

The Death Game:

Capital Punishment and the Luck of the Draw

by Mike Gray

Chapter One

Houston - May 13, 1981 - 9:35 P.M.

BERNADINE SKILLERN SCREAMS through the windshield at the man with the gun -- "Don't! Don't! Don't!"

Right in front of her under the glare of lights in the Safeway parking lot a white man with a bag of groceries is getting mugged. A black teenager has a gun to his head. In a flash of amazing courage Bernadine leans on her horn and screams at the kid. He glances at her for a heart-stopping second. Then he turns back to his victim. "POP!"

The white guy drops his groceries and collapses on the hood of a parked car as the shooter dashes for the street. At this point, everybody within range hits the deck. But not Bernadine Skillern. She drops into gear and peels out after him, almost cutting him off at the exit. Framed in her headlights, he looks directly at her again -- probably wondering if he's run into the Lone Ranger.

But Bernadine isn't alone. She has two kids in the car with her and they're screaming their lungs out for mommy to stop. She's done all she can. She slams on the brakes and the black kid disappears into the night. The victim, mortally wounded, staggers into the Safeway and hits the floor face down.

In minutes the Houston police are all over the place and when the detectives get to Bernadine Skillern she's positive she can identify the killer. She got a good look at him over a period of sixty to ninety seconds, mostly from the back and side, but for few seconds he looked directly at her. It was unforgettable.ⁱ

The police couldn't have asked for a better eyewitness. Black, middle-class, reputable, Ms. Skillern is an elementary school secretary. Her description is precise. The vision of the killer in the headlights is burned into her mind -- short hair, light complexion, thin face, no facial hair. He was wearing a white coat.

Seven days later the Houston Police have a kid in custody who matches the description, a vicious seventeen-year-old street punk named Gary Graham who's been on a violent rampage in the week since the murder. They've connected him to twenty armed robberies -- five last Friday alone -- and there's no doubt he's capable of killing. He shot and wounded three of his robbery victims.ⁱⁱ

At the police station the detectives lay out an array of five mug shots for Bernadine Skillern. And since even the best eyewitnesses can make mistakes, the cop who selected the pictures apparently decided to give Bernadine a little help. Of the five photographs, only one matches her description -- short hair, thin face, clean shaven. The other four are markedly different -- bushy Afros, moustaches or beards, full faces.

Skillern, not surprisingly, zeroes in on the only short-haired slender face on the table – Gary Graham. “That looks the most like him.” But she says the man she saw had a darker complexion. And his face was thinner.ⁱⁱⁱ

The next day Bernadine Skillern is shown a lineup at headquarters. Once again there seems to be an effort to minimize the possibility of a mistake on her part. Of the five men she saw in the mug shots, only one is in the police lineup -- Graham. She spots him and begins trembling. She doesn't realize that the window she's looking through is a one-way mirror and that he can't see her. “That's him,” she says.^{iv}

Case closed. It's a perfectly logical fit. The Safeway murder was committed on Wednesday, May 13th, 1981, and for the next six days this young scumbag had ripped Houston a new asshole -- rape, robbery, car jacking -- leaving several people in the hospital. Whatever triggered this explosion, it obviously began with the murder in the Safeway parking lot.

But there is a cautionary note. On the way home, Bernadine Skillern mentions to the officer who's driving that she recognized Gary Graham as the man “in the photo” that she saw at the police station the night before.^v

Houston - October 1981

IF ATTORNEY RON MOCK had known anything about this highly suggestive identification process he might not have done anything about it anyway. Three years out of law school with a dismal academic record and a serious interest in demon rum, Mock has a reputation for go-along affability and general laziness. He boasts about the fact that he flunked criminal law at Texas Southern.^{vi} With these qualifications, he has become an essential cog in the Harris County criminal justice system of the 1980s. There is no formal public defender arrangement here so the choice of a defense attorney is up to the judge. And since it's in everybody's interest to keep things moving, a lawyer like Ron Mock can be counted on to fulfill the legal requirements without throwing sand in the gears. The pay isn't that great but Mock is able to make up for it in volume. As one of the few black defense attorneys available for this kind of work, he's grossing \$150,000 a year. He has a Rolls, a Harley, and a piece of the action in several downtown saloons.^{vii}

When Mock looks over the state's evidence against Gary Graham he finds it overwhelming. Considering the twenty armed robberies the kid committed in the week after the murder, Mock feels his biggest problem will be to keep the jury from finding out about this one-man crime wave. He decides it's best not to provoke the prosecutors. Mock calls no witnesses of his own during the trial and doesn't bother to cross-examine the state's witnesses either. He offers no evidence at all, and when confronted with the laser-like certainty of Bernadine Skillern's identification, he doesn't delve into the details of how she came to select Graham from the lineup. Instead he tells the jury that Bernadine Skillern should get a standing ovation for bravery. While that's certainly true -- few of us would have the guts to do what she did -- it proves to be a losing strategy for his client. The trial is wrapped up in 48 hours,[^] and with no challenge to Skillern's identification, the verdict is a forgone conclusion. After a brief deliberation, the jury convicts Gary Graham of murder in the first degree. The penalty phase is even quicker. Mock calls only two witnesses to speak on Graham's behalf. Again the jury is back in a flash and the verdict is death.^{viii}

Houston - March 1992

BY THE TIME DICK BURR gets involved in the Gary Graham case it has already reached the

U.S. Supreme Court. Burr, a square-jawed civil rights attorney from Lake Wales, Florida, is with the NAACP Legal Defense Fund out of New York. As head of the Death Penalty Project, he's one of the country's leading experts on capital punishment and he's been brought on board for added firepower.

Graham's lead counsel, Mandy Welch, is a bright young lawyer from rural Oklahoma with a growing reputation in the elite club of death penalty specialists. She is head of the Texas Resource Center in Houston, a federally funded office that Congress set up to aid the defenseless. She and Burr hit it off immediately, and it's a good thing. The Gary Graham case is about to engulf them both.

In the years before these two picked up the reins, Graham had been represented by a volunteer attorney named Doug O'Brien who handled the automatic appeal that is filed in every Texas death penalty case. O'Brien was working for free of course -- his investigation was limited pretty much to the information at his fingertips -- but he hit pay dirt without getting out of his chair.

Even a casual reading of the trial transcript suggests that Ron Mock had done little more than grease the skids for the prosecution. Among other things, there were several alibi witnesses who claimed they were with Graham on the night of the murder. During the original trial they had approached Ron Mock and offered to testify but he had brushed them off. So in July of 1987, O'Brien filed a petition in state court that catalogued Mock's courtroom failings, among them his refusal to call these alibi witnesses to the stand.

Graham's case was then in the hands of state judge Donald Shipley and in February of 1988 he agreed to hold a hearing. He listened to three of these alibi witnesses testify under oath, then he ruled that they weren't credible because they were related to the defendant. Petition denied.

Doug O'Brien immediately filed for relief in federal court, where the case bounced around like a ping-pong ball for the next five years. What kept it bouncing was the issue of "youthfulness." Graham was seventeen at the time of the murder and a national debate was then raging about where to draw the line. Should we be executing people who can't legally drink or vote? Graham, on the other hand, was practically a poster boy for the death penalty -- a savage young marauder who had gunned down a defenseless white man with a bag of groceries. Despite this handicap, O'Brien actually got the federal appellate court to call for a new sentencing trial -- then they reversed themselves.

Despite Dick Burr's assistance, the U.S. Supreme Court finally decided they couldn't touch the case for technical reasons. If they agreed that Graham's death sentence was unconstitutional because of his age, it would represent a new rule of law. But a new rule of law that comes from a habeas corpus proceeding like this can't be applied retroactively, so it wouldn't help Graham in any event.

Houston - January 1993

GARY GRAHAM'S DATE WITH DEATH is set for April 29. But Dick Burr is now on the case full time. Mandy Welch has talked him into taking over as lead counsel and there are few people in the country with his expertise in this business. Since Welch's Texas Resource Center has access to cash, Burr's first move is to do the investigation that Ron Mock should have done in the first place.

The initial surprise is right there in the transcript. On careful reading, Burr notices that the jury was asked to leave the courtroom just before Bernadine Skillern testified. The judge

then held a brief discussion about her testimony, and one line from this dialog jumps out at Burr. With the jury out of the room, the police officer on the witness stand makes a stunning admission. It seems that the night Bernadine Skillern picked Gary Graham out of the lineup, there was another eyewitness there. His name was Ron Hubbard. And he said Gary Graham was not the guy.

It's been a dozen years since the trial but Ron Hubbard is easy enough to locate. He's a veteran postal service employee now and he's more than willing to talk. What he has to say gives Burr a jolt. On that fatal night in May of '81, Hubbard was a box-boy at the Safeway market and he remembers the man in the white coat. He walked right past the guy. Hubbard was out in the lot collecting shopping carts and he saw this man leaning against one of the columns. He passed directly in front of him, spoke to him, eye to eye. This man, says Hubbard, didn't look anything like Gary Graham. And he was a lot shorter. Hubbard is the same height as Gary Graham -- 5'-10". This other guy was about 5'-4".

They try to talk to Bernadine Skillern -- she declines -- but there were a couple of other people in the parking lot that night who did testify at the trial. One is dead of a heart attack but Burr finds the other, a woman named Wilma Amos. Ms. Amos was loading groceries in her van that night when the shooter ran past. She's 5'-2" and she says the gunman was about her size -- maybe 5'-3" or 5'-4" -- no taller than that. She didn't think it was Gary Graham then or now but nobody asked her.

Burr's team also finds a 12-year-old kid who was there. Leotis Wilkerson, sitting in his father's car, had seen it all go down. Now 24, Leotis still remembers the scene and one thing sticks in his mind. The shooter was shorter than the victim. The victim was 5'-6".

Burr is amazed. They've already found three eyewitnesses who say Graham was not the man, and they haven't even been able to see the police report yet. "The D.A.'s office refuses to give it to us," says Burr. But with Graham's execution date just ten days away, they've got to move.

On April 20, 1993, Burr files a petition asking the state court to let these new witnesses testify under oath. Six days later they're called to appear before Judge Shipley. But an hour before their court appearance, Burr gets word that the D.A. has finally turned over the police report. There's no time to examine it but at a glance it looks explosive. It seems there were several other witnesses in addition to the ones they've just discovered and one of them is even stronger than Hubbard. The police report also raises serious questions about the I.D. process that Bernadine Skillern went through. Ready to press his argument to the wall, Burr heads for the courtroom.

But Judge Shipley's a busy man and he's in the middle of jury selection on another trial. He takes a break just long enough to sign an order denying relief. He refuses to hear any argument. He says these eyewitnesses are not credible because Bernadine Skillern actually saw the man pull the trigger. These people "did not witness the actual shooting..." Dismissing their descriptions, he says, "the height discrepancies of three to four inches in the height approximations... of the black male they saw running in the parking lot do not discredit Bernadine Skillern's facial identification..."^{ix}

Burr's client now has less than 72 hours to live. He appeals directly to Governor Ann Richards for a stay. The Governor takes a look at the case and she decides there are too many loose ends. She grants a 30 day reprieve, pushing the date back to June 3.

Now Burr and his team fall on the police report with a vengeance and they quickly find what they're looking for -- the details of Bernadine Skillern's I.D. of Gary Graham. "After

seeing the photo array with Gary in it,” says Burr, “Ms. Skillern was drawn to him. But she says ‘the person I saw had a darker complexion and a thinner face.’” The report also reveals that after the lineup she said that she’d recognized Gary Graham as the same man she’d seen in the photo the night before. This is exactly the kind of guidance -- conscious or unconscious -- that has been proven to lead to eyewitness error.

But the most stunning revelation in the report is the discovery of yet another eyewitness who had a better look at the man in the white coat than anyone. Sherian Etuk, now a Harris County Child Protective Services employee, was working that night as a cashier at the Safeway. For nearly half an hour she saw the killer standing right outside her window. He was leaning against the column just as Ron Hubbard described him. For some reason she kept an eye on him between customers. This guy, she says, was about 5'-3" and she’s certain of that. She was married to a man who was 5'-3".

As Etuk turned to wait on a customer, she heard a shot. She looked up and saw Bobby Lambert fall and the man in the white coat making a run for it. When the police arrived she told them she hadn’t see the actual shooting but she had a clear look at the shooter before and after.

If Ron Mock had simply read the police report and called this woman to the stand, there is every likelihood that Gary Graham would not be on death row. But Dick Burr has no time for laments. He has to get these eyewitnesses in front of an impartial judge. The next execution date is 30 days away.

Since Judge Shipley has already slammed the door, Burr takes the case to the Texas Court of Criminal Appeals. Arguing that he’s uncovered a goldmine of new information casting doubt on Graham’s guilt, Burr asks the court to reopen the case and force Judge Shipley to hear all these witnesses under oath. The appellate court says no. They tell Burr that if he wants to pursue this line, he’ll have to start all over again and file a new petition. On the other hand, they’re willing to grant a brief stay of execution. Graham’s date with the needle is pushed back to August 16.

At this point, Burr and his team have had enough of Texas justice. “The state courts have been extremely hostile,” he says. It’s time to move to the federal courts. Once again, they’ve got less than a month.

On July 22nd, 1993, Burr files the petition with the U.S. District Court for the Southern District of Texas, followed by a flurry of motions arguing that the state process was unfair. All Judge Shipley did, says Burr, was to blindly sign the order proposed by the state. How can you rule that the new witnesses are not credible without hearing them? Burr also wants to dig further into the prosecution’s files. “We think there is more information that’s not in the police report.”

Over the next three weeks, Burr and his team make repeated requests to appear before the U.S. District Court to argue their motion. They hear nothing. Then three days before the execution they get a fax from the judge denying relief and denying a stay. It’s a rubber stamp of the state order.

Fortunately for Gary Graham, his lawyers always seem to have another rabbit in the hat. A lawsuit – Graham v. the State of Texas^ -- has been filed in *civil court* charging that the state’s clemency process is fundamentally flawed because it provides no fact-finding procedure for people who might be actually innocent. Taken by surprise -- civil courts aren’t supposed to be involved in criminal matters – the judge in Austin issues a temporary restraining order that says the state can’t touch Gary Graham until the issue is resolved.

Outflanked and outraged, the state prosecutors immediately ask the Court of Appeals to overturn the restraining order so they can execute Graham as scheduled, but the court decides to

deal with all this confusion by granting its own temporary stay of execution. For the third time this year Graham's date with death is set aside.

It is precisely this sort of legalistic maneuvering that drives death penalty proponents like Dianne Clements crazy. A temporary restraining order is normally used for things like stopping a landlord from evicting tenants or preventing the city from chopping down shade trees. No one expected this end run around the criminal justice system and there is outrage in Houston among a growing chorus of citizens who believe Gary Graham has already had his day in court. He's been on death row now for twelve years and his case has already been to the Supreme Court twice. What more does he want?

Dianne Clements knows something about murderers and murder victims. Her young son was shot to death a few years ago and she set out to honor his memory by founding Justice for All, the country's first and largest victims' rights group. She wants to make sure that Gary Graham does not cheat the Angel of Death. The Justice for All website charges Burr and his team with "a cynical fraud wherein lies, half-truths and intimidation have come together in an attempt to free the guilty and punish the law abiding... The pro-Graham movement is mounting an assault by death penalty opponents to abolish the death penalty in Texas and throughout the United States. But for most Texans, it is more than that. It is an attack on our safety."

New Orleans - August 1996

THE U.S. COURT OF APPEALS for the Fifth Circuit decides that Dick Burr is right. These new eyewitnesses – Ron Hubbard and Sherian Etuk – should be heard in open court.

It is a moment of triumph for Dick Burr and Mandy Welch, personally as well as professionally. After months of working side by side into the night and living on Pepsi and pizza, they have fallen in love. They were married last year, he for the second time, she for the third, and they have been moving in lockstep ever since.

"Mandy is my soul mate," says Burr. "I would not still be doing this work had Mandy and I not met each other. We give each other more than the strength of two."

The feeling is mutual. "He's an extraordinarily considerate person," she says. "And the thing that he and I laugh about is that his public persona is so gentle and sweet that he comes across as perfect. And he's not. Which makes him far more interesting and enjoyable to live with than if he were."

It's a good thing they have each other to lean on because nothing in the criminal justice system goes as planned. Although they have prevailed on the main point, the devil is in the details, and they have been tripped up by their own cleverness. The civil suit they filed against Texas two years ago was ultimately decided in Graham's favor and it resulted in a change in state law. Before, claims of innocence could only be raised within 30 days after trial. Now, they can be raised during the clemency process. And since that opening now exists, the federal judges feel that Burr and Welch have missed a wicket in the legal croquet game. Before they can present the case here, they must first exhaust all possible remedies in the state courts. After the Texas courts rule against them, then they can come back here.

Burr protests vehemently. He says they've already been through the wringer in Texas and the courts there have completely rejected his arguments. "There is no reason to believe they'll be any less hostile if you send us back this time," he says. "This man is innocent. He deserves a hearing. You agreed. Please send him back to the federal district court for the hearing that he deserves."

The U.S. Fifth Circuit, however, is not famous for bold decisions and the federal

judiciary has lately been under constant fire from the states for meddling in death penalty cases. The judges insist that Burr follow formal procedures. They dismiss Graham's case "without prejudice," meaning they'll be ready to hear it as soon as Burr makes another trip through the state gauntlet.

At this point, unfortunately for Graham, the case takes a funny bounce. Early in 1997 Dick Burr has to withdraw. He suddenly finds himself involved in one of the country's most notorious death penalty trials. He's been tapped by the federal appeals system to handle the sentencing trial of Oklahoma City bomber Timothy McVeigh. This case, tried in Denver, effectively ties Burr down for the rest of the year in a futile attempt to save McVeigh from the death penalty.

Houston - December, 1997

WHEN BURR GETS BACK TO HOUSTON at the end of the year he contacts Gary Graham on death row and gets back in harness. The first step is to get the permission of the Texas Court of Criminal Appeals to file a new petition, and within ninety days he's ready. In April of '98 he files the appeal and waits. And waits. Seven months pass. Then in November -- without hearing arguments from Burr or his colleagues -- the Court of Criminal Appeals issues a terse one-line order with no explanation: petition denied. Graham's execution is now set for January 12, 1999.

Dick Burr is often floored but never flat-footed. Since the Court of Criminal Appeals has effectively shut the door in Texas, the door is now open to federal court. He immediately refiles the case with the U.S. Fifth Circuit in New Orleans and asks them to pick up where they left off eighteen months ago.

But the State of Texas is not yet ready to throw in their hand. In the months since the U.S. Fifth Circuit sent Burr back to Texas state court, the dealer has changed the game. A new federal law -- the Anti-terrorism and Effective Death Penalty Act -- is about to create an inescapable Catch-22 for Gary Graham.

The "AEDPA," as it's known, is a popular piece of tough-on-crime legislation designed to limit the power of federal judges to second-guess the state courts. Signed into law in 1996, it was born of frustration on the part of state prosecutors everywhere who saw clever lawyers like Dick Burr dragging these death penalty cases on forever. Here, for example, was Gary Graham, still breathing two decades after he was sentenced to die.

One delaying tactic that the legislators intended to terminate was the strategy that defense attorneys use to keep the game going by playing their cards one at a time. If a defendant has, say, four separate reasons to get a new trial, his attorney could file four petitions one after another rather than exposing the whole hand at once. The AEDPA was specifically targeted at these litigious card tricks. The new rule says that if the evidence, whatever it is, could have been presented earlier, it's too late now. You can't bring it up unless it's legitimately new information that could not have been discovered before.

The Texas prosecutors insist that the AEDPA has closed the door on Gary Graham. Arguing before the Fifth Circuit, they say that he's lost his right to appeal any further because his so-called "new" eyewitnesses, Sherian Etuk and Ron Hubbard, are named in the original police report. That information was available to Ron Mock nineteen years ago. If it was important, Mock should have brought it up in then. He didn't. Now it's too late.

Burr says this argument is outrageous. The AEDPA can't be used against Gary Graham because he's already appeared before this court and they've already agreed that these new eyewitnesses must be heard. The Fifth Circuit itself insisted that Burr go back to the state. He

did. Now he's back as promised seeking the same thing he's been after for seven years -- a chance to put Sherian Etuk and Ron Hubbard under oath in front of a judge. The AEDPA, says Burr, cannot be applied retroactively to a case already in progress before this court.

Burr's colleagues all agree that the Fifth Circuit has to call for a new hearing because the AEDPA was already on the books at the time they sent Burr back to the state. They can't bat the ball over the net knowing that the net was going to be raised while everybody's back was turned.

But in this business you have to be prepared for anything. It's Sunday, January 11, and Gary Graham's execution is set for 6:00 p.m. tomorrow night. Burr is at his computer in the ramshackle Houston duplex that serves as his office. He's madly pounding out the next set of briefs for the Supreme Court -- just in case -- when the phone rings. It's the clerk of the Fifth Circuit. He says the court has granted a stay.

Burr exhales. "This means they are going to take our argument seriously."

He's even more positive after oral arguments in New Orleans the following month. The judges let him go on much longer than expected and they seem seriously engaged. In the courtroom, watching Burr in action, a number of the country's leading death penalty lawyers agree that he hit the ball out of the park.

There is a lone dissenter. Mandy Welch was watching the jurists on the bench and she has a knot in her stomach. But that evening she gets caught up in the celebration with the rest of them. Everybody agrees the argument went very, very well for Graham.

Houston - March 5, 1999

BURR AND WELCH ARE IN THEIR OFFICE when they get the fax. Burr rips it from the machine and scans it in disbelief. He hands it to Mandy. By a vote of 3 to 0 the Fifth Circuit is affirming the state's position. Gary Graham's appeal is too late.

"You know there's a part of you that always expects that you'll lose when you're in a court system like this," says Burr. "But this feels worse than almost any other loss I've had. They said we're entitled to a hearing. Then we come back in and they trap us with this hideous opinion that denies everything."

Once again, Graham's fate has been determined by the luck of the draw. If his case had been before one of the other federal circuit courts, he might have been granted a new hearing. "We have what's called a split among the circuits," says Burr. "There are other federal appellate courts that would agree with us." The Fifth Circuit in New Orleans is not one of them.

Without missing a beat, Burr and his team move to the next trench. In June of 1999 they file a petition with the U.S. Supreme Court asking for a review of the Fifth Circuit's decision. But the anger that propels them is now tempered with fear. They can feel the ground shifting beneath their feet. The AEDPA is symptomatic of a broad political push to speed up the death penalty process. The American people are fed up with a system that leaves convicted killers like Graham languishing at taxpayers expense for ten or twenty years. And lawyers like Dick Burr, once seen as heroes of the civil rights movement, are looked upon now as tricksters and charlatans who free the guilty.

Given the climate, Burr decides to hedge his bet by pursuing a brand new line of attack. In the original police investigation, there were some intriguing details about the victim. Bobby Lambert was a 53-year-old pilot from Tucson, Arizona, who turned out to be involved in the illegal drug trade. One curious note -- the cops found \$6000 in cash in his back pocket, a fact that did not mesh with the prosecution's robbery theory.

Burr then discovers that there were some folks in Oklahoma who did indeed have an

interest in Bobby Lambert and it had nothing to do with cash. A few months earlier, Lambert had been nailed by federal agents for flying a load of cocaine and Quaaludes into an airstrip near Oklahoma City. When that case finally came to trial, Bobby Lambert was unable to testify because he was dead -- shot in the Safeway parking lot three^ months earlier.

Burr and his people have been aware of this startling fact for a while now but they've had neither time nor resources to pursue it. He and his partners are all working for free, and private eyes are expensive. But after the Fifth Circuit decision, Burr's investigators are as pissed as he is. They agree to pursue the Bobby Lambert investigation for free.

With the dawn of the new millennium, however, the remarkable case of Gary Graham takes another unexpected turn. The governor of Texas announces he will run for President on the Republican ticket and suddenly the politics of the capital punishment are on the front burner. With 450 prisoners on death row in Texas and over a hundred executions already under his belt, Governor George Bush suddenly finds he's become a lightning rod in the death penalty debate. He has already been subjected to considerable heat on the issue and he has stood his ground. In January of '98 he sent Christian convert Karla Faye Tucker to her death despite direct appeals from conservative allies like Rev. Pat Robertson. That was 75 executions ago. Governor Bush has made it clear that he will follow the letter of the law. The only factors he will consider are questions of innocence, and whether or not the prisoner has had full access to the courts. But the Governor's political ambitions guarantee that the Graham case will be played out on the national stage.

Meanwhile, breaking news from the Midwest is beginning to intrude on the death penalty debate. The *Chicago Tribune*, after a seven month^ investigation, has published a devastating indictment of the death penalty as practiced in Illinois. Reporters Steve Mills and Ken Armstrong have blown the lid off the state's criminal justice system with a series of stories detailing prosecutorial misconduct, planted evidence, perjured testimony, and jailhouse confessions achieved by applying electricity to the suspect's genitals. New evidence, dug up largely by volunteers and college students, has so far freed over a dozen men from death row -- one of them within hours of execution. The actual tally in Illinois for the last twenty years is unnerving -- 12 executed and 13 freed. It raises the ugly possibility that the state has been killing innocent citizens.

When confronted with these revelations, Governor Bush is unmoved. Illinois may have problems but Texas does not. "As far as I'm concerned there has not been one innocent person executed since I've been governor."^x

With the gauntlet thus thrown, the Tribune reporters are on the next plane south. Over 130 people have received the needle on Bush's watch, and the Trib investigators begin digging through every case -- transcripts, briefs, witnesses, lawyers, judges, and the disciplinary records of the defense attorneys. They discover a rats nest of incompetence and malfeasance that makes Illinois look practically Olympian.

In 40 of these cases, defense attorneys like Ron Mock more or less sat on their hands throughout the trial, presenting an occasional witness, but generally no evidence whatsoever. In 29 cases, the prosecutors managed to introduce testimony from a psychiatrist known as "Dr. Death"^{xi} who claimed the remarkable ability to predict the defendant's future violence without meeting the defendant -- a parlor trick that got him kicked out of the American Psychiatric Association. Among the witnesses who sent these 130 individuals to oblivion was a forensic scientist who was on temporary release from a psychiatric ward and a pathologist who admitted that he faked an occasional autopsy.^{xii}

In 43 cases the defense attorneys were later sanctioned, suspended or kicked out of the

profession altogether. Twenty-three cases relied on hair samples as evidence, a technique that's considered slightly less reliable than flipping a coin. And in another 23 cases, conviction turned on the testimony of jailhouse snitches -- criminals who receive substantial and often secret rewards for climbing in bed with the prosecutors.^{xiii}

When the *Tribune* revelations hit the newsstand, Governor Bush sticks to his guns. The truth is, the criminal justice system in Texas has improved significantly in the last several years. For example, minimum standards are now required for death penalty attorneys. They have to pass a test on death penalty law. Unfortunately, the people sent to death row before 1995 missed out on this enlightened policy. Gary Graham's attorney, Ron Mock, no longer takes death penalty cases because he took the new test and couldn't pass it.

Houston - March 21, 2000

DICK BURR SITS IN HIS CLUTTERED OFFICE surrounded by file boxes and mountains of briefs as he contemplates the prospects. Gary Graham's case has been before the Supreme Court for eight months and he hasn't heard a peep. "In the habeas process we have, there are now seven eyewitnesses who would have exonerated him some way or another. The jury didn't hear any of that."

The nonstop roller-coaster he's been riding for the last several months is taking its toll. He drops to the sofa by the window like a sack of coal. "What we're working on right now is trying to solve the crime. Trying to figure out who did kill this guy. And that's hard to do when you're not the police. We have some suspects but we can't get access to all the records because we don't have subpoena power."

As for Graham's chances in court, he's hopeful, but not very. "I think there is a sense that people who get targeted for prosecution are bad people anyway," he says, "the lowest of the low, the people we need to get rid of. And somehow there is a cleansing effect in getting rid of them. Gary Graham, for example, had pled guilty to ten charges of aggravated robbery and assault. He didn't contest it. But he said, 'I'm innocent of the murder.' Well, who cares? I mean his defense lawyer didn't even investigate. He said, 'I figured he was guilty.'"

"So all the sense of animus toward people we don't like, people of color, poor people -- nameless, faceless, hated people -- get to be targets. And once they're targets, there's a sense that whether it's the right person or not is less important. They've become something else. They're symbols."

Death Row - Huntsville, Texas - April 25, 2000

GARY GRAHAM IS AWARE OF SYMBOLISM. If the State of Texas can play this game, so can he. During his two decades in this six-by-twelve cubicle, he has transformed himself from a street punk into a revolutionary and his relentless push for a new trial has taken on the trappings of a crusade.

Graham's charge of racism resonates among his homeys in Houston's Fifth Ward, and it also resonates across the nation. Whatever the merits of this particular case, there is a consensus among African Americans that they are singled out for special treatment and the facts bear them out. In the state of Texas fully a third of the young black males are locked up or under court supervision, and a black kid here is twice as likely to be treated as an adult as a white kid under the identical circumstances.^{xiv}

In the early '90s Gary Graham adopted the nom de guerre of Shaka Sankofa, and the rage that got him thrown in jail in the first place was refocused on the Texas criminal justice system. Proclaiming his innocence to any and all comers, he has slowly gathered supporters and they

now range from local activists to Italian parliamentarians. Jesse Jackson is demanding a stay of the execution. So is the U.N. High Commissioner for Human Rights.^{xv} The *New York Times* and the *Manchester Guardian* have reporters en route to death row in Texas.

There, the press corps finds a gaunt and intense 36-year-old facing them through the bulletproof window of the visitor's cubicle. His voice rasps through the telephone in the staccato rhythm of a man in a hurry. "I'm hoping," he says, "with the support of the people, I'll have many more years to do positive things." He says he is determined to get off death row "by any means necessary."

Dick Burr's partner Mandy Welch is among the visitors. She has been coming here for a dozen years, but she and Graham are still not close. "He doesn't go around expressing a lot of appreciation and making sure that he's nice to people," she says. "But if he'd have been that kind of person I'm not sure that he could have survived in the way that he has. He sort of has a revolutionary personality. He thinks that he has the capacity of helping people and changing things. The cause has become more important than anything else. And I think there's a lot to admire in that."

Houston - May 4, 2000

THE FAX MACHINE in Dick Burr's office is so often the bearer of bad news that he and Mandy are always braced for the worst. But as they scan the order from the Supreme Court there is a sinking sense of finality: "The petition for writ of certiorari is denied." In refusing to review the New Orleans decision, the High Court essentially affirms that the federal judiciary is prohibited by the Anti-terrorism and Effective Death Penalty Act of 1996 from considering the additional eyewitnesses because Ron Mock could have introduced them at the time of the trial and he didn't.

"They really are sort of looking at the number of angels on the head of a pin," says Burr. "They've lost sight as a body of what's important here."

Once again there's no time for hand-wringing. The new execution date is June 22.

Austin - Thursday, June 15, 2000

COLONEL JACK ZIMMERMAN was a Marine Corps vet with a couple of Bronze Stars for valor before he got into private law practice. He brings battle-honed discipline and tenacity to the job, and his courtroom record has ranked Zimmerman & Lavine among the top criminal law firms in Houston. When Dick Burr asked Zimmerman for advice on the Gary Graham case a few years back, Jack agreed to come on board as an unpaid consultant because he thought the state's refusal to hear these witnesses was outrageous. Since the first of the year his involvement has deepened day by day and now Zimmerman's firm is working nearly full time with Burr & Welch in a desperate last-ditch effort to save Graham from the needle.

The needle is now just seven days away. Only two possibilities remain: Governor Bush and/or the Texas Board of Pardons and Paroles. Burr and Zimmerman catch a plane for the capitol in Austin. They've arranged a meeting with the governor's counsel, Margaret Wilson, and tomorrow they'll be seeing the chairman of the Board of Pardons and Paroles. On the flight up they go over the pitch one more time even though they could do it in their sleep.

The general counsel's office is in the State Insurance building which has been largely taken over by the governor. Margaret Wilson is joined there by a couple of aides and a former Houston assistant D.A. who now works for Governor Bush. Both the D.A. and Ms. Wilson are well up on the case. They know the record and their questions are penetrating.

They are skeptical about the new eyewitnesses. They point out that Sherian Etuk's recent

statements do not jibe with what she originally told the cops. The police report says that she heard the gunshot and saw somebody fleeing, but that she didn't see his face.

Burr says the record is clearly mistaken. After the shooting, the police took Ms. Etuk to the station and showed her a photo array and asked her to identify the killer. Why would they do that unless she had seen his face? Clearly the police left something out of the report, says Burr, and what they left out was the half hour before the shooting when Sherian Etuk saw the killer up close.

The governor's people are unmoved. In addition to doubts about the eyewitnesses, they have problems with Graham's politics. A year ago, he wrote a manifesto about his views of the world and at one point he talked about people rallying to stop his execution "by any means necessary." If his execution is delayed, they fear, he will just have more time to foment violence.

Burr tries to put Graham's statement in perspective. He says it was written last year when Gary was facing an imminent execution date. "That's been the way he's coped with being there," says Burr. "He's become a revolutionary. I think he's a deluded revolutionary --"

"Sort of like you," says Wilson.

Burr looks at her. "No," he says. "You're the one who's deluded."

"Oh, I meant, you're a revolutionary."

"I'm a peace maker," says Burr.

Peacemaker or not, after three hours on this griddle he is disheartened. The palpable disgust these people feel toward Graham seems bombproof. But on the way out of the building, Jack Zimmerman tries to be upbeat. True, he says, the questioning was hostile, but it's Margaret Wilson's job to play devil's advocate. At least she knew the details.

Houston - Thursday, June 15

ONE OF THE INNOCENT VICTIMS of the Gary Graham debacle is the original heroine, Bernadine Skillern. After that day in court nineteen years ago when she identified Gary Graham as the killer, her life was turned upside down. She got death threats from people in her own community and had to quit her job because of the controversy and harassment. She tried to drop out of sight but each time Gary Graham's number comes up, the press tracks her down.

Tomorrow morning her picture will be spread across three columns in the *New York Times*.^{xvi}

Seated in her lawyer's office at a long table facing the television cameras, Bernadine Skillern wipes a tear from her eye as she recounts that horrible night yet again. She agreed to this press conference at the behest of Justice for All,[^] the Houston death penalty advocacy group that wants the public to hear her side of the argument. The news media has been dominated lately by death penalty critics and Gary Graham supporters like Reverend Al Sharpton, and the directors of Justice for All feel it's time to set the record straight. Who better to do that than the woman who saw Gary Graham pull the trigger?

This kind of pressure might overwhelm a lesser person, but Bernadine Skillern is no ordinary person. She is solid as a rock. Gary Graham is the man she saw that night. There is not the slightest doubt about that. "I saw Mr. Graham shoot and kill Mr. Lambert on that parking lot in 1981," she says. "That has not changed. That is not going to change."^{xvii}

For the average viewer watching this courageous woman on the 6:00 o'clock news, that's enough to settle the issue. Bernadine Skillern's unshakable certainty is so powerful it seems to sweep all arguments aside. This woman looked directly at the killer's face twice -- once only a few yards away.

But two days later in the Sunday edition of the *New York Times* there is a chilling reminder that Bernadine Skillern's absolute certainty could be resting on quicksand. In an op-ed

piece titled, "I Was Certain but I Was Wrong," a North Carolina woman named Jennifer Thompson tells of the day sixteen years ago when she was raped in her college dorm. Resistance was out of the question, she says – he had a knife at her throat -- so she decided to concentrate on making sure the sonofabitch never did this again.^{xviii}

"I studied every single detail on the rapist's face," she says. "I looked at his hairline; I looked for scars, for tattoos, for anything that would help me identify him. When and if I survived the attack, I was going to make sure that he was put in prison and he was going to rot."

She did survive, and with the help of the police she dug through a mountain of mug shots until she finally spotted him. Beyond a shadow of doubt, this was the face. His name was Ronald Cotton.

She also picked Cotton out of a lineup a few days later, and her testimony in court sent him to prison for life. "It was the happiest day of my life," says Thompson, "I could begin to put it all behind me."

But since it never seems to work that way, the case was overturned on appeal and she had to go through the whole nightmare again. And during this trial, the defense introduced some new evidence. It seems some other guy – a man in prison with her attacker -- was bragging that he had committed the rape. So they brought this man into the courtroom and presented him to Jennifer.

"Ms. Thompson, have you ever seen this man?"

"I have never seen him in my life," she said. "I have no idea who he is."

Once again Ronald Cotton was sentenced to life, this time for good. "He was never going to get out," she says. "He was never going to hurt another woman."

Jennifer Thompson somehow recovered and managed to get on with her life. She got married, started a family, and began doing volunteer work with abused children.

But Cotton's lawyers were indefatigable. Eight years later they were back again, this time asking Jennifer for a sample of her DNA. She complied immediately, thankful at last that science could put an end to this madness once and for all.

A few weeks later she was standing in her kitchen -- she remembers it vividly -- and one of the detectives stopped by to see her. He had the district attorney with him. They told her she had made a mistake. It was the other guy who raped her, not Ronald Cotton.

"The man I was so sure I had never seen in my life was the man who was inches from my throat," she says. "And the man I had identified so emphatically on so many occasions was absolutely innocent."

Thunderstruck by the realization that her word had shackled the wrong man for eleven years, Jennifer Thompson is now on a crusade. "If anything good can come out of what Ronald Cotton suffered because of my limitations as a human being, let it be an awareness of the fact that eyewitnesses can and do make mistakes."

Today, she and Cotton have somehow managed to bridge the unbridgeable. They've even become friends. But she lives with the knowledge that for eleven years, while she was getting married and raising a family, he was in a cell. She has a word of warning for Governor Bush.

"Today there is a man in Texas named Gary Graham who is about to be executed," she writes, "because one witness is confident that Mr. Graham is the killer she saw from 30 to 40 feet away. This woman saw the murderer for only a fraction of the time that I saw the man who raped me." She acknowledges that Bernadine Skillern's certainty is unshakable. "But she cannot possibly be any more positive than I was about Ronald Cotton. What if she is dead wrong?"

Houston - Tuesday, June 20 - 1:00 P.M.

BIANCA JAGGER IS IN TOWN representing Amnesty International. She and Jesse Jackson are addressing a crowd of several hundred supporters at an anti-death penalty rally in Houston's Fifth Ward.

On the other side of town in a tinted-glass office complex on South Post Oak Lane, Jack Zimmerman's conference room is filling with camera crews and reporters. The execution is two days away. With no hint yet from the governor or the Board, Dick Burr and Jack Zimmerman are taking the case to the people. This hastily-called press conference was pulled together this morning to take advantage of a slip-up by the state's top lawman last night on *Nightline*.

During an interview with ABC's Chris Bury, Texas Attorney General John Cornyn seemed to display a fundamental misunderstanding of the Graham case. Bury asked Cornyn why these new eyewitnesses, Sherian Etuk and Ronald Hubbard, had never had a chance to tell their story to a judge. "They've never been questioned in open court," said Bury, "they've never been cross-examined, they've never had a jury hear what it is they have to say."

Cornyn disagreed. He said they had been heard. "Indeed, after Mr. Graham's lawyers identified these supposed eyewitnesses -- some 12 years after the trial in this case -- they were heard by a judge in open court and found to lack credibility."

This is patently false. Etuk and Hubbard have never been heard by a judge anywhere, says Zimmerman. "The Attorney General is absolutely one-hundred percent wrong. If his opposition to clemency is based on his mistaken belief that these witnesses have been heard, then clemency is clearly in order."

Zimmerman also has some news about the credibility of these new eyewitnesses. The Attorney General and his people have been saying that these witnesses wouldn't have made any difference because Bernadine Skillern's identification was so powerful. So Zimmerman and Burr videotaped the statements of Etuk and Hubbard, and armed with these videotapes, they tracked down three of the original jurors. After watching the tapes, all three jurors signed affidavits saying that these witnesses would have changed the outcome of the trial. Zimmerman hands out copies of the affidavits and the reporters snap them up.

"...I do not understand why Gary Graham's lawyer did not bring those witnesses in to testify... If Etuk and Hubbard had testified at the trial... I would have had a serious doubt about him being guilty..."

"...If I had known that Mr. Graham was the only man in the live lineup whose photograph had also been shown to Bernadine Skillern the day before, it would have helped explain why she might have been mistaken... I would not have been able to convict Gary Graham on the evidence..."

"...There was no smoking gun. There were no fingerprints. No physical evidence was presented that tied Gary Graham to the crime... I have viewed the videotape... What they had to say causes me to have a doubt about Bernadine Skillern's testimony..."

If any one of these jurors had expressed these doubts back in 1981, says Zimmerman, Gary Graham would not be on death row tonight.

But during the Q. & A., it becomes clear that the convoluted history of the Graham case is beyond the reach of the average reporter on a deadline. A TV newsman from one of the major

local stations seems resolutely confused. Referring to the Attorney General's statement on *Nightline*, he says, "I think their argument is, it's already been tried in court and been through the appeals process --"

Zimmerman pounds the table. "It hasn't been tried in court! *Nobody has heard these witnesses.*"

"But Judge Shipley did hear two of them, did he not?"

Now Burr leaps up. "He did not hear *eyewitnesses!*"

"He didn't hear two witnesses?"

"He heard two *alibi* witnesses," says Burr. "Please! Get the difference. An alibi witness says 'the person was with me somewhere else.' An eyewitness says, 'I saw somebody commit a crime and this is what they look like.' No eyewitness that would have helped Gary Graham has ever been heard in court. None."

"Okay, well, that statement means that alibi witnesses wouldn't help Gary Graham, I mean --"

"No!" says Burr. "I said no *eyewitnesses*. Please, do not misinterpret what I'm saying. Three *alibi* witnesses testified in February 1988 and Judge Shipley found they were not credible. We are *not* putting forward alibi witnesses. There's a difference between an alibi witness and an eyewitness like night and day! Please, get it straight!"

That's easier said than done. Another reporter picks up the same thread. "Mr. Burr, what would you say to those folks that, I guess you'd say are on the other side of this case, who would say what you and the other attorneys have not been able to do in court, you're now trying to do through public relations?"

Burr looks at him wearily. "We have no place else to go. The court system has utterly failed Gary Graham. It is a miserable testament to the integrity of the judicial system in this country that no judge has heard these witnesses. It is a shame! The people who should be blamed are the courts. They have dropped the ball, they have refused to do what justice required. They are to blame. We have no where else to go."

Huntsville - Tuesday, June 20 - 4:00 P.M.

JACK ZIMMERMAN has to stay in Houston to attend a press conference with Jesse Jackson so Dick Burr heads up to Death Row alone.

Huntsville, Texas, is in the rolling green hills an hour north of Houston. The climate here is much more tolerable, which is why Sam Houston chose to live in Huntsville rather than the coastal swamp that was named for him. Sam Houston built a house in town that looks exactly like a river steamboat -- he loved yanking everybody's chain -- but the great Texan's notorious eccentricity seems jarringly out of place alongside Huntsville's other main attraction. A few blocks east along these tree-shaded streets the view is interrupted by an awesome red brick fortress known as "The Walls." Built in the 1800s as the state's first prison, it was intended to look forbidding and it succeeds. Thirty-foot ramparts interrupted by watchtowers enclose an area of six city blocks on a hill right in the middle of town. Because of its age, it's now a minimum security prison, but it still houses the state's execution chamber in a low building beneath the northwest watchtower.

Unless Dick Burr can somehow stop this steamroller, this will be Gary Graham's final destination in about 48 hours. But at the moment, Burr's client is elsewhere. Death row is now housed in a modern maximum security prison east of here known as the Terrell Unit, and there Burr joins the stream of newsmen, religious leaders and political activists trooping in to see Graham as the clock runs down. The lawyer finds his client vibrating with energy and anger.

Graham, like a man with terminal cancer, has been at death's door so often he's lost count, but each time Dick Burr and his team have somehow managed to stop the clock. It's almost impossible to believe they can't do it again. Graham is clinging to that hope. But at the same time he's preparing to go out like a revolutionary. He will resist, he says. They will not lead him down that hall like a goat. He will fight them every inch of the way.

Burr believes there's room for hope. He says that the Board of Pardons and Paroles is now saying they won't announce their decision on clemency until noon on Thursday -- six hours before the execution -- but that could be a good sign since they're taking so long to make up their minds. On the other hand, Burr's job is to anticipate the worst. He says he's going to lodge a new petition with the U.S. Supreme Court tomorrow. That way the Justices will already have the papers in their hands in case he has to call on them for a last minute intervention.

Finally, Burr asks Graham if he wants him to be here on Thursday in the event that everything goes wrong. Graham laughs. "No, I want you to be in Houston working. If they execute me, you don't deserve to be here."

Driving back to Houston, Burr feels like he's been in the ring for sixteen rounds. He is apprehensive about the Board of Pardons and Paroles and he doesn't feel all that much better about the Supreme Court. Governor Bush has been tight lipped -- another bad sign. The last time Bush granted a reprieve there was a lot of advance warning out of Austin.

The truth is, Governor Bush has very little maneuvering room in this situation even if he wanted to intervene, which he clearly does not. If he knuckled under to a bunch of bleeding hearts like Bianca Jagger and Jesse Jackson, his core constituency would be on fire. And since everybody seems to understand that, the only thing left for the press to discuss is the Governor's demeanor.

"Gravitas" has become the issue. Does George Bush have the intellectual weight to handle the job? The question cropped up last year when *Talk* magazine published a controversial profile that had Bush mocking the last-minute clemency plea of Karla Faye Tucker. It flared up again during the primary debates. Bush was told about a Texas lawyer who slept through a trial that led to a death sentence and he laughed. It may have been nervous laughter but it was the wrong response.^{xix}

Tomorrow morning's *New York Times* will weigh in on the subject with a quote from Georgetown University professor Stephen Wayne: "This gravitas issue is a very important one. I don't think he can say, in a snide way, 'I'm going through with this, he's guilty, period.' He's got to demonstrate some reflection in his words."^{xx}

Above all, he must not to come across as vulnerable to public pressure like his Democratic opponent Al Gore. "The most important thing for him to do is remain consistent," said Republican strategist Don Sipple.

So the Governor's role is fairly circumscribed. He must exhibit gravitas, but beyond that he'd be insane to get involved with this tar-baby. What's more, he doesn't have to. He can't grant clemency on his own. Only the Board of Pardons and Paroles can do that. And while the governor can grant a 30-day reprieve, he can grant only one reprieve per customer. Governor Ann Richards already granted a stay back in 1993, so as far as Bush is concerned, Graham's last ticket has already been punched.

Houston - Wednesday, June 21 - 3:00 A.M.

IN THE DEAD OF NIGHT Dick Burr's face is illuminated by the glow of the computer screen. The phone has finally stopped jumping off the hook and Burr is taking advantage of the silence for one more pass at his final Hail-Mary petition to the Supreme Court. His argument is simple:

if the Court, in an extraordinary case, has the constitutional authority to ignore the Effective Death Penalty Act, then this is such a case. But if the law says the Court no longer has this authority, then isn't the law itself unconstitutional?

Sounds logical, but lately the high court has been following a logic of its own on the death penalty. Either way, it will be a close call. Burr can count on four votes: John Paul Stevens, Ruth Bader Ginsberg, Stephen Bryer, and David Souter. On the other side of the moat will be Chief Justice Rehnquist with Anthony Kennedy, Clarence Thomas, and Antonin Scalia. This leaves the ball in the hands of Justice Sandra Day O'Connor. Her normal inclination is to vote with Scalia and the Chief Justice but you never know. She could go either way.

By the time Burr prints out the final draft, daylight is filtering through the towering shade trees along Castle Court, and as Burr's young intern races for Houston International with the documents in the seat beside him, the temperature and humidity are on their way back up to the century mark. The stewardess on the American flight to Washington National[^] will act as courier. Within hours, copies of the petition will be in the hands of each of the nine justices. If and when push comes to shove, Burr will be able to activate the petition with a phone call.

Austin - Wednesday, June 21

THE TEXAS BOARD OF PARDONS AND PAROLES now holds Gary Graham's life in their hands and for anyone who's concerned about his continued good health, that's not a happy prospect. In the last five years, the Board has heard 68 appeals for clemency. They've given a thumbs-up only once.

This inscrutable organization consists of eighteen Texans appointed by the governor and they work full time for the state in return for \$80,000 a year. Not surprisingly a lot of them are active Republicans and most have backgrounds in law enforcement. But there is also a rancher, an ex-schoolteacher and a psychologist. They spend the majority of their time deciding whether or not to grant parole to robbers, car thieves and drug users, but they must also deal with clemency appeals from death row.

Curiously, the board members almost never assemble in the same room. Because the state is so vast, they divvy up the cases and handle them semi-autonomously from various regional offices. In death penalty cases, however, the whole board must be involved because a majority -- ten votes -- is required for clemency. Even then they do not physically meet. Some members discuss it on the phone, some don't, but they deliberate individually, then fax their votes to the chairman's office in Austin.

With the national spotlight now focused on the state's legal machinery, there is growing criticism of the board and its mysterious operations. Two years ago legislation was introduced in Austin that would have forced the board to hold clemency hearings in public but Governor Bush torpedoed it. He was afraid it might create "a chance for people to rant and rail, a chance for people to emotionalize the process beyond the questions that need to be asked."^{xxi}

From a defense attorney's point of view, the board's procedures are maddening. Ideally you would like to get all eighteen members in a room somewhere and make your pitch and have them vote. But since they don't actually get together, Burr and Zimmerman had to make their case privately to Board Chairman Gerald Garrett in Austin last Friday. Garrett then agreed to forward copies of their brief to the other board members. Included in the package are videotaped affidavits from Sherian Etuk and Ron Hubbard along with affidavits from the three jurors who say the testimony would have changed their vote. But in this strange virtual courtroom, there's no way to know if any of the judges will actually look at those videos.

Houston - Wednesday, June 21

THE QUEST FOR BOBBY LAMBERT'S KILLER turned out to be fertile turf. Burr's investigators pursued the hit-man angle and found that Lambert was indeed being squeezed by the feds. "We learned that the FBI wanted Lambert to testify against a fellow in northwest Oklahoma," says Burr. It seems that when Lambert and his copilot were busted with a planeload of illegal drugs, the police, unfortunately, didn't bother to get a search warrant so the evidence was suppressed. With the case against Lambert and his partner suddenly crippled, the feds started focusing on a third guy who was said to be the money behind the operation. "They started pushing them to turn on the third guy," says Burr. "And Lambert said he didn't want to do it because he was afraid of the guy."

When Lambert turned up dead a short time later, the federal agents in Oklahoma didn't pursue the hit-man angle because they assumed that Lambert had been killed by Gary Graham in a botched stick-up. They didn't know about the money. "When we told them that Lambert had \$6000 on him that wasn't taken," says Burr, "they began to think, well, *maybe it was a hit.*"

Over the last ninety days, Burr's investigators have uncovered some tantalizing leads but they've run out of time. None of this will make any difference to Gary Graham now unless the clock can be stopped.

Death Row - Wednesday, June 21 - 5:00 P.M.

GARY GRAHAM HAS JUST FINISHED AN INTERVIEW and he's on the way back to his cell when he's suddenly surrounded by prison guards in battle gear. Graham has consistently maintained that he will not go to the slab willingly so the Department of Corrections has opted for a preemptive strike. Taken by surprise in the narrow corridor, Graham struggles but it's no contest. He's quickly subdued, chained hand and foot, and hustled out of the building.

The transfer from the Terrell Unit to "The Walls" in Huntsville was scheduled for noon tomorrow but Warden Glen Castlebury and his men wanted to avoid the difficulty and danger of forcibly removing Graham from his cell. Castlebury knows they'll probably have to do that tomorrow anyway but there's no sense doing it twice.

There's also the issue of security. Graham's growing army of supporters now includes radical left-wing groups like the New Black Panthers. With threats hanging in the air about stopping the execution "by any means necessary" and with a sizeable army of protesters expected in the streets around the prison tomorrow, he's not taking any chances.

They hustle Graham into a van and head out in an armed convoy with a chopper overhead. In less than an hour he's safely inside the death house in Huntsville and locked down in a holding cell next door to the execution chamber. After things settle down, they offer him dinner. He refuses. According to Rev. Jackson, "He does not want to eat on the table of those who would kill him."^{xxii}

Houston - Thursday, June 22 - 8:00 A.M.

JACK ZIMMERMAN'S OFFICE on South Post Oak Lane has become the eleventh-hour command post for the Graham defense team. Dick Burr and Mandy Welch just got here. Dick had a 6:00 a.m. slot on *Good Morning America*, then they had to make a run to the airport to ship one final appeal to state's top court in Austin. Burr holds no real hope for that effort -- the odds are zero that the Texas Court of Criminal Appeals is going to have a last minute change of heart about Gary Graham -- but Burr promised his client he would pursue every avenue.

Jack's office is already filling with supporters and legal experts from around the country. Outside the press is unpacking their gear and among the network television crews is a sprinkling

of young European documentarians with their mini-digital cameras and anguished faces. “What’s going on in this country?” asks a stunned Finnish camerawoman. “There is something wrong with the system.”

Everybody in the office is listening to the radio or monitoring the fax machine, waiting for the word from the Board of Pardons and Paroles. The phones are ringing off the hook and not all the calls are friendly. The other side is weighing in. One caller says, “Dick Burr, you’re a lying sonofabitch.” But while there’s a lot of hostility, so far no death threats.

Yesterday the state filed a response to Burr’s petition to the Supreme Court and Burr is faxing a response to their response when he gets another call. It’s the *New York Times*. The reporter says that the Board of Pardons and Paroles has denied clemency. “We heard you lost twelve to five. Do you have anything to say?”

Burr says he hasn’t heard anything but he’s willing to admit that the leak is probably credible. Twenty minutes later a fax from Austin confirms it.

Jack Zimmerman calls the governor’s counsel, Margaret Wilson, on the off chance that her boss might grant a 30-day reprieve, but she confirms that he’s more likely to walk on the moon. So the next two calls are to the Supreme Court in Washington and the Court of Criminal Appeals in Austin asking them to act on the petitions they already have in hand.

Then Burr calls his client to let him know what’s going on. Graham, tense but still in control, refuses to give up. He still believes somehow he’ll get through this. Burr says they will keep fighting. This is the last call Burr will be able to make unless he is successful. With a final word of encouragement, he says goodbye.

Then he and Zimmerman go outside to face the press.^{xxiii}

Huntsville - Thursday, June 22 - 11:30 A.M.

FLAK-JACKETED POLICE IN RIOT GEAR are patrolling the perimeter of The Walls with the Texas Rangers and National Guard standing in reserve. The street in front of the prison has been cordoned off to separate the pro- and anti-Graham demonstrators, and the press has been corralled between the two camps on a tree-shaded lawn directly opposite the main entrance.

Along the sidewalk facing the old fortress, a collection of tent-like canvas flies have been staked out to protect the TV reporters from the blistering sun. With the temperature already into the 90s and the humidity moving up with it, the makeup artists are having a hard time keeping their on-camera stars from melting. Geraldo’s assistant places a cold towel on the back of his neck as he rattles an update into a cell phone.

The crowd of thousands that the authorities had feared turns out to be a crowd of about five hundred but that’s small consolation to Warden Castlebury since it includes both the Ku Klux Klan and the New Black Panthers. The Panthers -- armed black militants -- are a particular concern because in Texas it’s perfectly legal to walk down Main Street carrying a weapon as long as it’s not concealed, and the Panthers have no interest in concealing their weapons. So the state police have invoked a two-block no-gun buffer zone around the prison, and so far the overwhelming presence of lawmen with riot shields is enough to keep the outraged protesters confined to speeches and flag burning. Through the afternoon the rasp of bull horns and tomtoms and chants of “Free Sankofa!” echo off the 30-foot red brick walls that surround him.

When the KKK finally makes it’s entrance, it’s a disappointment to the camera crews. The Klan’s once fearsome presence has been reduced to a couple of white boys with hoods and Confederate flags followed by a handful of boosters. They join a dozen blue collar workers sweating it out in the pro-death penalty camp. And here is a group of clean-cut white kids from Sam Houston State College who feel Gary Graham should have been executed a long time ago.

“He was found guilty in thirty-three appellate courts,” says Amanda.

The others agree. “I think they should kill him,” says Brian.

But one of the girls isn’t so sure. “I have mixed emotions. If he is innocent, I mean, that’s bad. I mean, I feel sorry for him. However, he did attempt to shoot three other people.”

That’s the factor that seems to doom Graham in the eyes of most Texans, judiciary included. If he is innocent of this particular crime, he’s guilty of a bunch of others. Says Emily, a young Chi Omega, “To me it doesn’t make any difference. But I think he’s guilty.”

Houston - Thursday - June 22 - 4:30 P.M.

ZIMMERMAN AND BURR ARE ON HOLD. There’s nothing left to do but wait for the word from Washington and pray that Sandra Day O’Connor sees the light. One encouraging sign: the court is taking a long time -- so long that the state has just set the execution back an hour to 7:00 p.m.

A few minutes before 5:00 there’s a call for Burr. It’s an attorney from Austin who occasionally lends a hand on the case. He tells Burr that he was at the health club near the Capitol and he ran into Judge James Nowlin of the federal district court. The judge told him he’s been following the case and he thinks that Gary Graham may have a legitimate beef. Nowlin said that if Graham’s lawyers can come up with a plausible reason to delay the execution on civil rights grounds, he’ll grant a stay. The judge said he was going directly back to his chambers and he’d wait there until he heard from Burr one way or the other.

Suddenly everybody’s in motion. As Zimmerman and Burr huddle with the experts already on board, staffers are reaching out to constitutional authorities around the country. They’ve got about ninety minutes to come up with a brand new reason why the federal government should halt this execution on civil rights grounds, and that’s no easy task. This field is well-plowed ground. The Supreme Court has already slapped down several recent attempts to use this strategy, but with an invitation like this, you don’t turn it down.

After an hour of frantic labor they get the word from Washington they’ve been dreading. The Supreme Court has split as predicted, but Justice O’Connor went with Rehnquist. It’s five to four. They didn’t deny his petition -- they just denied him a stay of execution.

This blow is quickly followed by the denial from the Court of Criminal Appeals in Austin. Suddenly the offer from Judge Nowlin looms much larger. It’s all that’s left. The execution is now less than an hour away.

In an attempt to stop the clock, they print out what they have in hand and fax it to Austin. It’s a patchwork quilt stitched together from pieces of other appeals and at one point Burr realizes they’ve got some other prisoner’s name in the thing. It’s got to be one of the sloppiest presentations ever filed but it does the trick. The state once more must bring the steamroller to a halt. As long as there is a court proceeding pending anywhere the execution cannot go forward.

The argument Burr and Zimmerman are advancing has to do with simple fairness. They allege that the State of Texas violated Gary Graham’s civil rights because the secretive clemency process is based on luck and whimsey rather than due process. To prove the point, Burr describes a phone call he got just last night. Charles Shipman, a member of the Board of Pardons and Paroles, called from Lubbock looking for information. He had been digging through the case files and had become intrigued with Graham’s alibi witnesses. Shipman wanted to know the details of a rock concert that took place in Houston the weekend after the murder. It seems the alibi witnesses had placed the night they were with Gary Graham in relation to that concert. Shipman said, “I called a Houston Chronicle reporter trying to get this information,” but he was unsuccessful.

Burr said, "It sounds like you all need some people helping you."

"Oh, yeah, you know, we have to do all this ourselves."

Burr looked up the information, and Shipman apparently decided that the alibi was credible -- he would later vote to commute Graham's sentence -- but what Burr wants to emphasize is Keystone Cops nature of the process. Here was a board member calling the Houston Chronicle in search of facts that might save a man's life. Clearly this rinky-dink phone and fax arrangement needs to be opened up to public view and the board must be forced to assemble in one place and hammer out a decision after everybody has the same information.

Unfortunately, this argument won't fly. Judge Nowlin says the Supreme Court has already rejected this line of reasoning because there's no inherent constitutional right to clemency. It's up to the states to grant it or not. How they go about it is their business.

But the judge still isn't ready to give up. He asks them to try again. If they can come up with anything else, he'll be standing by.

Huntsville - Thursday, June 22 - 5:30 P.M.

THE STATE OF TEXAS KNOWS FULL WELL what's going on here. If Graham's lawyers can keep this ball in the air until midnight, the designated execution date will have passed and their client will get an automatic 30-day reprieve. From the state's viewpoint, this would be bad news indeed. This is Gary Graham's eighth execution date. With tempers on the street already boiling, every day this mess drags on makes it more likely that somebody will get hurt. But until they get the go-ahead, all they can do is keep the machinery on hair-trigger alert.

Graham has refused all food and drink for the last day and a half and he's made it clear he will fight them to the end. Since he won't cooperate, Castlebury threatens to limit his visitors but you can hardly leave Bianca Jagger and Jesse Jackson cooling their heels in the lobby. They've been in to see Graham and so has his spiritual advisor, Minister Robert Muhammad of the Nation of Islam in Houston. Graham's even-tempered intensity masks a well of anger but the final reality is beginning to sink in. If the execution goes forward, Graham says, he wants Jesse and Bianca to be there.

Houston - Thursday, June 22 - 7:00 P.M.

FOR THE NEXT HALF HOUR Burr and Zimmerman struggle to come up with some way through the maze but every corridor is blocked. For another twenty minutes they argue about the possibility of getting a stay from the Fifth Circuit in New Orleans, but without a new angle they won't be able to keep the dance going long enough to get past midnight. The judges in the Fifth Circuit have been alerted and they're undoubtedly standing by the phones. Unless Burr and his team can come up with an absolutely brand new argument, they will slam the ball back over the net in about ten minutes.

Burr notifies Judge Nowlin that they are dead in the water. Nowlin reluctantly dismisses the suit. A few minutes later the attorney general's office calls to see if Burr has any other tricks up his sleeve.

Like an Indy driver running out of gas in the final lap, Burr realizes it's over. For seven years he has labored to dodge this bullet. Over the last month and a half he's been at it now fifteen hours a day without letup. He is pulverized. And he has failed.

The attorney general needs an answer. Burr says, "We plan no further appeals."

Austin - Thursday, June 22 - 8:15 P.M.

IT'S BEEN A LONG DAY for Governor Bush. Called back from the campaign trail, he's been

in his office since early this morning dealing with a backlog of state business and standing by for this moment. He steps up to the microphone with a prepared statement.

“Over the last 19 years, Mr. Graham’s case has been reviewed more than 20 times by state and federal courts. Thirty-three judges have heard and found his numerous claims to be without merit.

“In addition to the extensive due process provided Mr. Graham through the courts, the Board of Pardons and Paroles has thoroughly reviewed the record of this case as well as all new claims raised by Mr. Graham’s lawyers. Today the Board of Pardons and Paroles voted to allow Mr. Graham’s execution to go forward. I support the board’s decision.

“Mr. Graham has had full and fair access to state and federal courts, including the United States Supreme Court.

“After considering all the facts, I am confident justice is being done. May God bless the victims, the families of the victims, and may God bless Mr. Graham.”

Houston - Thursday, June 22 - 8:15 P.M.

DICK BURR is dead on his feet as he faces the cameras one more time. Defeated, he looks haggard and aged. But he’s unbowed. “Because of human error, human frailty, and no will to acknowledge our own frailty, we are about to put to death a man who is innocent. There is no greater miscarriage of justice, or travesty, or horror that a state can do to one of its citizens than this.”^{xxiv}

Huntsville - Thursday, June 22 - 8:00 P.M.

TRUE TO HIS WORD, Shaka Sankofa goes down swinging, but the armor-plated extraction team has had plenty of practice and they quickly overwhelm him.

Outside, the press corps has been largely in the dark about the end game, but when they spot Jesse Jackson and Bianca Jagger among the cluster of dignitaries heading for the main entrance, they realize something’s up.

The witnesses for the condemned man and the victim are ushered in separately so they don’t bump into each other in the hall. Each group has its own tiny cubicle overlooking the death chamber. On the victim’s side there is Bobby Lambert’s grandson and one of the robbery victims that Graham wounded back in 1981. Attorney Roe Wilson is here representing the Harris County district attorney’s office, and with her is the woman who has been pushing for this execution harder than anyone, Dianne Clements of Justice for All.

In the other cubicle Rev. Jackson and Bianca Jagger are joined by Minister Robert Muhammad and Rev. Al Sharpton, a few prison officials, and the pool reporters from AP, UPI and the *Huntsville Item* who witness every execution^{xxv}

The curtains are pulled back and there is Shaka Sankofa on the gurney, arms outstretched as if on a cross. It’s obvious that he kept his promise to “fight like hell.” In addition to all the regular straps and belts, they’ve had to jury-rig a restraint for his head. Last night he refused to be strip-searched, so he was not allowed to wear regular clothes. The paper suit they gave him ripped in the struggle so they’ve covered him with a sheet. The needle is already in his vein.

A microphone hangs from the ceiling to capture his last words. He is nervous but his voice is clear as he speaks in rapid-fire staccato.

“I would like to say that I did not kill Bobby Lambert. That I’m an innocent black man that is being murdered. This is a lynching that is happening in America tonight. There’s overwhelming and compelling evidence of my defense that has never been heard in any court of America. What is happening here is an outrage for any civilized country.”

For six minutes he ranges through a mix of revolutionary rhetoric and personal thoughts, literally putting off the terrible moment one sentence at a time. He thanks all the people who have rallied to his cause and he urges them to keep up the struggle. “We must not let this murder-lynching be forgotten tonight, my brothers. We must take it to the nation. We must keep our faith. We must go forward.”

He has unkind words for the state of Texas. “They know I’m innocent. They’ve got the facts to prove it. They know I’m innocent. But they cannot acknowledge my innocence, because to do so would be to publicly admit their guilt.”

The pool reporters for AP and UPI are struggling to take down every word because there are several hundred people on deadline outside who are depending on them for quotes. Finally Graham says, “Keep marching black people. They are killing me tonight. They are murdering me tonight.”

With that the I.V. valves are opened and a cocktail of sedatives, muscle relaxants and heart stopping potassium chloride begins filtering into his bloodstream.

Outside, the lighted clock face above the prison entrance reads 8:49.

New York - Friday, June 23, 2000

ON THE ISSUE OF GRAVITAS, the *New York Times* gives Governor Bush a pass: “Mr. Bush spoke in a somber voice and wore a solemn expression as he delivered a written statement about the case. He did not make eye contact with reporters, as he typically does, and walked briskly in and out of the room. He did not take questions.”

Houston - Friday, June 23 - 2000

ATTORNEY STEPHEN BRIGHT, director of the Southern Center for Human Rights in Atlanta, happened to be in Houston today to address the Harris County Criminal Lawyers Association. Bright says that Gary Graham may someday accomplish in death what eluded him in life. “When the history is written of the eventual abandonment of the death penalty in the United States... the name and case of Gary Graham will figure very prominently because the American people have been watching this case. They have come to the realization that the criminal justice system does not work... and that it makes deadly errors.”

Bright's certainty about the ultimate fate of the death penalty seems to be supported by the historic trend toward moderation in punishment. It's been a long time since we hung anyone in chains from a gibbet. Where once there was only one rule—the king's word—today there is a thicket of rules to protect the accused. But as we are about to see, the authority of the court then, as now, has always taken precedence over simple justice. Process becomes paramount, and if the process has been followed correctly, innocence may still be irrelevant.

"There is no basis...for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."

-- U.S. Supreme Court Justice Antonin Scalia

[NOTE: THIS IS THE AUTHOR'S ORIGINAL MANUSCRIPT. THE FINAL VERSION WAS EDITED AND FOOTNOTES SUPPLIED.]

i Is this from the offense report?

ii *Houston Chronicle*, June 18, 2000, “A Question of Justice.”

iii2. Is this from the offense report?

iv Offense report?

v *The Wall Street Journal*, July 19 2000, Letters, “The Gary Graham Defense,” Jack Zimmerman. Officer quoted. Need the original citation

vi *New York Times*, June 11 2000, “Texas Lawyer’s Death Row Record a Concern.”

vii *New York Times*, June 11 2000, “Texas Lawyer’s Death Row Record a Concern.”

viii Need trial transcript for Ron Mock and Bernadine Skillern

ix Proposed Finding of Fact and Conclusions of Law and Order, ¶ 32-33, April 26, 1993, *Ex parte Gary Graham*, No. 335378-B, 182nd District Court of Harris County.

x *New York Times*, June 23, 2000, “Capital Errors.”

xi Dr. James Grigson was expelled from the American Psychiatric Association in 1995 because his speculations about the future actions of defendants he had never examined. Grigson helped send scores of people to death row, and at \$150 an hour it was a pretty lucrative business. His testimony was so much in demand by prosecutors that in the 1980s he was making \$150,000 a year on the witness stand.

xii The Dallas Morning news reported in May, 2000 that hair analysis expert Charles Linch had been committed to a psychiatric ward for drinking and depression in 1994. Although considered a danger to himself and others, he was released to testify against Kenneth McDuff. McDuff was executed in 1998.

xiii *Chicago Tribune*, “Flawed trials lead to death chamber,” June 11, 2000

xiv “Nearly one in three young African American men (ages 21 to 29) in Texas is under some form of criminal justice control – either prison, jail or on parole or probation.” *Austin American-Statesman*, “The Color of Texas Justice,” Sept. 5, 2000

xv *Associated Press*, June 23, 2000, “Europe Outraged Over U.S. Execution,” by Colleen Barry.

xvi *The New York Times*, June 16, 2000, “In Death Row Dispute, a Witness Stands Firm.”

xvii

The New York Times, June 16, 2000, “In Death Row Dispute, a Witness Stands Firm.” “According to the trial transcript, Ms Skillern testified that she saw Mr. Graham ‘off and on about 60 seconds, maybe a little longer.’ She told the jury that she had seen the side of his face, and that she had then blown her horn, at which point she looked directly at his face for ‘a split second.’ Today she repeated roughly the same story, saying that she had seen the killer’s face from different angles three or four times over 90 seconds. Looking through her windshield, she said, she looked directly into his face when he walked in front of her headlights, about a car distance away.”

xviii *The New York Times*, June 18, 2000, “I Was Certain, but I Was Wrong” by Jennifer Thompson

xix *The New York Times*, June 21, 2000, “2 Men, Fates Linked: Nation Watches as Bush Prepares To Act in the Case of Gary Graham.”

xx *The New York Times*, June 21, 2000, “2 Men, Fates Linked: Nation Watches as Bush Prepares To Act in the Case of Gary Graham.”

xxi *The New York Times*, June 21, 2000, “Pending Execution in Texas Spotlights a Powerful Board.”

xxii *The Houston Chronicle*, June 23, 2000, “Graham Executed After Struggle.”

xxiii Dick Burr, interview, offices of Burr & Welch, Houston, June 23, 2000

xxiv *The Houston Chronicle*, June 23, 2000, “Graham Executed After Struggle.”

xxv *The Houston Chronicle*, June 23, 2000, “Graham Executed After Struggle.”