicia had recently hit the area, so there was plenty of yard work to do. Strangely, the bicycle owner filed a criminal action against James a week after he had completed the yard work.

Attorney Juanita Jeys was appointed to represent James in juvenile court. However, she did no investigation. Thus, she didn't present to the court any information about the deal to compensate the bicycle owner for the loss of her bicycle. Juanita Jeys simply urged James Clark to plead guilty and agree to go to Texas Youth

¹⁷ The criminal charge was theft of an item valued at more than \$20 and less than \$200.

Services State School.¹⁸ Similarly James' mother also wanted James to go to State School. She wanted to be rid of him.

After that day in juvenile court James Clark never saw his mother again. James Clark's father abandoned him before he was born. James Clark's mother abandoned him when he was 15 years old. Years later, after he was released from State School, James contacted his mother by telephone. She said that she loved him as a son, but didn't want to ever see or speak to him again. And she hasn't.

Any attorney undertaking the effective defense of a capital case would have patiently and thoroughly presented evidence to the jury about James Clark's troubled childhood. He or she would have had Mr. Clark's mother, his brothers, his step-father, his aunt, his elementary school teachers, his middle school teachers testify to the jury. James Clark's teachers from the Gainesville State School would have been called to testify. A competent attorney would have presented expert psychological testimony about Mr. Clark to the jury.¹⁹ Any competent attorney would have done something, anything, more than just "Shoot from the hip."

Shockingly, Podgorski and Paine were also appointed to represent Mr. Clark on his direct appeal, and they were appointed on the very day that Mr. Clark was sentenced to death, minutes after Mr. Clark's death sentence was entered. Not so surprisingly, they quit immediately after James Clark's direct appeal was denied. It's common practice, after a direct appeal is denied, for death penalty attorneys to file a Motion for Rehearing with the Texas Court of Criminal Appeals and to file a Petition for Writ of Certiorari to the U.S. Supreme Court, but not Podgorski or Paine. Without

¹⁸ Not surprisingly, and completely unrelated to James Clark, Juanita Jeys was disbarred a few years later for failure to provide her clients meaningful assistance.

¹⁹ Podgorski and Paine did have psychiatrist E. Clay Griffith examine Mr. Clark on January 13, 1994, but they didn't call him to testify. [See Appendix O.]

reason and without warning they simply quit. The courts did demand that Podgorski and Paine show cause why they left Mr. Clark without legal representation, but no impropriety was found, no sanctions were levied.

Judicial Indiscretion

Ira Sam Houston was the judge who presided over James Clark's trial. However, he repeatedly demonstrated a lack of good judgment. One, he forced prospective jurors to answer voir-dire questions that were later ruled to be an invasion of privacy. Two, he deprived James Clark's attorney any chance of thoroughly investigating Mr. Clark's personal background or the details of the case. Three, he appointed Richard Podgorski and Henry Paine, the exact same attorneys who represented Mr. Clark at trial, to represent Mr. Clark on direct appeal.

Judge Houston held perspective juror Dianna Brandborg in contempt of court for refusing to answer voir-dire questions. Mrs. Brandborg found the voir-dire questions too personal and refused to answer on the grounds that they were an unconstitutional invasion of her privacy. Mrs. Brandborg fought the contempt charges all the way to the federal courts. Years later she was exonerated. The U.S. District Court held that the questions asked of the perspective jurors in James Clark's case were too personal, and thus an invasion of privacy. On June 19, 1995, U.S. Magistrate Judge Robert W. Faulkner overruled Judge Houston's contempt of court charge against Mrs. Brandborg.²⁰

In a capital case a thorough background investigation is essential. Without the proper background information a capital defense attorney cannot possibly provide his or her client constitutionally required effective assistance.²¹ Shamefully, Judge Houston

²⁰ U.S. District Court for Texas, Eastern District, Brandborg v. Lucas, et. al., Case No. 94-CV-228

²¹ See David I. Bruck's comments on page 7 of this Application.

limited investigation fees in James Clark's case to a mere \$5,000. There is no possible way in which any defense attorney could properly investigate a capital case with \$5,000.

Finally, Podgorski and Paine were shockingly appointed to represent James Clark on direct appeal immediately after the jury delivered its death sentence verdict. Judge Houston had just seen Podgorski and Paine not make any opening remarks and not call any witnesses at trial. It was unconscionable for Judge Houston to think that Podgorski and Paine were best suited to protect Mr. Clark's rights on appeal. Moreover, common practice is for the presiding judge to appoint different attorneys on appeal than those who represented the defendant at trial. The idea is that new counsel will have a different perspective. Therefore, they are better able to see things that the original trial attorneys missed. In fact, current Texas State law (specifically, Texas Code of Criminal Procedure Art. 26.052(k)) prohibits the court from appointing the trial attorney as appellate counsel unless 1) the defendant and the attorney request the appointment, and 2) the court finds good cause to make the appointment.²²

Judge Ira Sam Houston did not have good cause to appoint Podgorski and Paine to represent James Clark on appeal. He was unreasonable to have limited defense investigation expenses to \$5,000. He was wrong to have found Dianne Brandborg in contempt of court.

Prosecutorial Duplicity

James Lee Clark and James Richard Brown were arrested for the June 7, 1993 murders of Shari Catherine "Cari" Keeler Crews and Jesus Gilberto Garza. James Clark was tried, convicted and sentenced to death, but it was based on a theory of the crime that the Denton County District Attorney's Office abandoned at the later trial of his co-

²² Texas Code of Criminal Procedure Art. 26.052 became effective September 1, 1995. It didn't apply to Judge Houston in James Clark's case.

defendant Brown. In James Clark's trial the prosecution argued that Mr. Clark shot and killed both Cari Crews and Jesus Garza. Then at Brown's trial the prosecution reversed itself and argued that James Brown, in fact, was the triggerman. Both theories of the crime could not have been true.

As unjust as it was for Denton County District Attorney Bruce Isaacks to argue two inconsistent and irreconcilable theories of the crime – he knew that at least one of the theories had to be false – the U.S. Court of Appeals for the Fifth Circuit held in *Beathard v. Johnson*, 177 3d 340 (1999) (another Texas death penalty case involving co-defendants) that “a prosecutor can make inconsistent arguments at the separate trials without violating the due process clause”. In other words, it's perfectly OK for the prosecution to argue a false theory of a crime to the jury.²³

Interestingly, on October 21, 2002 the New York Times published an editorial condemning such prosecutorial duplicity²⁴. In Pensacola, Florida Alex King, 13, and Derek King, 14, were tried and convicted of the murder of their own father. At the same time, the same prosecution had attempted to try a different defendant, using a different theory of the crime. Florida Judge Frank Bell, the presiding judge in the case against Alex and Derek King, threw out the boys' convictions when he learned that the prosecution had already gone after a different defendant for the same crime using a different theory. This New York Times Editorial correctly stated that it was an ethical violation for the Florida prosecution “to ask jurors to find defendants guilty beyond a

²³ In addition to James Clark and James Beathard there are other Texas co-defendant death penalty cases in which the prosecution argued inconsistent theories of the crime. Joseph Nichols and Willie Williams were separately sentenced to death for the same crime even though one of the prosecution's theories of the crime had to be false. Jesse Jacobs was sentenced to death for a crime the prosecution later convicted someone else of committing. James Beathard was executed on December 12, 1999. Willie Williams was executed on January 31, 1995. Jesse Jacobs was executed on January 4, 1995.

²⁴ Appendix R contains an internet download of the October 21, 2002 New York Times Editorial and an internet download of an October 17, 2002 related New York Times news article.

reasonable doubt when the prosecutors themselves were so uncertain about who committed the crime.”

Regarding the separate trials against James Clark and James Brown, however, it wasn't just inconsistent theories of the crime, the telling fact, the most significant fact, changed from the first trial to the second. Specifically, Medical Examiner Dr. Marc Krouse testified at James Clark's trial that the muzzle to wound distance of the shot that killed Jesus Garza was "a couple of feet"²⁵. Then at James Brown's trial Dr. Krouse changed his testimony. The muzzle to wound distance of the shot that killed Jesus Garza was actually "just a few inches"²⁶.

From "a couple of feet" it was virtually impossible for James Brown to have fired the shot that killed Jesus Garza. Thus, James Clark must have been the shooter. However, from "just a few inches" it was likely that James Brown had, in fact, killed Mr. Garza. So, based on this new fact, the prosecution argued that James Clark wasn't the shooter after all.

James Clark was brought to trial for the robbery-murder and rape-murder of Miss Crews. There was conclusive DNA evidence that James Clark raped her, but there was no conclusive forensic evidence that James Clark had murdered her. It was through a series of facts and inferences that the Denton County District Attorney was able to prove to the jury that it was James Clark, as opposed to James Brown, who shot and killed Cari Crews. The lynchpin, the fact that tied the prosecution's theory of the crime against James Clark together, was the muzzle to wound distance of the shot that killed

²⁵ See Appendix J, pg. 490, line 24 to pg. 491, line 6. Testimony of Dr. Marc Krouse at James Clark's capital murder trial.

²⁶ See Appendix K, Pg. 911, lines 18-19. Testimony of Dr. Marc Krouse at James Brown's capital murder trial.

Jesus Garza. At "a couple of feet" the shooter could only have been James Clark. At "a few inches" it could have been either Clark or Brown.

The quick list of facts and inferences used by the prosecution to convict James Clark were these:

- 1) FACT: James Brown was accidentally shot with a shotgun and severely wounded before either Jesus Garza or Cari Crews were killed.
- 2) FACT: James Brown's wound was so severe that he could not stand. He could only sit up or lay on the ground.
- 3) FACT: Cari Crews and Jesus Garza were killed with the same shotgun.
- 4) FACT: That shotgun was at least 24 inches in length.
- 5) FACT: Jesus Garza died from a single shotgun wound to the left side of his chin. The shot was fired while the shotgun was held parallel to the front of Mr. Garza's body.
- 6) FACT: Cari Crews was killed by a contact wound to the back of her head. That is, the barrel of the shotgun was in direct contact with the back of her head when the shotgun was fired.
- 7) FACT: The muzzle to wound distance of the shot that killed Jesus Garza was "a couple of feet". NOTE: This testimony changed to "just a few inches" at Brown's capital murder trial.
- 8) INFERENCE: The triggerman could not have fired the shotgun from "a couple of feet" away and also parallel to Mr. Garza's body from a sitting position.
- 9) CONCLUSION #1: Since James Brown could only have fired the shot that killed Jesus Garza from a sitting position, he could not be the shooter. By the process of elimination, James Clark must have been the shooter.

10) CONCLUSION #2: Even though it was physically possible for Brown to have killed Cari Crews (a sitting shooter could have fired that fatal shot), it's more likely that the same person who killed Jesus Garza also killed Cari Crews. It's unreasonable that Brown and Clark would have traded the gun back and forth in between fatal shots.

The prosecution was able to prove that James Brown was accidentally shot first, just above the knee with the shotgun. The two identical shotgun shells used to kill Miss Crews and Mr. Garza were found still in the shotgun when it was recovered near the crime scene. There was a conclusive match against shotgun pellets still found in Miss Crews and Mr. Garza and the pellets used in those particular shells. The shotgun shell that wounded Brown, a different type of shotgun shell than the other two, was found on the ground at the scene of the crime. Since the murder weapon was a double-barreled shotgun, it was reasonably argued that 1) Brown sustained his wound first, 2) the shell used to wound Brown was removed from the gun and placed on the ground, 3) the shotgun was reloaded with the two shells that were used to kill Miss Crews and Mr. Garza, and 4) Miss Crews and Mr. Garza were killed.

Dr. John Kristofferson, the orthopedic surgeon who treated Brown's gunshot wound, testified for the prosecution that Brown's injuries were so severe that Brown could not have stood. Two inches of Brown's femur bone just above the knee had been shattered. Also, as explained in the paragraph above, the same shotgun was used to kill both Miss Crews and Mr. Garza. Finally, since the shotgun was recovered, its length is undisputed.

Thus, it was the muzzle to wound distance of the shot that killed Jesus Garza that was crucial testimony against James Clark. After Medical Examiner Dr. Marc Krouse

testified that the shot that killed Jesus Garza was fired from "a couple of feet", the prosecution's carefully constructed theory of the crime made complete sense. James Clark was convicted of capital murder and sentenced to death.

But at James Brown's trial the prosecution reversed its theory of the crime. They argued that Brown killed Cari Crews and Jesus Garza. Shockingly, Dr. Marc Krouse changed his testimony to coincide with this new theory. Krouse now testified that the shot that killed Jesus Garza was fired from "a few inches" away, not from a couple of feet. At James Clark's trial the prosecution argued that it was physically impossible for James Brown to have killed Jesus Garza, but at Brown's trial the facts changed. Now, the shot that killed Jesus Garza was close enough for James Brown to have fired it.

One has to wonder whether the Denton County District Attorney's Office knew before taking James Brown to trial for the capital murder of Jesus Garza that Dr. Krouse was going to change his testimony. For without Dr. Krouse's change in testimony, James Brown could have easily defended himself by arguing the theory of the crime advanced by the prosecution in James Clark's case. That is, it was physically impossible for Brown to have fired the shot that killed Jesus Garza. But Dr. Krouse's testimony about how Mr. Garza was killed did change. And with that change, the Denton County District Attorney saw the opportunity to try to get James Brown sentenced to death, too.

Nonetheless, the jury in Brown's case saw through this duplicity. How could James Brown have killed Jesus Garza and Cari Crews when the Denton County District Attorney had already proved beyond a reasonable doubt that it was James Clark who had killed them? Thus, Brown was found innocent of capital murder, and guilty of the lesser charge robbery. Wisely, that jury sentenced James Brown to the maximum penalty for robbery – a \$10,000 fine and 20 years in prison.

It would have been one thing for the prosecution to have simply changed their theory of the crime, keeping the facts the same. But in Brown's case the actual facts themselves changed to coincide with the prosecution's new theory. James Brown was found innocent simply because of the way in which the prosecution played games with the jury. This guy did it; no, this guy did it. These are the facts; no, these are the facts.

If James Clark had known at his trial that the shot that killed Jesus Garza was fired from a few inches away, then he would have had a persuasive argument that James Brown was the shooter. Such duplicity guaranteed that the second person tried, no matter who that second person was, would be found innocent of capital murder.

Included in Appendix P is duplicate copy of the Prosecution's Subpoena List of Witnesses for the punishment phase of James Clark's trial. Item Number 25 includes the name Dr. James Grigson. Shamefully, Denton County Assistant District Attorney Lee Ann Breeding (one of the prosecutors in James Clark's case) characterizes Dr. Grigson simply as "Dr. Death". Such a characterization clearly demonstrates Ms. Breeding's contempt for James Clark's right to a fair trial.

Dr. James Grigson is a forensic psychiatrist in Dallas, Texas. He has testified in well over 100 capital murder cases as an expert in diagnosing a criminal offender's likelihood of committing future acts of violence. Even without interviewing the person on trial, Grigson almost always predicts with "absolute certainty" that those on trial for capital murder will murder again. Likewise, Grigson's testimony on future dangerousness almost always leads to a death sentence. The pattern is so consistent that Grigson is pejoratively nicknamed Dr. Death.

However, the American Psychiatric Association and the Texas Society of Psychiatric Physicians say that Dr. Grigson is a charlatan. They also say that Grigson is unethical to claim in court that he can predict with 100% certainty whether a criminal

offender will engage in future acts of violence. Grigson was expelled from each of those professional societies.

By characterizing James Grigson simply as "Dr. Death" Ms. Breading appears proud of this criticism against and disapproval of Grigson. For example, "We want this guy on our team. We don't play fair either." At the time, it appears that Ms. Breading was determined to get James Clark sentenced to death at any cost, even at the cost of depriving Mr. Clark of a fair and ethical trial.

Finally, in further example of Denton County District Attorney Bruce Isaacks' willingness to concoct more inconsistent theories of the crime, in 1998 he prepared another capital murder charge against James Brown – this time for the murder of Cari Crews²⁷. Brown had already been found not guilty for the capital murder of Jesus Garza, and James Clark had by then been on Texas Death Row for almost 4 years, condemned for the robbery-murder, rape-murder of Cari Crews. Yet Bruce Isaacks was trying to get Brown condemned for the capital murder of Cari Crews, too. Amazingly, in his attempt to reconcile this possible third theory of the crime, D.A. Bruce Isaacks offered James Clark limited immunity to testify against James Brown. The offer was essentially an empty one. It would have had no meaningful effect on James Clark's death sentence, or his appeals, so it was refused. I do wonder, however, what third theory of the crime Bruce Isaacks would have devised.

The Meaning of Clemency

"There is always a better alternative than capital punishment."

-- Pope John Paul II.

I've already shared with you one of my favorite Albert Einstein quotations. Now I share with you one of my favorite stories about Albert Einstein.

²⁷ Denton County Criminal Cause No. F-98-0648-E

Einstein moved to Princeton, New Jersey in the early 1930s. When he arrived his next-door neighbor excitedly explained to her young son who their new neighbor was – Mr. Einstein is one of the smartest men in the world – and she also cautioned her son not to bother him. Later that day the boy was having problems with his homework, and in spite of his mother’s caution he decided who better to help him than one of the smartest men in the world. The child collected his elementary school books and went next door to ask for help. A while later the mother noticed that her son wasn’t home. Eventually she decided that he might have gone next door to see Albert Einstein. She knocked on Einstein’s front door to find that her son was, in fact, there.

- Mom, Mr. Einstein is helping me with my homework.
- Oh! I’m so sorry that he’s bothering you, Mr. Einstein. It won’t happen again.
- Please don’t apologize. It was my pleasure. I learned a great deal.

I wish I were as open to the opportunities of learning and growing, especially in situations where it appears particularly unlikely. Again, I pray that I’m not being too presumptuous to ask you, the Honorable Members of the Texas Board of Pardons and Paroles, to be open to the opportunity to learn and to grow now.

Clemency is an essential part of the checks and balances built into our constitutional form of representative government. As stated in the *Guide to Executive Clemency Among the American States*, National Governor’s Association, March 1988: “Executive Clemency ... essentially offers the executive branch of government a veto power over the courts.” Clemency is not about canceling guilt, or allowing offenders to “beat the rap”. Sadly, there are many who passionately and forcefully argue that Clemency is nothing more than a miscarriage of justice. But might doesn’t make right. The passion and force of one’s argument does not make it rational or sound. It is the substance of the argument that gives it merit. When deciding whether to recommend

for the Governor to grant clemency, the Texas Board of Pardons and Paroles must not fall victim to vitriol void of merit.

Again, Executive Clemency is an essential part of the checks and balances built into our constitutional form of representative government. Clemency is about providing remedy for the errors that the courts didn't remedy themselves. Legal fairness requires the courts to see only with judicial eyes. The courts may only make legal decisions based on what the rules of evidence and the rules of legal procedure allow. Thus, it is Executive Clemency that provides the final check against judicial error. It is Executive Clemency that provides the fail-safe remedy against errors that the courts didn't or couldn't correct themselves. These can be errors relating to innocence, level of culpability, or procedural issues. More importantly Executive Clemency is also about mercy, grace and forgiveness.

Alexander Hamilton provided a remarkable, succinct and correct description of the purpose of Executive Clemency in The Federalist Papers, No. 74:

The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.

With specific regard to capital punishment, the U.S. Supreme Court reiterated this same attitude in *Gregg v. Georgia* 428 U.S. 153, footnote 50 (1976)(A system of capital punishment without Executive Clemency "would be totally alien to our notions of justice".) This doesn't mean that the guilty are entitled to clemency. No one is entitled to mercy or forgiveness. They are given at the discretion of the giver. Mercy and forgiveness shouldn't be seen as a function of being deserved or earned. They are gifts.

However, forgiveness, mercy and kindness are age-old concepts: "Forgive us our trespasses as we forgive those who trespass against us"²⁸; "The quality of mercy is not strained, it droppeth as the gentle rain from heaven upon the place beneath. It is twice blessed – it blesseth him that gives and him that takes"²⁹; "The life you save may be your own"³⁰.

A more direct analogy is charity. No one is required to give to charity. It is through a sense of community, kindness and consideration for others that people want to give to charity, or do charitable work. Likewise with Clemency, the Board is not required to recommend for the Governor to grant Clemency to anyone. However, humanity and good policy dictate that the Board of Pardons and Paroles should recommend clemency more often than extraordinary special cases. Conversely, if the Board doesn't ever recommend clemency for humanitarian reasons – for example, in spite of unfortunate guilt – then justice becomes sanguinary and cruel.

Yes, I'm confident that many of you are saying to yourselves right now "How can we give such a person another chance? How can we be sure that this person might not commit a heinous murder in the future? How can we risk another Kenneth McDuff? It's not our place to oppose the will of the original trial jury? It would be an insult to the memory of the victims."

These are unfair questions and statements. You know that every single parole that the Texas Board of Pardons and Paroles grants to general population inmates bears the same risk. No one knows for sure what a parolee is going to do in the free world. All the Board can do is to try its best to limit parole to those inmates who have

²⁸ The Gospel According to Mark, Chapter 6, Verse 12.

²⁹ William Shakespeare, Merchant of Venice, Act 4, Scene 1.

³⁰ As a child I remember seeing this public service message on billboards alongside the road. The primary message was to encourage people to wear their seatbelts. I was particularly taken by the secondary message – if you do good things, then good things will happen to you, even when your life is at stake.

demonstrated that they are ready to be re-integrated back into society. So out of humanity and good policy the Board grants hundreds of paroles a year.

I say Bravo! I think you do a great job determining who should be paroled and who isn't ready yet. However, the Board isn't perfect. Some parolees do commit crimes. On the other hand, many parolees turn their lives around and truly become productive members of society. It must be immensely satisfying for the Board when parole works exactly as it is supposed to. It's a win-win situation. A person's life is restored, and the taxpayer is freed from the associated incarceration costs.

Sadly, however, such win-win situations regarding death penalty clemency have become virtually impossible, and the reasons for it have nothing to do with what's right and what's just. The reasons have nothing to do with humanity and good Board policy. The reasons have nothing to do with the Board's character.³¹ Public debate on the death penalty is just so polarized and so emotionally charged, that the Board is no longer allowed to make sound and rational choices on death penalty clemency.

The statement "I support the death penalty" has become code, a TV sound byte, for many distinct sentiments: 1) "I'm tough on crime, 2) "I support victims rights, 3) "You can depend on me to make the tough decisions", etc. The very statement "I oppose capital punishment" invites immediate, angry and irrational response: "So you think that criminals should be rewarded!" Moreover, in political circles support for the death penalty has become the quick litmus test to determine whether a fellow politician is "friend" or "foe". Thus, Elected Officials see publicly stated opposition to the death penalty as political suicide.

³¹ Amnesty International was unfair when it characterized the Board of Pardons and Paroles as "human rights scoundrels" in its 2001 annual report. Although I wholeheartedly agree with Amnesty International's opposition to capital punishment, this criticism of the Board of Pardons and Paroles was misplaced.

Under such ruthless and artificial pressure, it's no wonder that the Board of Pardons and Paroles rarely recommends the Governor to commute death sentences to life in prison.³² Such outside pressure explains why the Board doesn't have open hearings on Applications for Commutation of Sentence. I'm convinced that many of you Board members, if left strictly to your own individual consciences, would regularly want open Clemency hearings and would often vote to recommend commutation for death sentence offenders. Humanity and good administrative policy dictate nothing less.

Naturally victims' families are hurting. Theirs are tragic and heartrending stories. I had a friend who was murdered. I was also robbed at gunpoint in my own home, but neither crime gives me any insight into the particular suffering of others who have lost family and friends to murder. Everyone's situation is unique. Everyone's response to such an evil as murder is different.

I know that I felt anger, rage and revenge when I was victimized by crime. There were times when my feelings of hatred felt satisfying – yes, I remember the feeling all too well – but those times were rare, fleeting and unproductive. I know that others feel anger, rage and revenge, too. But I didn't want to stay angry and vengeful. My ultimate goal was to heal.

Murder and the death penalty are not opposites that balance the scales of justice. Although that does appear to be the popular belief. Sadly, I see that the death penalty forces friends and family members of the victim to focus on the crime. It actually prevents them from grieving. It encourages victims to prolong their rage, instead of dealing with their grief. It encourages victims to stay stuck in their anger and hatred.

³² My research indicates that the Board has recommended the Governor commute only one death sentence to life in prison during the last 15 years: namely, Henry Lee Lucas.

I know that the Texas Constitution provides that the Governor may not commute a death sentence without a positive recommendation from the majority of the Board. I also know that the Board can't do anything to change the Texas Constitution. However, for the sake of what's true and right, I mention that Texas's Clemency procedures are in total conflict with the ideals of Clemency set out by Alexander Hamilton in the Federalist Papers, No. 74.

As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his sole fiat, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of government, than a body of men.

Clemency in Texas is the exact opposition of what Alexander Hamilton suggested. But, again, I understand that the Board must obey the Texas Constitution.

Conclusion

There will come a time when the Death Penalty is abolished in the United States. There will come a time when people will look back at today and wonder how intelligent, committed and well-meaning people could have supported the premeditated and deliberate killing of fellow human beings without mercy and without remorse. For that is what the death penalty is – the premeditated, deliberate killing of a fellow human being without mercy and without remorse.

Bernard Shaw (1856–1950). *Man and Superman*. 1903.
Maxims for Revolutionists
CRIME AND PUNISHMENT

Assassination on the scaffold is the worst form of assassination,
because there it is invested with the approval of society. – 59

It is the deed that teaches, not the name we give it. Murder and capital punishment
are not opposites that cancel one another, but similars that breed their kind. – 60

There will come a time when people will realize that as evil and wicked as individual criminal offenders can be the government's premeditated and deliberate killing of a fellow human being without mercy and without remorse is infinitely more cold-blooded than anything any criminal has committed or could ever commit. The Death Penalty is in irreconcilable conflict with the ideals of democracy rooted in the Constitution of the United States of America.

Our country's recognition and enactment of civil rights and human rights is an evolving process. As wonderful and the United States is – and it is wonderful – the United States has a history of conduct that was in abhorrent violation with the Constitution. For the proverbially four score and seven years the United States tolerated slavery. Until 1920 women were deprived the right to vote. Until 1924 Native Americans were not allowed to be U.S. citizens. Until 1965 all sorts of schemes were used to manipulate who could vote – poll taxes, literacy requirements, grandfather clauses, etc. Today we look back at all of this with chagrin.

There are evolving standards of decency that mark the progress of a maturing society.³³ It takes years and years for any government to recognize these fundamental civil rights violations and correct them. Yet I am an idealist. I know that the death penalty will be abolished. My hope is that it occurs soon, for the death penalty makes

³³ Regarding its "cruel and unusual punishment" clause the U.S. Supreme Court ruled in *TROP v. DULLES*, 356 U.S. 86 (1958) that the Eighth "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

me a killer. With each execution, the State of Texas kills in my name. But I do not want to be a killer.

Carl Sandburg (1878-1967). *Smoke and Steel*. 1922.
IV. Playthings of the Wind
18. Killers

I AM put high over all others in the city today.

I am the killer who kills for those who wish a killing today.

Here is a strong young man who killed.

There was a driving wind of city dust and horse dung blowing and he stood at an intersection of five sewers and there pumped the bullets of an automatic pistol into another man, a fellow citizen.

Therefore, the prosecuting attorneys, fellow citizens, and a jury of his peers, also fellow citizens, listened to the testimony of other fellow citizens, policemen, doctors, and after a verdict of guilty, the judge, a fellow citizen, said: I sentence you to be hanged by the neck till you are dead.

So there is a killer to be killed and I am the killer of the killer for today. I don't know why it beats in my head in the lines I read once in an old school reader: I'm to be queen of the May, mother, I'm to be queen of the May.

Anyhow it comes back in language just like that today.

I am the high honorable killer today.

There are five million people in the state, five million killers for whom I kill.

I am the killer who kills today for five million killers who wish a killing.

Life is worthwhile for every man, woman and child, even for the least of us, especially for the least of us. Every time I listen to Beethoven's "Ode to Joy", the choral finale of his Ninth Symphony, there is a moment in which I burst out laughing. The whole chorus is belting out the song, the orchestra is in high gear, and the message I get from Beethoven is that life is difficult, that life seems to be an endless series of adversities, that life isn't fair, but even still it's gloriously worthwhile. At that moment I have an epiphany, a sudden leap of understanding. And I laugh.

I laugh because I realize that I spend too much of my life worrying about the tiniest of things; that I use way too much energy getting upset about next to nothing;

that I squander too many opportunities to contribute to others. I laugh at myself. Oh, what foolish self-indulgence!

It's a humbling and wonderful experience.

Yet it's "Stars and Stripes Forever"³⁴, John Philip Sousa's magnum opus, that is my inspiration. Like Beethoven, Sousa is also saying that life is gloriously worthwhile, but Sousa is also saying that life doesn't have to be unfair. There doesn't have to be injustice. Life can work for everyone. Even the least of us can make an enormous contribution. And I cry my eyes out.

Omar Khayyam (1048 – 1131). The Rubaiyat.
Translation by Edward J. Fitzgerald. 1859.

The Moving Finger writes; and, having writ,
Moves on: nor all your Piety nor Wit
Shall lure it back to cancel half a Line,
Nor all your Tears wash out a Word of it.

Cari Crews was brutally raped and savagely murdered. She was also an active member of Amnesty International, one of the strongest opponents of capital punishment in the world. It's safe to say that Cari Crews would not have wanted her murderer executed.

Clemency is not an injustice. Please recommend to Governor Perry that he commute the death sentence of James Lee Clark to life imprisonment. Thank you.

"To save one life is as if you have saved the world."
– *the Talmud*.

Sincerely,

Ward Larkin

³⁴ I encourage everyone to listen to the Dallas Wind Symphony's rendition of "Stars and Stripes Forever" online at <http://www.dws.org/sousa/starsstripes.htm>. RealAudio and MPEG-3 versions are available.

Application for 60-day Reprieve from Execution

James Lee Clark is the applicant. His Texas Department of Criminal Justice Identification Number is 999095. His birth date is May 13, 1968.

I, Ward Larkin, am presenting this application for 60-day Reprieve to the Texas Board of Pardons and Paroles in Mr. Clark's behalf. Mr. Clark has authorized me to present this application to the Governor of the State of Texas and to the Texas Board of Pardons and Paroles in his behalf. [See Appendix A, Pg. 1.] I have sworn that I have not and will not take any compensation whatsoever for any services associated with Mr. Clark's applications for Executive Clemency. [See Appendix A, Pg. 2-3]

Included herein are certified copies of the following court documents in Mr. Clark's case: True Bill of Indictment (See Appendix B); Judgment on Plea of Not Guilty Before Jury (See Appendix C); Charge of The Court (For Guilt-Innocence/Includes Verdict Form) (See Appendix D); Charge on Punishment (Includes Verdict of The Jury) (See Appendix E); Order Setting Execution (See Appendix F); and Death Warrant (See Appendix G).

On June 7, 1993 in Denton County, Texas Shari Catherine "Cari" Keeler Crews³⁵ and Jesus Gilberto Garza were found dead, each shot in the head with a firearm. Mr. Clark was indicted on July 8, 1993 in the 362ND District Court of Denton County, Texas, for capital murder for knowingly and intentionally causing the death of Shari Catherine Crews during the course of committing and attempting to commit robbery, and of causing the death of Miss Crews during the course of committing and attempting to commit aggravated sexual assault. On April 29, 1994 Mr. Clark was found guilty of capital murder, as alleged in the indictment. On May 3, 1994, following a separate

³⁵ Miss Crews' formal name is Shari Catherine Keeler Crews. The Denton County District Attorney's Office consistently refers to her as Shari Catherine Crews, or Cari Crews.

punishment hearing, the jury answered affirmatively the two special issues submitted pursuant to Section 37.071(b) of the Texas Code of Criminal Procedure and thereby sentenced Mr. Clark to death.

The Texas Court of Criminal Appeals affirmed Mr. Clark's conviction and death sentence on October 2, 1996. Mr. Clark filed a state petition for writ of habeas corpus on October 6, 1997 to the Texas Court of Criminal Appeals. On July 8, 1998 it was denied. Mr. Clark filed a federal petition for writ of habeas corpus on September 30, 1998. On December 13, 1999 it was denied. On April 3, 2000 Mr. Clark filed an application for Certificate of Appealability with the U.S. Court of Appeals for the 5TH Circuit. On September 12, 2000 it was denied. On December 11, 2000 Mr. Clark filed a petition for writ of Certiorari with the U.S. Supreme Court. Certiorari was denied February 20, 2001. A successor state writ of habeas corpus is being prepared.

On appeal Mr. Clark's attorneys raised and emphasized the following legal issues: 1) the prosecution withheld exculpatory evidence, 2) the judge improperly instructed the jury, permitting the jury to find Mr. Clark guilty without finding that Mr. Clark killed, attempted to kill, or intended to kill the victims, 3) the judge improperly instructed the jury about parole eligibility associated with a life sentence, 4) Mr. Clark was deprived effective assistance of counsel, and 5) Mr. Clark was deprived of evidentiary hearings at the state and federal level on appeal.

At trial Mr. Clark's attorneys raised no legal issues. During the guilt-innocence phase of the trial they made no opening statement, they called no witnesses. During the penalty phase they made no opening statement, they called no witnesses.

James Lee Clark requests a 60-day reprieve. There is evidence that Mr. Clark may be mentally retarded, and he needs 60 days to develop this claim fully before it can be presented to the courts. On June 20, 2002 the U.S. Supreme Court ruled in *Atkins v.*

Virginia, 536 U.S. ____, 122 S.Ct. 2242 (2002), that execution of the mentally retarded is unlawful.

Requests for psychological evaluation reports on Mr. Clark have been made to the Texas Department of Criminal Justice, Texas Youth Services, the Harris County Juvenile Courts and the Goose Creek Consolidated Independent School District. As of this writing the Texas Department of Criminal Justice and Texas Youth Services have not produced any records relating to psychological evaluations. Harris County Juvenile Court Records provide that Mr. Clark failed the 4TH grade and failed the 8TH grade. The Goose Creek Consolidated Independent School District destroyed Mr. Clark's school records, but does say that Mr. Clark was a Special Education student during the 1981-1982 school year.

Sincerely,

Ward Larkin